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The Nondelegation Doctrine Revisited: Universal Service and the Power to Tax

Ronald J. Krotoszynski Jr.
University of Alabama - School of Law, rkrotoszynski@law.ua.edu

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RONALD J. KROTOSZYNSKI

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by

Prof. Ronald J. Krotoszynski, Jr.[1]

"The power to tax involves the power to destroy."[2]

"The power to tax is not the power to destroy while this Court sits."[3]

Nothing raises the blood pressure of average Americans more than taxes -- a common aphorism has it that few things in life are certain, save death and taxes. Moreover, concerns about taxation sparked the American Revolution.[4] From the Boston Tea Party, in December 1773, to the California property tax revolt leading to passage of Proposition 13 a little over two hundred years later in 1978,[5] to the present, U.S. taxpayers have proven remarkably

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[2] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

[3] Panhandle Oil Co. v. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

[4] *See* BERNARD BAILYN, THE IDEOGICAL ORIGINS OF THE AMERICAN REVOLUTION 4, 102, 111-21, 198-218 (1967); Malcolm Gladwell, *Tea and Sympathy: The Truth About American Taxpayers*, NEW YORKER, April 19, 1999, at 94.

[5] *See* Cal. Const. art. XIII, A; Nordlinger v. Hahn, 501 U.S. 1 (1992); Amador Valley High Sch. Dist. v. State Bd. of Equalization,

resistant to surrendering their property to the government involuntarily. Taxes may well be the price that we pay for civilized society,[6] but many citizens greatly resent having to underwrite the cost of government.

In light of all this hostility on the part of the voting public, few things inspire greater dread in most politicians than the prospect of raising taxes.[7] Given the unpopularity of new or increased levels of taxation and the concomitant and pressing need for government to raise funds to pay for myriad programs, one should not be at all surprised to find that politicians might attempt to find ways to tax and run.

An incumbent politician's dream would be to create new and improved government services (thereby generating good will, credit,

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583 P.2d 1281 (Cal. 1978); *see also* Kirk Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 192, 197-202 (2001); Henke, *Financing Public Schools in California: The Aftermath of* Serrano v. Priest *and Proposition 13*, 21 U.S.F. L. REV. 1 (1986); Jim Wasserman, *25 Years Later, bill comes due on California's Proposition 1*, SEATTLE TIMES, Aug. 2, 2003, at A5. For a recent critique of the long term effects of Proposition 13, *see* Joseph T. Halliman, *Buffett Suggests Property Taxes Aren't High Enough in California*, WALL ST. J. Aug. 15, 2003, at A1, A4 (reporting Warren Buffett's view that property taxes are far too low in California and that he "strongly suggested. . . that the state's property taxes need to be higher").

[6] *See* Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (reporting Justice Holmes's view that "taxes are what we pay for civilized society").

[7] *See*, *e.g.*, John M. Broder, *As California Borrows Time, Other States Scrape Together Some Budget Solutions*, N.Y. TIMES, July 2, 2003, at A15 (reporting that in 2003 state governments have "staggered across their budget deadlines with stopgap solutions, short-term spending plans and continued debate about the most cotentious budget issues," noting that "governors in 29 states are seeking to raise revenues" through tax increases, and observing that "[b]udget woes have been exacerbated by disputes over the taxes-versus-spending conflict that has stalled solutions, most notably in California, where Republicans are refusing to consider any plan that includes new taxes").

and votes) without having to take responsibility for paying for these services through new or increased taxation (which leads, with some regularity to electoral difficulties).[8] Indeed, what could be more desirable than creating a new and useful government program without having to take any responsibility for paying for it? One means of accomplishing this objective would be to use deficit spending -- effectively printing money. With a depressing regularity, the federal government and state governments lacking a balanced budget requirement do just that (spend and borrow), in lieu of embracing the electorally toxic approach of spend and tax.[9]

But an even more cowardly stratagem than the "spend and borrow" gambit exists. Sufficiently devious legislators could attempt to delegate responsibility to an administrative agency for a new social program's design *and*, in addition, also delegate to the agency responsibility for selecting the precise funding mechanism that will pay for it.

Suppose, for example, that Congress told the Federal Communications Commission (the "Commission") to "go forth and provide really useful telecommunications services to a group of favored constituents."[10] Suppose further that Congress did not bother to

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[8] *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9-12 (1993).

[9] *See* Dale Russakoff, *States Drowning in Fiscal Woes*, SEATTLE TIMES, June 27, 2003, at A6 ("President Bush, who unlike the governors does not face a constitutional requirement to balance his budget, proposed to increase total spending by 4.2 percent, anticipating a deficit now expected to exceed $450 billion.").

[10] *See* 47 U.S.C. § 254(c) ("Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.").

define the precise scope of the program or the means to pay for it, except with a blanket authorization to assess "fees" on providers of "telecommunications services."[11] Such a program would raise what should be a very difficult question: May Congress transfer its power to tax and spend to an independent administrative agency, without significant limitations on either the objects to be pursued or the means to pay for achieving them?

The obvious and easy answer should be self-evident: "no." If Congress wishes to reap the benefits of establishing a new social welfare program, it should be prepared to take political responsibility for finding the means of paying for it. As is so often the case in life, however, the reality is a bit more complicated.

Black letter constitutional law prohibits Congress from making excessive delegations of its legislative powers to Executive Branch entities, including both independent and presidentially-controlled administrative agencies. "Article I, § 1 of the Constitution vests 'all legislative Powers herein granted. . . . in a Congress of the United States' and '[t]his text permits no delegation of those powers.'"[12] This means that "[t]he Congress is not permitted to abdicate or to transfer to others the essential legislative functions

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[11] *See* 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.").

[12] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).

with which it is thus vested."[13] Accordingly, "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[14]

These rules apply with particular force in the context of laws delegating the power to tax: "Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income."[15] The Supreme Court has explained that "[i]n the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others," pretty much for whatever reasons Congress deems sufficient.[16]

An administrative agency, on the other hand, may not institute unilaterally measures for raising revenue, much less institute arbitrary revenue measures.[17] Although the Supreme Court has permitted some delegations of taxing authority,[18] it has never

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[13] Schecter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

[14] *American Trucking Ass'ns*, 531 U.S. at 472 (quoting and citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409) (1928)).

[15] National Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974).

[16] *See* Sonzinsky v. United States, 300 U.S. 506, 512-14 (1937).

[17] *See NCTA*, 415 U.S. at 340-42; Seafarers Int'l Union v. United States Coast Guard, 81 F.3d 179, 183-86 (D.C. Cir. 1996).

[18] *See* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-23 (1989) ("We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter non-

suggested that Congress could escape all political responsibility for material design elements of a tax program.[19]

At various points in time, scholarly commentators have declared[20] -- or called for[21] -- the death of the nondelegation doctrine. Others, including Professors Cass Sunstein[22] and John Manning,[23] argue that the nondelegation doctrine serves important

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delegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").

[19] *See id.* at 224 (holding that "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes'" and noting that "any such delegation must also meet the normal requirements of the nondelegation doctrine"). Although *Mid-America Pipeline* squarely rejected a nondelegation challenge to a user fee established by the Department of Transportation, there were major differences between the program at issue in *Mid-America Pipeline* and the universal service program. Congress established a maximum sum that the Department of Transportation could collect on an annual basis, incident to an appropriations bill. *See* text and accompany notes ___ to ___; *see also id.* at 220. Accordingly, Congress itself took responsibility for the precise amount of money to be collected -- in this sense, then, *Mid-America* did not really present a case in which Congress actually delegated taxing authority to an administrative agency.

[20] *See, e.g.*, KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 2, at 76-81 (1958).

[21] *See, e.g.*, Eric A. Posner and Adrian Vermuele, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

[22] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316-317 (2000) ("The nondelegation canons represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree."); *see also* Lisa Shultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 460-69 (2002) (arguing that administrative law principles requiring agencies to limit their discretion and avoid ad hoc implementation of laws through use of administrative standards advances core concerns of the nondelegation doctrine).

[23] *See* John F. Manning, *The Nondelegation Doctrine As a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 277 ("The nondelegation doctrine serves important constitutional interests: It requires

democratic values and should continue to exist (at least in some sort of watered-down form).

For the most part, the Supreme Court has not shown much interest in enforcing the doctrine in a meaningful way.[24] As Professor Sunstein wryly notes, "[w]e might say that the conventional doctrine has had one good year, and 211 bad ones (and counting)."[25] Notwithstanding the federal courts' apparent lack of interest in revitalizing and enforcing nondelegation principles, one should not be too anxious to bury the body and move on.

For a variety of reasons, Congress attempts to escape responsibility for making hard choices.[26] The root cause of this behavior is easy enough to understand: hard choices force legislators to declare themselves in ways that are certain to alienate at least some members of their constituency.[27] In order to claim credit and escape blame, members of Congress have a strong incentive to enact vague laws that leave the operative details (and the political responsibility for them) to someone else.[28]

Congress to take responsibility for legislative policy and ensures that such policy passes through the filter of bicameralism and presentment.").

[24] *Cf.* American Trucking Ass'n, 531 U.S. 457, 472-76 (2001) (rejecting nondelegation doctrine challenge to provisions of the Clean Air Act).

[25] Sunstein, *supra* note __, at 322.

[26] *See* SCHOENBROD, *supra* note ___, at 9-12, 82-96; *see also* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 731-32, 740-41 (1999).

[27] *See*, Schoenbrod, *supra* note ___, at 9-10, 84-89, 92-94; Schoenbroad, *supra* note ___, at 740-41.

[28] *See* Schoenbrod, *supra* note ___, at 47-96; *see also* Peter H. Aranson, Ernest Gellhorn & Glen Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 40-45, 55-62 (1982).

On the other hand, defenders of delegations, such as Professor Jerry Mashaw, argue that many benefits, including presidential oversight of the regulatory process, result from moving the locus of decision making from the Congress to administrative agencies.[29] Others have suggested that administrative agencies are more open than Congress to meaningful and broad-based public participation.[30]

Whatever the merits of delegation in other contexts, one should view skeptically delegations of authority over the ability to raise and expend revenue. As I will explain in some greater detail below,[31] multiple reasons support such a rule.

First, taxing is just different. At the Federal Convention in 1787, the Framers spent many hours debating how best to constrain the federal government's ability to separate a citizen from her personal wealth. In particular, the Framers were vitally concerned about ensuring democratic control and accountability over the revenue and appropriations powers.[32] One of the cornerstones of the "Great Compromise" that facilitated a deal between the large states and the smaller states was the vesting of the House of Representatives, the most democratically accountable entity in the Framer's blueprint, with complete control over fiscal policy. Although the final version of the Origination Clause[33] greatly watered down the House of

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[29] *See* JERRY L. MASHAW, CHAOS, GREED, AND GOVERNANCE 132-56 (1997).

[30] *See* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781-82 (1999).

[31] *See* text and accompanying notes ___ to ___.

[32] *See* text and accompanying notes ___ to ___.

[33] *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the

Representatives's exclusive control over the federal purse by permitting the Senate to "propose or concur with Amendments" to revenue and appropriations measures, the importance that the Framers placed on the power to raise and spend money should inform nondelegation jurisprudence.[34]

Practical reason also supports greater judicial scrutiny of delegations of taxing authority. Delegations of revenue authority coupled with delegations of spending authority are a prescription for disaster. No agency should enjoy the power to infinitely extend its jurisdiction and programs. No sane government would vest such a power in a semi-autonomous bureaucracy. Simply put, rational bureaucrats will seek to expand their dominion to the outer limits of their ability. If given a blank check and a vague mandate to "do good," those outer limits could prove to be very broad indeed.

If Congress limits either the amount to be collected or the purposes for which the amount collected can be spent, the problem of uncontrolled growth in the agency's mandate should not manifest. Notwithstanding the very expansive mandates that many federal agencies enjoy -- for example, one of the Commission's prime directives is to regulate the airwaves for "the public interest, convenience, and necessity,"[35] hardly a model of clarity -- an agency

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Senate may propose or concur with Amendments as on other Bills.").

[34] *See, e.g.*, Federalist 58 (Clinton Rossiter, ed. 1961) (arguing that the Senate will not undermine democratic self-government because of the House's ability to not "only refuse [unjust policies proposed by the smaller states in the Senate], but they alone can propose the supplies requisite for the support of government. . . . they, in a word, hold the purse").

[35] *See* 47 U.S.C. §§ 157(a), 302a, 303, 307(a), 309(a); *see also* National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) (rejecting nondelegation challenge to the Communications Act

cannot generate its own resources to implement the mandate infinitely. Instead, the agency must seek and obtain appropriations from Congress to advance its vision of the public good. Incident to this process, Congress provides both oversight of the agency's action and direct approval, through an appropriation, of the agency's proposed course of action.[36] But should Congress fail to limit either the amount of money to be raised or the purposes to which it may be put, the danger of an agency running amok becomes more than merely theoretical.

Third and finally, the doctrine of ratification would avoid many of the problems that would attend more aggressive enforcement of the nondelegation doctrine in other areas. Since 1907 and continuing to the present, the Supreme Court has held that Congress may ratify an otherwise unlawful tax, thereby saving it from invalidation.[37] Moreover, the Court also has held that retroactive taxation is lawful if it rationally relates to a legitimate government purpose.[38] It would therefore be possible to require Congress to endorse a particular revenue scheme without requiring Congress to design the revenue scheme in the first instance. Congress should be required to do so when taxation is involved because taxation involves not merely a limitation on liberty, but a coerced transfer of property to the

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of 1934, which establishes the "public interest" standard).

[36] *See* Schuck, *supra* note ___, at 783-86 (discussing various oversight mechanisms and their importance for ensuring that agencies stay within the limits of their delegated authority).

[37] *See* United States v. Heinszen & Company, 206 U.S. 370, 383-85 (1907).

[38] *See* United States v. Carlton, 512 U.S. 26, 30-31, 35 (1994).

government itself. In this sense, then, taxation involves both a loss of liberty and property -- triggering constitutional concerns associated with basic notions of due process, in addition to concerns about the separation of powers.[39]

As it happens, such a delegation -- a delegation of both taxing authority and discretion to designate the uses to which the revenue may be put -- presently exists in federal law. Under the universal service program created by section 254 of Title 47, the Federal Communications Commission enjoys authority to impose taxes and to spend the monies that it raises.[40] Congress did not establish any statutory limit on the amount that the Commission may raise[41] nor did it provide any meaningful limits on the exact purposes for which the money raised may be spent.[42]

At the Constitutional Convention of 1787, the Framers were acutely aware of the dangers of unchecked government power. The power to levy and collect taxes was, in particular, a matter of great concern among the delegates.[43] Chief Justice John Marshall's aphorism undoubtedly is true: the power to tax is the power to destroy. Congress has used its taxing power to achieve social objectives in circumstances where its direct regulatory authority has

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[39] *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (arguing that enforcement of separation of powers doctrine has the effect of advancing individual liberty by providing important checks against arbitrary or unjust government action).

[40] *See* text and accompanying notes ___ to ___.

[41] *See* 47 U.S.C. § 254(c).

[42] *See* 47 U.S.C. § 254 (d).

[43] *See infra* text and accompanying notes ___ to ___.

been open to question.[44] Moreover, the Supreme Court generally has permitted Congress to use its taxing authority in this fashion.

It is one thing for Congress to tax a good or service into extinction. It is entirely another for an independent regulatory agency to do so. To date, the Commission has set the universal service fee assessments at a relatively modest level; most companies paying the assessments charge customers an additional 5 to 10% surcharge on their monthly bill to recoup the charges.[45] Although a 10% surcharge on a $25 monthly long distance bill is not shocking, it does represent a significant cost. Any person using long distance services, a cell phone, or a pager is contributing to the Commission's universal service fund. From a separation of powers perspective, the question that begs to be asked and answered is: How can Congress escape responsibility for either raising the revenue used to provide universal service subsidies or determining the specific uses to which those funds may be used?[46]

This Article argues for a re-invigoration of the nondelegation doctrine, at least in the very narrow context of delegations vesting

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[44] *See, e.g.*, United States v. Kahriger, 345 U.S. 22 (1953) (upholding confiscatory taxes on the proceeds of unlawful wagering); Sonzinsky v. United States, 300 U.S. 506, 512-14 (1937) (upholding confiscatory taxes on the sale or transfer of certain disfavored firearms).

[45] *See* Cherie R. Kiser & Angela F. Collins, *Regulation on the Horizon: Are Regulators Poised to Address the Status of IP Telephony?*, 11 COMMLAW CONSPECTUS 19, 22 (2003) (discussing universal service assessments); In the Matter of Proposed Second Quarter 2002 Universal Service Contribution Factor, Public Notice, 17 FCC Rcd 4451 (2002) (setting quarterly universal service charges for telecommunications service providers).

[46] *See* Schoenbrod, *supra* note ___, at 734-35 (describing increased use of delegations regarding an ever-broader array of subjects).

independent agencies with the ability directly to raise and spend revenue. Taxing powers are, as a matter of history and practice, different from other sorts of government authority. When government commands that a citizen surrender money or property, it is essential that the decision reflect a modicum of democratic accountability. Democratically elected -- and accountable -- members of Congress, and not *Dilbert*-esque bureaucrats ensconced at the Portals Building, should be required to endorse de facto revenue measures and face the potential wrath of the voters if they deem the taxes too burdensome or the program's benefits too ephemeral.

In the case of the universal service program, because Congress has failed to limit either the amount of revenue to be raised or the particular purposes to which the revenue may be used, it has essentially given the Commission a blank check. Moreover, the program's design permits Congress to take credit for the benefits it provides without being accountable for the taxes used to pay for them. Taxation without democratic accountability is fundamentally unjust and conflicts with the Framers' design. The federal courts should not permit it.

Under existing legal doctrine, Congress may delegate responsibility for designing taxation and spending programs to agencies provided, however, that it ratifies the agency's work product. Even a completely ultra vires tax collected by the Executive Branch may be ratified, and thereby validated, through appropriate legislation.[47] Thus, even if Congress attempts to escape

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[47] *See* Thomas v. Network Solutions, Inc., 176 F.3d 500, 506-07 (D.C. Cir. 1999); *see also* United States v. Heinszen, 206 U.S. 370, 383-85 (1907).

responsibility for the implementation of a tax, the federal courts possess the ability to force Congress to ratify the tax via legislative approval (and take political responsibility for it) or invalidate the tax (precluding Congress from claiming responsibility for the benefits that the agency's program would provide without accepting responsibility for the taxes needed to fund it).

Part I of this Article examines and critiques the concept of universal service and the Commission's efforts to implement the program. Part II considers the meaning and effect of the Origination Clause to the problem of delegated taxing authority. This part reviews the legislative history of the clause, giving particular attention to the Framers' concerns about controlling the exercise of the taxing and spending powers and its potential relevance to contemporary concerns about the nondelegation doctrine. Part III considers the nondelegation doctrine generally, the more specific prohibition against the delegation of taxing authority, and whether the universal service program, as presently designed and implemented, is consistent with the nondelgation doctrine. In Part IV, the Article considers the fascinating, but largely forgotten, doctrine of congressional ratification of unlawful taxes. This part also argues in favor of enforcing the nondelegation doctrine more diligently, at least in the context of taxation. The Article concludes that the federal courts should enforce the nondelegation doctrine more readily in the context of delegations involving the power to tax. In particular, the courts should invalidate the Commission's current universal service funding mechanism, subject to congressional ratification.

The goal of providing universal service to all households in the United States probably represents a sound public policy.[48] Even so, the question remains as to who should be primarily responsible for the design of the universal service program and, equally importantly, precisely who will pay to make universal service possible. At least arguably, this is a task for Congress and not the Commission.

I. A Brief History of the Quest for Universal Service

Universal service represents the idea that every American should have access to affordable telecommunications service, and both the Commission and Congress have worked to achieve this objective for many years. Congress first codified the concept of universal service when it enacted the Communications Act of 1934,[49] which created the

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[48] *See, e.g.*, Jim Chen, *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. COLO. L. REV. 921, 971 (2000) (endorsing some of the goals the universal service program advances, but seriously questioning section 254's funding mechanism as a means of achieving these goals). A vexatious person, however, might ask if the use of a telephone with nifty "advanced services" really matters all that much to someone who lacks access to basic health care or prescription drugs. It is an odd entitlement scheme that places access to telephone service on a higher plane than access to basic health care services.

[49] 47 U.S.C. § 151 (as amended) (creating Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service"); *id.* at § 201(a) (providing that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and . . . in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."); *see* Alenco Communications, Inc. v. FCC, 201 F.3d 608, 614-15 (5th Cir. 2000) (observing that "[u]niversal service

Federal Communications Commission (the "Commission").[50] The 1934 Act authorized the Commission to regulate commerce in wire and radio communications in order to provide these services to all Americans at reasonable rates.[51] Since that time, the concept has grown and expanded to encompass a massive social welfare program funded through involuntary surcharges on virtually all telecommunications services.

A. The Raison d'Etre of Universal Service.

The cost of providing someone in rural North Dakota with the same telecommunications services enjoyed by a denizen of Manhattan would be (and is) staggeringly expensive on a per capita basis. Broadband Internet access, for example, is feasible (given current costs) only in relatively high population density areas. It would make very little economic sense to lay broadband fiber optic cable in a town of 200 souls located in rural North Dakota. The local residents who might be enticed to subscribe to the service could never pay the true costs of building and operating such a system. Accordingly, no rational capitalist would invest the money to build such an infrastructure, precisely because the project would be a recipe for bankruptcy.

At least arguably, all users of telephone services benefit from universal subscription to these services: "Because the value of

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has been a fundamental goal of federal telecommunications regulation since the passage of the Communications Act of 1934"). Although neither provision uses the phrase "universal service," sections 151 and 201(a) effectively require telephone service providers to offer service to all would-be customers and, moreover, consistent with the mandate of section 201(b), to do so at "just and reasonable rates." *Id.* at § 201(b).

[50] *See* 47 U.S.C. § 151 (creating Federal Communications Commission).

[51] *Id.*

telecommunications service increases to customers with greater degrees of system interconnectivity, universal service is regarded as economically valuable by telecommunications firms and customers, even those who can afford market-priced services."[52] But it is possible to overstate the benefits to urban consumers, many of whom may not have much cause to place interstate calls to rural Wyoming. As Professor Rossi observes, "expansion of a network initially financed by middle-class customers to include the poor, particularly those with whom middle-class customers rarely interact, will likely provide few benefits of the sort that the average middle-class customer will be willing to pay for."[53]

Whether or not urban consumers derive significant benefits from increased subscription rates, Congress has mandated that telecommunications service providers underwrite the full costs of paying for the program and these service providers, in turn, directly have passed these charges along to consumers. Thus, individual consumers effectively have funded universal service programs through assessments imposed by service providers to recoup the Commission's demands for tribute.

Section 254 of Title 47 mandates that the Commission establish a comprehensive system of fees to subsidize consumers living in rural and other high cost areas; it also mandates subsidized

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[52] Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty to Serve?*, 21 ENERGY L.J. 27, 39 (2000).

[53] *Id.*; *see also* James Alleman, et al., *Universal Service: The Poverty of Policy*, 71 U. COLO. L. REV. 849, 856, 862-63 (2000) (arguing that benefits universal service provides to most average consumers are, at best, quite limited relative to the charges assessed to pay for the program).

telecommunications services to schools, libraries, and rural health care providers. Section 254 leaves open the question of precisely what services should be available on a nationwide basis, and at what cost -- these most basic questions lie entirely within the Commission's discretion.[54]

Universal service then, is a social welfare subsidy program that benefits certain consumers of telecommunications services by imposing taxes on other consumers.[55] Those paying the bill supposedly benefit from having the theoretical ability to call persons enjoying service only by virtue of the universal service subsidies.[56] Congress decided virtually none of the major design

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[54] *See* In the Matter of Federal-State Joint Board, CC Docket No. 96-45, 18 FCC Rcd 2932 (2003) (NPRM) (considering, but rejecting, the addition of new and expanded services for inclusion in the federal universal service program); *see also* In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 17 FCC Rcd 24952, 24974-83 (2002) (Report & Order and Second Further NPRM) (acknowledging that carriers simply pass along universal service fees to their customers); Weiser, *supra* note ___, at 824 (noting that Congress "did not provide much guidance as to exactly how it should be implemented" and instead "handed the ball to the FCC, mandating that the FCC work with a Joint Federal-State Board. . . to figure it out").

[55] *See* Rossi, *supra* note ___, at 39-40; *see also* Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819, 824-25 (2000) (arguing that "[i]n essence, the FCC has been saddled with the task of designing a program similar to the Medicaid Act's system of providing medical service to the poor" incident to "a grant-in-aid program where the federal government sets basic standards, provides monetary support, and leaves the implementation -- as well as elective supplementation -- to the states").

[56] *Cf.* Rossi, *supra* note ___, at 39-40 (noting that middle class consumers may not put much value on ability to call beneficiaries of universal service subsidies). This argument does not really survive close examination. If someone in New York City regularly flies to San Francisco, charging her a 10% tax on the ticket to provide a subsidy for air service to Pierre, South Dakota, would not convey a meaningful benefit. A benefit exists only if the person either wishes to fly to Pierre, South Dakota or hopes that someone from Pierre, South Dakota will come to New York City for a visit. Neither condition seems very probable and the passenger would

elements of the universal service program, preferring instead to leave (quite literally) all the details to the Commission.

B. Universal Service From the Pre-*Carter Phone* Era to the Present

Since the inception of the Federal Radio Commission in 1928, and continuing with the creation of the Federal Communications Commission in 1934, the federal government has pursued a policy of providing "universal" telephone service to all residents and businesses in the United States. For most of the period from 1928 to the present, the objective was not so much assuring that everyone actually enjoyed telephone service, but rather ensuring that, if someone could afford to pay for it, such service would be available.

The idea was not unique to either Congress or the Commission. Instead, the concept of universal service was, quite literally, a marketing strategy developed and promoted by American Telephone &

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probably object to being forced to subsidize a service that she will never use. Prior to 1978, the Civil Aeronautics Board maintained a complex system of cross subsidies that effectively taxed urban flyers to ensure that a Boeing 737 would be available to fly granny from Pierre, S.D. to Chicago for a big weekend. *See* ELIZABETH K. BAILEY, ET AL., DEREGULATING THE AIRLINES 27-37 (1985). The government wisely abandoned this type of regulation in favor of free and open competition, with fares tracking actual costs. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §§ 40,101-40,120); *see also* J. Gregory Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward Looking Costs*, 72 N.Y.U. L. REV. 1068, 1110-13 (1997) (discussing economics of commercial airline industry before and after deregulation). Of course, this change in regulatory policy had the effect of severely reducing service to low population rural areas. The same basic rules of economics apply to the provision of telephony -- but for the universal service mandate, rural residents would enjoy more limited telecommunications services precisely because they are either unable or unwilling to pay the true cost of such services.

Telegraph ("AT & T") as a justification for unlimited consolidation of local telephone service providers.[57]

AT & T's former Chairman, Theodore Vail, repeatedly argued for, "One policy. One System. Universal Service."[58] A turn of the century AT & T advertisement explains that "[b]ecause these are the fundamental needs of a nation of telephone users, the Bell System must provide universal service."[59] "By his motto, 'One System, One Policy, Universal Service,' Vail meant that service would be 'universal' only in the sense that any subscriber could place a call to any other subscriber, because networks would be interconnected."[60] The federal government essentially embraced AT & T's model of one service provider facilitating universal service to the nation -- but only in the sense of the availability of service to those willing to pay for it.[61]

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[57] *See* Milton Mueller, *Universal Service in Telephone History: A Reconstruction*, 17 TELECOMMS. POL'Y 352, 353-57 (1993) (describing AT & T's business strategy).

[58] MICHAEL K. KELLOGG, ET AL., FEDERAL TELECOMMUNICATIONS LAW § 1.3, at 12 (1992) (quoting AT & T Chairman Theodore Vail)).

[59] ATT, "The Chain of Communication" (vintage advertisement, undated) (on file with law review).

[60] Alleman, *supra* note ___, at 860.

[61] *See Howard A. Shelanski, A Comment on Competition and Controversy in Local Telecommunications*, 50 HASTINGS L.J. 1617, 1624-29 (1999); *see also* William J. Byrnes, *Telecommunications Regulation: Something Old and Something New*, in THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996 (Max D. Paglin et al. eds., 1999). Professor Shelanski argues persuasively that simply mandating interconnection of competing local and long distance telephone networks could have accomplished the same objective, potentially at a lower cost and without embracing the problems associated with regulation of a monopoly. *See* Shelanski, *supra*, at 1625-27.

In exchange for monopoly status, incumbent telephone companies agreed to accept rate regulation and to provide universal service. "Common carriers could not discriminate among 'similarly situated' users, which in practice meant that they had a limited capacity to price service as a function of demand and marketplace conditions rather than being subject to a regulator-managed calculation of carrier costs and a fair rate of return."[62]

As Professor Frieden has explained, "[g]overnments negotiated a regulatory compact with common carriers, providing the carriers with valuable insulation from competition and reduced civil and criminal liability in exchange for governmental authority to regulate prices, revenues, and many other aspects of a carrier's corporate and operational behavior."[63] In addition, "[t]he government could require the telecommunications common carrier to provide service to any customer within a geographical area who was ready, willing, and able to take service."[64]

Federal and state regulators worked to keep the cost of residential local telephone service artificially low. In a regime characterized by monopoly and pervasive rate regulation, a highly byzantine system of cross-subsidies advanced the universal service program.[65] Long distance service users paid disproportionately

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[62] Robert M. Frieden, *Universal Service: When Technologies Converge and Regulatory Models Diverge*, 13 HARV. J.L. & TECH. 395, 401 (2000).

[63] *Id.* at 400.

[64] *Id.* at 401.

[65] *See id.* at 1624-29. The system of structural subsidies involved (mis)allocating system costs to interstate, rather than local, telephone service; charging business customers artificially high rates for local service, charging artificially high rates for

higher rates than local callers, with the costs of the local network being taxed against long distance customers. Local business customers paid higher rates than local residential customers. Nor did rates reflect traffic patterns or population: low volume high cost calls were tariffed at the same rates as high volume low cost calls between major urban centers.[66] The entire scheme worked to make residential local service highly affordable, even in relatively high cost rural areas.[67] The regulators' goal was to keep residential customers happy with their local telephone rates by making these rates as low as possible.

Beginning with *Carter Phone*[68] and continuing with the *Execunet* litigation,[69] the Federal Communications Commission embarked on a fundamental shift in regulatory paradigms. Rather than rely on monopoly service from AT & T, the agency would instead work to

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interstate and intrastate toll calls; and employing artificial state-wide cost averaging to understate the cost of providing service in sparsely populated areas. *See* Byrnes, *supra* note ___, at 89-100.

[66] For a brief discussion of the system of various cross subsidies, *see* THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW & POL'Y 349-52 (2d ed. 1997).

[67] *See* Shelanski, *supra* note ___, at 1628 (noting that "the development of a system of implicit subsidies to keep residential rates low was an important part of the story").

[68] *See* In re Use of the Carterfone Device in Message Toll Service, 14 FCC Rcd 571 (1968); In re Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968); *see also* Glen O. Robinson, *The Titanic Remembered: AT & T and the Changing World of Telecommunications*, 5 YALE J. REG. 517, 521-23 (1988) (discussing and critiquing the Carterphone decision and its effects).

[69] *See* MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978); MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977); *see also* Robinson, *supra* note ___, at 523-26 (discussing MCI's entry into long distance service market and effects on pre-existing regulatory policies).

facilitate a competitive market for local and long distance telephony. A universal service program based on cross subsidies cannot survive in a competitive marketplace: by definition, the system of cross subsidies sold services at an artificially high cost in some areas in order to sell the same services at or below cost in other areas.

If the government permits competition for long distance service between St. Louis and Chicago, AT & T cannot continue to charge monopoly rates well in excess of the company's true costs for providing that service. Monies generated from this route and used to subsidize local residential service would cease to be available. AT & T would face the choice of either raising local residential rates or finding another source of monopoly profits. A third option also exists: if AT & T could convince regulators to assess fees on long distance calls, those fees could be used to subsidize directly the local residential rates.

The break up of AT & T in 1984, incident to a federal district court's modified final judgment in a massive antitrust case,[70] greatly exacerbated the problem first created by limited competition in the long distance market. Until 1983, AT & T's internal rate structure largely funded the universal service program.[71] By divorcing the provision of local and long distance communication services altogether, however, the local Regional Bell Operating Companies (known as the "RBOCs") were no longer able to subsidize

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[70] *See* Robinson, *supra* note ___, at 540 (noting that "[t]he divestiture was not effective until 1984").

[71] *See* H. Walker Feaster, III, *Semiannual Report of FCC Inspector General*, <http://www.fcc.gov/oig>; June 11, 2002.

local residential service with artificially high interstate and international rates. Business rates could still be kept artificially high in low cost areas, with the monopoly returns used in part to offset the cost of residential service. But the modified final judgment severely limited AT & T's ability to continue its system of pervasive cross subsidies. Because local telephone service remained essentially a monopoly, however, the universal service program could still rely, more or less, on a system of implicit subsidies to lower the costs for some consumers by artificially raising the cost for others, supplemented by monies paid by competitive long distance service providers for interconnection of long distance calls with the local loop.[72]

In response to the changed market conditions created by the division of AT & T, the Commission established a regulatory "Universal Service Fund" to maintain artificially low local telephone service by providing support to incumbent local exchange carriers that provided service to low income households or high cost areas.[73] The Commission generated funds to support local telephone companies in rural and high cost areas by imposing interconnection fees on long distance carriers; the interconnection fees ensured that incumbent telephone companies providing residential and business service would be able to continue doing so at rates at or below actual cost.[74]

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[72] *See* Rural Telephone Coalition v. FCC, 838 F.2d 1307, 1310-15 (D.C. Cir. 1988).

[73] *Id.*; *see* Rural Telephone Coalition v. FCC, 838 F.2d 1307, 1310-15 (D.C. Cir. 1988) (describing and upholding Commission's use of access charges to fund universal service program after divestiture of Regional Bell Operating Companies from AT & T).

[74] *See* Alleman, et al., *supra* note ___, at 860-61 ("When a portion of long distance was divested from local service in 1984,

The Communications Act of 1996 dealt the pre-existing system of universal service a fatal blow. By opening up the local telephone market to competition,[75] the last remaining part of the old universal service program, based on a system of pervasive cross subsidies, fell. Congress, recognizing the effect that competition would have on the existing universal service program, enacted section 254 of Title 47, which expressly created a direct subsidy system to facilitate universal access to telephony.

At the same time, Congress expanded the scope of services covered under the rubric of "universal service."[76] In addition to provisions for affordable basic telephone service for individual

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this flow of funds had to be handled on an arms-length basis, so that the old subsidy flow was replaced by the 'access charges' that local companies charged long distance carriers to originate or terminate long distance calls."); *see also* Rural Telephone Coalition v. FCC, 838 F. 2d 1307, 1310-12, 1314-15 (D.C. Cir. 1988) (describing changes in telephone market after divestiture and upholding assessment of new access charges to offset losses associated new competition in some markets).

[75] *See* Jaison R. Abel, *Entry Into Regulated Monopoly Markets: The Development of a Competitive Fringe in the Local Telephone Industry*, 45 J. LAW & ECON. 289, 289-90 (2002) (noting that "[w]ith the passage of the Telecommunications Act of 1996, explicit state and local regulatory barriers to entry that acted to shield incumbent local exchange carriers (ILECs) from competitive entry have been removed. . . . [T]his industry, once served solely by regulated monopoly providers of local telephone service has now become an industry consisting of incumbent dominant firms (namely, ILECs) facing entry by small fringe competitors").

[76] *See* Weiser, *supra* note ___, at 824-25 (noting that "[i]n 1996, Congress codified the decades-old principle that telephone users should be afforded access to the telephone network at reasonable rates, regardless of where they live" and predicting that "the FCC must confront a series of technical, economic, and political minefields" in order to implement this program under the terms and conditions that Congress set forth).

consumers, the 1996 Act provided for telecommunications and internet services for schools, libraries, and rural health care facilities.[77]

Since 1996, the Federal Communications Commission has worked to devise a system of direct universal service "fees" that would replicate the economic results that existed under the system of pervasive cross subsidies. Congress had very high hopes: it not only wanted the Commission to create an overt universal service program, it also wanted the Commission to design a support system that was (and is) competitively neutral. That is to say, Congress wanted the universal service system of taxes and subsidies to have no competitive effect on the relationship between incumbent local exchange carriers ("ILECs") and new market entrants (competitive local exchange carriers, or "CLECs"). To put the matter more directly, Congress wished to have its universal service cake and eat it too.

C. Section 254 and the Universal Service Program

In 1996, the Commission created three quasi-private entities to administer the universal service programs. It directed the Universal Service Administrative Company (the "USAC") to manage low-income and high cost support, while the Schools and Libraries Corporation and the Rural Health Care Corporation would oversee the new support mechanisms laid out in the 1996 Act.[78] In 1999, the Commission incorporated the latter two organizations into the USAC.[79] The USAC now administers the support mechanisms of universal service through

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[77] 47 U.S.C. § 254.

[78] *See* REPORT, SCHOOLS AND LIBRARIES PROGRAM; UPDATE ON E-RATE FUNDING 2 n.3 (GAO-01-672, May 2001).

[79] 47 C.F.R. § 54.701(b).

three divisions: the Schools and Libraries Division, the Rural Health Care Division, and the High Cost and Low Income Division.[80] Each of these programs will be considered in some greater detail in Section I(D).

Contributions to the Universal Service Fund from telecommunications carriers and other entities providing interstate telecommunications services currently fund the universal service programs.[81] The USAC calculates, on a quarterly basis, the level of contribution for each provider by multiplying the provider's universal service revenue base by the relevant universal service contribution factor.[82] For example, in 2002, the USAC required each provider to contribute 8.77% of its interstate service revenue to the Universal Service Fund.[83] Contribution rates generally have risen for traditional long distance carriers as revenues have fallen, due to competition from wireless service providers.

Because the guiding language of the 1996 Act stipulates only that these contributions be "equitable and nondiscriminatory,"[84] the Commission has given the carriers and providers of interstate

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[80] 47 C.F.R. § 54.701(g).

[81] 47 U.S.C. § 254(d).

[82] *See* 47 C.F.R. § 54.709(a). The revenue base is "the contributors' interstate and international revenues derived from domestic end users for telecommunications. . .services." 47 C.F.R. § 54.709(a)(1). The quarterly contribution factor will be "based on the ratio of total projected quarterly expenses of the universal service support mechanisms to total end-user interstate and international telecommunications revenues." 47 C.F.R. § 54.709(a)(2)).

[83] *See* Edie Herman, COMM. DAILY, June 13, 2002, Telecom Section.

[84] 47 U.S.C. § 254(d).

telecommunications services great flexibility as to how they collect their contributions.[85] Many choose to recover these contributions directly from their consumers through line-item charges.[86]

The funding rates that the USAC has required interstate telecommunications providers to contribute have consistently increased since the inception of the E-rate program. Rate increases have occurred with such regularity because funding requests have grown in each year of the program's existence, while, at the same time, interstate telecommunications revenues have fallen, especially for the larger, more established providers, such as AT & T.[87] Until very recently, established telecommunications providers have complained that, notwithstanding the consistent increases in the base rate, they were forced to charge their consumers more than the USAC mandated revenue rate because the Commission has used past revenues, rather than projected revenues, to establish the contribution factor.

Over the past five years, several market forces have caused a drop in revenue. The rise of cell phones (55 million in 1997 to 109 million in 2002), voice over the internet, the entry of local phone companies into the long distance market, and the bundling of various services have all contributed to an overall decline in revenues for the major universal service fund contributors.[88] Accordingly, major

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[85] *See* Universal Service Order, 12 FCC Rcd at 9210-11, para. 853.

[86] *Id.* at 9054, para. 529.

[87] *See FCC Applies Unused E-Rate Funds to Reduce Carrier USF Payments*, TELCO BUSINESS REPORT, June 17, 2002, Vol. 19, at No. 12; *see also* Bruce Mohl, *Consumers Absorb Federal Fee Raises Charged to Carriers*, BOSTON GLOBE, Jan. 6, 2002, at F3.

[88] *See* Almar Latour, *Local-Phone Companies Face Siege in an Industry in Turmoil*, WALL ST. J., Aug. 13, 2003, at A1, A6.

increases in the contribution factor have proven necessary to cover the drop in contributions.[89]

For example, AT & T has been losing interstate telecommunications revenue due to relatively new telecommunication providers like Verizon, increased internet and wireless telecommunication use, pre-paid phone cards, and the infamous "10-10" numbers.[90] Because AT & T has been obligated to pay USF charges based on revenues collected for the previous two quarters -- when the company's revenues were higher -- it had to charge a rate of 11.5% or higher to its customers in order to recoup the 8.77% contribution factor mandated by the USAC and the Commission.[91]

Conversely, the newer service providers -- who have been consistently growing since entering the market -- benefitted substantially from this retrospective formula because their revenues were (and are) growing over time. In consequence, these carriers were collecting a percentage against much larger revenues than two quarters ago. This allowed the newer providers to either charge their consumers a rate lower than the USAC required rates, or charge the 8.77% rate and reap the economic windfall of overcollection. Despite repeated requests by AT & T and other major telecommunications providers, the Commission did not provide any relief until December 2002.

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[89] *See* Paul Davidson, *Mobile Users to See Higher Service Fees*, USA TODAY, Dec. 3, 2002, at B1.

[90] *See* Wohl, *supra* note __; *see also* Heather Forsgren Weaver, *Migration to wireless causes problems for universal-service fund, says regulator*, RCR WIRELESS NEWS, June 24, 2002, at 10.

[91] *See* Herman, *supra* note __.

In February 2002, the Commission issued a Notice of Proposed Rulemaking ("NPRM") seeking comments on changing the contribution factor formula from a retrospective to a projected revenue basis.[92] The Commission also sought comments on the desirability of moving from a revenue based system to a connection based system of assessing universal service contributions. Finally, the Commission sought input regarding new regulations that would prescribe the precise manner through which telecommunications firms recover their universal service assessments from their customers.[93]

In December 2002, the Commission adopted interim rules that permit service providers to use *projected* revenue estimates, rather than *past* revenue collections, to determine the relevant contribution factor from their customers.[94] "[I]nstead of assessing universal service contributions based on revenues accrued as much as six months prior, USAC will assess contributions based on projections provided by contributors of their collected end-user interstate and international telecommunications revenues for the following quarter."[95]

The Commission believes that "[b]ecause contributors will be assessed in the period for which revenues are projected, the modified methodology will eliminate the interval between the accrual of

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[92] *See* In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 17 FCC Rcd 3752 (2002) (Further NPRM & Order).

[93] *See id.* at 3754-62.

[94] *See* In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 17 FCC Rcd 24952, 24954-55 (2002) (Report & Order and Second Further NPRM).

[95] *Id.* at 24969, 25014-017; *see also* 47 C.F.R. §§ 54.706, 54.709 (2003).

revenues and the assessment of universal service contributions based on those revenues."[96] This change "mitigates the anti-competitive effects of the current system" and will help "to ensure the sufficiency and stability of the universal service fund."[97]

Migration to a system based on the connections and capacity of each contributor represents the Commission's long term solution to matching universal service consumer charges to carrier assessments.[98] Under this approach, each contributor would be charged a flat, monthly rate for every residential, single-line business, and mobile wireless connection.[99] This methodology could nearly double the average household universal charge for residential customers.[100] Multi-line business connections would be assessed fees to recover the balance of the carriers' universal service contributions based on the capacity of the connections provided. The Commission hopes that by moving to a connection based assessment system, it will be easier for

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[96] *Id.* at 24969.

[97] *Id.* at 24969-70.

[98] *See id.* at 24954-57, 24964-83 (2002) (Order and Second NPRM); *see also* Davidson, *supra* note ___, B1 (noting the shift to projected income will reduce universal service fees for wireline service while raising fees for wireless services, and describing Commission's "expected move to flat universal service fee of about $1 per phone line or number").

[99] A staff study suggests that the net universal service charge for residential and business customers would remain more or less constant, regardless of the methodology that the Commission ultimately selects. *See* Wireline Competition Bureau Staff Study of Alternative Contribution Methodologies, CC Docket No. 96-45, 18 FCC Rcd 3009, 3010-14 (2003) (staff report). The average net contribution for residential consumers would be between $2 and $4 per month and between $1 and $1.50 for business customers. *See id.* at 3010-13.

[100] *See id.* at 3011-13 (showing average charges of $3.47 to $3.81 per month, as opposed to charges of $2.17 to $2.68 under other methodologies).

contributors to recover their universal service assessments from their customers on a more predictable basis.[101]

D. The Dedicated Universal Service Programs

The universal service program comprises three separate and discrete subsidy programs: schools and libraries, rural health care, and high cost/low income. Each program's main features are discussed briefly below.

1. Schools and Libraries Division. When the Telecommunications Act of 1996 expanded the definition of universal service to include schools and libraries, it gave the Commission broad discretion to determine what kinds of services should be provided to the new beneficiaries. The guiding language of the statute allows the Commission to designate "additional services"[102] and to provide these services to schools and libraries for "educational purposes."[103] In response, the Commission created the Schools and Libraries Support Mechanism, which is more commonly known as the "E-rate" program.

This program provides discounted telecommunications services, Internet access, and the internal connections necessary to provide these services to eligible schools and libraries. The Commission placed an annual cap of $2.25 billion to provide for these services, with any unused funds to be carried over to the next year of the

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[101] *See* Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies, CC Docket No. 96-45, 18 FCC Rcd 3006, 3006-07 (2003) (public notice).

[102] 47 U.S.C. § 254(c)(3).

[103] *See id.* at § 254(h)(1)(B).

program.[104] To be eligible for this program, a school must be an elementary or secondary school as defined in 20 U.S.C. § 8801.[105] Only those schools having an endowment exceeding $50,000,000 or operating as a for profit business are ineligible for E-rate funds.[106] A library must be an independent, not for profit entity whose budget is completely separate from any school to qualify for funding.[107]

The Schools and Libraries Division (the "SLD") of the USAC does not disperse funds directly to schools and libraries. Instead, a school or library must apply for E-rate discounts that the SLD reimburses directly to the service providers. There are many steps in this process.[108]

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[104] 47 C.F.R. § 54.507(a).

[105] 47 C.F.R. § 54.501(b).

[106] *Id*.

[107] *Id*.

[108] A school or library must first submit a technology plan to the USAC which lays out its goals and strategies for the best use of the requested technology, including training of staff, a budget for hardware, software, and other non discounted elements of the plan, and an evaluation process to monitor the progress of the facility in its use of the new technology. *See* <http://www.sl.universalservice.org/ overview/techplan.asp>. Next, the facility submit an FCC Form 470 to the USAC in order to notify service providers that the facility is seeking the discounted services. *See* <http://www.sl.universalservice.org/ overview/form470.asp>; *see also* 47 C.F.R. § 54.504(b). After the school or library submits a Form 470 and selects a service provider, the facility then submits a Form 471, which is the actual request for funding. The SLD uses this form to calculate the percentage of the discount which the facility will be entitled to receive. *See* <http://www.sl.universalservice. org/overview/ form471.asp>; *see also* 47 C.F.R. § 54.504(c). The agency will then review and process Form 471 and will send both the vendor and the facility a funding commitment letter, authorizing work to begin. *See* <http://www.sl.universalservice. org/overview/fcdl.asp>. Once work begins, the facility must submit a Form 486, in order to verify that only those services that have begun being delivered will be

Discounts levels for E-rate services vary by locality. Vendors offer these services at discounts of 20%-90%, with the highest discounts going to the most economically disadvantaged areas.[109] The percentage of students who are eligible for participation in the National School Lunch Program or by an approved alternative mechanism determines the discount level for the schools and libraries in an area.[110]

Since the second year of the E-rate program, the total amount of requests from eligible schools and libraries has routinely exceeded the program's funding cap.[111] When the amount qualified schools and libraries request exceeds the cap, the agency gives priority to funding requests for discounted telecommunications services and Internet access.[112] Internal connections are then funded using a priority system that begins funding applicants at the 90% discount level moving to the lower levels until all funds have been committed.[113]

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reimbursed. *See* <http://www.sl.universalservice.org/overview/form486.asp>. Finally, in order to be reimbursed, the service providers must submit either an FCC Form 472 or Form 474, which shows an invoice for completed work. *See* <http://www.sl.universalservice.org/overview/invoice.asp>.

[109] *See* 47 C.F.R. § 54.505(b).

[110] *Id*.

[111] *See* Universal Service Administrative Company, Schools and Libraries Division website, <http://www.sl.universalservice.org/funding/y1/> (1998 data); <http://www.sl.universalservice.org/funding/y2/> (1999 data); <http://www.sl.universalservice.org/funding/y3/> (2000 data); <http://www.sl.universalservice.org/funding/y4/> (2001 data).

[112] Schools and Libraries Program: Update on E-Rate Funding (GAO-01-672, May 2001) at 2.

[113] *Id.*

Several problems have arisen with the operation of the Schools and Libraries Support Mechanism. In the program's first year, the agency committed $1.7 billion to eligible schools and libraries.[114] In each year since, however, the requests from eligible schools and libraries have exceeded the Commission's $2.25 billion mandated cap. Although the requests exceeded the cap by only $110 million in 1999, the Commission estimates that E-rate funding requests will soon exceed $5 billion per year, more than double the $2.25 billion spending cap.[115]

This cap on program funding has resulted in requests of many schools for internal connections going unfunded. In 2001, eligible applicants requested over $5.2 billion for service, with $1.7 billion of the requests dedicated to telecommunications services and Internet access.[116]

Under the USAC's funding priorities, only $517 million would be left to fund the $3.5 billion in requests for internal connections. This is not even enough to cover the $1.6 billion in requests made by those schools and libraries eligible for the 90% upper level of funding discounts.[117] When funds are insufficient to fund completely a discount level, the SLD must divide the total amount of support

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[114] *See supra* note 36; <http://www.sl.universalservice.org/funding/y1/> (1998 data).

[115] *See* In the Matter of Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, First Report and Order, 17 FCC Rcd. 11521, para. 4 (2002).

[116] Schools and Libraries Program: Update on E-Rate Funding (GAO-01-672, May 2001) at 5.

[117] *Id*.

remaining by the total amount requested by the discount level to produce a pro-rata factor of disbursement.[118]

If the current trend of increased requests across the board continues, the SLD will soon face a year in which requests for telecommunications and Internet access alone exceed the funding cap, and no school will receive funding for internal connections. Although the USAC gives it the lowest priority, the demand for internal connection discounts has consistently accounted for over 50% of all E-rate funds requested.[119] With the level of requests increasing each year, this means that fewer and fewer schools will receive funding for this much sought-after service.

In some respects, this might not be entirely a bad thing. It appears that some schools that receive funding for internal connections really do not need it. Despite the safeguards of the SLD requirement of a technology plan, reports exist of facilities receiving funding to install internal connections capable to support *five times* the actual number of computers that they possess.[120] Other cases of misuse of funds have been reported. In the first years of the program, the agency approved millions of dollars of E-rate funds for ineligible products and services.[121]

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[118] 47 C.F.R. § 54.507(g)(1)(iv).

[119] Schools and Libraries Program: Update on State-Level Funding by Category of Service (GAO-01-673, May 2001) at 5.

[120] *See* Lee Bergquist, *Phone users pay bill for school technology; $111 million allocated; skeptics say it doesn't ensure better education*, MILWAUKEE JOURNAL SENTINEL, March 18, 2002, at 1A.

[121] *Agencies*, WASHINGTON INTERNET DAILY, Dec. 20, 2000, Vol.1, at No. 146.

Other inequities exist. Although poorer schools are more likely to receive internal connection funding under the USAC's priority structure, richer schools receive indirect benefits that their poorer counterparts do not. Many schools in wealthy areas already had extensive technology budgets before the beginning of the E-rate program. These schools are able to apply for and receive E-rate funds and use their own technology budgets to offset other programs that poorer schools cannot afford.[122]

Compounding the problem of increasing funding requests is the fact that, each year, facilities that successfully request funding fail to actually use the funds, resulting in a substantial percentage of the funds committed for the Schools and Libraries Support Mechanism going unspent. In a May 2001 GAO report, the auditing agency found that $1.3 billion of the $3.7 billion, or 35%, of funding set aside for applicants during the first two years of the program, had gone unused.[123]

Since its inception in 1998, myriad other problems have surfaced in the implementation of the E-rate program. Although each facility must submit a technology plan to the USAC, many do not live

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[122] *See* Ann McFeatters, *A Federal Promise to Hook Kids to the Web Lurches Amid Controversy, Red Tape*, PITTSBURG POST-GAZETTE, Jan. 30, 2001, at A-16.

[123] Schools and Libraries Program: Update on E-Rate Funding (GAO-01-672), May 2001, at 6. Rather than reallocating this money to other schools that requested but were initially denied funds for internal connections services, the USAC decided to place these unused funds into an interest bearing account. *Id*. The Commission did not determine what to do with the unused funds until June 2002, when, at the request of AT & T and other major telecommunication providers, it voted to temporarily apply these funds to reduce the size of the contributions carriers were required to make to the Universal Service Fund. *See* Edie Herman, *FCC Applies Unused E-Rate Funds to Reduce Carrier USF Payments*, COMM. DAILY, June 12, 2002.

up to the plan's goals. The technology plan asks schools to present evidence of staff training to use the technology. Unfortunately, the U.S. Department of Education has found that this type of training is often a one time seminar, with a single expert attempting to instruct hundreds of teachers at a time.[124] Additionally, an *Education Weekly* survey found that a majority of teachers have had less than five hours of technology training.[125] Lack of training is not the only problem faced by schools wishing to use E-rate funds. The poorest schools who do get funds for internal connections often have outdated computers and insufficient software to make using technology in the curriculum worthwhile.[126]

2. Rural Health Care Division. Section 254 of the Telecommunications Act of 1996 provided for the funding of telecommunications and Internet services to rural health care providers. To implement this aspect of the universal service program, the USAC created the Rural Health Care Division (the "RHCD"), and charged it with administering a program that would offer funding to help rural health care providers gain access to telecommunications services at rates no higher than those for similar telecommunications services in the nearest city within the state with a population of at least 50,000.[127]

To be eligible for these services, a health care provider must be located in a rural area and be a not-for-profit hospital, a local

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[124] *See* McFeatters, *supra* note ___.

[125] *Id*.

[126] *Id*.

[127] Universal Service Order, 12 FCC Rcd. at 9093, para. 608.

health department or agency, a community mental health center, a health center providing health care to migrants, a post-secondary educational institution offering health care instruction, or a consortium of health care providers consisting of one or more of the proceeding entities.[128] The RHCD only provides funding for services relating to Internet access and internal connections necessary to implement "essential telemedicine applications."[129] Based on the state of the rural health community and available technology in 1997, the Commission capped the annual level of universal support for the RHCD at $400 million.[130]

Similar to the provision for schools and libraries, funding for the Rural Health Care Support Mechanism does not go directly to the rural health care providers. The process for requesting these funds is extraordinarily cumbersome and probably discourages eligible facilities from applying.[131]

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[128] 47 C.F.R. § 54.601(a)(2).

[129] *See* Universal Service Order, 12 FCC Rcd. at 9094, para. 611.

[130] *See* 47 C.F.R. § 54.623; *see also* Universal Service Order, 12 FCC Rcd. at 9141, para. 705.

[131] The health care provider ("HCP") must first submit an FCC Form 465, which certifies the HCP's eligibility and states the HCP's requests for services. *See* http://www.rhc. universalservice.org/overview/ processoverview.asp>. Upon approval of Form 465, the RHCD posts Form 465 and opens up a 28 day competitive bidding cycle. *Id.* The HCP then selects the most cost efficient telecommunications carrier and sends it an FCC Form 468, which verifies the type of service order, to be completed and returned to the HCP. *Id.* The HCP then completes an FCC Form 466, which verifies the service requested and that the carrier selected is the most cost-effective, and sends this form along with Form 468 to the RHCD. *Id.* If the RHCD approves the 466/468 packet, it will send a funding commitment letter and a copy of FCC Form 467, which is a receipt of service confirmation form, to both the HCP and the carrier. *Id.* The HCP then completes Form 467 and returns it to the RHCD, which then reviews it. If the agency approves the Form 467, it

Congress envisioned that the Rural Health Care Support Mechanism would ensure that persons living in rural parts of the country would enjoy meaningful access to the best and latest health care services. Proponents of telemedicine hoped that RHCD funding would allow doctors practicing in major urban centers to diagnose and treat patients in rural areas by watching live videos transferred over high-speed Internet connections.[132] Since its inception, the Rural Health Care Support Mechanism has funded telecommunications and information services for rural health care providers in forty states and the U.S. Virgin Islands.[133]

Many problems with the agency's implementation of the program have seriously reduced participation rates by eligible health care providers and raised the costs of program administration to unacceptably high levels. For example, procedural problems have resulted in the Rural Health Care Support Mechanism being the least utilized program in the new and expanded universal service program. During its first two years of existence, the RHCD was an abysmal failure. Of the 22,000 rural health care providers contacted by the USAC, only 3,000 expressed an interest in the program, and less than 600 filed formal applications.[134]

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then issues an HCP support schedule to the HCP and the telecommunications carrier, allowing the carrier to begin crediting the HCP's account with the support mechanism discount. *Id.*

[132] *See* Jube Shiver, Jr., *For Doctors, Blocked Internet Artery: Bureaucratic Delays Stall Promising Program to Improve Rural Health Care*, LOS ANGELES TIMES, Sept. 19, 1999, at A8.

[133] *See* Universal Service Administrative Company 2001 Annual Report, at 37, *available at* http://www.universalservice.org/reports/2001/.

[134] *See* Shiver, *supra* note ___.

The complicated application process led to only 68 of 452 applicants being awarded funds in the first 18 months of the program.[135] Moreover, the funds distributed to these 68 applicants totaled less than $300,000, much less than the $1.4 million it cost the RHCD to administer the program during this same 18 month time period.[136]

In recent years, the program has not fared much better. The Commission narrowed the definition of "health care provider" and determined that this term did not include emergency medical service facilities or long-term care facilities, such as nursing homes and hospices.[137] This decision significantly reduced the number of eligible rural health care providers nationwide from an estimated 22,000 to an estimated 9000; even so, only 700 providers received assistance in 2001.[138] As of February 2002, the RHCD had only distributed $13 million of a potential $900 million in funds during the first three years of the program.[139] Although a handful of rural health care providers might be pleased with the results of this program, based on the program's poor results, a reasonable observer might seriously question the program's efficacy.

3. High Cost and Low Income Division. In addition to the new provisions to support schools, libraries, and rural health care

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[135] *Id.*

[136] *Id.*

[137] *In the Matter of Rural Health Care, Support Mechanism*, 17 FCC Rcd 7806, 7809 para. 8 (1998).

[138] *See* 17 FCC Rcd. 7806, 7810 n.17.

[139] *See* Universal Service Administrative Company 2001 Annual Report, at 37, *available at* http://www.universalservice.org/reports/2001/.

providers, section 254 sought to extend the original universal service goal of providing affordable telecommunications services regardless of location or income level. The USAC strives to accomplish this goal by using the High Cost and Low Income Support Mechanisms.[140] The agency created this program to provide support to telephone companies that offer affordable telecommunications services to residents of rural, insular, and high cost areas at comparable rates to those being charged for similar services in urban areas.[141]

The Low Income Support Mechanism provides discounts to low income consumers to activate and maintain telecommunications services they otherwise might not be able to afford.[142] Whether or not the beneficiaries of the program would simply go without telephone service in its absence is a highly debatable question.[143] The High Cost and Low Income Division of the USAC administers both of these programs.[144]

The High Cost Support Mechanism (the "HCSM") funds eligible telecommunications carriers who provide a services to rural, insular, and high cost areas. There are a variety of support options for

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[140] *See* In the Matter of Federal-State Joint Board on Universal Service, 12 FCC Rcd at 8792-8794.

[141] Universal Service Administrative Company 2001 Annual Report at 4, *available at* http://www.universalservice.org/reports/2001/; *see also* 47 U.S.C. § 254(b)(3).

[142] Universal Service Administrative Company 2001 Annual Report at 4, *available at* http://www.universalservice.org/reports/2001/.

[143] *See* Alleman, et al., *supra* note ___, at 856-57, 861, 865-66 (arguing that low income households subscribe to unsubsidized telecommunications and media services, such as cable or satellite television, at rates virtually equal to households with significantly higher household income).

[144] 47 C.F.R. § 54.701(g)(iii).

these carriers, including high cost loop support for rural carriers, forward-looking support for non-rural carriers, local switching support, long term support for interstate access charges, interstate common line support, and interstate access support.[145]

To be eligible for these support mechanisms, a telecommunications carrier must be certified an eligible telecommunications carrier (an "ETC") by the state in which it seeks to provide service.[146] There are many types of ETCs that are eligible to participate in the HCSM, including incumbent local exchange carriers, competitive ETCs, wireless carriers, telephone cooperatives, and independent telephone companies.[147]

Although many categories of carriers theoretically are eligible for HCSM funds, the Commission's procedure for gaining ETC status makes it quite difficult for non-incumbent local exchange carriers to receive these funds.[148] Incumbent local exchange carriers are, by their nature, ETCs if they serve high cost areas, and are eligible to receive substantial funding from the HCSM. If, however, a competitive ETC begins to service the incumbent's area, the incumbent's level of support will be reduced.[149] Therefore, the

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[145] Universal Service Administrative Company 2001 Annual Report at 6, *available at* http://www.universalservice.org/reports/2001/.

[146] *See* 47 C.F.R. § 54.201(d).

[147] *See* Universal Service Administrative Company 2001 Annual Report at 6, *available at* http://www.universalservice.org/reports/2001/.

[148] *See* Chen, *Subsidized Rural Telephony*, *supra* note ___, at ___ [draft at 20-39].

[149] Shira Levine, *Liberty, Justice, and Telephone Service for All: The concept of universal service has been a linchpin of telecommunications policy. Can that policy be modified to fit a*

incumbent has a strong incentive to remain the sole telecommunication service provider for a high cost area (if possible). If another carrier applies for ETC status in the same service area, the incumbent local exchange carrier can oppose the application and delay the state's decision by way of numerous discovery requests and lengthy hearings.[150] This process has made it extremely difficult for competitive ETCs to enter into incumbent local exchange carriers' service areas.

In 2001, 18 competitive carriers received HCSM support for providing service to high cost areas, compared to over 1200 incumbent local exchange carriers.[151] In the previous year, only 3 competitive carriers received HCSM support.[152]

The Low Income Support Mechanism ("LISM") assists local service providers who provide telecommunication access to low income customers. The LISM focuses on three programs to reduce costs for these customers. The "Lifeline" program provides support to telephone companies that provide reduced services for qualified low income consumers.[153] The Lifeline service can save a low income subscriber between $5.25 and $8.50 each month on local monthly phone

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competitive market?, AMERICA'S NETWORK, Nov. 1, 2001, No.16, Vol. 105, at 22.

[150] *Id.*

[151] Universal Service Administrative Company 2001 Annual Report at 6, *available at* http://www.universalservice.org/reports/2001/.

[152] *Id.*

[153] *See* 47 C.F.R. § 54.401(a).

charges.[154] The "Link Up" program reimburses local telephone service providers that offer a reduction for telephone service activation to low income consumers. The benefit to the consumer is a discount of up to 50% of the customary initiation fee, not exceeding $30.[155] The LISM also reimburses a service provider for the costs associated with providing low income consumers toll limitation service, including toll blocking and toll control.[156] An individual must meet the state's eligibility requirements or participate in a federal assistance program such as Medicaid or food stamps before he is qualified to be a low income consumer.[157]

A substantial problem that the LISM faces is underutilization. Both the Lifeline and Link Up programs can be administered by individual states, and in fact many states mandate this administration.[158] In some states, such as New York and California, state governments have made publicity of these programs a priority, and these efforts have yielded relatively high levels of participation by eligible households.[159]

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[154] Universal Service Administrative Company 2001 Annual Report at 8, *available at* http://www.universalservice.org/reports/2001/.

[155] 47 C.F.R. § 54.411(a)(1).

[156] Universal Service Administrative Company 2001 Annual Report at 8, *available at* http://www.universalservice.org/reports/2001/; *see also* 47 C.F.R. § 54.400(b)-(d) (defining the terms "toll blocking," "toll control," and "toll limitation").

[157] *See* 47 C.F.R. § 54.409(a)-(b).

[158] *See* 47 C.F.R. §§ 54.409, 54.415.

[159] *See* Eve Tahmincioglu, *Phone Aid Not Connecting With Poor*, ST. PETERSBURG TIMES, Oct. 18, 1998, at 1H.

In other states, however, these programs have been poorly publicized. In early 2002, the AARP began its own advertising campaign for Lifeline and Link Up in Florida, because less than 14% of the eligible consumers in this state were using these services.[160] The Commission requires that telephone companies publicize the Lifeline program "in a manner reasonably designed to reach those likely to qualify."[161] Oftentimes, phone companies fulfill this requirement simply by placing an insert into each customer's monthly phone bill. Unfortunately, this notice is often one of many inserts within the bill, all of which, upon receipt, usually make a short, one-way trip into the nearest trash can.[162] No similar requirement exists for phone companies to publicize the Link Up program.

E. From Here to Eternity: The Unending and Ever-Expanding Quest for Universal Service.

As the discussion above demonstrates, the goal of universal service has shifted and changed over time. Originally merely a promise to provide service on demand to any paying customer, it now represents a new government entitlement program that subsidizes a growing basket of telecommunications services. As competitive service providers colonize the last source of cross subsidies, local business service, the cost of universal service will have to be paid entirely through direct taxes on consumers of various telecommunications services.

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[160] *See* Dave Simanoff, *AARP Encourages Floridians to Keep In Touch*, THE TAMPA TRIBUNE, April 5, 2002, at 2.

[161] *See* 47 C.F.R § 54.405(b).

[162] *See* Tahmincioglu, *supra* note ___.

The Commission's implementation of the universal service program reflects all the problems usually associated with designing and executing a massive welfare program. As Professor Weiser has argued, "[i]n essence, the FCC has been saddled with the task of designing a program similar to the Medicaid Act's system of providing medical service to the poor."[163] And, like Medicaid, the cost of administering the universal service program is staggering, even while large segments of the program seem to be dismal failures (the rural health care provider program) or incredibly wasteful (the schools and libraries program).

One can mount a sustained and powerful attack against the Commission's implementation of the universal service program on public policy grounds -- but there are other, more pressing objections to be considered.[164] The purpose of providing a relatively detailed description of the federal universal service program and its implementation is to give an interested observer a sense of the scope of the delegation that section 254 represents. In my view, Congress should be required to take greater direct responsibility for the design elements and execution of the universal service behemoth.

Section 254 does not establish the particular services that must (or must not be) provided or the precise mechanisms that will be used to pay for these services. Congress essentially punted all the hard questions away to the Commission, telling it to work out all the relevant details.

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[163] Weiser, *supra* note ___, at 824.

[164] For sustained objections to the universal service program on public policy grounds, *see infra* text and accompanying notes ___ to ___.

To be sure, this approach does not represent an entirely novel approach to telecommunications regulation -- many provisions of the Communications Act vest great discretion to the Commission to make and administer vitally important policies.[165] Yet, section 254 does differ from other, relatively broad delegations of regulatory authority to the Commission because it vests the Commission with the ability to assess taxes on telecommunications services, thereby favoring some services and potentially disfavoring others. Even if Congress could constitutionally delegate the universal service program design to the Commission, it should not also be permitted to delegate responsibility for funding the program.

II. The Framers, the Origination Clause, and the Power to Tax.

There are at least three separate objections that one could lodge against section 254 and the universal service program. The first relates to the Origination Clause. The Origination Clause requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills."[166] A statute originating in the Senate violates the Origination Clause if it comes within the definition of a revenue-raising bill.[167]

A separate, but conceptually related, objection arises under the nondelegation doctrine. Black letter law requires that Congress,

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[165] *See*, *e.g.*, 47 U.S.C. § 157 (empowering Commission to encourage new technologies and services); *id.* at § 303 (authorizing Commission to issue licenses for radio and television stations as "public interest, convenience, and necessity" requires").

[166] U.S. CONST. art. I, § 7, cl.1.

[167] United States v. Munoz-Flores, 863 F.2d 654, 657 (9th Cir. 1988), *rev'd*, 495 U.S. 385 (1990).

when delegating responsibility to an administrative agency, must provide an "intelligible principle" that effectively constrains an agency's discretion to act under the delegation.[168] Thus, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors."[169] Some have argued that section 254 violates the nondelegation doctrine because it vests an undue amount of discretion with the Commission to establish and administer the universal service program.[170]

A final argument involves a more specialized iteration of the nondelegation doctrine: an administrative agency may not interpret an ambiguous statute to confer the power to tax.[171] If Congress expressly delegates authority to shape a revenue program, however, the usual nondelegation doctrine principles will apply to the statute.[172] Some critics have suggested that section 254 violates this more narrow corollary of the non-delegation doctrine.[173]

The Origination Clause represents the best place to begin the analysis because it provides the most specific textual basis for limiting congressional delegations that involve revenue authority.[174]

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[168] *See* Touby v. United States, 500 U.S. 160, 164-65 (1991).

[169] *Id.* at 165.

[170] *See* Cherry, *supra* note ___, at 123-33.

[171] *See* National Cable Television Ass'n v. United States, 415 U.S. 336, 340-43 (1974).

[172] *See* Mid-America Pipeline Co., 490 U.S. 212, 221-24 (1989).

[173] *See* Cherry, *supra* note ___, at 133-36.

[174] *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 572-73, 615-19 (1997); *see also* Albright v. Oliver, 510 U.S. 266, 269 (1994); Graham v. Connor, 490 U.S. 386

Unfortunately, it is not a very promising avenue of inquiry. One should keep in mind, however, that although the existence of the Origination Clause should inform the nondelegation doctrine's application, the nondelegation doctrine inquiries are separate and distinct questions (to be considered in Part III).

A. The Origination Clause as a Possible Basis For Challenging Section 254's Constitutionality.

The Origination Clause requires that "[a]ll bills for raising Revenue shall originate in the House of Representatives."[175] As it happens, the Telecommunications Act of 1996 ("TCA") originated in the Senate, not the House of Representatives.[176] Accordingly, if section 254's universal service program constitutes a "revenue" measure for purposes of the Origination Clause, Congress did not properly enact it.

Since 1789, the Supreme Court has decided eight Origination Clause cases.[177] In every case, the Origination Clause-based challenges have failed. Several reasons help to explain this remarkable lack of success.

The Supreme Court has held that Origination Clause applies only to general revenue measures -- not to limited or targeted taxes. "The Court has interpreted this general rule to mean that a statute

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(1990).

[175] U.S. CONST. art. I, § 7, cl. 1.

[176] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (enacting S. 652).

[177] *See* United States v. Munoz-Flores, 495 U.S. 385 (1990); Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989); Rainey v. United States, 232 U.S. 310 (1914); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Millard v. Roberts, 202 U.S. 429 (1906); Twin City Bank v. Nebeker, 167 U.S. 196 (1897); Lumberman's Bank v. Huston, 167 U.S. 203 (1897); United States v. Norton, 91 U.S. 566 (1875).

that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause."[178] Using this approach, the Supreme Court has rejected Origination Clause challenges involving fees on bank notes,[179] real property,[180] and a crime victim's compensation fund.[181] Moreover, this approach also comports with Justice Story's authoritative interpretation of the Origination Clause.[182] Although the utter lack of success enjoyed by litigants raising Origination Clause claims should have given a prudent lawyer serious pause before proceeding, telecommunications service providers subject to the universal service fees initiated a legal challenge to section 254 premised on a violation of the Origination Clause.[183]

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[178] *Munoz-Flores*, 495 U.S. at 398-99.

[179] *Nebeker*, 167 U.S. at 203.

[180] *Millard*, 202 U.S. at 436-37.

[181] *Munoz-Flores*, 495 U.S. at 397-401.

[182] Justice Story explained that "[t]his provision, so far as it regards the right to originate what are technically called 'money bills,' is, beyond all question, borrowed from the British house of commons, of which it is the ancient and indisputable privilege and right, that all grants of subsidies and parliamentary aids shall begin in their house. . . ." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §445, at 315 (1833). In a later edition of his work, he noted "that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes, which may incidentally create revenue." JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION, § 880, at 610-11 (3rd ed. 1858).

[183] *See* Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 426-28 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210, 1223 (2000), and *cert. dismissed*, 531 U.S. 975 (2000).

The Fifth Circuit rejected this claim in summary fashion, reasoning -- quite correctly -- that the TCA was not a "bill for raising revenue." Although "[a] different case might be presented if the program funded were entirely unrelated to the persons paying for the program,"[184] the universal service fees do not really fit within this exception. The Fifth Circuit, applying *Munoz-Flores*, properly concluded that the universal service fees were part of a special program and generally benefited the persons or entities responsible for paying them.[185]

Given this jurisprudential backdrop, one wonders why telecommunications service providers pressed an Origination Clause claim before the Fifth Circuit. Indeed, the *Munoz-Flores* decision even rejects the argument that an exact correspondence between the class of payors and beneficiaries must exist to avoid labelling legislation a "revenue" measure.[186] Thus, the Origination Clause does not itself support a serious challenge to the universal service program, because the Telecommunications Act was not a "revenue bill" for purposes of the Clause.

The formal effect of the Origination Clause, however, provides only part of the picture. The debates surrounding its enactment should, at least arguably, inform the separation of powers analysis

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[184] *Id.* at 400 n.7.

[185] *Texas Office of Public Utility Counsel*, 183 F.3d at 427-28.

[186] *See id.* at 400 (holding that earlier cases did not establish rule "that any bill that provides for the collection of funds is a revenue bill unless it is designed to benefit the persons from whom the funds are collected" and noting that "had the Court adopted such a caveat, the Court in *Nebeker* would have found the statute to be unconstitutional").

associated with application of both the general nondelegation doctrine and the more specific requirement of an express delegation of revenue raising authority. To the extent that rendering the taxing power democratically accountable was a primary concern of the Framers, one could plausibly argue that delegations involving revenue authority should receive closer scrutiny than other kinds of delegations.

B. A Brief Legislative History of the Origination Clause.

The Constitutional Convention met in Philadelphia between May 25 and September 17, 1787.[187] One of the most difficult issues facing the delegates concerned the apportionment of seats in the legislative branch of the federal government. States with small populations preferred equal representation of the states, whereas the relatively populous states preferred representation based on population. In the end, the "Great Compromise" resulted in a Senate featuring equal apportionment of seats among all states (a rule that the Constitution purports to make unamendable[188]) and a House of Representatives with seats apportioned based on relative population (with a slavery-friendly method of counting the population[189]).

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[187] CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787 at 193, (Agathon Press 1988).

[188] *See* U.S. CONST. art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

[189] *See* U.S. CONST., art. I, § 2, cl. 3 ("Representatives and Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons*.") (emphasis added).

The resolution of the impasse over the method allocating representation in the House and Senate included an additional compromise that vested the House of Representatives with exclusive powers over taxation and appropriation measures. Although the delegates initially had approved, by a unanimous vote, the right of both houses to originate legislation,[190] this approach did not survive the Great Compromise. The Framers' debates over the question of origination of revenue measures provide a very helpful context in which to consider the larger nondelegation question.

Prior to June 13, 1787, the working draft of the Constitution permitted either house to originate taxation and appropriations measures. During that day's debates, Elbridge Gerry, of Massachusetts, "moved to restrain the Senatorial branch from originating money bills."[191] He reasoned that "[t]he other branch was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings."[192]

James Madison, of Virginia, responded that, unlike Great Britain's House of Lords, "[t]he Senate would be the representatives of the people as well as the first branch [the House of Representatives]."[193] Madison further argued that:

> If [the Senate] should have any dangerous influence over it, they would easily prevail on some member of the latter to originate the bill they wished to be passed. As the Senate would be generally a more capable sett [sic] of men, it would be wrong to disable them from any preparation of the business,

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[190] *Id.* at 57.

[191] 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 233 (2d ed. 1937).

[192] *Id.*

[193] *Id.*

> especially of that which was most important, and in our republics, worse prepared than any other.[194]

After a brief general debate, the delegates rejected Gerry's motion, by a margin of 3 states in favor and 8 opposed.[195]

The question of democratic control over the appropriations and taxing powers did not go away. Moreover, the question of apportionment had not been firmly resolved as of June 13, 1787. In the days that followed, the Convention reached an impasse between the large and small states regarding the apportionment of seats in the House and Senate.[196] On July 2, 1787, the delegates appointed a special committee to consider the question of apportionment;[197] the Committee of Eleven presented its report to the Convention on July 5, 1787.[198]

The Committee of Eleven broke the impasse by proposing the Great Compromise.[199] The Great Compromise established a bicameral legislature with proportional representation in the House of Representatives and equal representation of the states in the Senate.[200]

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[194] *Id.*

[195] *Id.* at 234 n.15. Madison records the vote as 3 to 7, but the official journal reports the vote as 3 to 8. Later in the deliberations, General Charles Pinckney, of South Carolina, references a vote of 3 in favor and 8 against. *See id.* at 546.

[196] 2 FARRAND, *supra* note 8, at 12.

[197] *See id.* at 509; *see also id.* at 510-16.

[198] *Id.* at 524-25.

[199] 2 FARRAND, *supra* note __, at 7. The Committee of Eleven consisted of Gerry, Ellsworth, Yates, Patterson, Franklin, Bedford, Martin, Mason, Davie, Rutledge and Baldwin. *Id.* at 12.

[200] 1 FARRAND, *supra* note 8, at 78.

As a concession to the larger states for the accepting equal representation of all states in the Senate, the committee vested the power of originating taxation and appropriations measures in the House of Representatives and prohibited the Senate from either originating or amending such legislation.[201] The committee's draft provided "[t]hat all Bills for raising or appropriating money and for fixing the salaries of Officers of the Government of the United States, shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second Branch -- and that no money shall be drawn from the public Treasury but in pursuance of appropriations to be originated by the first Branch."[202]

Thus, vesting the origination power with the House was an integral part of the deal that resolved the conflict over congressional apportionment: seats in the Senate would not be apportioned based on population, but only the House of Representatives would have the power to initiate legislation that raises or spends money. Gerry described the clause as "of great consequence" and as "the corner stone of the accommodation [sic]."[203] Similarly, Caleb Strong, of Massachusetts, viewed "the small States [as having] made a considerable concession in the article of money

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[201] JILLSON, *supra* note 6, at 133. Speaking before the Maryland House of Delegates, James McHenry explained: "The Larger States hoped for an advantage by confirming this privilege to that Branch where their numbers predominated, and it ended in a compromise by which the Lesser States obtained a power of amendment in the Senate." 3 FARRAND, *supra* note 8, at 148. *See also* 2 FARRAND, *supra* note 8, at 14.

[202] *Id.* at 524.

[203] 2 FARRAND, *supra* note ___, at 5.

bills."[204] Benjamin Franklin, of Pennsylvania, echoed this view, observing that "the two clauses, the originating of money bills, and the equality of votes in the Senate, [are] essentially connected by the compromise which had been agreed to."[205]

Madison, who successfully had opposed Gerry's earlier motion to restrict the Senate's power to originate taxation or appropriations measures, immediately objected to the committee's approach to the origination question. He argued that "[e]xperience proved that it [an origination restriction] had no effect," that the restriction would be "a source of frequent & obstinate altercations," and he reminded the delegates that the Convention had rejected an identical proposal earlier (referring to Gerry's June 13, 1787 motion).[206] In Madison's view, the solution to the problem of democratic legitimacy was to apportion seats in both the House *and* the Senate on the basis of population.[207]

Governeur Morris, of Pennsylvania, also opposed the restriction for a different reasons. He argued that the restriction "will disable the second branch from proposing its own money plans, and giving the people an opportunity of judging by comparison of the merits of those proposed by the first branch."[208]

George Mason, of Virginia, disagreed with Madison and Morris. He suggested that "[t]he consideration which weighed with the

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[204] *Id.* at 8.

[205] *Id.* at 233.

[206] *See* 1 FARRAND, *supra* note __, at 527.

[207] *See id.* at 528-29.

[208] *Id.* at 543-44.

Committee was that the first branch would be the immediate representatives of the people, the second would not."[209] In light of this, "[s]hould the latter have the power of giving away the people's money, they might soon forget the source from whence they received it" and "[w]e might soon have an aristocracy."[210] Thus, for Mason, the Origination Clause was essential to ensure that the power to tax and spend could not be exercised without immediate democratic accountability.

Benjamin Franklin associated himself with Mason's remarks, noting that "it was always of importance that the people should know who had disposed of their money, & how it had been disposed of."[211] Franklin added that "those who feel, can best judge" and "[t]his end would. . . be best attained, if money affairs were to be confined to the immediate representatives of the people.[212]

Following this debate, a motion to strike the origination restrictions on the Senate failed by a vote of 5 to 3, with 3 delegations not voting.[213] Accordingly, a strong proscription against the Senate originating taxation or appropriations measures remained in the working draft of the Constitution.

But Madison and others opposed to vesting the House of Representatives with the exclusive power to initiate revenue and spending measures would not give up. After all, a proposal to

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209 *Id.* at 544.

210 *Id.*

211 *Id.* at 546.

212 *Id.*

213 *See id.* at 547.

include such a restriction had failed only a few weeks earlier by a margin of 8 to 3. On the other hand, however, the earlier rejection took place when the principle of equal suffrage in the Senate had not yet been firmly established.

In a private conversation with John Carroll, of Maryland, Madison explained his opposition to origination restrictions on the Senate. He believed "[t]hat lodging in the house of representatives the sole right of raising and appropriating money, upon which the Senate had only a negative, gave to that branch extraordinary power in the constitution, which must end in its destruction."[214] Moreover, "without equal powers they [the House and Senate] were not an equal check upon each other -- and that this was the chance that appeared for obtained an equal suffrage, or a suffrage equal to what we had in the present confederation."[215] Thus, Madison viewed the Origination Clause as mere window dressing, especially when contrasted with some sort of proportional representation principle in the Senate as well as the House of Representatives.

On July 16, 1787, the delegates adopted the Great Compromise. Notwithstanding Madison's objections, the resolution incorporated the strong version of the Origination Clause and passed by a vote of 5 to 4, with one state delegation abstaining.[216] On July 26, 1787, the delegates charged a "Committee of Detail" with preparing a new

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[214] 2 Farrand, *supra* note __, at 210-11.

[215] *Id.*

[216] *Id.* at 13-14.

working draft that would reflect and incorporate the various resolutions and amendments adopted up to that point.[217]

On August 6th, John Rutledge, of South Carolina, delivered the Report of the Committee of Detail.[218] Article IV, section 5 of the working draft included a strong version of the Origination Clause. It provided that "[a]ll bills for raising or appropriating money, and for fixing the salaries of the officers of the Government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate."[219]

The Convention considered this provision on August 8, 1787. At that time, Charles Pinckney, of South Carolina, moved to strike the provision from the draft. He argued that "[i]f the Senate can be trusted with the many great powers proposed, it surely may be trusted with that of originating money bills."[220] Goveneur Morris supported Pinckney's motion, noting that "[it] is particularly proper that the Senate should have the right of originating money bills."[221]

George Mason objected strongly to the motion. Mason argued that "[t]o strike out the section, was to unhinge the compromise of which it made a part."[222] Mason was referring to the equal suffrage of all states, regardless of population, in the Senate.

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[217] *See id.* at 116-17, 128.

[218] *Id.* at 177.

[219] *Id.* at 178.

[220] *Id.* at 224.

[221] *Id.*

[222] *Id.*

Characterizing the Senate as a bastion of "aristocracy," Mason argued that "[t]he purse strings should never be put into its hands."[223]

Notwithstanding Mason's arguments, the delegates voted in favor of Pinckney's motion by a margin of 7 states in favor and 4 states against. This vote had the effect of striking the Origination Clause from the working draft of the Constitution.

Edmund Randolph, of Virginia, was displeased with the Convention's "extremely objectionable" decision to strike the Origination Clause.[224] On August 9, 1787, Randolph gave the Convention notice that he would seek reconsideration of the vote at a later time. On August 11, 1787, he moved for reconsideration.[225]

In support of his position, Randolph noted that he had opposed an origination restriction when suffrage in the Senate was to be based on proportional representation. Now that representation in the Senate would be based on equal representation among the states, "the large states would require this compensation at least."[226] Moreover, retention of the Origination Clause "would make the plan more acceptable to the people, because they will consider the Senate as the more aristocratic body, and will expect that the usual guards against its influence be provided according to the example in Great Britain."[227] Randolph argued that "the privilege will give some advantage to the House of Representatives if it extends to the

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223 *Id.*

224 *See id.* at 230.

225 *Id.* at 262.

226 *Id.* at 262-63.

227 *Id.* at 263.

originating only -- but still more, if it restrains the Senate [from] amending.[228] Finally, he asked for the support of the smaller states, reminding their delegates that the Great Compromise depended upon this condition in exchange for equality of representation in the Senate.[229]

Randolph's motion to reconsider passed by a vote of 9 states in favor to 1 state opposed, with one state abstaining. Two days later, on August 13, 1787, the Federal Convention took up reconsideration of the Origination Clause.

In a proactive move, Randolph immediately moved to limit the clause to "revenue raising" bills.[230] This amendment served to eliminate the objection that the term "money bills" was overly broad so as to potentially bring within the restriction "all bills under which money might incidentally arise."[231]

George Mason spoke strongly in favor of vesting the House of Representatives with control over the power of taxation and spending. Mason's argument largely focused on the character of the Senate as distanced from and unaccountable to the voting citizens. This was so because as constituted "the Senate did not represent the ***people***, but the ***States*** in their political character."[232] Accordingly, "[i]t was improper therefore that it should tax the people."[233] He concluded

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228 ***Id.*** at 263.

229 ***Id.***

230 ***Id.*** at 273.

231 ***Id.***

232 ***Id.*** at 273 (emphasis in the original).

233 ***Id.***

that "in all events he would contend that the pursestrings [sic] should be in the hands of the Representatives of the people.[234]

Gerry offered his opinion that the citizens' acceptance of the Constitution would be contingent on the inclusion of an origination restriction. "Taxation and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses.[235] He warned that "acceptance of the plan will inevitably fail, if the Senate be not restrained from originating Money bills."[236]

Madison responded to Randolph's proposed amendment by observing that "[i]f the right to originate be vested exclusively in the House of Representatives either the Senate must yield against the judgment to that House, in which [case] the Utility of the check will be lost -- or the Senate will be inflexible & the House of Representatives must adapt its Money bill to the views of the Senate, in which case, the exclusive right will be of no avail."[237] Moreover, Madison wholly dismissed Randolph's suggestion that the Great Compromise hinged on the origination restriction.[238]

John Dickinson, of Delaware, spoke in favor of Randolph and Gerry's position. He asked rhetorically "[h]as not experience verified the utility of restraining money bills to the immediate

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234 *Id.* at 274.

235 *Id.* at 275.

236 *Id.*

237 *Id.* at 277.

238 *Id.*

representatives of the people[?]"[239] He posited that "all the prejudices of the people would be offended by refusing this exclusive privilege to the House of Representative [sic] and these prejudices should never be disregarded by us when no essential purpose was to be served."[240] He predicted that "[w]hen this plan goes forth, it will be attacked by the popular leaders. Aristocracy will be the watchword; the Shibboleth among its adversaries."[241]

Randolph then renewed his plea for reviving the origination restriction, suggesting that it was "of such consequence, that as he valued the peace of this Country, he would press the adoption of it." He asked "[w]hen the people behold the Senate, the countenance of an aristocracy; and in the president, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives, a right which has been so long appropriated to them?"[242]

Despite these admonitions, only four states -- New Hampshire, Massachusetts, Virginia, and North Carolina -- voted in favor of the restoring the origination restriction.[243] Accordingly, the Origination Clause remained dead in the delegates' working draft of the Constitution.

On August 15, 1787, the delegates considered Article VI, section 12 of the Committee of Detail's draft. This provision simply

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[239] *Id.* at 278.

[240] *Id.*

[241] *Id.*

[242] *Id.* at 278-79.

[243] *See id.* at 279-80; *see also* JILLSON, *supra* note ___, at 138.

provided that "[e]ach House shall possess the right of originating bills, except in cases beforementioned."[244] Article IV, section 5 of the draft, the strong version of the Origination Clause, constituted an "exception." The delegates, however, had struck this provision and Randolph's effort to revive it had failed two days earlier on August 13, 1787.

During the debate, Caleb Strong moved to amend Article VI, section 12, to include a weaker version of the Origination Clause that the delegates had rejected. Strong's amendment provided that:

> Each House shall possess the right of originating all Bills, except Bills for raising money for the purposes of revenue or for appropriating the same and for the fixing of salaries of the Officers of Government which shall originate in the House of Representatives; but the Senate may propose or concur with amendments as in other cases.[245]

The delegates postponed debate on the amendment without comment, by a vote of 6 to 5.[246] The full convention never returned to this subject -- instead, a special committee decided to incorporate Strong's weakened restriction on the Senate originating revenue bills.

On August 31, 1787, the delegates created a committee consisting of a delegate from each state to consider "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on."[247] On September 5, 1787, this "Committee of Eleven" proposed a weaker version of the original Origination Clause -- the House of Representatives would have the power to originate revenue measures, but the Senate would enjoy full powers of amendment

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[244] 2 Farrand, *supra* note ___, at 181.

[245] *Id.* at 294, 297.

[246] *See id.* at 294, 297.

[247] *Id.* at 473.

to such legislation. The clause provided that "all Bills for raising revenue shall originate in the House of representatives and shall be subject to alterations and amendments by the Senate."[248]

Three days later, on September 8, 1787, the delegates amended the proposed Origination Clause to strike the language "and shall be subject to alteration and amendments by the Senate" in favor of the language "but the Senate may propose or concur with amendments as in other bills."[249] The Convention then voted 9-2 in favor of including the amended (and weaker) Origination Clause in the United States Constitution.[250]

The Federal Convention delegates signed the Constitution on September 17, 1787. Significantly, Randolph, Mason and Gerry -- all supporters of a strong version of the Origination Clause -- refused to sign the draft.

In late January 1788, Gerry wrote that ceding to the Senate the power to amend revenue bills "effectually destroyed" the restriction on that body's power over the purse. Moreover, "[t]he admission . . . of the smaller States to an equal representation in the Senate, never would have been agreed to by the Committee, or by myself, as a member of it, without [the unmodified Origination Clause]."[251]

Madison, who consistently opposed imposing origination restrictions on the Senate, shamelessly touted the watered down Origination Clause as an important democratic feature of the plan.

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[248] *Id.* at 505.

[249] *Id.* at 552.

[250] *Id.* at 552.

[251] 3 FARRAND, *supra* note ___, at 265.

At the Virginia ratifying convention, a delegate objected to the Senate's ability to influence money bills. The delegate viewed this arrangement as "a departure from that great principle which required that the immediate representatives of the people only should interfere with money bills."[252] Delegate Grayson asked rhetorically "[w]hy should the senate have a right to intermeddle with money, when the representation is neither equal nor just?"[253]

Madison responded that a ban on Senatorial amendment would not be feasible and that the Senate, unlike the House of Lords, was not based on a hereditary principle.[254] He also noted that "[t]he honorable member says, that there is no difference between the right of originating bills, and proposing amendments."[255] In Madison's view, "[t]here is some difference, though not considerable."[256] He explained that "[i]f any grievances should happen in consequence of unwise regulations in revenue matters, the odium would be divided, which will now be thrown on the house of representatives."[257] Thus, although in a weak form, the Origination Clause would ensure democratic accountability for revenue measures by requiring the House of Representatives to initiate taxing measures; voters would instinctively blame the House when faced with new or increased taxation.

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[252] *Id.* at 317 (comments of Delegate Grayson).

[253] *Id.*

[254] *Id.* at 317-18.

[255] *Id.* at 318.

[256] *Id.*

[257] *Id.*

In the Federalist Papers, Madison again invoked the Origination Clause as an important democratic feature of the Constitution. In Federalist No. 58, Madison minimizes concerns about the anti-democratic nature of the Senate. Even if a number of small states somehow manage to dominate the Senate, "a constitutional and infallible resource still remains with the larger States by which they will be able at all times to accomplish their just purposes."[258] And what is this "infallible resource"? The House of Representatives: "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government."[259]

Now, working to secure ratification of the Constitution, the Origination Clause metamorphizes into an essential bulwark of democratic control over the federal government (rather than a silly irrelevancy). "The power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[260]

The House will be able to check the Senate routinely, Madison confidently asserted, citing the "continual triumph of the British House of Commons over the other branches of government, whenever the engine of a money bill has been employed."[261] Alexander Hamilton, in

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[258] The Federalist No. 58, at 359 (Madison) (Clinton Rossiter, ed. 1961).

[259] *Id.*

[260] *Id.*

[261] *Id.*

Federalist No. 66, also trotted out the fact that "[t]he exclusive privilege of originating money bills will belong to the House of Representatives,"[262] as an argument against concerns that the Senate would have too much power given its lack of proportional representation.

Finally, in an early session of Congress, Madison again extolled the virtues of the Origination Clause. "The constitution. . . places the power in the House of originating money bills."[263] He explained that "[t]he principal reason why the constitution had made this distinction was, because they were chosen by the People, and supposed to be best acquainted with their interests, and ability [to pay taxes]."[264]

Besides proving that the art of "spin" significantly predated the Clinton Administration, what are we to make of Madison's repeated invocations of a clause that he "was for striking out. . . considering it as of no advantage to the large States as fettering the Govt. and as a source of injurious altercations between the two Houses"?[265] Obviously, the undemocratic nature of the Senate was a major issue during the ratification debates -- any argument that seemed to enhance the relative stature of the House probably advanced the cause of ratification. Thus, as a pragmatic politician, Madison used whatever tools were close at hand to advance the cause of ratification.

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[262] The Federalist No. 66, at 404 (Hamilton) (Clinton Rossiter, ed. 1961).

[263] *Id.* at 356.

[264] *Id.*

[265] 2 Farrand, supra note ___, at 224.

C. The Lessons of the Framers' Debate About Political Accountability for Revenue Measures

The delegates at the Federal Convention of 1787 were acutely concerned with building a national government that respected the citizenry's desire for democratically accountable institutions. This concern was greatest with respect to Congress, the branch possessed of the most far reaching powers to regulate the citizenry. The Origination Clause debates demonstrate that the Framers viewed fixing responsibility for taxing and spending as an essential component of any viable scheme of government. Although they disagreed about whether a Senatorial power of amendment was consistent with the necessary democratic accountability, no one argued that the President alone or in concert with other Executive Branch officers should possess the power to tax or spend.

Both supporters and opponents of the Origination Clause in the founding era viewed the Origination Clause as a marker for a broader political principle: taxation should be, indeed must be, democratically accountable.[266] Moreover, disputes about the power of Senatorial origination were not really debates about the importance of vesting taxation and appropriations policy with politically accountable government officials. Rather, the debate was really about whether the Senate represented an incursion of "aristocracy" into an otherwise democratic scheme of government. Supporters of

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[266] *See generally* Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 673-74 (1999) (noting that "[d]ecisions of governing political and social policy are to be made, for the most part, by those who are both representative of and accountable to the populace" and "that ultimate accountability to the populace -- if only indirectly -- served as the sine qua non of American government").

Senatorial amendment powers did not view the Senate as lacking democratic accountability (notwithstanding that fact that Senators were not be directly elected and served relatively long terms of office).

Given this political history, one would expect that the Supreme Court would enforce the nondelegation doctrine with particular vigilance in the area of delegations of revenue authority. This, however, has not been the case.

In fact, the Supreme Court expressly has rejected the idea that delegations of taxing powers raise special nondelegation doctrine concerns: "We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter non-delegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power."[267] Moreover, not a single member of the Court dissented from this holding.

Even if the realities of modern government preclude Congress itself from addressing every detail associated with implementing a complex regulatory scheme, Congress should be required to take responsibility for decisions to tax. When an agency requires those it regulates to contribute more to the agency than the benefit the agency itself confers in exchange, the "fee" in question should be deemed a "tax," and Congress itself should be required to endorse it. A limited requirement of democratic accountability in the specific context of revenue measures would not disrupt the operation of the modern administrative state, but would ensure that political

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[267] Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-223 (1989).

accountability for basic tax policies rests with those elected to make such decisions.

The Framers' debates over the Origination Clause reflect the importance of democratic accountability for revenue policies. Those supporting a weak restriction on Senatorial origination did not do so because they believed that taxing and spending powers should be insulated from democratic control. Rather, those supporting an equal voice for the Senate in revenue matters, like James Madison, did not view the Senate as intrinsically and irredeemably anti-democratic.

At the Federal Convention, no one suggested that either the President alone or a group of inferior Executive Branch officers should enjoy the power to impose taxes or spend government monies absent a congressional appropriation.[268] The only question presented for consideration was whether the failure to apportion Senate seats based on population made the Senate sufficiently similar to the House of Lords to justify strict limits on the body's ability to influence fiscal policies directly. Notwithstanding the objections offered by Gerry, Mason, and Randolph, the delegates concluded that the Senate's manner of selection and apportionment did not require limiting its voice in matters of taxing and spending. Even so, the Origination Clause reflects a symbolic commitment to the principle that those who tax must be accountable to the people, whether directly (in the case of the House of Representatives) or indirectly (in the case of the Senate, prior to the ratification of the Seventeenth Amendment in 1913).

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[268] *But cf.* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1183-89 (arguing that President has inherent power to spend monies in aid of his constitutional duties under Article II).

Even if Congress may delegate details regarding the operation of tax laws to administrative agencies, the federal courts should ensure that Congress ultimately bears responsibility for the decision to separate a citizen from her money. Moreover, the Supreme Court has emphasized the need for clear lines of responsibility in its most recent federalism cases.[269] The need for clear lines of responsibility is no less pressing in the context of delegations of revenue authority.

If, as the Supreme Court has posited, citizens have difficulty fixing blame when Congress forces states to undertake particular actions, there is no reason to suppose that they are any better empowered to react when their monthly cell phone bill reflects a 10% surcharge for a "universal service fee." When an agency enjoys authority to design a public welfare program and to determine how to fund it, without any direct congressional input or oversight, accountability for taxation is lost. A citizen could blame her cell phone provider, the Commission, or the Congress for the universal service fee charges appearing on her monthly statements. In all probability, however, the consumer will blame the service provider or the agency, rather than Congress, for the obligation to pay the surcharge. In this way, the delegation in section 254 violates the presumption of democratic accountability for taxation.

III. The Non-Delegation Doctrine and the Question of Democratic Accountability

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[269] *See* New York v. United States, 505 U.S. 144, 168-69 (1992) (noting that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished").

Independent of the direct effects of the Origination Clause, congressional delegations of taxing authority must comport with the requirements of the nondelegation doctrine. This includes both the general rule that Congress must place limits on delegations to administrative agencies and a more specific rule against implied delegations of taxing authority. As will be explained below in some detail, section 254 appears to comply with both doctrines as they presently exist.

A. The Origin and Contemporary Application of the Non-Delegation Doctrine

Although Article I, section 1 of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[270] Congress constitutionally may delegate responsibility to an administrative agency to create regulations with the force of law necessary to achieve a statutory objective. Provided that Congress establishes an "intelligible principle" that limits an agency's decision making power, the delegation does not violate the separation of powers. The Supreme Court has described Congress's burden when drafting a delegation to an agency as the "channelization" or "canalization" of the agency's discretion.

The Supreme Court announced the modern nondelegation doctrine in *Field v. Clark*.[271] In *Field*, the Court explained "[t]hat Congress

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[270] U.S. Const. art. I, 1.

[271] 143 U.S. 649, 692 (1892). Some earlier cases make vague references to limits on Congress's ability to delegate, but arguably do not articulate the modern rule against overly broad delegations of legislative power to administrative agencies. *See* Lisa Schultz Bressman, Schecter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1403-04 (2000 (briefly discussing earlier cases and arguing that "[f]or almost two

cannot delegate legislative power to the President" and noted that this "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[272]

The case raised a constitutional challenge to the Tariff Act of October 1, 1890, which granted the President authority to modify, within pre-set ranges established by Congress, certain tariffs without seeking congressional approval.[273] The challengers argued that section 3 of the Act unconstitutionally vested the President with legislative powers to tax and collect duties.[274]

The Supreme Court sustained the delegation. In doing so, the Justices distinguished between "the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law."[275]

A few years later, in *J.W. Hampton, Jr. & Co.* v. *United States*,[276] Chief Justice Taft articulated the general test used to

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centuries, the Supreme Court has understood [the Article I Vesting Clause] to limit the extent to which, or the conditions under which, Congress may delegate its lawmaking power to executive or administrative officials"); *but cf.* Posner & Vermeule, *supra* note ___, at 1722 ("Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth century constitutionalism -- a theory that wasn't clearly adopted by the Supreme Court until 1892, and even then only in dictum.").

[272] *Field*, 143 U.S. at 692.

[273] *Id.* at 691.

[274] *Id.* at 681.

[275] *Id*. at 693-94 (quoting The Cincinnati, Wilmington, and Zanesville R.R. v. Clinton County Commissioners, 1 Ohio St. 77, 88 (1852)).

[276] 276 U.S. 394 (1928).

determine whether a statute violates the nondelegation doctrine: "If Congress shall lay down by legislative act an intelligible principle to which the person or body . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."[277] Moreover, "in determining what [each governmental branch] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."[278]

The Supreme Court applied the doctrine most broadly in three cases decided in 1935 and 1936 -- the last gasp of the *Lochner* era. Prior to 1935, the federal courts uniformly had found statutes challenged on nondelegation doctrine grounds to be constitutional.[279]

In 1935, in *A.L.A. Schechter Poultry Corporation v. United States* ("*Schechter Poultry*") and *Panama Refining Company v. Ryan* ("*Panama Refining*"), the Supreme Court invalidated challenged provisions of the National Industrial Recovery Act of 1933 (the "NIRA") because Congress, at least in the Supreme Court's view, had not sufficiently limited the scope of the powers that it delegated to

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[277] *Id.* at 409; *see also* Mistretta v. United States, 488 U.S. 361, 372 (1989) (applying the "intelligible principle test" and holding that Congress did not violate the nondelegation doctrine by establishing the United States Sentencing Commission to adopt guidelines binding federal judges).

[278] *J.W. Hampton*, 276 U.S. at 406.

[279] *See, e.g.*, Federal Radio Comm. v. Nelson Brothers Bond & Mortgage, 389 U.S. 266 (1933); New York Central Securities Corp. v. United States, 287 U.S. 12 (1932); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (upholding the Tariff Act of Sept. 21, 1922); United States v. Grimaud, 220 U.S. 506 (1911) (upholding a delegation of authority to the Secretary of Agriculture, enabling him to promulgate rules and regulations governing use of the national forests).

the Executive Branch.[280] A year later, in *Carter* v. *Carter Coal Co.*,[281] the Supreme Court invalidated portions of the Bituminous Coal Conservation Act of 1935 on nondelegation doctrine grounds.

Panama Refining involved a challenge to section 9(c) of the NIRA, which authorized the President to restrict the transportation of petroleum products in interstate and foreign commerce, and prescribed criminal penalties for violations of the President's orders.[282] In turn, President Roosevelt issued an Executive Order conferring on the Secretary of the Interior "all the powers vested in the President 'for the purposes of enforcing Section 9(c).'"[283]

Chief Justice Hughes, writing for the majority, found that the statutory provision failed to define adequately the circumstances and conditions under which one could lawfully transport petroleum products.[284] Nor did the statute impose any limitations on the President's authority to establish policies under the NIRA.[285] The Court complained that "Congress left the matter to the President without standard or rule, to be dealt with as he pleased."[286] Moreover, the Court expressly rejected the argument that the delegation passed constitutional muster because the President should

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[280] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

[281] 298 U.S. 238 (1936).

[282] *Panama Refining*, 293 U.S. at 406.

[283] *Id.*

[284] *Id.* at 417.

[285] *Id.*

[286] *Id.* at 418.

be assumed to act "for what he believes to be the public good."[287] Rather, "[t]he point is not one of motives but of constitutional authority, for which the best of motives is not a substitute."[288]

Five months after the *Panama Refining* decision, the Supreme Court took a second swipe at the Roosevelt Administration's implementation of the NIRA. In *Schechter Poultry*, the Justices invalidated yet another provision of the Act.[289]

Schechter Poultry involved a more sweeping delegation of legislative authority to the President, one authorizing the President to approve "codes of fair competition" for "all trades and industries."[290] Under this authority, the President approved a "Live Poultry Code" to govern the sale of poultry in New York.[291] Schecter Poultry, a New York company dealing in live poultry, operated slaughterhouses in violation of this code. The company was charged and convicted of criminal charges arising from these code violations.[292]

The Supreme Court held that Congress utterly had failed to define the term "fair competition," rendering the President "virtually unfettered" in implementing the statute.[293] Accordingly,

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[287] *Id.* at 420.

[288] *Id.*

[289] *Schechter Poultry*, 295 U.S. 495.

[290] *Id.* at 521-22.

[291] *Id*. at 525-26.

[292] *Id.* at 519.

[293] *Id.* at 532, 542. Justice Cardozo, the sole dissenter in *Panama Refining*, concurred with the majority in *Schechter Poultry*. He characterized the *Schechter Poultry* delegation as "unconfined and vagrant," a "roving commission to inquire into evils and upon

it invalidated section § 3 of the NIRA, observing that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[294]

In *Carter Coal*, the Justices applied the nondelegation doctrine to invalidate New Deal legislation one last time. The Bituminous Coal Act of 1935 (the "BCA") created joint labor/management boards charged with setting the terms and conditions of employment in the coal industry, as well as minimum prices for bituminous coal. Section 4 of the BCA provided that these agreements, to be known as "the Bituminous Coal Code," would have the force and effect of law after a local district board adopted an agreement.[295]

The Court invalidated section 4 as an overbroad delegation of government power to private parties. "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[296] This scheme was fundamentally unjust because "in the very nature of things, one person may not be entrusted with the power to regulate the business

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discovery correct them." *Id.* at 551.

[294] *Id.* at 537-38.

[295] *See id.* at 281-82.

[296] *Id.* at 311.

of another, and especially of a competitor."[297] Citing *Schecter*, the Supreme Court invalidated the program.[298]

Since 1936, the Supreme Court has not invalidated any federal legislation on the grounds that it violates the nondelegation doctrine.[299] All the Supreme Court's subsequent nondelegation

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[297] *Id.*

[298] *See id.* at 311-12.

[299] *See, e.g.*, Loving v. United States, 517 U.S. 748 (1996) (upholding the delegation of authority to the President to promulgate Rules for Courts-Martial, specifying aggravating factors for capital sentencing); Touby v. United States, 500 U.S. 160 (1991) (upholding the delegation of authority to the Attorney General under the Controlled Substances Act); Mistretta v. United States, 488 U.S. 361, 374 (1989) (upholding the delegation of authority to the United States Sentencing Commission); United States v. Mazurie, 419 U.S. 544, 556-57 (1975) (unanimously upholding the delegation to Native American tribes of authority to regulate the introduction of liquor to Native American reservations); United States v. Sharpnack, 355 U.S. 286, 297 (1958) (upholding the application of the Assimilative Crimes Act to subsequently adopted state criminal statutes); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950) (upholding the constitutionality of Presidential Proclamation 2523 as an executive rather than legislative power); Lichter v. United States, 334 U.S. 742, 785-86 (1948) (upholding the delegation of authority to determine excessive profits); Fahey v. Mallonee, 332 U.S. 245, 253 (1947) (upholding the delegation of authority to the Federal Home Loan Bank Board under the Home Owners' Loan Act of 1933); American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (upholding the delegation of authority to the Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); Bowles v. Willingham, 321 U.S. 503, 516 (1944) (upholding the delegation of authority to the Price Administrator to restrain inflation by setting rent controls); Yakus v. United States, 321 U.S. 414, 426 (1944) (upholding delegation of authority to Price Administrator to fix commodity prices that would be fair and equitable, and would effectuate the purposes of the Emergency Price Control Act of 1942); FPC v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944) (upholding the delegation of authority to the Federal Power Commission to determine just and reasonable rates); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943) (upholding the delegation of authority to the Federal Communications Commission to regulating broadcast licensing "as public interest, convenience, or necessity" require); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165 (1941) (upholding the delegation of authority to the National Labor Relations Board under the National Labor Relations Act); Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Div. of Dept. of Labor, 312 U.S. 126, 145 (1941) (upholding the

doctrine decisions simply invoke Chief Justice Taft's intelligible principle test, examine the challenged statute to determine whether sufficient standards and statements of purpose limit the delegation, and then conclude that the delegation meets the standard.[300] Thus, the post-New Deal decisions "display a much greater deference to Congress' power to delegate"[301] than did *Panama Refining*, *Schecter Poultry*, or *Carter Coal*.

Indeed, in 1974, Justice Thurgood Marshall described the nondelegation doctrine as "moribund."[302] As a formal matter, however, the nondelegation doctrine remains a part of the separation of powers doctrine.[303] Instead of construing statutes broadly and invalidating

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delegation of authority to the Administrator of the Wage and Hour Division of the Department of Labor to establish a uniform minimum wage under the Fair Labor Standards Act); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940) (upholding a delegation of authority under the Bituminous Coal Conservation Act of 1937); United States v. Rock Royal Co-op., 307 U.S. 533, 574 (1939) (upholding the Agricultural Marketing Agreement Act); Mulford v. Smith, 307 U.S. 38, 48-49 (1939) (upholding a delegation of authority under the Agricultural Adjustment Act of 1938); Currin v. Wallace, 306 U.S. 1, 15 (1939) (upholding a delegation of authority under the Federal Tobacco Inspection Act); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936) (upholding a delegation of authority to the President to exercise discretion in prohibiting arms sales to certain foreign countries).

[300] Synar v. United States, 626 F.Supp. 1374, 1384 (D.D.C. 1986) (three-judge panel), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). *Carter Coal* did not apply this standard only because the BCA's coal code provisions transferred government power directly to private parties, an arrangement that the Supreme Court thought to be per se invalid. *See Carter Coal*, 298 U.S. at 310-12. Accordingly, it did not have to inquire into whether Congress provided sufficient guidelines to the private parties exercising government power.

[301] *Synar*, 626 F.Supp. at 1384 (quoting Opp Cotton Mills, 312 U.S. at 145).

[302] National Cable Television Ass'n v. United States, 415 U.S. 336, 353 (1974) (Marshall, J., dissenting).

[303] The *per curiam* opinion in *Synar v United States* referred to the Supreme Court's nondelegation decisions since *Schechter* and

them, however, the Supreme Court has used the nondelegation doctrine to narrow the scope of legislation that it finds potentially too vague for comfort.[304]

In *Whitman* v. *American Trucking Associations, Inc.*,[305] the Supreme Court's most recent case involving the nondelegation doctrine, the Justices simply ratified the pre-existing trend against vigorous enforcement of the nondelegation doctrine. The Supreme Court roundly rejected an effort by the U.S. Court of Appeals for the District of Columbia Circuit to resurrect the nondelegation doctrine.[306]

The D.C. Circuit became the first federal court in seven decades to apply Chief Justice Taft's "intelligible principle" test and conclude that legislation insufficiently constrained an agency's discretion. The court invalidated the Environmental Protection Agency's (the "EPA") construction of two Clean Air Act sections as unconstitutional delegations of legislative power.[307] Plaintiffs

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Panama Refining, stating: "Such cases indicate that while the delegation doctrine may be moribund, it has not yet been officially interred by the Court." *Synar*, 626 F.Supp. at 1384.

[304] *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) ("*Benzene*") (interpreting ambiguous legislation as requiring OSHA to prove the existence of a "significant risk" prior to enactment of a rule); *see also* Mistretta v. United States, 488 U.S. 361, 374 n.7 (1989) (noting that "[i]n recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional").

[305] 531 U.S. 457 (2001).

[306] *See id.* at 473-76.

[307] American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1033 (D.C. Cir.), *modified*, 195 F.3d 4 (D.C. Cir. 1999).

challenged the EPA's national ambient air quality standards ("NAAQS") for particulate matter and ozone.[308]

Rather than simply invalidate the problematic provisions of the Clean Air Act, the panel remanded the regulations, with instructions to the agency "to extract a determinate standard on its own."[309] Although the court recognized that recent Supreme Court cases have not applied a "strong form of the nondelegation doctrine,"[310] the panel argued that the remarkable scope of the delegation at issue, coupled with its potential real-world effects, required the court to break with the consistent general trend of sustaining virtually any delegation, however open-ended or vague.[311] Because the EPA's construction of its statutory authority was so unconstrained as to potentially "send industry not just to the brink but hurtling over it,"[312] the Constitution required a "'more precise' delegation" rather than the generally appropriate "vague delegation."[313]

The D.C. Circuit's decision proved to be remarkably controversial and generated considerable negative commentary.[314] The

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[308] *Id.* at 1033.

[309] *See id.* at 1038 (citing and quoting Lockout/Tagout I, 938 F.2d at 1313) (holding that "[w]here (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard of its own")).

[310] *Id.*

[311] *See id.* at 1037-38.

[312] *Id.* at 1037.

[313] *Id.*

[314] *See, e.g.*, Mark Seidenfeld & Jim Rossi, *The False Promise of the 'New' Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1 (2000);

Supreme Court granted review and emphatically reversed the D.C. Circuit, thereby ending the nondelegation doctrine's Norma Desmond-like return to modern separation of powers doctrine.

Writing for the majority, Justice Scalia emphatically held that "[t]he scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents."[315] He explained that "[i]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency."[316] All legislative powers belong to the Congress and the Constitution "permits no delegation of these powers."[317] If a statute purports to

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Richard J. Pierce, *The Inherent Limits on Judicial Control of Agency Discretion*, 52 ADMIN. L. REV. 63 (2000); Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999); *but cf.* Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 460-62, 483-85 (2002) (arguing that requiring administrative agencies to promulgate and honor standards limiting their discretion advances "important democratic values," notably including "accountability, fairness, rationality, and regularity," and warning that "[u]nguided administrative discretion is a threat to democratic values, even if delegation itself is not").

[315] *American Trucking Ass'ns*, 531 U.S. at 474.

[316] *Id.* at 472.

[317] *Id.* Eric Posner and Adrian Vermuele have put forth a novel argument that suggests that the nondelegation doctrine either does not, or should not, exist. *See* Posner & Vermuele, *supra* note ___, at 1721-24. They agree with Justice Scalia "that the Constitution bars the 'delegation of legislative power.'" *Id.* at 1723. Posner and Vermuele dispute, however, that legislation routinely characterized as delegating "legislative" powers actually does so. "A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power." Thus, when Executive Branch officers act on delegated authority, they "are exercising executive power, not legislative power." *Id.*; *but see* Gary Lawson, *Delegations and Original Meaning*, 88 VA. L. REV. 327, 344 (2002) ("Something is not an exercise of executive power merely because it is carried out by an executive official; it is executive if it falls within the sphere of activity contained within the eighteenth-century understanding of 'Executive Power.'"). Interestingly, Posner and Vermuele do not engage the Framers' debates over control of the taxing powers, nor do they make any effort to

vest an Executive Branch entity with legislative powers, the statute is void. Moreover, "[t]he idea that the an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory."[318] "Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.[319]

The Justices concluded that the Clean Air Act provisions supplied a sufficient "intelligible principle" to limit the scope of the agency's discretion and therefore did not transfer "legislative powers" to the EPA.[320] Justice Scalia cautioned that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those

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engage the Origination Clause. *See* Posner & Vermuele, *supra* note ___, at 1733-41. They do note that "[i]n its latest dismissal of *Wayman*'s theory of nondelegable powers, the Court held that even the taxing power could be conferred upon federal agencies, subject only to the usual intelligible principle test." *Id.* at 1756. Although this is accurate in a strict sense, the question of delegating taxing powers to agencies raises deeper -- and harder -- questions than Posner and Vermuele acknowledge in their Essay. It may be true, in a generic sense, that "nothing in the language or structure of the Constitution supports" the view that delegations of lawmaking power to agencies violate the separation of powers. *Id.* at 1762; but *cf.* Lawson, *supra*, at 344 (arguing that law creation represents a fundamentally core legislative function and arguing that "Congress cannot transform lawmaking into execution (or judging) by the simple expedient of enacting a statute"). The Origination Clause, and the debates surrounding it, lend significant support to the idea that Congress -- and not the Executive Branch -- has a special duty to take institutional responsibility for revenue measures. *See supra* text and accompanying notes ___ to ___.

[318] *Id.* at 473.

[319] *Id.*

[320] *See id.* at 473-76.

executing or applying the law.'"[321] The Court left the door open just a crack for future nondelegation doctrine challenges, noting that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[322] But the main point was clear: most statutes delegating vast authority to administrative agencies do not raise serious separation of powers questions.

The Supreme Court's reluctance to enforce the nondelegation doctrine is not difficult to understand. As Professor Manning has observed, "enforcement of the nondelegation doctrine necessarily reduces to the question whether a statute confers too much discretion."[323] "Without a reliable metric (other than an I-know-it-when-I-see-it test), the Court has long doubted its capacity to make principled judgments about such questions of degree."[324]

Professor Sunstein's shares very similar concerns. He notes that "the real question is: How much executive discretion is too much to count as 'executive'?"[325] The distinction between a permissible delegation and an impermissible transfer of core legislative power "cannot depend on anything qualitative; the issue is a quantitative one."[326] Because of these problems, "the overwhelming likelihood is that judicial enforcement of the doctrine

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[321] *Id.* at 474-75 (quoting and citing Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

[322] *Id.* at 475.

[323] Manning, *supra* note ___, at 241-42.

[324] *Id.* at 242.

[325] Sunstein, *supra* note ___, at 326-27.

[326] *Id.* at 326.

would produce ad hoc, highly discretionary rulings, giving little guidance to the lower courts or to Congress itself."[327]

Sunstein warns that "[b]ecause the underlying issue is one of degree, decisions invalidating statutes as unduly open-ended are likely to suffer from the appearance, and perhaps reality, of judicial hostility to the particular program at issue."[328] Moreover, beyond "the considerable difficulty of principled enforcement," lies the "absence of reason to believe that the conventional doctrine would be more good than harm for modern government."[329]

B. The Specific Prohibition Against Implied Delegations of Taxing Authority

In addition to the generic prohibition against the delegation of legislative power to an administrative agency, a more specific rule prohibits implied delegations of taxing authority to administrative agencies. The rule sounds much more categorical in theory than it operates in practice. In theory, Congress must take responsibility for any revenue generating measure, whether in the

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[327] *Id.* at 327. Professor Gary Lawson's test for an impermissible delegation seems to suffer from the precise flaws that Sunstein identifies. Lawson argues that "[t]he line between legislative and executive power (or between legislative and judicial power) must be drawn in the context of each particular statutory scheme." Lawson, *supra* note ___, at 376. This is all well and good as a matter of abstract theory, but he continues: "In every case, Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts." *Id.* at 376-77. This definition is an open invitation to judicial subjectivity. No matter how hard a judge attempts to enforce these lines, she will be subject to the objection that she simply dislikes the regulatory scheme Congress has enacted.

[328] *Id.* at 327.

[329] *Id.* at 328.

form of a law or a regulation.[330] Congress may not escape political responsibility for raising taxes by the simple expedient of delegating that power to an agency, whether it be the Internal Revenue Service or the Customs Service.

In practice, the rule devolves to a mere prohibition against an agency unilaterally raising revenue without any congressional authorization.[331] Broad or vague congressional authorizations, leaving much of the heavy lifting to an administrative agency to work out, do not violate the canon against delegating taxing authority to an agency.[332] This means that Congress may, to a large extent, charge an agency with achieving particular ends and also delegate the means of funding these efforts to the agency itself.

The characterization of a charge as a "fee" or a "tax" could have important implications for the nondelegation argument. After all, numerous agencies of the federal government charge "user fees" incident to their daily operations. Moreover, for many years now, Congress has required agencies to recover certain operating expenses as a matter of course.[333] As it turns out, the characterization of a government charge as a "fee" or "tax" proves to be far less important

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[330] *See* National Cable Television Ass'n v. United States, 415 U.S. 336, 340-42 (1974); Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 349-51 (1974).

[331] *See* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-24 (1989).

[332] *See id.*

[333] *See, e.g.*, Independent Offices Appropriation Act, 31 U.S.C. § 9701 (requiring that federal agencies providing benefits to private sector entities in form of licenses or other useful services be "self-sustaining to the full extent possible" and mandating user fees that are "fair and equitable" to those receiving such benefits). Congress enacted this law in 1952. *See* 65 Stat. 290 (1952).

than the clarity with which Congress vests the agency with authority to impose the charge.

In *National Cable Television Association* v. *United States*,[334] the Supreme Court of the United States had to decide whether the Federal Communications Commission lawfully had imposed a charge on community antenna television service providers. The Association argued that the "fee" was really an unauthorized tax. The Commission claimed authority to recover the costs of regulating the cable industry on the basis of the Independent Offices Appropriation Act ("IOAA").[335]

Acting under authority of the IOAA, the Commission initially implemented only very modest user fees on persons and entities seeking licenses and other services. Congress indicated some displeasure with the paltry revenue generated under the initial fee schedule and the Commission responded by raising user fees to generate more cash.[336] It established a "user fee" of 30 cents per subscriber on community antenna cable systems, regardless of whether a particular CATV system had sought any services from the Commission at all. The 30 cent fee represented the Commission's estimated "value to the recipient" of its regulatory services.[337]

If the user fee constituted a "tax," it was not authorized by the Independent Offices Appropriations Act and quite possibly could

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[334] National Cable Television Ass'n v. United States, 415 U.S. 336 (1974).

[335] 31 U.S.C. § 483(a).

[336] *See National Cable Television Ass'n*, 415 U.S. at 339-40.

[337] *Id.* at 340.

not be authorized without violating the nondelegation doctrine.[338] Although "Congress may select the subjects of taxation, choosing some and omitting others,"[339] an agency cannot constitutionally exercise this sort of discretion to establish tax policy because "[t]axation is a legislative function."[340] A "user fee," on the other hand, would be consistent with the Act and would not implicate any serious separation of powers questions.[341]

In order to avoid a nondelegation problem, Justice Douglas read the Independent Offices Appropriation Act narrowly: "The phrase 'value to the recipient' is, we believe, the measure of the authorized fee."[342] Thus, the Act did not authorize an agency to assess user fees that exceeded the value of the benefit that the agency bestowed on the user.

In the case at bar, the Commission had assessed all the costs of regulation against the CATV operators, regardless of whether those costs directly benefited the CATV operators particularly (as opposed to the general public).[343] To the extent that the Commission's annual 30 cent per subscriber fee exceeded the value of the services that

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[338] *Id.* at 340-43.

[339] Sonzinsky v. United States, 300 U.S. 506, 512-14 (1937).

[340] *NCTA*, 415 U.S. at 340.

[341] *See* Seafarers Int'l Union v. United States Coast Guard, 81 F.3d 179, 182-83, 186 (D.C. Cir. 1996) (noting that "fees [under the IOAA] cannot be charged based on a perceived furthering of public policy goals if those fees are unrelated to a specific service provided by the agency to an identifiable recipient" and holding that "there must always be a statutory basis for any requirements giving rise to a fee").

[342] *NCTA*, 415 U.S. at 342-43.

[343] *See id.* at 343-44.

the Commission provided to the CATV operators, the Act did not authorize it and, because it constituted an unauthorized tax, was null and void.

In reaching this conclusion, the Court took some effort to distinguish a tax from a fee. Only a legislative body may levy a "tax" and a tax may be based solely on ability to pay, without regard to any benefit conferred on the taxpayer.[344] A "fee" constitutes a charge that an agency exacts in return for a benefit voluntarily sought by the payer.[345] An agency usually bestows a fee-based benefit only upon those paying the fee, and not upon society as a whole.[346] The Supreme Court remanded the case to permit the Commission to evaluate and, if necessary, revise the user fee structure applicable to CATV operators.[347]

In a companion case, *Federal Power Commission* v. *New England Power Company*,[348] the Supreme Court repeated its gloss on the Independent Office Appropriations Act and held that the Federal Power Commission could not assess fees against persons or entities having no pending regulatory business before the agency.
The Court held that only "specific charges for specific services to specific individuals or companies" could be assessed under the IOAA.[349] The FPC could not assess and collect generic fees from

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[344] *Id.* at 340.

[345] *See id.* at 340-41.

[346] *Id.* at 341.

[347] *Id.* at 344.

[348] 415 U.S. 345 (1974).

[349] *Id.* at 349.

persons or entities having no pending business before the agency: "the 'fee' presupposes an application whether by a single company or by a group of companies."[350] This construction of the Act "ke[pt] it within the boundaries of the 'fee' system and away from the domain of 'taxes.'"[351]

In recent decisions, federal courts have followed these general definitions in determining whether a charge constitutes a tax or a fee and have sharpened them to apply to various government charges. Evaluating the nature of a charge for the purposes of the federal Tax Injunction Act (the "TIA") provides an instructive example.

In *Valero Terrestrial Corp.* v. *Caffrey*,[352] the U.S. Court of Appeals for the Fourth Judicial Circuit surveyed the relevant case law and provided an excellent summary of the rules that govern in TIA cases. Under the TIA, the concept of a "tax" has a somewhat broader scope than permitted under either the *NCTA* or *New England Power* glosses.[353] The *Valero* panel explained that the characteristics of a "classic tax" are easily distinguishable from the characteristics of a "classic fee."

A "classic tax" is a charge imposed by a legislative body upon a large portion of society in order to raise revenues that will benefit society at large.[354] By way of contrast, a "classic fee" is a

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[350] *Id.*

[351] *Id.* at 351.

[352] Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130 (4th Cir. 2000).

[353] *Id.* at 134 (citing Tramel v. Schrader, 505 F.2d 1310, 1315 (5th Cir. 1975)).

[354] *Id.* (citing San Juan Cellular Telephone Co. v. Pub. Serv. Comm'n, 967 F.2d at 685 (1st Cir. 1992)); *see also* United States v.

charge that an administrative agency imposes upon persons or entities that are subject to its regulation. The fee may serve a direct regulatory purpose or a more indirect purpose such as raising money for a specific account to help fund the agency's expenses.[355] Unfortunately, few charges fall directly into one of these categories.

Courts determine whether a charge is a tax or a fee for the purposes of the TIA by using a three part test. This test considers "(1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge."[356] Often, the results of this test will include characteristics of both a tax and a fee. When this occurs, courts consider the third factor to be the most important in making their ultimate decision.[357] When applying the third (and dispositive) factor, the general rule is that if the fund benefits the general community, then the charge represents a tax, whereas if only select persons or entities enjoy the benefits, the charge constitutes a fee.[358]

River Coal Co., Inc., 748 F.2d 1103, 1106 (6th Cir. 1984) (reasoning that an"abandoned mine reclamation fee "[u]nlike the permit fee. . . does not confer a benefit on the operator different from that enjoyed by general public when environmental conditions are improved" and holding that the fee "has the essential characteristics of a tax, and we conclude it is a 'tax' for purposes [of the Bankruptcy Act].").

[355] *Valero*, 205 F.3d at 134.

[356] *Id.*

[357] Valero, 205 F.3d at 134 (citing South Carolina v. Block, 717 F.2d at 887 (4th Cir. 1983)).

[358] *Id.* at 134.

The Export Clause of Article I of the Constitution provides yet another context in which the federal courts have assessed the nature of a government charge.[359] The Supreme Court consistently has held that this clause prohibits Congress from imposing any tax on exports, but permits a "user fee" designed to compensate the government for benefits, services, or facilities provided to an exporter.[360] In this context, the Supreme Court has held that a charge based on the value of cargo, rather than on a fair approximation of benefits, services, or facilities, constitutes an impermissible tax rather than a permissible user fee.[361]

In *United States* v. *U.S. Shoe Corporation*, United States Shoe brought a challenge against the Harbor Maintenance Tax ("HMT"),[362] which imposed charges based on the value of the cargo being shipped.[363] The Supreme Court invalidated the HMT on Export Clause grounds.

Justice Ginsburg explained that to "qualify as a permissible user fee," a charge must relate to "a fair approximation of services, facilities, or benefits furnished to the exporters."[364] The Supreme Court noted that in the case of the HMT, "[t]he value of export

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[359] *See* U.S. Const. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."); *see also* United States v. U.S. Shoe Corp., 523 U.S. 360, 362-63 (1998).

[360] *Id.* at 363 (citing Pace v. Burgess, 92 U.S. 372, 375-76 (1876)).

[361] *Id.* at 369.

[362] *See* 26 U.S.C. § 4461(a).

[363] *See United States Shoe*, 523 U.S. at 363 ("[t]he charge is currently set at .125 percent of the cargo's value").

[364] *Id.* at 363.

cargo. . . does not correlate reliably with the federal harbor services used or usable by the exporter."[365] In order to "'guard against. . .the imposition of a [tax] under the pretext of fixing a fee," the Court held "that the HMT violates the Export Clause as applied to exports."[366] Although "[t]his does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance," the Court emphasized that "[i]t does mean, however, that such a fee must fairly match the exporters' use of port services and facilities."[367]

Thus, the determination of whether a charge constitutes a tax or a fee turns on the purposes served by the money collected. That said, one should be careful not to put too much stock in *U.S. Shoe* as an absolute rule against the imposition of fees that exceed the exact value conveyed to the person or entity paying it. Justice Ginsburg carefully distinguished other areas in which the federal courts must characterize charges as "taxes" or "fees" and emphasized that the Supreme Court enforces the Export Clause with particular vigilance.[368]

Universal service charges probably should be characterized as "taxes" rather than "fees." Because an administrative agency, the

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[365] *Id.* at 369.

[366] *Id.* at 370 (citing and quoting Pace v. Burgess, 92 U.S. at 376).

[367] *Id.*

[368] *See id.* at 367-39 (noting that Supreme Court has upheld "fees" levied on awards from the Iran-United States Claims Tribunal against a Takings Clause challenge, on state-owned and operated aircraft against a sovereign immunity claim, and on passengers using airports against a dormant commerce clause challenge and suggesting that these challenges involved "less exacting" provisions than the Export Clause).

Commission, levies these charges, the first part of the *Valero* test shows the characteristic of a fee.

The second part of the test considers who must pay the charges. The Commission would probably assert that this part of the test shows another characteristic of a fee because only telecommunications service providers are directly subject to the universal service charges. But this is a very superficial analysis. Telecommunications carriers directly pass through all universal service charges to their customers. Most do so by including a separate line item on the subscriber's monthly bill.[369] Because 93.8% of American households have telephones in their homes a vast majority of the population is subject to these charges.[370] Thus, the universal service charges are widely shared by the entire population. This supports the conclusion that they are a tax, rather than a fee.

The third and most important part of the *Valero* test -- which also controlled in *U.S. Shoe* -- focuses on how the fees are spent: precisely who benefits from universal service fees and to what degree? The Commission claims that the primary purpose of these funds is to expand and maintain universal service, in order to provide a fair price for telecommunications services in high cost and rural areas. The agency further contends that the real beneficiaries of universal service include the narrow categories of high cost and rural consumers who will gain more affordable access to

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[369] *See* John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 162 (2000).

[370] *See* 14 FCC Rec. 21,177 (1999).

telecommunications service, and the telecommunications providers themselves, due to the expanded telecommunications network.[371]

Thus, because the beneficiaries are specified and narrow groups and not the general public, universal service charges show another characteristic of a "fee." This argument is not without force, except for the fact that subsidizing telecommunication services for high cost and rural areas does not constitute the only use for universal service funds.[372]

Providing discounted internet access for schools, libraries, and rural health facilities represents another goal set forth in section 254. The cost associated with providing this access still falls solely with the telecommunications providers, even though they often will not be providing either the wiring or Internet service subsidized by the universal service charges.

It is difficult to see how those paying the charge benefit directly from funding these services. Of course, by the same logic that both consumers and telecommunications service providers benefit from an expanding telecommunications network, one could also argue that telecommunications consumers and service providers also benefit from the expanded Internet capabilities that universal service subsidies facilitate. But this argument proves too much. In fact, the entire general population also benefits from more accessible and higher quality education and health care opportunities created through enhanced access to the Internet. The diffuse nature of the benefits associated with the schools, libraries, and rural health

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[371] *See* Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 428 (5th Cir. 1999).

[372] *See* 47 U.S.C. § 254(b)(3).

care provider subsidy programs suggest that the charge constitutes a tax.

Universal service charges also seem to resemble taxes rather than fees when considering the *U.S. Shoe* test.[373] For the purposes of universal service, this test states that a charge must directly relate to the cost of the benefit rendered by the agency. In that respect, the charges for each telecommunications provider should be based on the benefit it receives from the expanded telecommunications network. However, universal service charges are not based on the benefits conferred by the Commission, they are based on the Commission's perceived need for funds to underwrite the program. Moreover, the assessments bear no relationship to net benefits -- the Commission assesses universal service support charges based on the amount of revenue each provider makes over a period of time.

This appears to be similar to the charge in *U.S. Shoe*, the HMT, that the Customs Service assessed based on value of cargo, rather than the extent and manner of a shipper's port use. Just as the Supreme Court found that the HMT constituted a tax because it bore no relation to the benefits the government conferred on the payor, the universal service charges do not convey a benefit proportionate to the charge and therefore constitute "taxes" rather than "fees."

In the end, it may not matter a great deal whether one can formally characterize universal service charges as a "fee" rather than tax. In *Mid-America Pipeline Company*,[374] a case rejecting a nondelegation challenge to a user fee, the Supreme Court did not put

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[373] *See U.S. Shoe*, 523 U.S. at 363, 367-70.

[374] Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989).

much emphasis on the characterization of the charge as a "tax" or "fee," but seemed to assume that the user fee at issue constituted a "tax" for purposes of applying the nondelegation doctrine.

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") included a provision that directed the Secretary of Transportation "to establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines."[375] Any entity operating pipeline facilitates subject to either the Hazardous Liquid Pipeline Safety Act of 1979 or the Natural Gas Pipeline Safety Act of 1968 would be liable for the annual user fees.[376] The statute dedicated the revenues generated by the user fees to paying the enforcement and administrative costs associated with the pipeline safety acts.[377] Finally, the Department of Transportation could not assess fees in excess of "105 percent of the aggregate appropriations made for such fiscal year for activities to be funded by such fees,"[378] i.e., Congress would itself establish the ceiling for the net fees to be collected by the Department on an annual basis.

Mid-America operated a pipeline subject to the Hazardous Liquid Pipeline Safety Act and received an assessment of $53,023.52 for 1986.[379] It paid the fee under protest and immediately sued for a

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375 49 U.S.C. App. § 1682a.

376 *Id.* at § 1682a(a).

377 *Id.* at § 1682a(c).

378 *Id.* at 1682a(d).

379 *Mid-America Pipeline Co.*, 490 U.S. at 217.

refund in federal district court. The district court, adopting a magistrate judge's decision, held that the pipeline safety fee program represented an unconstitutional delegation of the taxing power to the Department because "Congress did not give the kind of guidance to the Secretary necessary to avoid the conclusion that Congress had unconstitutionally delegated its taxing power to the Executive Branch."[380] A direct appeal to the Supreme Court followed.

The Supreme Court proceeded directly to the nondelegation question without pausing to consider whether the pipeline safety assessments constituted "fees" or "taxes" for purposes of *National Cable Television Association*. Holding that no support existed "for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter non-delegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power," it reversed the lower court.[381]

In light of this conclusion, the Court found it unnecessary to decide "the threshold question that so exercised the District Court whether the pipeline safety users 'fees' created by § 7005 are more properly thought of as a form of taxation because some of the administrative costs paid by the regulated parties actually inure to the benefit of the public rather than directly to the benefit of those parties."[382] Instead, the Court held that "[e]ven if the user fees are a form of taxation, we hold that the delegation of

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[380] *Id.* at 217-18.

[381] *Id.* at 222.

[382] *Id.* at 223.

discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other non-delegation challenges."[383]

The *Mid-America Pipeline* Court did not overrule either *National Cable Television Association* or *New England Power Company*. Instead, it distinguished them from the case at bar by noting that these cases "stand only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of the regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties."[384] Moreover, "any such delegation must meet the normal requirements of the nondelegation doctrine."[385]

Earlier in the opinion, the Court took some pains to demonstrate the circumscribed nature of the delegation at issue. Writing for a unanimous Court, Justice O'Connor noted that program limited the universe of persons and entities from whom the Secretary could collect fees, that the funds could be used only for purposes of administering the safety acts, and that the fees had to be set generically based on considerations limited to volume miles, miles, or revenues.[386]

Perhaps most importantly "the Secretary has no discretion whatever to expand the budget for administering the Pipeline Safety

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383 *Id.*

384 *Id.* at 224.

385 *Id.*

386 *Id.* at 219.

Act because the ceiling on aggregate fees that may be collected in any fiscal year is set at 105 percent of the aggregate appropriations made by Congress for that fiscal year."[387] In light of these limitations, the Justices had "no doubt that these multiple restrictions Congress has placed on the Secretary's discretion to assess pipeline safety user fees satisfy the constitutional requirements of the nondelegation doctrine as we have previously articulated them."[388]

The upshot is that one need not wrestle with the characterization of the universal service charges as "fees" or "taxes" if the underlying program itself satisfies the general requirements of the nondelegation doctrine. Even a tax may be delegated, provided that Congress authorizes the charge by a clear statement.[389] As Justice O'Connor explained in *Mid-America Pipeline*, "[f]rom its earliest days to the present, Congress, when enacting tax legislation, has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive in such enactments."[390]

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[387] *Id.* at 220.

[388] *Id.*

[389] *See* Sunstein, *supra* note ___, at 331-32 (noting that certain clear statement canons, such as rule against retroactive regulations absent express authorization, have the effect of limiting delegations to administrative agencies and also impose an "institutional requirement" that "Congress must make that choice explicitly and take the political heat for deciding to do so"); *see also* Manning, supra note __, at 271 ("The central aim of the nondelegation doctrine is to promote specific rather than general legislative policy-making--that is, to induce Congress to filter more precise policies through the process of bicameralism and presentment rather than leaving such policies to be elaborated by agencies or courts outside the legislative process.").

[390] *Mid-America Pipeline Co.*, 490 U.S. at 221.

Although the Mid-America Pipeline Court rejected a special -- and stricter -- nondelegation doctrine for delegations of revenue authority, the clear statement rule has some potential bite. In *Thomas* v. *Network Solutions, Inc.*,[391] the United States Court of Appeals for the District of Columbia Circuit rejected an effort by the National Science Foundation ("NSF") to collect special fees when registering Internet domain names. Acting under contract with NSF, Network Solutions registered Internet domain names for a fee. Domain name registrants paid "a one time registration fee of $100 for the first two-year period, and $50 per year thereafter, with 70 percent of the fees going to Network Solutions as 'consideration for the services provided,' and 30 percent set aside, in a custodial account held by Network Solutions on NSF's behalf, for preserving and enhancing the 'Intellectual Infrastructure of the Internet.'"[392] The 30 percent supplemental assessment for registration "was discontinued for registrations made on or after April 1, 1998."[393]

Essentially, from September 14, 1995, to April 1, 1998, NSF assessed and collected an unauthorized fee on all persons and entities registering internet names involving ".com," ".org," ".net," and ".edu" domain names.[394] The case squares with *National Cable Television Association* and *New England Power Company* almost perfectly: an administrative agency attempted to assess fees that went beyond the scope of its statutory authority (including the

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391 176 F.3d 500 (D.C. Cir. 1999).

392 *Id.* at 505.

393 *Id.*

394 *Id.* at 504-05.

Independent Offices Appropriation Act[395]). The additional 30 percent assessment that exceeded the actual cost of administering the domain name registration program was entirely ultra vires.

Neither the D.C. Circuit nor the federal district court considered the threshold question whether the 30 percent add on constituted a "tax" or a "fee" very difficult. Both courts easily concluded that the unauthorized charge was a "tax" for purposes of *National Cable Television Association* and *New England Power Company*. The D.C. Circuit explained that "[t]o begin, we shall assume, *arguendo,* that the 30 percent portion of the domain name registration fee Network Solutions collected and held for NSF constituted an illegal tax because, as the district court decided, NSF lacked congressional authorization."[396] As in *Mid-America Pipeline*, the tax/fee question became conflated with the larger delegation question.

If Congress delegates clearly and with the requisite specificity, it simply does not matter whether one characterizes the charge as a "fee" or a "tax." Congress may delegate responsibility for implementing either a fee or a tax to an administrative agency. An agency, however, utterly lacks any unilateral authority to assess either fees or taxes absent some sort of congressional authorization. Accordingly, one may put aside the ultimate resolution of whether universal service charges are "taxes" rather than "fees" until engaging in a more general nondelegation doctrine analysis -- an

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[395] 31 U.S.C. § 9701.

[396] *Network Solutions*, 176 F.3d at 506; *see also* Thomas v. Network Solutions, Inc., 1998 U.S. Dist. Lexis 14696, at *7 ("There is no dispute that the Preservation Assessment, as imposed by NSF in 1995, is an illegal tax.").

analysis that will moot the fee/tax dichotomy. Under *Mid-America Pipeline*, the real question is not whether a particular charge is a "fee" or a "tax," but rather whether Congress has taken sufficient responsibility for establishing it.

C. The Theory Applied: Does Section 254 Violate the Nondelegation Doctrine?

As noted earlier, some commentators have argued that section 254, which establishes the universal service program, violates the nondelegation doctrine.[397] The nondelegation doctrine requires only that "Congress delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of the delegated authority."[398]

In the case of section 254, Congress has established both the objects of the program and the means of paying for the attainment of those objects. It would be very hard to make a plausible claim that the delegation is too open ended to survive generic delegation doctrine scrutiny.[399]

Indeed, one must entirely disregard the most recent Supreme Court precedents regarding the non-delegation doctrine to advance such arguments. Fairly read, the Supreme Court's decisions strongly suggest that section 254 does not constitute an unlawful delegation

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[397] *See* Barbara A. Cherry & Donald D. Nystrom, *Universal Service Contributions: An Unconstitutional Delegation of Taxing Power*, 2000 L. REV. M.S.U.-D.C.L. 107 (2000).

[398] American Power & Light Co. v. Securities and Exchange Comm'n, 329 U.S. 90, 105 (1946); *see supra* text and accompanying notes ___ to ___ (discussing the nondelegation doctrine).

[399] *But cf.* Cherry, *supra* note ___, at 123-36 (arguing, somewhat unpersuasively, to the contrary).

of the taxing power, nor does it violate the more generic prohibition against unconstrained delegations of policy making authority.[400]

This conclusion is less an indictment of the critics of the universal service program than a reflection of the moribund state of the nondelegation doctrine. Unlike *NCTA* and *New England Power*, and consistent with *Mid-America Pipeline*, Congress *has* delegated revenue raising authority to the Federal Communications Commission to fund the universal service program. Although this delegation is, de facto, a limited power to impose taxes on communications services,

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[400] *But cf.* Barbara A. Cherry, *Challenging the Constitutionality of Universal Service Contributions:* Whitman v. American Trucking Associations, Inc., 2001 L. REV. M.S.U.-D.C.L. 423 (2001) ("In light of *Whitman*. . . there should be renewed efforts to review the constitutionality of the universal service provisions of section 254 by the courts under the nondelegation doctrine."). Cherry argues that *Whitman* prevents reviewing courts from applying *Chevron* analysis to agency interpretations of vague statutes. *See id.* ("it is clear that Court would find the Fifth Circuit's evasion of the delegation challenge to section 254(h) through agency deference under *Chevron* step-two analysis to be improper"). Thus, she argues that *Whitman* overruled *Chevron* sub silentio. In my view, the Justices would be most surprised to learn that they had done this. *Chevron* analysis takes place only after the resolution of any delegation doctrine issues that might exist -- if a statute is too vague, so vague that it fails nondelegation doctrine analysis, the court never gets to *Chevron*. If the delegation is vague -- but permissibly so -- *Chevron* applies and an agency's interpretation of the permissibly vague language controls over other reasonable readings of the language. The more difficult problem is squaring *American Trucking Associations* with *Mead Corporation*. *See* United States v. Mead Corp., 533 U.S. 218 (2001). According to *Mead Corp.*, *Chevron* deference applies only when Congress delegates lawmaking power to an agency. *Id.* at 229-31; *see* Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 747-54 (2002). Yet, the delegation of lawmaking power seems to run against Justice Scalia's admonition that "legislative power" cannot be transferred to Executive Branch agencies. Thus, under *Mead Corp.*, *Chevron* deference seems to apply only when Congress has intentionally delegated lawmaking power to an agency. Somehow, the lawmaking power transferred to an agency to write binding rules does not constitute "legislative power" for purposes of applying the nondelegation doctrine. The Justices have not yet addressed precisely why and how this is so.

this fact simply does not matter for purposes of applying the "no delegation of taxing authority" rule. Based on *Mid-America Pipeline*'s holding that no special rules govern the delegation of revenue authority, a reviewing court should sustain section 254's funding mechanism against either a generic nondelegation doctrine challenge or a challenge premised on the more specific rule against implied delegations of taxation powers.

IV. An Argument In Favor of a Limited Revival of the Prohibition Against Delegating Basic Revenue Decisions to Independent Agencies.

Although section 254 survives the application of the contemporary incarnation of both the general nondelegation doctrine and the more specific rule against the implied delegation of taxing powers, there are some very good reasons why this should not be so. In particular, the Framers were extremely concerned with fixing responsibility for revenue policy and limiting its exercise to the branch of government most subject to direct democratic accountability. As Professor Lawson has noted, "[t]he delegation phenomenon raises fundamental questions about democracy, accountability, and the enterprise of American governance."[401] This seems especially true when the exercise of taxation powers is at issue.

Sound policy also supports a stronger version of the "no delegation of taxing authority" rule. An agency free to tax for an open ended purpose can grow at will, largely free and clear from the need to seek additional authorizations from Congress. Congressional control over an agency's access to operating monies is an important

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[401] Lawson, *supra* note ___, at 332.

check on agency behavior. An agency free to raise revenue without congressional oversight or approval runs the risk of unchecked growth with insufficient oversight.

A. The Doctrine of Retroactive Ratification and Its Potential Use as the Answer to the Problem of Delegations of Revenue Authority

The Supreme Court has held that Congress may retroactively approve an unauthorized tax, thereby saving it from being judicially voided. Although the doctrine is somewhat obscure -- and finds its roots in a case decided in 1907 -- it remains good law. Moreover, the lower federal courts have applied this doctrine with some regularity over the last twenty years, most recently in 1999.

In *United States* v. *Heinszen & Company*,[402] the Supreme Court faced a challenge to tariffs collected in the Philippines. Following the occupation of Philippines in 1898, the Secretary of War, acting with the President's consent, established a system of tariffs for goods imported into the country.[403] Although Congress had not authorized the imposition of these tariffs, the federal government began assessing and collecting duties on all goods from abroad coming into the Philippines based on the Secretary of War's order. In 1902, Congress enacted legislation establishing a system of duties for goods imported into the Philippines. For the period from 1898 to 1902, however, no congressionally-authorized system of duties existed -- only the system created and enforced by the Executive Branch existed.

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[402] 206 U.S. 370 (1906).

[403] *See id.* at 378.

From 1898 to 1902, Heinszen paid the tariffs due under the Secretary's tariff schedule. Thereafter, the company sued for a refund, arguing that the tariff scheme was ultra vires, unlawful, and void. During the pendency of the litigation, Congress enacted a law that purported to endorse the tariffs established by the President for the period from 1898 to 1902.[404] Heinszen argued that the attempted ratification of the tax, retroactive for a period of over six years, was an unconstitutional deprivation of due process. The Court of Claims agreed with Heinszen, finding that "the act of Congress of June 30, 1906, ratifying the collection of duties was beyond the power of Congress to enact."[405]

On review, the Supreme Court reversed, even though it was "obvious that the court below correctly held that such tariff exactions were illegal."[406] The tariffs were illegal because Congress had not authorized any tariffs for goods coming into the Philippines for the period 1898 to 1902. Accordingly, "the only question open for consideration [was] whether the court below erred in refusing to give effect to the act of Congress of June 30, 1906, which ratified the collection of the duties levied under the order of the President."[407] The "simple question" presented for decision was "whether Congress possessed the power to ratify which it assumed to exercise."[408]

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404 *Id.* at 381.

405 *Id.* at 382.

406 *Id.* at 382.

407 *Id.*

408 *Id.*

By a vote of 7-2, the Supreme Court found that Congress could ratify a tax that was unlawfully collected at some prior point in time. "That where an agent, without precedent authority, has exercised in the name of the principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement."[409] For the majority, then, the case presented an almost embarrassingly easy question.[410]

Even if the tax was ultra vires at the time of its collection, the subsequent congressional ratification totally divested Heinszen of any right to a refund. If Congress could have authorized the tariffs before they were collected, then "it had power to ratify the acts which it might have authorized."[411] Moreover, "it may cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights."[412] In the case at bar, "[i]t is then evident, speaking generally, both on principle and authority, that Congress had the power to pass the

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[409] *Id.*; *see also* Mattingly v. District of Columbia, 97 U.S. 687, 690 (1878) (permitting ex post ratification of a tax collected without congressional authorization for public works improvements projects in District of Columbia).

[410] *See Heinszen*, 206 U.S. at 382 ("That the power of ratification as to matters within their authority may be exercised by Congress, state governments or municipal corporations, is also elementary."); *id.* at 382-83 ("We shall not stop to review the whole subject or cite the numerous cases contained in the books dealing with the matter, but content ourselves with referring to two cases as to the power of Congress, which are apposite and illustrative.").

[411] *Id.* at 384.

[412] *Id.*

ratifying act of June 30, 1906, and that the act bars the plaintiff's right to recover, unless by the application of some exception this case is taken out of the operation of the general rule."[413] The Justices found no reason not to apply the general rule in the case.

Along the way, the Court rejected a strong due process claim that retroactive taxation was fundamentally unjust. Although the Supreme Court decided *Heinszen* at the height of the *Lochner* era, the Justices found the due process claim utterly lacking in merit. "In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify."[414] Even though ratification post-dated the assessment and collection of the taxes by six years, no due process violation existed. Because Congress has the right to ratify an ultra vires act, no claim of entitlement to a refund could arise, for recognizing such a claim would divest Congress of its undoubted power of ratification (even six years later).

"Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution."[415] Thus, if Congress sees the potential for a recovery that it does not like, it can prefigure a preferred result by utilizing the ratification process.

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413 *Id.*

414 *Id.* at 386.

415 *Id.*

The only rule for ratification is that the Congress ratify by a plain statement. If the ratification utilizes vague or ambiguous language, a court need not find that a ratification has occurred.[416] In the statute at issue, however, Congress used language that unquestionably sought to ratify the tariffs.[417]

Since deciding *Heinszen*, the Supreme Court consistently has held that Congress may retroactively ratify an act that it could have undertaken in the first instance.[418] The Court has, however, established some limits to the use of ratification.

In 1919, Florida's legislature attempted to ratify the collection of certain unauthorized tolls for the use of a lock on a canal.[419] The disputed tolls arose in and prior to 1917. At that time, Forbes Pioneer Boat Line ("Forbes") paid tolls for the use of the lock. Forbes subsequently sued the state of Florida for a refund in the state courts. In 1919, on the very day that the Supreme Court of Florida issued a decision in favor of Forbes's claim, the state

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[416] *See id.* at 387-89.

[417] *See id.* at 381 ("That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two, at all ports and places in said islands, and upon all goods, ware, and merchandise imported into said islands from the United States, or from foreign countries, or exported from said islands, are hereby legalized and ratified, and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed.").

[418] *See*, *e.g.*, Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-02 (1937) (citing and applying *Heinszen* to permit retroactive taxation); Rafferty v. Smith, Bell & Co., 257 U.S. 226, 232 (1921) (same); Graham and Foster v. Goodcell, 282 U.S. 409, 427-31 (1931) (same).

[419] *See* Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922).

legislature enacted a bill that purported to ratify the tolls. The federal Supreme Court granted review.

Writing for a unanimous Court, Justice Holmes stated the question as "whether a state legislature can take away from a private party a right to recover money that is due when the act is passed."[420] He went on to answer this question in the negative. "A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power," but the "ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."[421] Applying these principles, the Supreme Court found the Florida legislation "is invalid."[422]

Justice Holmes explained that "if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls."[423] Thus, Florida could not enact a retroactive toll, even if it might be permitted to enact a retroactive tax. For reasons that the Court does not fully explain, retroactive tolls are fundamentally unjust, whereas retroactive taxes are not. In any event, the Court concluded that

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420 *Id.* at 339.

421 *Id.*

422 *Id.*

423 *Id.*

because the tolls were not foreseeable, the state legislature could not assess them retroactively.[424]

In later cases decided during the *Lochner* era, the Supreme Court applied the *Forbes* rule to some, but not all, retroactive taxes.[425] Thus, two sometimes conflicting lines of cases both remained on the books and valid, even though they seemed to call for conflicting results on the same facts: *Heinszen* permitted retroactive ratification of unlawful acts, whereas *Forbes* purported to limit the scope of retrospective legislation.[426]

In 1981, Justice White dissented from the Supreme Court's refusal to hear a South Dakota case involving a statute that imposed a new sales tax retroactively from 1981 to 1969.[427] Justice White noted that "[t]he difficulty in discerning the difference between

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[424] *See id.* at 340 ("We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot.").

[425] *See*, *e.g.*, Coolidge v. Long, 282 U.S. 582, 595-99 (1931) ("The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them."); *see also* Untermyer v. Anderson, 276 U.S. 440, 445-46 (1928) (disallowing retroactive gift tax); Blodgett v. Holden, 275 U.S. 142, 146-47 (1927) (same). For an extended discussion of these cases, *see* Faith Colson, *Note, The Supreme Court Sounds the Death Knell for Due Process Challenges to Retroactive Tax Legislation*, 27 RUTGERS L.J. 241, 252-57 (1995).

[426] For thoughtful consideration of the problem of retroactive legislation, *see* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 693 (1960); W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216 (1948); Frederick A. Ballard, *Retroactive Federal Taxation*, 48 HARV. L. REV. 592 (1935).

[427] *See* Van Emmerik v. Janklow, 454 U.S. 1131, 1131-32 (1981) (White, J., dissenting).

permissible curative legislation and unconstitutionally retroactive legislation is apparent from our cases."[428]

He explained that "*Heinszen* and *Forbes* appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively."[429] That said, "*Heinszen* and *Forbes* offer little guidance as to whether a retroactive tax increase constitutes a change in legislative policy."[430] He argued that the Court, in declining to review the case, was shirking its "duty to define the boundary between permissible and impermissible retroactive tax increases."[431]

The teaching of *Heinszen* is remarkably simple: the case holds that if a direct retroactive tax would be valid, a legislature may ratify a tax that was unauthorized at the time of collection. Logically, then, the only real question regarding the scope of *Heinszen* relates to the ability of a legislative body to assess retrospective taxes. During the *Lochner* era, the Supreme Court permitted some retrospective taxes and rejected others. Since 1937, however, the trend in the Supreme Court has been quite clear: unless wholly irrational or unjust, retrospective taxes do not violate the Due Process Clauses.[432] As one observer has noted, the Supreme

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[428] *Id.* at 1132.

[429] *Id.* at 1133.

[430] *Id.*

[431] *Id.* at 1133-34.

[432] *See* United States v. Carlton, 512 U.S. 26, 30-31 (1994); General Motors Co. v. Romein, 503 U.S. 181, 191-92 (1992); Welch v.

Court's pre-1937 cases invalidating retroactive taxes "have been confined to their facts."[433]

United States v. *Carlton* resolves any residual doubts about the validity of retroactive taxes, at least insofar as the Due Process Clauses are concerned. Writing for the Court, Justice Blackmun declared that "[t]his Court repeatedly [has] upheld retroactive tax legislation against a due process challenge."[434]

Although the Supreme Court had used a test inquiring into whether a particular retroactive tax was so "harsh and oppressive"[435] as to violate substantive due process, this formulation "'does not differ from the prohibition against arbitrary or irrational legislation' that applies generally to enactments in the sphere of economic policy."[436] If a retroactive tax scheme rationally relates to a legitimate government interest, it is consistent with the requirements of due process of law.[437]

The *Carlton* Court went out of its way to disavow, utterly, the *Lochner*-era cases subjecting retroactive taxes to a more demanding standard of review. "Those cases were decided during an era characterized by exacting review of economic legislation under an

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Henry, 305 U.S. 134, 146-49 (1938).

[433] Colson, *supra* note ___, at 254.

[434] *Carlton*, 512 U.S. at 30-31.

[435] *Henry*, 305 U.S. at 147, 149.

[436] *Carlton*, 512 U.S. at 30 (quoting and citing Pension Guaranty Benefit Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984)).

[437] *See id.* at 30-31.

approach that 'has long been discarded.'"[438] The Court explained that "[t]o the extent that their authority survives, they do not control here."[439] Accordingly, it is no overstatement to suggest that after *Carlton* "constitutional review of retroactive application of tax statutes is officially dead."[440]

Two years earlier, in a somewhat more cautious opinion, Justice O'Connor noted in *General Motors Corp.* v. *Romein* that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."[441] However, the requisite standard of review applicable to such enactments remained "a legitimate legislative purpose furthered by rational means."[442]

Taken together, *Carlton* and *Romein* effectively end meaningful substantive due process review of retroactive taxes. Unless a tax is wholly arbitrary and utterly outrageous, it is consistent with due process. When read against the conflicting lines of authority created by *Heinszen* and *Forbes*, it would appear that the *Heinszen* rule remains good law whereas the *Forbes* rule does not. If a legislative body could enact a retroactive tax, it may ratify a tax that was ultra vires when collected. Moreover, the test for

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[438] *Id.* at 34 (quoting and citing Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

[439] *Id.*

[440] Colson, *supra* note ___, at 271; *see id.* at 262 ("the result of the Court's holding is that constitutional review of retroactive tax statutes is dead").

[441] General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

[442] *Id.*

permissible ratification is the least demanding known to modern constitutional law: the rationality test.

B. A Cautionary Note on the Takings Clause

Even though the Due Process Clauses no longer appear to provide an avenue of relief for persons unhappy with a retroactive tax, the Takings Clause might provide a basis for invalidation of a sufficiently unforeseen retroactive liability. In *Eastern Enterprises* v. *Apfel*,[443] a four Justice plurality of the Supreme Court used the Takings Clause to invalidate certain funding provisions of the Coal Industry Retiree Health Benefit Act of 1992.[444] Justice Kennedy, using a due process analysis, reached the same conclusion as the plurality and voted to invalidate the law, thereby providing a critical fifth vote to strike down the statute.[445]

Under the Act, the former employers of now-retired coal miners were required to fund health care benefits for the retired miners and their dependents. Eastern Enterprises faced an assessment of $5 million dollars for a single year's obligation under the Act.[446] Rather than simply pay the assessment, Eastern Enterprises challenged the retroactive funding obligation on due process and takings grounds. The lower courts rejected the company's claims, but the Supreme Court reversed.

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[443] 524 U.S. 498 (1998) (plurality opinion).

[444] *See id.* at 522-24, 528-29 (plurality opinion).

[445] *See id.* at 540-41, 547-50 (Kennedy, J., concurring).

[446] *Id.* at 517.

Writing for the plurality, Justice O'Connor found that the retroactive funding provision was sufficiently harsh and oppressive to constitute a regulatory taking. In her view, the employers could not have foreseen the imposition of heavy new funding burdens for retired employees' health benefits, in some cases literally decades after the employment relationships had ceased to exist.[447] Because the law had the effect of imposing new legal obligations on long terminated employment relationships, the law constituted a regulatory taking.

Justice Kennedy voted to invalidate the law, but insisted on applying due process analysis, rather than the Takings Clause. In his view, the imposition of significant new liabilities for employment relationships long ended was sufficiently arbitrary to violate basic notions of fairness.[448] Because the law imposed significant, unforeseen new liabilities years after the fact, it was sufficiently unjust and irrational to transgress the requirements of due process of law. Had the employers known that they would (or even might) be liable for millions in additional health care costs at the time they made employment decisions, they might well have made different choices (i.e., employed fewer workers).

As I have argued previously, a retroactive tax that has significant, unforeseen economic effects would be subject to a Takings Clause challenge and might well be judicially invalidated on

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[447] *See id.* at 523-24, 530-35.

[448] *See id.* at 549; *but cf.* Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977) (arguing that any change in tax laws upsets somebody's prior expectations and that, given inevitability of problem and absence of a logical stopping point, federal courts should not seek to police retroactivity in tax law).

that basis.[449] Although the Due Process Clause requires only minimal rationality, the Takings Clause appears to impose stronger limits on the retroactive imposition of new civil liabilities.

This analysis would not be helpful in attacking the universal service program, primarily because section 254 puts everyone on notice that the Commission will assess charges to create a pot of money that will subsidize a class of defined beneficiaries. The law is entirely prospective in its design and effects. Moreover, even if a reviewing court were to hold that section 254 delegates too much revenue authority, and requires Congress to ratify the Commission's universal service program design, the level of retroactivity involved would not approach the degree at issue in *Eastern Enterprises*.

That said, *Eastern Enterprises* suggests that some limits probably exist on Congress's ability to ratify a tax after the fact. If, a decade after judicial invalidation of an ultra vires tax, Congress attempted to ratify the tax and demand payment of it, a strong argument would exist that the enactment violates the Takings Clause and, accordingly, is void. In this regard, it bears noting that the Supreme Court's ratification cases involve retroactivity of only a few years' time. Such limited retroactivity would probably not violate the Takings Clause, even as broadly construed in *Eastern Enterprises*.

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[449] *See* Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 728-34 (2002).

C. *Heinszen* in the Circuit Courts

Notwithstanding the due process and takings questions, the lower federal courts consistently have followed *Heinszen* over the last thirty years. For example, in *Purvis* v. *United States*,[450] the U.S. Court of Appeals for the Ninth Judicial Circuit cited and applied *Heinszen* to sustain retroactive provisions of the Interest Equalization Tax Act of 1964.[451] The *Purvis* panel explained that "the Court early recognized the power of Congress to ratify unauthorized Executive action taken in the area reserved to Congress, and thus retroactively to validate such action."[452]

Moreover, concerns about the potential unfairness of retroactive validation of executive action should be directed to Congress, and not the federal courts:

> We feel we can confidently leave to Congress, as a purely political matter, the control of such instances of interaction between the departments. If at any time Congress feels the President to be overreaching in seeking to create legislative consequences from Executive proclamation or request, it can reject the request for retroactive application.[453]

Thus, because Congress will remain politically accountable for its decision to ratify (or not) the President's actions, the judiciary need not actively police the use of this power.

Some twelve years later, in 1986, the United States Court of Appeals for the Second Judicial Circuit applied *Heinszen* to sustain

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450 501 F.2d 311 (9th Cir. 1974).

451 *Id.* at 312-13.

452 *Id.* at 314.

453 *Id.*

ratification of an unauthorized FICA tax.[454] Citing ***Heinszen***, the court noted that "Congress could ratify admittedly unlawful collection of duties even after the plaintiff had brought [an] action to recover the duties paid."[455]

In 1999, the U.S. Court of Appeals for the District of Columbia Circuit applied ***Heinszen*** to permit ratification of an unlawful fee collected on behalf of the National Science Foundation ("NSF").[456] The NSF hired Network Solutions to oversee the registration of Internet domain names.[457] Under its agreement with NSF, Network Solutions imposed fees to cover its costs, plus a 30% surcharge to create a fund that would support improvements to the Internet.[458] These improvements would benefit the general public, rather than the holders of particular domain names.

The district court and D.C. Circuit both viewed the surcharge, which Congress had not approved, as an unauthorized tax.[459] Congress, within mere weeks of the district court's initial decision declaring

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[454] ***See*** Canisius College v. United States, 799 F.2d 18, 25-26 (2d Cir. 1986).

[455] ***Id.*** at 26.

[456] ***See*** Thomas v. Network Solutions, Inc., 176 F.3d 500, 506-07 (D.C. Cir. 1999).

[457] ***See id.*** at 503-05.

[458] ***Id.*** at 505. For additional background information about this case, ***see supra*** text and accompanying notes __ to __.

[459] ***Id.*** at 506 ("To begin, we shall assume, ***arguendo***, that the 30 percent portion of the domain name registration fee Network Solutions collected and held for NSF constituted an illegal tax because, as the district court decided, NSF lacked congressional authorization."); ***see also*** Thomas v. Network Solutions, Inc., 1998 U.S. Dist. Lexis 14696, at *6 (D.D.C. Aug. 28, 1998) ("There is no dispute that the Preservation Assessment, as imposed by NSF in 1995, is an illegal tax."), ***aff'd***, 176 F.3d 500 (D.C. Cir. 1999).

the surcharge invalid,[460] enacted legislation to save Network Solution's 30% surcharge on registration services.[461] Both the district court[462] and the D.C. Circuit[463] found that this retroactive endorsement satisfied *Heinszen* and validated the otherwise invalid tax. The D.C. Circuit explained that "[a]n old Supreme Court case -- rarely cited by never overruled -- stands for the proposition that Congress 'has the power to ratify the acts which it might have authorized' in the first place, so long as the ratification 'does not interfere with intervening rights.'"[464]

The *Network Solutions* panel properly found that Congress intended to ratify the preservation assessment via § 8003 of the FY98 Supplemental Appropriations and Recessions Act and that it possessed the power to impose such a tax on domain registrations in the first instance.[465] "If a prior act of Congress had directed NSF to collect $30 for each new registration and $15 thereafter and to retain the funds in order to support the Internet, we perceive no reason --

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[460] The district court invalidated the surcharge on April 6, 1998. President Clinton signed the legislation that included the ratification clause on May 1, 1998, only three weeks later. *See* 1998 U.S. Dist. Lexis 14696, at *3-*4.

[461] *See* Fiscal Year 1998 Supplemental Appropriations and Recessions Act, Pub. L. 105-174, § 8003, 112 Stat. 58, 93-94 (1998).

[462] 1998 U.S. Dist. Lexis 14696, at *6 (holding that "it is settled law that if Congress ratifies a tax, it is proper under the Constitution, even though Congressional approval might postdate the initial imposition and collection of the tax").

[463] 176 F.3d at 506-07.

[464] *Id.* at 506 (quoting and citing United States v. Heinszen & Co., 206 U.S. 370, 384 (1907)).

[465] *See id.* at 506-07.

registrants have offered none -- why such legislation would not have been within Congress's constitutional power under Article I, § 8."[466]

D. Toward a Renewed Nondelegation Doctrine in the Area of Taxation.

The *Heinszen* rule, coupled with Congress's ability to impose taxes retroactively, would make it relatively easy to resuscitate the nondelegation doctrine in the area of delegations of revenue authority. Congress could, in the first instance, ask an agency to design and implement a benefits program without establishing either the precise objectives it would achieve or the means to pay for achieving those objectives. Section 254 would fit this paradigm very nicely: Congress painted in very broad strokes and took virtually no responsibility for any of the major details of implementing or funding the universal service program.

The program would be subject to judicial invalidation, however, unless and until Congress itself ratified the precise mechanisms selected by the administrative agency. *Network Solutions* provides a very good example. Congress thought that a fund to advance the Internet was a sound policy and ratified the NSF's otherwise ultra vires program. In so doing, Congress resolved all difficulties arising under the nondelegation doctrine.

Congress itself, by ratifying the NSF's preservation fee program, entirely negated any delegation problems. As Judge Randolph explained, "Section 8003 delegated to NSF no discretionary authority, much less the power to enact tax legislation or to fix tax rates."[467] At the time Congress enacted the ratification, "Congress then knew

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[466] *Id.* at 507.

[467] *Network Solutions*, 176 F.3d at 507.

how much Network Solutions had been charging registrants, the period during which the charges had been imposed. . . and what portion of the charges -- 30 percent -- had gone to NSF and for what purpose."[468] For all intents and purposes, the ratification was no different than the imposition of a retroactive tax on domain registrations, retroactive for three years.

The ratification legislation did not convey any additional discretion to NSF on a going forward basis. Congress ratified the fee that NSF had been charging, not some other fee. NSF lacked any authority to modify the charge or institute a new or different charge. Of course, NSF could have unilaterally demanded payments for some other purpose, in some different amount. If the agency were to do so, the charges would be unlawful, unless and until Congress enacted legislation ratifying this new course of agency action.

Ratification permits an agency to act, but ultimately requires Congress to take political responsibility for the action. It represents a sound compromise between the extremes of sustaining any wholesale delegation of revenue authority to an agency or disallowing any agency role in the process of paying for benefit programs.[469] Congress may obtain the benefit of agency expertise in designing the program and the mechanisms that will pay for it,[470] but Congress must

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[468] *Id.*

[469] *See* Ronald J. Krotoszynski, Jr., *Constitutional Flares*, 83 MINN. L. REV. 1, 4-6 (1998); *see also* Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1710-12, 1714-23, 1821-24 (1998); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1121 (1990); Quill v. Vacco, 80 F.3d 716, 731-32, 738-43 (2d Cir. 1996) (Calabresi, J., concurring).

[470] *See* Krotoszynski, *supra* note ___, at 739-41, 750-54.

ultimately accept, in a very direct way, political responsibility for enacting the taxes (or "fees" or "charges").

As Professor Manning has observed, "[t]he nondelegation doctrine serves important constitutional interests: It requires Congress to take responsibility for legislative policy and ensure that such policy passes through the filter of bicameralism and presentment."[471] Greater reliance on the ratification doctrine in cases presenting wholesale delegations of revenue authority would advance these values in a significant way.

Moreover, no good reason exists for assuming that the nondelegation doctrine could not be more sensitive in some areas than it is in others. The Supreme Court itself said as much in *American Trucking Associations*[472] and some scholarly commentators have advocated such an approach.[473] Professor Rappaport, in particular, believes that the nondelegation doctrine's bite should vary depending on the precise nature of the delegation at issue.[474] Unlike Professor Rappaport, I propose applying the standard nondelegation test (as *Mid-America Pipeline* effectively requires), but doing so with an eye toward the potential curative effect of the ratification doctrine.[475]

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[471] Manning, *supra* note ___, at 277.

[472] *American Trucking*, 531 U.S. at 475-76.

[473] *See* Michael B. Rappaport, *The Selective Non-Delegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265 (2001).

[474] *See id.* at 271-72, 345-55, 369-72.

[475] *See*, *e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (applying rationality test to invalidate Colorado's Amendment 2, even though plausible reasons for adopting Amendment 2 existed); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (applying rationality test to invalidate city's refusal to issue a permit for group home

Professor Sunstein has suggested that a revised nondelegation doctrine that looks to subject matter, rather than the scope or degree of delegation, might be more plausible than a strong, generic nondelegation doctrine.[476] The ratification doctrine, coupled with the *NCTA/New England Power* requirement of a clear textual authorization to an agency to impose charges, rests on a subject matter distinction, rather than a "hard to manage question [about] whether the legislature has exceeded the permissible level of discretion."[477] Consistent with this approach, forcing Congress to make greater use of the ratification doctrine would not involve the judiciary in as many difficult judgment calls as would a generalized reinvigoration of the nondelegation doctrine.

Along similar lines, Professor Manning suggests that "[t]he central aim of the nondelegation doctrine is to promote specific, rather than general, legislative policy-making -- that is, to induce Congress to filter more precise policies through the process of bicameralism and presentment rather than leaving such policies to be elaborated by agencies or courts outside the legislative process."[478] Increased reliance on the ratification doctrine in circumstances where Congress vests an agency with the power to raise revenues would advance the values that Manning identifies; it would require Congress

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for adults with developmental disabilities).

[476] *See* Sunstein, *supra* note ___, at 338.

[477] *Id.*; *see also* Schuck, *supra* note ___, at 792-93 ("In the end, the nondelegation doctrine is a prescription for judicial supervision of both the substance and forms of legislation and hence politics and public policy, without the existence or even the possibility of any coherent, principled, or manageable judicial standards.").

[478] Manning, *supra* note ___, at 271.

to validate the imposition of de facto taxes on the public or acquiesce in judicial invalidation of the taxes.

Finally, ratification is not an impermissible legislative veto. *INS* v. *Chadha*[479] prohibits Congress from delegating authority to an administrative agency while attempting to reserve a power to superintend the delegated authority. If Congress told NSF to establish a system of fees to create a fund to improve the Internet, and then purported to vest a single house or a single committee with oversight powers over the exercise of that delegated authority, a separation of powers problem would exist.[480] In cases where ratification could apply, Congress has, in point of fact, not delegated authority to the agency in the first place. In other cases, the scope of the delegation is not sufficiently sweeping to encompass the agency's proposed course of action. Finally, we could posit a class of cases in which the delegation might be too sweeping, given the subject matter at issue and Congress's failure to provide significant limitations on its exercise.

Consistent with the doctrine of ratification, reviewing courts could reasonably require Congress to ratify when the scope of a delegation is unclear. *Mid-America Pipeline* and *National Cable Television Association* together stand for the proposition that delegations of revenue authority must be express. If an agency does not have a clear textual mandate to tax, federal courts should force the agency to resort to the ratification process or face judicial invalidation of its work product.

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[479] 462 U.S. 919 (1983).

[480] *See id.* at 944-51, 956-59.

On the other hand, the current nondelegation doctrine does not require invalidation when Congress has delegated in a clear fashion. The question then arises as to whether the nondelegation doctrine requires Congress to take on any responsibility for the design of a revenue program beyond a bare authorization to tax. Read broadly, *Mid-America Pipeline* seems to suggest that if Congress delegates revenue authority in a clear fashion, the terms of the delegation are not subject to any special analysis simply because they involve taxation. The case certainly would bear this interpretation.

If one focuses on the design of the program in *Mid-America Pipeline*, however, the matter becomes somewhat more complicated. The revenue program at issue in *Mid-America Pipeline* defined who would pay the charges, the basis on which the agency would assess the charges, and how much the pipeline operators would pay in any given year.[481] Congress itself set a ceiling for the maximum amount to be collected each year through an annual appropriations measure: "the Secretary has no discretion whatsoever to expand the budget for administering the Pipeline Safety Acts because the ceiling on aggregate fees that may be collected in any fiscal year is set at 105 percent of the aggregate appropriations made by Congress for that fiscal year."[482]

Given that Congress established, on an annual basis, the net level of taxation that the Department of Commerce could impose on pipeline operators, and that Congress had established the basis on which the taxation would occur, the case did not really involve a

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[481] *See* Skinner v. Mid America Pipeline Co., 490 U.S. 212, 215-16, 219-20 (1989).

[482] *Id.* at 220.

delegation at all. Congress not only had the ability to ratify, but in fact ratified, through the annual appropriation, the Department's execution of the pipeline safety programs. Presumably if Congress had concerns about the precise means the Department used to assess the fees, it would have amended the program incident to setting the annual appropriation for pipeline safety.

In many ways, then, *Mid-America Pipeline* did not present a particularly strong case for applying the nondelegation doctrine. Unless the separation of powers doctrine simply barred Congress from delegating any aspect of a revenue program to an agency, the delegation at issue was not problematic. Moreover, given that Congress often delegates discretion to the Internal Revenue Service to implement tax policies without direct congressional approval of the agency's work, a holding that prohibited any delegation of discretion to an agency implementing a revenue program would have been wholly unprecedented and a clear break with decades of settled administrative law practice.

Section 254 presents a very different case. Congress has not established the precise services to be subsidized and, on the contrary, has urged the Commission to add new services over time. Indeed, universal service funds could be used to pay for services that did not even exist in 1996, when Congress enacted section 254. This might not be problematic, had Congress established clear limits on the amount of money that the Commission could raise and spend. By way of contrast, the revenue program sustained in *Mid-America Pipeline* had clear limits on the purpose for which monies could be spent, the ways in which money could be raised, and the net amount of

funds that could be raised in a given fiscal year. Section 254 has none of these important safeguards.

This analysis should not lead to an immediate conclusion that section 254 is unconstitutional and that the universal service program should be struck down (and monies collected rebated). Instead, it suggests that Congress should be required to ratify the Commission's plan, just as Congress ratified the NSF's decision to create a fund to promote the Internet. Section 254 obviously informs telecommunications service providers that taxes of some sort will be assessed on their products; it goes a long way toward ameliorating concerns about notice and unfair retroactive taxation. At the end of the day, however, citizens should not be required to pay universal service fees unless and until Congress itself endorses the charges and the services funded by the program.

Beyond serving the separation of powers and the Framers' enduring concerns about democratic accountability for revenue measures, imposing a ratification requirement would also set a ceiling on universal service fees unless and until Congress again ratified the program. In essence, this approach reads section 254 as a mandate to create a universal service plan, with the plan going into effect, at least temporarily, pending formal congressional ratification.

If Congress wishes to avoid the ratification requirement, it could amend section 254 to limit either the purposes for which universal service monies can be spent or, in the alternative, cap the total funds to be raised via universal service charges. If it prefers to do neither of these things, leaving section 254 "as is,

where is," the federal courts should require ratification as a precondition of forced payment.

E. The Universal Service Program Represents Poor Public Policy

Even if the universal service program does not violate the nondelegation doctrine, it reflects a poor means of achieving the goal of universal access to basic telecommunications services. Administration of the program is expensive, with double assessments and collections. Portions of the program, such as the assistance for rural medical care providers, are abject failures.[483] Other aspects of the program, such as funding for Internet wiring for schools and libraries, have proven wildly popular -- even when the schools and libraries lack any computers to put the shiny new wiring to work for its intended purpose.[484] The program, at least at the federal level, is bloated and poorly administered. Funding decisions seem arbitrary and wasteful. The system is no less costly and no more effective than the system of cross subsidies that Congress intended for it to replace.

The current universal service policy also is incoherent. Simply put, you cannot subsidize one part of an integrated network without creating competitive benefits that have effects across the entire network. As one observer has noted, "[s]tranded cost and universal service provisions, for radically different reasons, adopt a regulatory attitude that is more reminiscent of the unitary Bell

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[483] *See supra* text and accompanying notes ___ to ___.

[484] *See supra* text and accompanying notes ___ to ___.

System than it is consonant with the regulatory ambitions of the Telecommunications Act."[485]

The idea that providing ILECs with universal service monies will not enhance the ability of the ILECs to fend off competitors is sheer fantasy. Any subsidy for a portion of an integrated network will have spill over effects that will lower the costs of operating the non-subsidized portion of the network. If Congress wished to create a truly competitively neutral program, it should have devised a system of tax credits or direct subsidies to service subscribers, rather than service providers.[486] Moreover, Congress should have encouraged the use of new competitive technologies in high cost and rural areas -- such as satellite and cell phones -- rather than continuing to support the provision of wireline services. In many developing countries, wireless telephone systems are the only game in town.[487]

State PSCs, however, tend to favor pre-existing wireline technologies over newer, wireless ones. As Professor Chen has

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[485] Jim Chen, *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, U. COLO. L. REV. 921, 924 (1997).

[486] *See id.* at 945 ("Numerous commentators have lamented Congress's failure to authorize direct subsidies for universal service, drawn from general tax revenues rather than surcharges on telecommunications services.").

[487] *See* Rebecca Carroll, *Americans cutting cord on land line to go mobile*, SEATTLE TIMES, Aug. 5, 2003, at A4 ("Cellphones overtook landline phones earliest in some developing countries that hadn't laid land lines by the time cellular technology arrived. In Cambodia, for instance, nearly 90 percent of phones are cellular."); see also Jason Roy Flaherty, *Note, Reallocating the Instructional Television Fixed Service Electromagnetic Spectrum at 2.5 GHz*, 96 NW. U. L. REV. 1177, 1177 (noting that "[w]ireless communications services is one the fastest growing segments of the communications industry" and reporting that "half of all telecommunications services [in the United States] will be wireless by the year 2010").

argued, it is very difficult to justify this preference on sound policy grounds.[488] As Rosston and Wimmer put it, "in rural, high-cost areas, customers who make few calls may be better off if they are allowed to use a wireless service with a low monthly rate and a relatively high per-minute charge." If access for rural consumers can be achieved more cheaply and efficiently using cell or satellite phone service, why insist on wireline technologies or define universal service program participation requirements in ways that strongly disadvantage wireless carriers?[489]

The answer should be obvious: wireline systems require huge capital outlays and create greater rents for the incumbent local exchange carriers. By defining program participation requirements in ways that inevitably favor incumbent wireline service providers, state regulators ensure that the bulk of universal service subsidies will go to the ILECs, and not the CLECs.[490] These subsidies, in turn, will enable the ILECs to retain their competitive advantage in providing local telephone service, and will enhance their ability to

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[488] *See* Jim Chen, *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, [publisher] (2004) [draft at 33-39, 54-55]; *see also* Alleman, et al, *supra* note ___, at 856 ("We argue that the current manipulation of telecom rates exists, not because it is necessary to promote subscription, but simply because the public choice process prefers the current rates to those a competitive market would produce."); Gregory L. Rosston & Bradley S. Wimmer, *The ABC's of Universal Service: Arbitrage, Big Bucks, and Competition*, 50 HASTINGS L.J. 1585, 1605-07 (1999) (describing service provider participation requirements and how incumbents benefit from these requirements in securing universal service contracts).

[489] *See* Chen, *supra* note ___, at ___. [draft 54-56]

[490] *See generally* Rosston & Wimmer, *supra* note ___, at 1607 (arguing that a free choice between a subsidized wireless service and wireline service cannot be made "because regulators require a local usage component" and "such an option will not be available because only plans with local usage components will be supported").

provide intra- and interstate telephone service. To state the matter simply, the universal service program has the untoward effect of impeding the conditions necessary to break the local telephone service monopoly.

Other problems exist. For example, the universal service program design is radically unprogressive and arguably hurts as many poor consumers as it benefits. "Because the burden of this funding is concentrated on certain telecommunications services, rather than drawn from general revenues, the base of the 'tax' is relatively narrow, and the markups on the prices of services generating the subsidy are quite high."[491] A single, low-income mother, living in the Bronx, with a cell phone for personal safety, pays 10% or more of her monthly wireless telephone bill to support universal service for wealthy Montana residents living on ranchettes. The program makes no allowance for ability to pay, but raises prices for all consumers of telecommunications services. Perhaps the single mother makes lots of calls to rural Montana, but this proposition is open to some serious doubts.

If urban air travellers were required to pay a 10% fee to ensure that the airport in Staunton, Virginia (SHD) remained open with jet service to major destinations, there would be a great deal of grumbling. The fact that someone living in New York might be able to fly to SHD would not seem like a very good exchange for a 10% surcharge on a ticket from New York City to Los Angeles, California. Yet, this is precisely how the universal service program operates:

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[491] Alleman, et al., *supra* note ___, at 869.

it taxes urban consumers, regardless of ability to pay, in order to subsidize rural consumers (regardless of ability to pay).

If ensuring that rural residents have access to telephone service and/or the Internet truly serves the public good, then general public revenues should be used to provide the necessary subsidies.[492] "More limited programs, targeted at marginal subscribers, could meet this objective at lower cost, and with less interference with a competitive market."[493]

In no other area are consumers in one area taxed to provide service to consumers in another area. For example, rural electrification enjoys federal subsidies under the Rural Electrification Act,[494] but the federal government does not assess "universal service" fees on urban customers to pay the costs associated with rural electrification.[495]

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[492] Professor Chen states the matter straightforwardly:

> The cure for universal service is equally simple. No one seriously disputes the desirability, or at least the plausibility, of a public role in ensuring educational access to the internet. Doing so through a general tax rather than an internal subsidy drawn from other telecommunications users would not only simplify the administration of the Telecommunications Act but also improve overall economic value.

Chen, *supra* note ___, at 971.

[493] Alleman, et al., *supra* note ___, at 856.

[494] Rural Electrification Act of 1936, ch. 432, 49 Stat. 1363 (1936) (codified as amended 7 U.S.C. §§ 901-950).

[495] *See* Joel A. Youngblood, *Note, Alive and Well; The Rural Electrification Act Preempts State Condemnation Law:* City of Morgan City *v.* South Louisiana Electric Cooperative Ass'n, 16 ENERGY L.J. 489, 489-96 (1995) (discussing history and operation of the Rural Electrification Act of 1936, which provides subsidized financing for qualifying rural electrification projects); *see also* Richard P. Keck, *Reevaluating the Rural Electrification Administration: A New Deal for the Taxpayer*, 16 ENVTL. L. 39, 42-61 (1985) (providing a history of the REA and a comprehensive description of its subsidy programs

Urban electricity customers arguably benefit from a national electricity grid with universal service. Residents of urban areas, when travelling, might find it inconvenient if large swaths of the country lacked electrical power. The ability to access persons living in rural areas also would be reduced in the absence of electricity. The same arguments that support the urban to rural subsidy in the context of telephony could be trotted out in favor of forced subsidies for rural electric customers.[496]

Under the Rural Electrification Act, however, local rural communities receive federally subsidized loans, which they must themselves repay, to underwrite the cost of transmission lines and other infrastructure requirements.[497] Rural electric cooperatives organize to build and operate rural electric services and pay the costs of doing so (albeit with artificially lower costs because of the federal subsidy). This model makes a great deal more sense than taxing a single mother in the Bronx to subsidize Harrison Ford's air conditioning bill in Montana.[498]

Even if one embraces the objectives that the universal service program exists to advance, the program's design and execution do not

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from a decidedly skeptical point of view).

[496] *See* Rossi, *supra* note ___, at 39-40 (noting that universal service concepts has no logical stopping point and that "taken to its extreme it could require not only subsidization of the network, but a redistributive tax to pay to provide computers or other electronic devices to consumers who cannot afford to pay for these").

[497] *See* Youngblood, *supra* note ___, at 490-96; Keck, *supra* note ___, at 46-48, 51-61.

[498] *See* Alleman, et al., *supra* note ___, at 870 (arguing that "since rural customers generally rely more heavily on long distance service, raising long distance rates to subsidize rural subscribers is counterproductive" and noting that "it is far from clear that all rural subscribers are needy").

ensure that the most needy persons obtain the maximum benefits. Some commentators fault the program as an "inefficient means of obtaining its intended goal" for a number of reasons, including its failure to target "marginal" and "needy" subscribers, problematic pricing practices that will not "obtain the desired goal," and revenue devices to underwrite the program that are "counterproductive."[499]

It is far from certain exactly how much effect the universal service program has in boosting telephone subscription rates. "In the United States, as in most western European countries, the vast majority of households now subscribe to telephone service."[500] In light of this fact, "[i]t is difficult to argue that the external benefit to existing subscribers is high when new subscribers are added" to the system.[501] If adding new subscribers really enhanced the value of the system, private telecommunications firms probably would underwrite some part of the cost of providing universal service because these expenditures "would increase demand for services by inframarginal subscribers."[502]

The universal service program, with it multi-layered collection and administration, is a veritable Hydra. The Commission assesses fees on service providers, who then pass these charges on to consumers. Each transaction creates administrative costs.[503] As Alleman, Rappoport, and Weller have argued, "if promoting

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499 *See* Alleman, et al., *supra* note ___, at 861.

500 *Id.* at 862.

501 *Id.*

502 *Id.* at 862-63.

503 *See* Chen, *supra* note ___, at 971.

subscription were the real goal of universal service policy, then subsidizing rates for local service generally is an extremely inefficient means of achieving that goal."[504] One analyst estimates that the program costs $1.65 for every $1.00 in subsidy that it generates and distributes.[505]

The spending side is little better. Both state and federal authorities appropriate universal service funds. These subsidies often go to incumbent telephone companies, which can offset universal service charges by meeting universal service needs. The accounting necessary to keep track of these matters could easily engage an army of accountants.[506]

It would be much easier to offer refundable tax credits to persons living in rural or high cost areas for telephone service of their choice. Some might elect to purchase wireline service from an ILEC, other beneficiaries might opt for a cell phone instead. Consumers, rather than bureaucrats, would be empowered to select the

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[504] Alleman, et al, *supra* note ___, at 863; *see also* Rosston & Wimmer, *supra* note ___, at 1587 ("Universal service programs, as currently structured, rely on arbitrary definitions to determine which providers will be taxed, how much they will be taxed, and which ones are eligible for support. As a result, universal service programs not only distort consumer behavior by artificially raising prices but alter firms' actions so they can either avoid taxes or to gain access to subsidies.").

[505] *See* JERRY HAUSMAN, TAXATION BY TELECOMMUNICATION REGULATION: THE ECONOMICS OF THE E-RATE 13-14 (1998); see also Rosston & Wimmer, supra note ___, at 1587-88 (predicting that "[a]s the universal service programs grow, firms will devote more resources to avoid paying the increased charges to fund the system" and characterizing such "avoidance activity" as "unproductive").

[506] *See* Alleman, et al., *supra* note ___, at 869 (noting that "distorting the prices of telecommunications services is a particularly costly method for financing universal service subsidies" and cataloguing some of the inefficiencies associated with the universal service program).

telephone delivery system that best met their needs as they (and not some state PSC administrator) see them.[507] The truly poor would still be entitled to universal service if the tax credit program was fully refundable.

Indeed, one would imagine that a refundable tax credit, if assignable, would create a wave of new competition for rural and high cost area consumers. Provided that the credit was sufficiently generous, various service providers would directly market products to potential consumers in exchange for an assignment of the universal service credit. It seems likely that more and better service would result for most consumers -- to say nothing of the jump start that such an approach would provide for competition in providing local telephone service.

As things stand now, both the design and implementation of the universal service program tend to impede competition and entrench incumbent wireline service providers.[508] As one commentator has observed, "[a]lthough competition in local telephone markets appears to be intensifying, many have been critical of the pace at which it has developed."[509] The reasons for this have to do with state

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[507] *See* Rosston & Wimmer, *supra* note ___, at 1607 ("By allowing consumers the option of choosing between a wireline and wireless offering, both of which are subsidized, consumers will determine which service best matches their needs.").

[508] *See* Chen, *supra* note ___, at 924, 938-46; *see also* Rosston & Wimmer, *supra* note ___, at 1607 (noting "the potential for state commissions to block the introduction of new technologies to deliver service to rural areas frustrates the ability of markets to find the least cost solution to the universal service problem").

[509] Abel, *supra* note ___, at 313.

regulators adopting policies that favor, at least at the margins, incumbent local exchange carriers over newcomers.[510]

Some critics have suggested that "low rates for local service make it unattractive for new firms to compete for customers with lower usage levels, especially for residence customers."[511] Yet, the goal of the universal service program is to maintain and extend these artificially low rates for local residential service. Thus, to the extent that non-market based pricing impedes competition in the local loop, the universal service program simply exacerbates a pre-existing problem.

There is also little reason to believe that consumers are less able than the Commission or state PSCs to decide precisely what telecommunications services are most essential. In fact, subscription rates for unsubsidized telecommunications and media services are fairly constant across household income levels.[512] Studies of subscription rates across household income "confirm that consumers, even those with low incomes, choose to purchase packages of wireless, cable, and other services with prices at least as high as local phone prices would be in the absence of the current subsidy."[513] One could plausibly claim that universal service

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[510] *See id.* at 313-14 (noting the state regulators have impeded competition and appear to have benefitted from doing so); Rosston & Wimmer, *supra* note ___, at 1614 (arguing that "universal service has been used to justify economically irrational pricing policies that affect virtually every aspect of telecommunications regulation ").

[511] Alleman, et al., *supra* note ___, at 861.

[512] *See id.* at 865-66.

[513] *Id.* at 866.

presently represents a welfare program for the former Bell Operating Companies, and little more.

In sum, even if the universal service program is constitutional, it represents a rather poor means of achieving admittedly laudable ends. Congress should rethink its approach and junk universal service in favor of more direct -- and economically efficient -- subsidy schemes.

V. CONCLUSION

The Supreme Court should revive the nondelegation doctrine in a limited way by requiring Congress to ratify agency actions that raise revenue in the absence of an express and limited delegation. Because section 254 neither limits the objects of the universal service program nor the funds to be expended to achieve them, it should be subjected to the ratification requirement.