Reexamining the Massachusetts Nondelegation Doctrine: Is the "Areas of Critical Environmental Concern" Program an Unconstitutional Delegation of Legislative Authority?"

Benjamin M. McGovern

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Environmental Law Commons

Recommended Citation
Benjamin M. McGovern, Reexamining the Massachusetts Nondelegation Doctrine: Is the "Areas of Critical Environmental Concern" Program an Unconstitutional Delegation of Legislative Authority?", 31 B.C. Envrnl. Aff. L. Rev. 103 (2004),
http://lawdigitalcommons.bc.edu/ealr/vol31/iss1/5

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
REEXAMINING THE MASSACHUSETTS NONDELEGATION DOCTRINE: IS THE “AREAS OF CRITICAL ENVIRONMENTAL CONCERN” PROGRAM AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY?

Benjamin M. McGovern*

Abstract: In 1974, the Massachusetts Legislature delegated authority to develop statewide policies “regarding the acquisition, protection, and use of areas of critical environmental concern” to the Executive Office of Environmental Affairs (EOEA). As of 2003, this power has been parlayed into a program that regulates nearly a quarter of a million acres across seventy-five Massachusetts municipalities, and in some instances affects the vast majority of all land in a particular community. To be certain, delegations of legislative power like the one given to EOEA are necessary to make government work. It is also possible, however, for these delegations to be overbroad, as federal and state non-delegation doctrines draw lines in the sand that delegations cannot cross. In Massachusetts, one might be tempted to conclude that this limitation no longer exists, since the state judiciary has not invalidated a delegation of legislative power in thirty years. This Note examines whether the powers given to EOEA could reverse this trend, and revive the Massachusetts non-delegation doctrine.

INTRODUCTION

On August 12, 1974, Massachusetts Governor Francis W. Sargent signed into law “An Act Establishing an Executive Office of Environmental Affairs” (the Act). The main purpose of the legislation was to centralize previously fragmented environmental regulation power into one state agency, the Executive Office of Environmental Affairs

* Executive Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW 2003–04. The author would like to thank his editors, all of whom left this Note in better condition than they found it.

(EOEA).\(^2\) In addition to that purpose, it is also significant that the Act gave birth to the Massachusetts Areas of Critical Environmental Concern (ACEC) program.\(^3\) Specifically, the Act created that program by giving EOE A authority to identify Massachusetts lands that should be “designated” as ACECs, as well as power to protect those lands by developing policies that govern ACEC “use.”\(^4\) While it is impossible to know what Massachusetts lawmakers originally intended, some believe that the ACEC program has developed into a regulatory sledgehammer that the modern EOEA uses to stifle land development in the name of environmental protection.\(^5\)

Fast forward to December 11, 2002. On that date, EOE A Secretary Robert Durand announced that his office was designating 64,000 acres of land in north-central Massachusetts as an ACEC.\(^6\) With that simple pen stroke, Durand placed land from eleven different com-

---

\(^2\) See generally James Ayres, Report Warns of Bay State Environment Crisis, BOSTON GLOBE, Nov. 26, 1972, at 71 (stating that the purpose of the proposed legislation was to “eliminate overlapping responsibilities of various state agencies and to make state government more streamlined, efficient and, ideally, less expensive”); John W. Riley & R.S. Kindleberger, Environment: 49 State Agencies Would Be Combined, BOSTON GLOBE, Jan. 19, 1973, at 3 (observing that the legislation “would bring 49 units of state government under a single agency . . . end[ing] duplicated efforts and improv[ing] environmental services”).

\(^3\) See §§2(7), 40(e), 1974 Mass. Acts at 808, 821. One provision from “An Act Establishing an Executive Office of Environmental Affairs” (the Act) that creates the Areas of Critical Environmental Concern (ACEC) program is codified at MASS. GEN. LAWS ch.21A, § 2(7) (2002). The other provision from the Act that creates the ACEC program is not codified, but is found at section 40(e) of the legislation. § 40(e), 1974 Mass. Acts at 821.

\(^4\) See §§2(7), 40(e), 1974 Mass. Acts at 808, 821. For a more complete discussion of the power delegated to EOE A see infra text accompanying notes 195–203, see also infra note 197 for a discussion of whether EOE A was actually given affirmative power to designate ACECs.


munities into the ACEC program, including 88% of Groton, 71% of Townsend, 61% of Dunstable, 54% of Pepperell, and just under 50% of both Ayer and Shirley. By far, Durand’s designation was the largest in the ACEC program’s history, bringing the total amount of land under the program’s purview to nearly a quarter of a million acres.

One might think that such a designation, affecting so many communities and landowners, would be the product of a reasoned and intelligent public debate. That is not the case. The process is much simpler. In fact, all that is required to begin the designation process is nomination of an area for ACEC consideration by any ten citizens of Massachusetts, irrespective of whether those citizens are landowners, residents of an affected community, or in any way qualified to make such a nomination.

Once made, nominations are reviewed by the EOA Secretary to make certain that the area nominated is indeed “eligible” to be designated as an ACEC. The threshold for eligibility, however, is set at a fairly low level. To be eligible, an area must contain an environmental “attribute” from four out of eleven groups—but these groups are extremely inclusive. For example, environmental “attributes” that help satisfy the four-group requirement include swamps, streams, creeks, oxbows, lands of agricultural productivity, forestland, natural areas, and scenic sites.

If the EOA Secretary finds a nominated area to be eligible, the next step in the designation process is a public hearing, though there is no requirement that opposition to the nomination be considered in good faith. To conclude the process, the EOA Secretary must ei-

---

7 See Noonan, Environmental Area, supra note 5. The other communities affected by this designation were Ashby, Harvard, Lancaster, Lunenburg, and Tyngsborough. See id.
8 See id. Approximately seventy percent of ACEC lands have received that designation in the years since 1990. See DEP’T OF ENVTL. MGMT., EXECUTIVE OFFICE OF ENVTL. AFFAIRS, GUIDE TO STATE REGULATIONS & PROGRAMS REGARDING ACECs 16 (2001), available at http://www.state.ma.us/dem/programs/acec/regsbooklet.pdf (last visited Nov. 4, 2003).
9 See MASS. REGS. CODE tit. 301, § 12.05(1)(a) (2002). Such a nomination may also be made by: (1) the Board of Selectmen, City Council, Mayor, Planning Board, or Conservation Commission of any city or town affected by the nomination; (2) any state or regional planning agency; (3) any member of the Massachusetts General Court; or (4) the Governor. See id. § 12.05(1)(b)–(d).
10 Id. § 12.07.
11 See generally id. § 12.06.
12 See id. For a complete list of eligibility factors see infra note 283.
13 See MASS. REGS. CODE tit. 301, § 12.08. In fact, an attendee characterized one public meeting for the December 2002 ACEC designation as a “mutual admiration society” where “countless ACEC supporters extoll[ed] the virtues of [the EOA Secretary] and vice versa,
ther accept or reject any nomination within sixty days after the public hearing. While the EOEA Secretary can consider nine factors when making this decision, the “strong” presence of even a single factor is enough to support a finding that a nominated area should be designated as an ACEC.

Considering the relative ease with which large swaths of Massachusetts can be designated as ACECs, one might think that the substantive effects of such a designation would be minimal. Again, that is not the case. An ACEC designation has teeth. Individuals wishing to develop ACEC-designated land face significant obstacles, found in the complex regulatory schemes of three different Massachusetts agencies. The most onerous of these obstacles is that any development in an ACEC requiring a state permit becomes subject to review under the Massachusetts Environmental Policy Act (MEPA). Functionally, this can result in “crippling delay” and additional expense, because MEPA review requires developers to submit up to three detailed reports—all at their own expense—that identify a project’s environmental impacts, examine the ways that the developer can mitigate negative impacts, and suggest alternatives to those impacts. Moreover, promises made in these reports must be kept before necessary state permits can be issued. Another potent obstacle to ACEC development is the strict prohibition of certain land uses within ACECs.

---

14 MASS. REGS. CODE tit. 301, § 12.10.
15 See id. § 12.09. Examples of factors that might justify designation include the following: uniqueness from a regional perspective; outstanding natural characteristics like recreational opportunities; or richness of wildlife nutrients. See id.
16 See DEPT OF ENVTL MGMT., supra note 8, at 5–15. These three agencies are the Office of Coastal Zone Management, Massachusetts Environmental Policy Act Office, and Department of Environmental Protection. See id. In addition, the regulatory schemes of these three agencies involve at least six different environmental programs administered at the state level. See id.
17 See id. at 7 (“ACECs are addressed in the MEPA regulations at 301 CMR 11.03(11). The proponent of any project (as defined by the MEPA regulations) located within an ACEC must file an Environmental Notification Form . . . unless the project consists solely of one single family dwelling.”).
18 See Doreen M. Zankowski, An Overview of the Massachusetts Environmental Protection Act (“MEPA”), CONSTRUCTION OUTLOOK MAG., June 2002.
19 Id. at 3.
20 See DEPT OF ENVTL MGMT., supra note 8, at 9, 15 (“Within an ACEC, potential projects are prohibited that would result in the loss of up to 5,000 square feet or, in some cases, up to 500 square feet, of Bordering Vegetated Wetland (defined at) 310 CMR
The First Circuit has summed up the effect of all this restriction by noting that ACEC lands "[are] subject to use restrictions and presumably a diminution in value."21 Moreover, Massachusetts agencies can make ACEC regulations stricter at any time. In other words, once land is designated, its development potential is placed under a permanent cloud of uncertainty.22

At the very least, the Act places substantial power in the hands of the EOEA Secretary. Such power is represented by the Secretary's ability to craft nomination and designation procedures regarding ACECs, as well as by the authority to place land-use restrictions on ACECs.23 As a result, the EOEA Secretary can almost unilaterally affect the property rights of Massachusetts landowners.24

Although true that the ACEC program has existed in this form for nearly thirty years, it nonetheless may be vulnerable to attack precisely because the EOEA Secretary has been delegated such potent powers.25 In 1978, a nearly identical program was adjudged to violate the Florida Constitution because the legislation creating that program delegated to an administrative official "the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection."26 Moreover, decisions like this are not uncommon—when legislatures attempt to broadly delegate powers to third parties or government agencies, they can violate the "nondelegation doctrine."27 This judicial restraint on legislative activity has been recognized in various forms by every state and has also been the

10.55(4)(e). . . . [R]egulations . . . prohibit the siting of solid waste management facilities within an ACEC."). For a complete discussion of how state environmental agencies regulate ACECs, see generally id. at 5–15.

21 Baker v. Coxe, 230 F.3d 470, 472 (1st Cir. 2000). Contra Noonan, Landowners, supra note 5 (noting that development has not slowed in some ACEC areas, and quoting one advocate as saying that ACEC regulations are "so nominal that they won't prevent development").


24 See discussion infra Part III.C.

25 See generally discussion infra Part III.


subject of successful litigation in federal courts. The fact that this doctrine exists, and can invalidate broad delegations of power, begs an important question: could a court conclude that the Act violates the Massachusetts version of the nondelegation doctrine?

Part I of this Note provides a general synopsis of the nondelegation doctrine, examining its constitutional origins and reviewing general application of the doctrine in federal and state courts. Part II of this Note explores the specific strain of the nondelegation doctrine that has evolved in Massachusetts. Part III of this Note analyzes whether Massachusetts courts could use this doctrine to strike down the ACEC program and concludes that such a result is conceivable.

I. DIFFERENT CONCEPTIONS OF THE NONDELEGATION DOCTRINE

The constitutional doctrine prohibiting delegation of legislative power rests on the premise that the Legislature may not abdicate its responsibility to resolve the "truly fundamental issues" by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policies.

The basic structure of American government is familiar to most citizens. Our constitutions, both federal and state, divide government into three branches: legislative, executive, and judicial. Equally familiar is the "separation of powers" corollary: constitutions give each of these branches a separate set of powers to utilize and no branch may exercise the powers of another.

A less familiar notion might be the "nondelegation doctrine" described above. Though not explicitly required by any constitution, this doctrine represents a logical extension of the separation of powers framework. Specifically, if separation of powers means that no branch can take away the powers of another branch, then branches

28 See generally Rossi, supra note 27, at 1189 (comparing and contrasting the fifty state nondelegation doctrines and the federal nondelegation doctrine); Greco, supra note 27, at 568.


32 See generally, e.g., Rossi, supra note 27, at 1177–81, 1185–91; Greco, supra note 27, at 567–70.
cannot give away, or delegate, these same powers.\textsuperscript{33} In other words, since constitutional authors placed powers in specific branches, they must have meant for those powers to stay there.\textsuperscript{34} To accomplish this end, separation of powers and the nondelegation doctrine work in tandem. The former operates to stop aggressive branches from stealing the powers of other branches.\textsuperscript{35} The latter does the opposite; courts employ it in order to prevent branches from delegating their constitutionally-assigned powers to other entities.\textsuperscript{36}

Though simple in theory, the nondelegation doctrine is complex in practice, particularly when courts examine delegations of legislative power, like the ACEC delegation.\textsuperscript{37} Because legislatures are responsible for passing laws dealing with a broad range of topics, they often encounter unfamiliar subject matter that is well understood only by experts in a particular academic or scientific field.\textsuperscript{38} Legislatures cope with this problem by drafting difficult statutes in extremely broad terms, while delegating the resolution of complicated details to entities with specialized experience and knowledge.\textsuperscript{39} If such delegations

\textsuperscript{33} See Rossi, supra note 27, at 1188–89; Greco, supra note 27, at 568.

\textsuperscript{34} See, e.g., Buckley, 424 U.S. at 120. In Buckley, the Supreme Court stated that:

James Madison . . . defended the work of the Framers against the charge that these three governmental powers were not entirely separate from one another in the proposed Constitution. . . . [Madison wrote:] "[t]he reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'"

\textit{Id.} (quoting THE FEDERALIST No. 47, at 299 (James Madison) (G.P. Putnam's Sons ed., 1908)).

\textsuperscript{35} See generally, e.g., Chadha, 462 U.S. at 945–46; Buckley, 424 U.S. at 120–24.

\textsuperscript{36} See generally, e.g., Rossi, supra note 27, at 1177–81, 1185–91; Greco, supra note 27, at 567–70.

\textsuperscript{37} See generally Davis & Pierce, supra note 31, § 2.6; Rossi, supra note 27, at 1239–40. This Note does not discuss delegations of power attempted by the executive or judicial branches.

\textsuperscript{38} See, e.g., Davis & Pierce, supra note 31, § 2.6 (discussing the various motivations behind delegations of power).

\textsuperscript{39} See generally Brodbine v. Inhabitants of Revere, 66 N.E. 607, 609 (Mass. 1903) (holding that the Legislature had delegated "administration of details which the Legislature cannot well determine for itself"); Rossi, supra note 27, at 1179 ("[D]elegation to agencies can assist in reducing the costs of making decisions, including the monitoring and supervision costs; agencies have institutional advantages over legislatures that make them more cost effective.").
were not allowed, legislators would be faced with the "hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape," and few laws would ever get passed.40

Unfortunately, the realization that delegation of legislative power can be efficient puts competing interests at play. On the one hand, a literal application of the nondelegation doctrine seems to indicate that any delegation of the law-making authority is impermissible if the separation of power principle means anything.41 On the other hand, common sense indicates that modern legislatures could never function if they were unable to delegate some responsibility to specialized administrative agencies or other experts.42 When weighing these competing interests, courts are not constrained by the nondelegation doctrine as they have been with specific constitutional commands, since the nondelegation doctrine arises only as an implicit extension of the separation of powers framework.43 As a result, the doctrine is malleable. Courts may interpret it as broadly or as narrowly as they choose; leading to different conceptions of the nondelegation doctrine across jurisdictions, and varying views on what is the permissible level of legislative delegation.44

A. The Federal Vision of the Nondelegation Doctrine

When Congress delegates power to other actors, federal courts almost always accept the delegations as proper, a fact that has led some commentators to pronounce the nondelegation doctrine dead at the federal level.45 There was a time, however, when the federal doctrine

---

40 Rossi, supra note 27, at 1183 (quoting INS v. Chadha, 462 U.S. 919, 967-68 (1983) (White, J., dissenting)).
42 See, e.g., DAVIS & PIERCE, supra note 31, § 2.6.
43 See, e.g., KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2.02 (1st ed. 1958) (noting that the "nondelegation doctrine is wholly judge-made").
44 Compare Democratic Party of Okla. v. Estep, 652 P.2d 271, 277-78 (Okla. 1982) (holding that legislatures must set out policies and articulate definite standards when delegating power), with Barry & Barry, Inc. v. State Dep't of Motor Vehicles, 500 P.2d 540, 542 (Wash. 1972) (holding that procedural safeguards determine the validity of delegations because "the requirement of specific legislative standards for the delegation of legislative power is excessively harsh and needlessly difficult to fulfill").
45 See DAVIS & PIERCE, supra note 31, § 2.6 ("Except for two 1935 cases, the Court has never enforced its frequently announced prohibition on congressional delegation of legislative power."); Rossi, supra note 27, at 1178 ("Since 1935, the Supreme Court has not in-
had more vitality. In the 1930s, the Supreme Court found on three separate occasions that a congressional statute violated the nondelegation doctrine because the statute lacked a "substantive, 'intelligible principle' articulated by Congress" that could help courts decide if recipients of delegated powers used them in accordance with legislative intent. These decisions indicated that federal delegations were permissible, but only if detailed standards were included to guide the delegation.

Over time, the federal judiciary began to articulate a vision of the nondelegation doctrine that was less demanding. Starting in the 1940s, the Supreme Court stopped insisting upon the inclusion of detailed standards, and began finding that congressional delegations of power were acceptable so long as "general" standards were present. Eventually, the federal judiciary went even further. By the 1960s, the focus of nondelegation inquiries had shifted entirely, away from an emphasis on statutory standards, and towards an examination of the procedural safeguards put in place by the recipients of delegated powers. In other words, the courts no longer relied on statutory standards to regulate the exercise of delegated powers; rather, they placed trust in the recipient's safeguards, hypothesizing that delegated powers could not be abused if the recipient forced itself to utilize those powers responsibly.

In recent years, since Congress usually delegates power to administrative agencies that have extensive procedural safeguards built into their structures, federal courts easily find safeguards present, and rarely invalidate delegations. Though Justice Rehnquist attempted to revive a standards-based interpretation in the 1980s, the permissive proce-
dural safeguard approach continues to dominate federal jurisprudence today. 54

B. The Nondelegation Doctrine at the State Level

As the preceding section makes clear, the federal nondelegation doctrine is little more than an academic curiosity—an outdated legal theory that is virtually useless to modern litigants. At the state level, however, the “nondelegation doctrine is alive and well,” because “state supreme courts historically have used the delegation doctrine to a greater extent than the U.S. Supreme Court to strike down legislative delegations of power.” 55 Even so, state nondelegation doctrines are far from consistent. Each state judiciary has a particularized interpretation of their nondelegation doctrine, and some states are far more likely to strike down a delegation of legislative power than others. 56

Despite these global differences, two separate commentators have theorized that state nondelegation doctrines can be divided into three general groups. 57 The first group, the “strict standards and safeguards” category, includes approximately twenty states that have articulated the strongest possible version of the nondelegation doctrine. 58 These states

54 See id. at 1180–81 ("Although, following Justice Rehnquist’s suggestion, some lower courts referred to the doctrine as ‘no longer . . . moribund,’ one must search far and wide to find lower court opinions striking delegations as unconstitutional.").

55 Rossi, supra note 27, at 1189; Greco, supra note 27, at 578. Theories abound as to why state courts are more apt than their federal counterparts to find legislative delegations of power unconstitutional. Some believe that a textual difference between state and federal constitutions yields the answer. See, e.g., Rossi, supra note 27, at 1188–89. Others hypothesize that federal courts readily permit legislative delegations to the “massive federal bureaucracy” because such agencies are considered reliable, while similar delegations to state agencies are rejected because those smaller agencies are thought to be less expert, and are viewed more skeptically. See Greco, supra note 27, at 578 (citing DANIEL R. MANDELMAN ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 599 (2d ed. 1983)). Some subscribe to the notion that any difference is illusory—the only reason that state courts use the nondelegation doctrine more frequently to invalidate laws is because, numerically, there are many more state statutes under review than federal statutes. See id.

56 See Rossi, supra note 27, at 1191; Greco, supra note 27, at 579–80.

57 See Rossi, supra note 27, at 1191–200; Greco, supra note 27, at 579–80.

58 See Rossi, supra note 27, at 1195–97 (noting the existence of this category, but labeling it “strong nondelegation states”); Greco, supra note 27, at 580–88. Both commentators agree that this category contains at least eighteen states: Arizona, Florida, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and West Virginia. See Rossi, supra note 27, at 1191–200; Greco, supra note 27, at 579–80. One commentator, however, believes that the category contains two additional states—Illinois and Utah—bringing his total number of states in the category up to twenty. See Rossi, supra note 27, at 1196.
permit delegations of legislative power only if the statute delegating the power "provide[s] definite standards . . . or procedures that the [recipient] must adhere to when making a decision."59

The second group, the "loose standards and safeguards" category, contains nearly half of all states, and favors a more moderate view of the nondelegation doctrine.60 Within these states, delegations are acceptable if the delegating statute includes a "general legislative statement of policy," or "a general rule to guide the [recipient] in exercising the delegated power."61

The final group, the "procedural safeguards" category, consists of a handful of states, and advocates the weakest nondelegation doctrine.62 Largely mirroring current federal doctrine, these states ignore statutory standards, and find delegations of legislative power to be acceptable so long as recipients of the power have "adequate procedural safeguards" in place.63

Viewed as a whole, these three groups form a spectrum of nondelegation interpretation, ranging from aggressive interpretations of the doctrine to those that are more restrained.64 Though the groups constituting the spectrum appear distinctive, in practical application the state doctrines do not fit so easily into one category or another.65

59 Greco, supra note 27, at 580; see Rossi, supra note 27, at 1193–97. It has been noted that this version of the nondelegation doctrine roughly corresponds to federal doctrine from the 1930s, when that doctrine was at its strongest. Greco, supra note 27, at 580.

60 See Rossi, supra note 27, at 1198–200 (dubbing the category "moderate nondelegation states"); Greco, supra note 27, at 580. Each commentator agrees that twenty-three states belong in this category: Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, Tennessee, Vermont, and Wyoming. See Rossi, supra note 27, at 1198–200; Greco, supra note 27, at 588–90. One commentator would include Illinois in this category, bringing his total to twenty-four states. See Greco, supra note 27, at 588–90.

61 See Rossi, supra note 27, at 1200; Greco, supra note 27, at 588. This category mirrors the federal doctrine of the 1940s, when the Supreme Court required only "general" standards to make a legislative delegation of power acceptable. See Greco, supra note 27, at 588.

62 See Rossi, supra note 27, at 1191–93 (naming the category "weak nondelegation states"); Greco, supra note 27, at 598–99. It is agreed that six states fit into this category: California, Iowa, Maryland, Oregon, Washington, and Wisconsin. See Rossi, supra note 27, at 1191–93; Greco, supra note 27, at 598–99. One commentator would include Arkansas, raising his total number in the category to seven. See Rossi, supra note 27, at 1201 tbl.1.

63 Rossi, supra note 27, at 1191–93; Greco, supra note 27, at 598–99.

64 See Rossi, supra note 27, at 1191–200; Greco, supra note 27, at 579–80.

65 See Rossi, supra note 27, at 1189, 1239–40 (observing that the application of the nondelegation doctrine in the states appears to "transcend constitutional text," and that the typical state decision "strings together some misleading legal cliches and announces the conclusion" (quoting Davis, supra note 43, § 2.07)); Greco, supra note 27, at 601 ("At first glance, [strict standards and safeguards] states appear to adhere to a strict delegation
For example, commentators generally agree that the Massachusetts nondelegation doctrine belongs in the “strict standards and safeguards” category—reserved for those states most likely to overturn delegations of power.66 Thus, it would seem that legislative delegations of power in Massachusetts, like the ACEC delegation, would be subject to more aggressive judicial review, and therefore vulnerable to attack.67 The reality is that the Massachusetts Supreme Judicial Court has not invalidated a legislative delegation of power since 1973, although it has continuously professed that the doctrine retains force as a judicial tool.68 Is the Massachusetts nondelegation doctrine dead?

II. THE MASSACHUSETTS NONDELEGATION DOCTRINE

A. Origins in Constitutional Text

The Massachusetts nondelegation doctrine takes root in a textual command from the state constitution that makes separation of powers mandatory in state government.69 Specifically, Article 30 of the Massachusetts Declaration of Rights (Article 30) dictates that:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.70

Thus, unlike the federal constitution and some state constitutions, the Massachusetts Constitution explicitly spells out the separation of powers requirement; it is impermissible for any branch of gov-

---

66 See Rossi, supra note 27, at 1196; Greco, supra note 27, at 583.
67 See Act of Aug. 12, 1974, ch. 806, §§ 2(7), 40(e), 1974 Mass. Acts 807, 808, 821; Rossi, supra note 27, at 1196; Greco, supra note 27, at 583.
ernment to utilize the powers of another. Perhaps less obviously, the explicit nature of Article 30 also makes it easier for the Massachusetts judiciary to extend this separation of powers framework by articulating a nondelegation doctrine.

In fact, Massachusetts courts recognized as early as 1903 that Article 30 provides a constitutional basis for the nondelegation doctrine. In *Brodbine v. Inhabitants of Revere*, the Massachusetts Supreme Judicial Court (SJC) noted that, "[i]t is well established in this commonwealth and elsewhere that the Legislature cannot delegate the general power to make laws, conferred upon it by a constitution like that of Massachusetts. . . . This doctrine is held by the courts almost universally." Moreover, this idea seems to have survived the passage of time, because the current SJC often uses this exact language when examining delegations of legislative power. In sum, Massachusetts courts have had little trouble acknowledging that a nondelegation doctrine exists, and that it has a solid basis in the text of the state constitution. More troublesome has been the determination of just how potent this doctrine should be.

---

71 Compare Mass. Const. pt. 1, art. 30, with U.S. Const. art. I–III; see also Rossi, supra note 27, at 1190 (citing Article 30 as an example of a mandatory separation of powers provision). It should be noted that the Massachusetts requirement of separation of powers is not as burdensome in practice as it appears in rhetoric. See generally Commonwealth v. Gonsalves, 739 N.E.2d 1100, 1104–05 (Mass. 2000). In reality, Massachusetts courts have opined that constitutional separation of powers does not actually require “watertight” compartments of government, and that branches may utilize the powers of another branch if doing so would be more efficient. See id.; Opinions of the Justices to the Senate, 363 N.E.2d 652, 658–62 (Mass. 1977). As a rule, when this borrowing occurs, “focus . . . is on ‘the essence of what cannot be tolerated under art. 30 . . . interference by one department with functions of another.’” Gray v. Comm’r of Revenue, 665 N.E.2d 17, 22 (Mass. 1996) (quoting Chief Admin. Justice of the Trial Court v. Labor Relations Comm’n, 533 N.E.2d 1313, 1316 (Mass. 1989)).


73 See *Brodbine*, 66 N.E.2d at 608.

74 Id. (emphasis added).

75 See, e.g., C & S Wholesale Grocers, Inc. v. City of Westfield, 766 N.E.2d 63, 67 (Mass. 2002) (“The principle that the General Court may not delegate the authority to make laws is firmly established.”); Constr. Indus. of Mass, 546 N.E.2d at 373 (“Article 30 . . . provides for the strict separation of powers in the government of the Commonwealth. The doctrine of separation of powers encompasses the general principle that the Legislature cannot delegate the power to make laws.”).

76 See *C & S Wholesale Grocers*, 766 N.E.2d at 67; Constr. Indus. of Mass., 546 N.E.2d at 373.
B. Are Some Types of Delegation Permissible?

Even as the turn-of-the-century SJC was discovering the nondelegation doctrine, it realized that the Massachusetts Legislature would need some ability to delegate authority in order to be functional. In fact, even as Brodbine cited the nondelegation doctrine with approval, the court actually approved the delegation at issue. Brodbine involved municipal park commissioners who located and built a boulevard within a state park, and passed a resolution forbidding vehicular travel on that boulevard. Plaintiff, aggrieved by the prohibition, alleged that the Massachusetts Legislature had violated the nondelegation doctrine by giving municipal boards the power to regulate state parklands.

In addressing the allegation, the SJC recognized that Article 30 supports the idea that the Legislature cannot delegate the power to make laws. Nevertheless, the court found that the delegation in question did not violate Article 30 because there was "strong ground for the contention that the ... statute simply leaves to the [Revere] board ... administration of details which the Legislature cannot well determine for itself ...." Implicitly, the court concluded that it would be inefficient to require the Legislature to draft detailed regulations for every park in the state, so it should be allowed to delegate that responsibility to other entities. In order to justify approving such a delegation in the face of the "well established" nondelegation doctrine, the court sought refuge in the distinction between formulation of legislative policy and control over administrative details that carry out such policies. Specifically, the court held that the power to make laws had not been delegated because the Revere board was only given authority to fill in the gaps of a legislative policy that the Legislature had already articulated. According to the court, the larger policy was that individuals violating any park regulation should be punished, in order to avoid chaos in state parks. For the court, the essence of legislative power

---

77 See Brodbine, 66 N.E. at 608–09.
78 See id.
79 Id. at 608.
80 Id.
81 Id.
82 Id. at 609.
83 See Brodbine, 66 N.E. at 609.
84 See id. at 608–09.
85 See id. at 609.
86 See id.
was represented by that large policy decision, and not by the specific park regulation that prohibited vehicular travel. 87

1. Continued Recognition That Some Delegation Is Acceptable

Thus, through Brodbine, the SJC sent a signal that the nondelegation doctrine existed, but that it would not prohibit every single delegation of legislative power. This principle was expressed more clearly in a later decision, when the court stated that "[t]he Legislature may delegate ... the working out of the details of a policy adopted by the Legislature." 88 Having articulated this bright-line test, in subsequent years the court had to distinguish between legislative policymaking and the administration of details on many occasions. 89 As a general matter, the SJC has almost always found these delegations to be permissible. 90

For example, in Commissioner of Revenue v. Massachusetts Mutual Life Insurance Co., the SJC examined a statute that gave the Commissioner of Insurance authority to decide what information Massachusetts insurance companies were required to include in their annual financial statements. 91 The plaintiff argued that the contents of annual statements critically affected what portion of their yearly income was taxable, and by extension, functionally determined the amount of excise tax they owed. 92 Thus, the plaintiffs alleged that by giving the Commissioner power to control annual statement contents, the Legislature effectively handed over the power to calculate excise tax bills in violation of the nondelegation doctrine. 93 The court rejected this argument, holding that the Commissioner’s discretion to alter the contents of annual statements was for the purpose of eliciting a “complete and accurate exhibit of the condition and transactions of the companies,” and that any related influence over the amount of tax paid was

87 See id.
91 428 N.E.2d at 300. Generally, delegating to the Commissioner of Insurance the authority to classify or not classify income as “gross investment income” for annual statement purposes was the most contentious issue. Id.
92 Id.
93 Id.
purely incidental. Moreover, the court emphasized that the Legislature had itself determined the excise tax rate, and had only delegated the authority to determine what portion of yearly income was applicable to that rate. The legislative policy was the determination of the tax rate applicable to insurance companies, and a detail necessary to carry out that policy was the amount of yearly income upon which that rate would operate. Thus, since the Legislature had made the policy determination and had only delegated the working out of details, the court found the delegation constitutional.

2. A Reminder That the Doctrine Retains Force

The SJC has concluded—on one occasion—that a legislative delegation illegally gave away the power to formulate policy. In *Corning Glass Works v. Ann & Hope, Inc.*, the challenged statute authorized product manufacturers to enter into “fair-trade” contracts with retailers that sold their products. These contracts mandated that retailers could not re-sell the manufacturer’s products at a price below the “fair-trade” price fixed by the manufacturer. In *Corning Glass Works*, the defendant retailer had never entered into such a contract, but a manufacturer nonetheless sought to stop that retailer from selling its products below the price established by the manufacturer in other “fair-trade” contracts. The retailer argued that the statute violated the nondelegation doctrine because it gave the manufacturer power

---

94 Id.
95 Id. at 300–01.
96 Id.
97 See Mass. Mut. Life Ins., 428 N.E.2d at 300–01. The SJC has determined in numerous other instances that statutes delegated only the working out of details. See, e.g., *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102, 112–13 (Mass. 1984) (upholding a statute that froze local zoning when a developer filed a notice of intent to build a hazardous waste facility because the developer’s ability to file a notice of intent was a necessary detail of the legislative policy that hazardous waste facilities should be more easily sited); *Arno v. Alcoholic Beverages Comm’n*, 384 N.E.2d 1223, 1226–28 (Mass. 1979) (upholding a statute that prohibited the granting of liquor licenses within 500 feet of an objecting school or church because the right to object to liquor licenses was only a detail of the larger policy that liquor should be kept away from concerned schools or churches).
99 294 N.E.2d at 355.
100 Id.
101 Id. at 355–56.
to craft legislative policy, by determining a "fair-trade" price floor that would bind all retailers selling that manufacturer's products.\textsuperscript{102}

The court agreed, holding that "[t]here is no provision [in the statute] . . . for any policy . . . to govern the prices set," and therefore the Legislature had not formulated the policy itself, but had improperly delegated it to the manufacturers.\textsuperscript{103} Implicitly, the court buttressed its conclusion by observing that the determination of a "fair-trade" price represented something beyond the filling in of details in order to carry out a larger policy.\textsuperscript{104} Rather, that "price-setting" was itself a policy judgment, in much the same way that the setting of tax rates reflected a judgment about how civic costs should be apportioned in Massachusetts Mutual Life Insurance Co.\textsuperscript{105} In both situations, the policy determination represented the essence of the power to make laws, and in Corning Glass Works the attempt to delegate that power could not help but violate the nondelegation doctrine.\textsuperscript{106}

C. An Additional Restriction: Protection Against Arbitrariness

By insisting that only the Legislature could formulate policy, these early court decisions largely eliminated the risk of arbitrary legislative policies, because citizens could refuse to reelect those responsible for passing arbitrary laws.\textsuperscript{107} But, since legislative delegation of policy details was acceptable, arbitrary action concerning those details remained a risk. Massachusetts courts knew that unelected recipients of delegated powers—like agencies, boards, or private citizens—were largely outside the democratic process, and therefore did not face electoral conse-

\textsuperscript{102} Id. at 356.
\textsuperscript{103} See id. at 362. Though the statute in question delegated power to an individual and not to another government actor, the court placed little emphasis on that distinction. See \textit{id.} ("Delegations of governmental powers to private persons or groups can be no broader than that to public boards or officers."). Subsequent decisions agreed that delegations should not fail just because power was delegated to outside actors. Town of Arlington v. Bd. of Conciliation & Arbitration, 352 N.E.2d 914, 920 (Mass. 1976) ("The delegation does not fail in that it was conferred on a 'private person' . . . [D]elegations to private persons are not forbidden so long as proper safeguards are provided.").
\textsuperscript{104} See Corning Glass Works, 294 N.E.2d at 360 ("The resolution of this dispute involves questions of economic theory and political judgment: To what extent is the obvious short-run interest of the consumer in lower prices offset by a long-run[n] interest in preserving a competitive structure. . . . Disputes of this type are regularly and properly resolved in the political and legislative arenas.").
\textsuperscript{106} See Corning Glass Works, 294 N.E.2d at 362.
\textsuperscript{107} See, e.g., Mass. Mut. Life Ins., 428 N.E.2d at 300–01; Corning Glass Works, 294 N.E.2d at 362.
quences when they arbitrarily exercised power. Recognizing this problem, the courts erected obstacles to guard against arbitrariness in situations where delegations were otherwise appropriate.

*Corning Glass Works* was not the first instance where this issue was addressed, but the decision is nonetheless instructive. Although the SJC ultimately based its holding on other grounds, the court was also troubled that the challenged statute contained "no provision for participation by any public board or officer in the process by which [the manufacturer] fixes the prices . . . nor for any policy or standard to govern the prices set . . . nor for notice, hearing, or judicial review of the prices fixed." Essentially, the court seemed to be suggesting an alternative reason for its holding. Specifically, the lack of statutory standards, lack of provisions for judicial review, and unaccountability of the manufacturers involved meant that delegated powers could have been used arbitrarily by recipients.

The SJC expounded upon these ideas three years later in *Town of Arlington v. Board of Conciliation & Arbitration*. In this case, a statute gave a three-arbitrator panel the power to resolve salary disputes between certain municipal employees and municipalities. The arbitration panel had the authority to select either the "last and best" salary offer from an employee organization, or from an employer town, as being more reasonable. That decision would then become binding upon both parties. Plaintiffs alleged that the statute violated the nondelegation doctrine because it gave the panel the power to decide the proper level of compensation for municipal employees, and impose that judgment upon both parties.

---

108 See *Corning Glass Works*, 294 N.E.2d at 362.
109 See id.
111 *Corning Glass Works*, 294 N.E.2d at 362.
112 See id.
114 See id. at 917 n.3. The three-member arbitration panel consisted of an arbitrator selected by the municipality, an arbitrator selected by the employee organization, and an impartial arbitrator selected by the other two arbitrators. Id.
115 Id. at 917.
116 Id. at 917 n.3. This authority also depended upon the fulfillment of other statutory requirements having to do with notice, good faith, and exhaustion of remedies. See id.
117 See id. at 919.
The court held that the statute did not violate the nondelegation doctrine.\textsuperscript{118} It presumed that the statute delegated to the panel the filling in of details, rather than a substantive policy determination.\textsuperscript{119} More importantly, the court determined that the statute provided adequate safeguards that would prevent the panel from abusing the power that it had been delegated.\textsuperscript{120} Stating that "we are [concerned] with the totality of the protection against arbitrariness" provided in the statutory scheme," the court overtly acknowledged that abuses of discretion needed to be controlled, even if the delegation was otherwise appropriate.\textsuperscript{121} Applying that standard to the facts, the court found that the board "must follow detailed procedures and is bound to apply [ten] statutory standards in reaching a decision."\textsuperscript{122} The court concluded that "the safeguards against arbitrary action in this statute are extensive, and they provide the act with a sound constitutional basis."\textsuperscript{123}

D. Putting It All Together: Three Nondelegation Inquiries

In reviewing these early nondelegation decisions, one can sense that the SJC knew some delegations of legislative authority were unconstitutional, but often had difficulty adhering to a consistent approach.\textsuperscript{124} Often, the court focused on the essence of what had been delegated—was it the power to make policy, or the authority to fill in details?\textsuperscript{125} At other times, the court sped through that analysis, and

\textsuperscript{118} See id. at 920.

\textsuperscript{119} See Bd. of Conciliation & Arbitration, 352 N.E.2d at 919–20. Perhaps the court viewed the real policy decision as the determination that labor impasses involving police and fire departments should be resolved quickly. See id. By extension, the actual selection of one "last and best" offer would only represent a detail that was necessary to carry out that larger policy. See id. But, one could argue that the selection of one salary offer over another could not help but represent a policy judgment about the proper level of compensation emergency officials should receive, involving intangible factors like the difficulty of the job, and the importance of the services rendered. See id. In this sense, the power delegated here is arguably like the determination of a tax rate, or the setting of a "fair-trade" price, that other decisions have classified as policy-based. Cf. Comm'r of Revenue v. Mass. Mut. Life Ins. Co., 428 N.E.2d 297, 300–01 (Mass. 1981); Corning Glass Works v. Ann & Hope, Inc., 294 N.E.2d 354, 362 (Mass. 1973).

\textsuperscript{120} See Bd. of Conciliation & Arbitration, 352 N.E.2d at 920.

\textsuperscript{121} Id. (quoting Kenneth Culp Davis, Administrative Law Treatise § 2.00–5 (Supp. 1970)).

\textsuperscript{122} Id. The ten standards consisted of a list of "factors . . . to be given weight by the arbitration panel in arriving at a decision." Id. at 919 n.5.

\textsuperscript{123} Id. at 920.


\textsuperscript{125} See, e.g., Mass. Mut. Life Ins., 428 N.E.2d at 300–01.
instead scrutinized the protection against arbitrariness that a given statutory scheme provided. In 1984, the SJC went a long way towards solving this problem by clearly articulating three inquiries to be employed by courts when reviewing delegations of legislative power.

In *Chelmsford Trailer Park*, the court recognized the ambiguity surrounding the nondelegation doctrine, and attempted to clarify it. The SJC stated that:

No formula exists for determining whether a delegation of legislative authority is "proper" or not. Here, in order to make that determination, we undertake a threefold analysis: (1) did the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop the standards, sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?

After articulating these inquiries, the court proceeded to the merits of the case, and decided that the statute in question was not an unconstitutional delegation of power.

The *Chelmsford* case involved a statute giving individual municipalities power to control rent levels and evictions within mobile home parks. It was not disputed that the statute delegated only details concerning an already-stated policy—namely, that a local response was needed to address erratic evictions and unreasonable rents being imposed by local mobile park owners. Thus, the first inquiry of the newly announced test was easily answered in the negative. The

---

126 See, e.g., *Board of Conciliation & Arbitration*, 352 N.E.2d at 919–21.
128 See id.
129 Id.
130 See id. at 1263–65.
131 Id. at 1260.
132 See id. at 1261–62 (discussing the policy and purpose behind the statute, but identifying the "main thrust of the owner's argument" as having to do with a lack of standards in the statute).
133 See *Chelmsford Trailer Park*, 469 N.E.2d at 1261–64 (largely skipping the first inquiry because the plaintiff's argument implicated only the second and third inquiries). A "negative answer" to the first *Chelmsford* inquiry is another way of saying that only control over the details of an already-stated policy had been delegated. See id. at 1262.
more contentious allegation was the second inquiry of the new test, namely that the statute "fail[ed] to delineate sufficiently specific guidelines, standards, and procedures for the application of the by-law by the [Chelmsford] board."134

Although the court acknowledged that the statute in question was less detailed than other rent control laws, it indicated a willingness to evaluate the statute broadly, stating that "[p]rovided that the policy and purpose of the Legislature are clearly expressed, the absence of detailed standards in the legislation itself will not necessarily render it invalid."135 Continuing, the court observed that "the standards for action to carry out a declared legislative policy may be found not only in the express provisions of an act but also in its necessary implications. The purpose, to a substantial degree, sets the standards."136

The court then interpreted the statute as sufficiently restraining the town's discretion.137 First, the court inferred standards from the statute's purpose that prevented the town from establishing irrational rent levels.138 Though no specific standards in the statute addressed rent levels, a stated purpose of the statute was that "whatever adjustments are made must assure that the [trailer home park] owner will receive a 'fair net operating income.'"139 Thus, the town was guided by an implicit standard because it could not impose a rent ceiling that would deny mobile home park owners a "fair net operating income."140 Next, the court determined that eviction standards from other sections of the Massachusetts Code could stand in for eviction standards missing from the statute in question.141 The SJC observed that "[i]ndividual

---

134 Id. at 1262. In its analysis, the court explicitly alluded to third-inquiry safeguards only once, when it stated that the act "provides . . . sufficient safeguards to protect against arbitrary action or abuse of discretion." See id. In large part, the court seemed to assume that if it could find sufficient standards to satisfy the second inquiry, the safeguards required by the third inquiry would also be present. See id. at 1262–64 ("This act, coupled with the availability of judicial review and the clearly expressed objectives of the act, provides sufficient protection to the owner and to the other tenants against the arbitrary granting of rent decreases.").

135 Id. at 1262.


137 See id. at 1262–64.

138 See id. at 1264.

139 Chelmsford Trailer Park, 469 N.E.2d at 1264. "Fair net operating income" was defined as income after expenses which yields a return on the fair market value of the property equal to the generally available debt service rate or such other rates as the board deems appropriate. Id.

140 See id.

141 See id. at 1263.
statutory provisions related to the same general area must be read ‘as a whole . . . to the end that . . . the [entire legislative program] will constitute a consistent and harmonious whole.’”142 Applying that logic, the court found that although the challenged statute did not explicitly tell the town when eviction was appropriate, such direction could be found from other state statutes dealing with mobile home evictions in slightly different contexts.143

Thus, when answering the second inquiry, the SJC inferred standards that were otherwise lacking, and concluded that the statute did not violate the nondelegation doctrine.144 Ultimately, Chelmsford Trailer Park is most significant for its articulation of three nondelegation inquiries. Yet, the actual holding is also critical, because the SJC displayed a willingness to answer these inquiries loosely, an inclination that would continue to manifest itself in later decisions.145

E. Recent Developments: The SJC Applies the Chelmsford Inquiries

In the years since Chelmsford Trailer Park, the SJC has not found any delegation of legislative power to be unconstitutional.146 In most instances where a delegation dispute reached the SJC, the court proceeded quickly through the Chelmsford inquiries, finding easy answers to all three questions.147 For example, in Powers v. Secretary of Administration the Massachusetts Legislature reacted to a fiscal crisis in the city of Chelsea by passing a statute establishing a “receivership.”148 In essence, the “receivership” suspended most Chelsea government powers for one year, and vested these powers in a “receiver” appointed by the Gover-

142 Id. (quoting Jones v. Town of Wayland, 402 N.E.2d 63, 68-69 (Mass. 1980) (quoting Haines v. Town Manager, 68 N.E.2d 1, 3 (Mass. 1946))).
143 Id.
144 See Chelmsford Trailer Park, 469 N.E.2d at 1262-64; see also Risk Mgmt. Found. v. Comm’r of Ins., 554 N.E.2d 843, 847-48 (Mass. 1990).
148 Powers, 587 N.E.2d at 745.
nor, who was charged with devising a long-term solution to the city’s fiscal problems. It was alleged that the statute violated the nondelegation doctrine because the Legislature’s power to deal with Chelsea’s fiscal crisis had been delegated to the “receiver.”

The SJC addressed the Chelmsford inquiries one by one. In answering the first inquiry, the court found that the Legislature had delegated only the power to oversee details, and had not given away the authority to formulate policy. Specifically, the legislative branch had “set forth the fundamental policy decision[] that the financial situation of Chelsea is intolerable and should be improved through the imposition of a receivership,” the “receivership” duties themselves being only details. Moving on, the SJC found the second inquiry satisfied because the “Legislature has set forth adequate direction for the receiver’s implementation” through enumerated powers and clear objectives that provided “direction as to the manner in which the receiver shall implement ... the ... policy decision to improve Chelsea’s financial position.” Finally, the court found that the third inquiry was satisfied, because the statute as a whole “provides safeguards to control any abuses of the receiver’s discretion.”

Such safeguards included: (1) an annual report the “receiver” was required to submit to the Legislature; (2) Secretary of Administration approval for certain “receiver” actions; and (3) the fact that the one-year term of the “receiver” could be terminated at any time for just cause. Most SJC nondelegation decisions have looked like Powers—the SJC answered each Chelmsford inquiry in turn, and found a delegation to be permissible. But, when the court has been unable to find supportive answers for all three inquiries, the SJC has followed the trend started in

---

149 See id.
150 See id. at 748.
151 Id. at 749.
152 Id.
153 Id. Examples of these powers and objectives included specific directives that the “receiver” establish: (1) an annual balanced budget; (2) a five-year operating and capital outlay plan; (3) school and government budgets; (4) uniform budget guidelines; (5) uniform financial planning systems; (6) a “city recovery” plan; and (7) prudent financial management techniques. See id.
154 Powers, 587 N.E.2d at 750.
155 Id.
Chelmsford Trailer Park by affording a challenged statute considerable latitude. 157

For example, in Blue Cross of Massachusetts, Inc. v. Commissioner of Insurance, the SJC found a delegation of power to be constitutional, even though it was not clear that the third Chelmsford inquiry could be answered satisfactorily. 158 The challenged statute gave the Massachusetts Commissioner of Insurance the power to review statewide insurance company rate increases. 159 Before the Commissioner could approve any rate increase, however, the statute required a finding that the relevant insurance company “employ[s] a utilization review program and other techniques acceptable to [the Commissioner] which have... a demonstrated impact on the prevention of reimbursement by such corporation[s] for services which are not medically necessary.” 160 Plaintiffs alleged that the statute delegated unfettered power to reject rate increases because the Commissioner could always claim that a company’s utilization review program was not “acceptable to him.” 161

Not presented with the question of whether the statute delegated policymaking powers, the court’s analysis focused on the subject matter of the second and third Chelmsford inquiries. 162 Recognizing that detailed standards to govern what the Commissioner should find “to be acceptable to him” could not be found in the statute, the court held that “[e]ven ‘very general [legislative] guides’” could replace specific standards if the overall scheme was subject to judicial review. 163 Then, without discussing whether such judicial review was available, the court held that certain “general guides” allowed the statute to pass nondelegation scrutiny. 164 Specifically, the SJC found “general guides” to be

---


158 See 489 N.E.2d at 1256. It should be noted that although Blue Cross of Massachusetts, Inc. was decided after Chelmsford Trailer Park, the Blue Cross court did not explicitly acknowledge the Chelmsford inquiries in its holding. See id. at 1255–56.

159 Id. at 1250–51.


161 Id. at 1255.

162 See id. at 1255–56. Again, the Blue Cross court dealt with subject matter covered by these Chelmsford inquiries, but did not explicitly reference the inquiries. See id.

163 Id. at 1256 (quoting Corning Glass Works v. Ann & Hope, Inc., 294 N.E.2d 354, 361 (Mass, 1973)).

164 Blue Cross of Mass., 489 N.E.2d at 1256. There were undoubtedly formal judicial safeguards in place that could have protected those who may have been aggrieved by the Commissioner’s decisions, such as the normal judicial review of administrative decisions. Yet, the court did not mention any such safeguards in its analysis, and did not seem to
present because the Commissioner’s determination of what was “appropriate to him” would occur only after a review of existing programs already in place, and would not include the power to force companies to affirmatively undertake programs favored by the Commissioner. In addition, the court believed the requirement that the program have a “demonstrated impact” on the prevention of certain economic costs guided the Commissioner’s review of existing programs. At the same time, the SJC completely glossed over any meaningful discussion of judicial review or other safeguards.

Similarly, in *Tri-Nel Management, Inc. v. Board of Health*, the SJC afforded substantial deference to a statewide statute that gave municipal boards of health the power to “make reasonable health regulations.” The plaintiffs in *Tri-Nel Management, Inc.* alleged a violation of the nondelegation doctrine after the Barnstable Board of Health used the authority delegated by the statute to forbid smoking “in all food service establishments, lounges, and bars.”

After setting out the three *Chelmsford* inquiries, the SJC easily answered the first, concluding that the delegating statute had not given local health boards the authority to formulate policy. The court then decided that the second inquiry was also satisfied because the requirement that any local regulation “address the ‘health’ of the community and ... be ‘reasonable’” provided sufficient guidance.

In answering the third inquiry, the court largely avoided a discussion of explicit safeguards. The court noted that local health boards had historically been given control over health concerns, and that the Legislature itself had dealt extensively with such matters. Then the court surmised that such “limitations on content and reasonableness sufficiently demarcate the boundaries of regulatory discretion so that the act provides safeguards to control abuses of discretion.”

---

165 Id.
166 Id.
167 See id.
169 See id. at 40, 44.
170 Id. at 44–45 (explaining that “public health matters affecting local communities may be the subject of reasonable municipal regulation,” while adding that the Legislature had made similar policy determinations that prohibited smoking in other public locations).
171 Id. at 45.
172 See id.
173 See id.
court also mentioned briefly that the standard safeguard of declaratory relief remained available for those claiming that a board had exceeded "proper boundaries."174

III. Analysis: Does the Massachusetts ACEC Program Represent an Unconstitutional Delegation of Legislative Power?

Although the Massachusetts Supreme Judicial Court (SJC) continues to insist that certain delegations of legislative power could run afoul of the state constitution, no delegation of legislative power has been struck down in Massachusetts over the past thirty years.175 One could interpret those three decades of inertia as a sign that the Massachusetts nondelegation doctrine—like the federal nondelegation doctrine before it—has been reduced to irrelevance.176 Yet, that dramatic conclusion is probably premature. The remainder of this Note will attempt to identify the special circumstances which might compel the SJC to revive the nondelegation doctrine, with particular focus on whether a judicial challenge to the Areas of Critical Environmental Concern (ACEC) program could precipitate that revival.

A. Current Status of the Massachusetts Nondelegation Doctrine

A survey of Massachusetts nondelegation caselaw reveals that the Chelmsford inquiries are the accepted “test.”177 Moreover, these inquiries seem to represent the culmination of judicial notions that had existed for decades.178 Specifically, the first Chelmsford inquiry appears to em-

---

174 Tri-Nel Mgmt., 741 N.E.2d at 45.
176 See supra text accompanying notes 45-54.
177 In the years just after the Chelmsford inquiries were announced, there was some doubt as to what would be the accepted nondelegation approach. Several nondelegation decisions did not use the Chelmsford inquiries and applied a much stricter “test” that focused on statutory standards. See, e.g., Risk Mgmt. Found. v. Comm’r of Ins., 554 N.E.2d 843, 848 (Mass. 1990); Op. Justices H.R., 471 N.E.2d 1226, 1219–20 (Mass. 1984); see also Greco, supra note 27, at 587 tbl.1 (identifying the Massachusetts nondelegation “standard” as having come from Op. Justices H.R., 471 N.E.2d at 1226). This uncertainty appears to have been resolved—all of the most recent Massachusetts nondelegation decisions use the Chelmsford inquiries. See, e.g., C & S Wholesale Grocers, 766 N.E.2d at 68; Tri-Nel Mgmt., 741 N.E.2d at 44–45; Ops. Justices H.R., 696 N.E.2d 502, 507 (Mass. 1998).
178 See supra text accompanying notes 77–123.
body the "policy or details" debate found in the *Commissioner of Revenue v. Massachusetts Mutual Life Insurance Co.* line of cases. Conversely, the second and third inquiries seem to encapsulate the "totality of protection against arbitrariness" goal of *Town of Arlington v. Board of Conciliation & Arbitration*. Nevertheless, the court has not explicitly clarified how these three inquiries work in conjunction with each other. Do they represent a mandatory three-part test, or are they simply guideposts for courts to use while reviewing delegations of power?

In short, the inquiries seem to be both. The inquiries themselves, as well as specific SJC decisions, support the proposition that the first *Chelmsford* inquiry represents a "threshold determination"—if a delegation cannot pass first-inquiry scrutiny, the delegation fails. The second and third inquiries appear to operate as more of a "guide"—questions for the SJC to ponder as they attempt to determine whether delegated powers could be used arbitrarily.

**B. Analyzing the Act Through the First Chelmsford Inquiry**

1. The First Inquiry: A "Threshold Determination" of Constitutionality

In the years since *Chelmsford*, the SJC has not encountered a statute that delegates the power to formulate legislative policy. In other words, the first *Chelmsford* inquiry has never been answered affirmatively. Nevertheless, when confronted with a statute that *does* delegate lawmaking powers, it is conceivable that the SJC could break a thirty-year trend and find a violation of the nondelegation doctrine without having to answer the second or third inquiries.

---

179 See *Chelmsford Trailer Park*, 469 N.E.2d at 1262; *supra* text accompanying notes 91–106.

180 See *Chelmsford Trailer Park*, 469 N.E.2d at 1262; *supra* text accompanying notes 107–123.

181 See generally, e.g., *C & S Wholesale Grocers*, 766 N.E.2d at 67–68; *Chelmsford Trailer Park*, 469 N.E.2d at 1262–64.

182 See *infra* text accompanying notes 184–194.

183 See *infra* text accompanying notes 237–250.


185 See *infra* text accompanying notes 186–194.
The most obvious basis for this conclusion comes from the literal language of two Chelmsford inquiries. The first inquiry attempts to discover the nature of a delegation, asking whether the delegation involves a “fundamental policy decision” or the “implementation of legislatively determined policy.” The second inquiry scrutinizes the delegating statute to see if “adequate direction for implementation” can be found.

The use of the word “implementation” in both inquiries is telling. Only if the answer to the first inquiry is “no”—because the delegation involves implementation of policy—can the SJC answer the second inquiry, dealing with whether direction for such implementation is present. Conversely, if the answer to the first inquiry is “yes”—because the Legislature delegates policymaking power—the second inquiry is irrelevant, because recipients of delegated powers would be making policy, not implementing it. Therefore, the first inquiry most closely resembles a “threshold determination.”

There is another, more basic reason that the first inquiry looks like a “threshold determination.” When reviewing the nature of legislative delegations, the SJC has never disputed the turn-of-the-century notion that “[t]he General Court may not delegate the authority to make laws.” More importantly, the SJC has always equated the essence of this lawmaking power with the authority to formulate substantive policy. For instance, in Massachusetts Mutual Life Insurance Co., the SJC opined that the ability “to enact substantive measures” was equivalent to “legislative authority,” and could not be delegated. Thus, if the lawmaking power and the authority to formulate policy are one and the same, then neither may be delegated. Since a re-

---

186 Chelmsford Trailer Park, 469 N.E.2d at 1262.
187 Id.
188 See id.
189 See id.
192 See 428 N.E.2d at 301.
193 See C & S Wholesale Grocers, 766 N.E.2d at 67 (stating that power to make laws may not be delegated); Mass. Mut. Life Ins., 428 N.E.2d at 301 (equating the power to make laws with the power to formulate substantive policy).
spouse of "yes" to the first Chelmsford inquiry means that the power to formulate policy has been given away, it weeds out the exact type of delegation that the SJC has never permitted, making what appears to be a "threshold determination" of appropriateness.194

2. Plain Statutory Language: Indications That the Act Cannot Pass the "Threshold Determination"

The "Act Establishing an Executive Office of Environmental Affairs" (the Act) delegates power to EOEIA through two separate statutory provisions.195 The first provision, codified in the Massachusetts General Laws, gives EOEIA power to develop policies regarding the acquisition, protection, and use of ACECs.196 The second provision—located near the end of the Act, but not codified—gives EOEIA authority to identify and designate ACECs.197

The literal language of the first provision suggests that judicial review of the Act could spark a revival of the nondelegation doctrine. More precisely, this provision makes itself a candidate to fail the "threshold inquiry,"198 by stating that EOEIA shall "develop statewide poli-

194 See, e.g., C & S Wholesale Grocers, 766 N.E.2d at 67; Chelmsford Trailer Park, 469 N.E.2d at 1262; Mass. Mut. Life Ins., 428 N.E.2d at 301.
196 MASS. GEN. LAWS ch. 21A, § 2(7) (2002) ("[EOEA] shall carry out the state environmental policy and in so doing they shall ... develop statewide policies regarding the acquisition, protection, and use of areas of critical environmental concern to the commonwealth.").
197 See § 40(e), 1974 Mass. Acts at 821. The assertion that the Act actually gives EOEIA affirmative power to designate ACECs is debatable. See id. Section 40(e) of the Act only gives EOEIA the authority to "conduct a study relative to land use so as to identify and designate areas of critical environmental concern ... ." Id. (emphasis added). Thus, one could argue that since the Legislature only gave EOEIA the power to "conduct a study," it delegated something less than total autonomy. See id. That conclusion is strengthened by the use of the term "shall" earlier in the Act when delegating powers—if the Act intended to give away complete control over the designation process, it probably would have followed this earlier language by stating that EOEIA "shall" have the power to designate ACECs. See § 2(7), 1974 Mass. Acts at 808. Whatever was intended, the regulations that govern the ACEC process make it clear that EOEIA has seized the designation power as its own. See MASS. REGS. CODE tit. 301, § 12.10 (2002) ("The [EOEA] Secretary shall make a final decision as to whether or not to designate a nominated area ... . The Secretary shall designate an ACEC only after finding that ... the area is of critical environmental concern to the Commonwealth.").
198 See § 2(7), 1974 Mass. Acts at 808. Conversely, if the Massachusetts Legislature administered the ACEC program itself, there would be fewer questions about the program's legality. Selecting individual areas of the state that are environmentally critical—and subjecting those areas to increased regulation—certainly falls within the Legislature's power to protect the health, safety, and welfare of Massachusetts citizens. See Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n, 711 N.E.2d 135, 138 (Mass. 1999). ("Under
cies regarding [ACECs] . . ."199 Thus, the Legislature’s own words indicate that it intended to delegate the authority to develop statewide ACEC policies to EOEA, supporting the inference that the Act did not formulate those policies itself.200

Moreover, when one puts the provision in context by comparing it to other powers that the Act delegates to EOEA, the potential for a nondelegation violation seems even stronger.201 Other grants of power in the Act deal with very specific details of larger state policies and only give EOEA authority to aid, promote, encourage, analyze, or monitor those larger activities.202 In short, those other grants of power seem to delegate control over the details of legislatively stated policies, while by comparison the ACEC provision looks and feels more like a broad delegation of authority to formulate substantive policy from scratch.203

3. Comparisons to SJC Precedent: Further Clues That the Act Cannot Pass the “Threshold Determination”

A court might also conclude that the Act delegates policy-formulating powers to EOEA because the powers delegated strongly resemble what the SJC has classified as “law-making powers” in other nondelegation decisions.204 In general, these decisions seem to suggest that policy formulation, at its very core, involves the decision to impose burdens upon some citizens so that benefits can be bestowed upon other citizens.205 Put slightly differently, the essence of what cannot be delegated is the responsibility to balance competing interests and to decide whether the benefits of a proposed policy offset the costs.206

As discussed in Part II of this Note, most SJC nondelegation decisions have involved statutes that performed this balancing of benefits and costs themselves.207 For example, the statute in Massachusetts Mu-

---


200 See id.

201 See § 2(1)–(28), 1974 Mass. Acts at 808–09. In very general terms, the Act created EOEA, and then listed twenty-eight powers that it possessed. Id.

202 See id. § 2(4), (6), (9), (11), (14), (16), (18), (19), (22)–(24), (27).

203 See id.


205 See infra text accompanying notes 207–217.

206 See id.

tual Life Insurance Co. addressed the contents of annual statements, which determined the amount of excise tax owed by Massachusetts insurance companies.208 Thus, the subject matter of the statute demanded a balancing of the economic benefit to Massachusetts—as the recipient of tax revenues—and the monetary cost imposed on state insurance companies paying excise taxes.209 The SJC held that the Legislature itself balanced those interests when it decided that insurance companies should be forced to pay one percent of their annual gross investment income as an excise tax.210 For the court, the selection of a specific rate showed that the Legislature had placed a “fulcrum” that balanced benefit to the state and cost to the insurance companies at an excise tax rate of one percent.211

In another decision, the SJC determined that a statute had shirked this responsibility by delegating this critical balancing of interests to another entity.212 In Corning Glass Works v. Ann & Hope, Inc. the statute dealt with the setting of “fair-trade” price floors that applied to the resale of certain products.213 This practice bestowed benefits upon product manufacturers by helping their trademarked products maintain higher retail values.214 At the same time, it imposed burdens on consumers and retailers—in the form of higher product prices and the elimination of effective intra-brand price competition.215 Implicitly, the SJC recognized that a balance between these interests would be struck by placing a “fulcrum” at the “fair-trade” price that would prevent excessive benefits or burdens from being felt by either side.216 But, since the statutory scheme in question gave manufacturers the right to balance these competing interests by setting the “fair-trade” price, the court held that the Legislature had delegated the power to formulate policy, thereby violating the nondelegation doctrine.217

209 See id. at 300–01.
210 See id. at 299 n.2, 300.
211 See id.
213 See id. at 355–56.
214 See id. at 359.
215 See id. at 360.
216 See id. at 362.
217 See id. Many other SJC nondelegation decisions mirror Massachusetts Mutual Life Insurance Co. and Corning Glass Works, by supporting the notion that the “threshold determination” power to formulate policy equals the right to balance benefits and costs. See, e.g., Powers v. Sec’y of Admin., 587 N.E.2d 744, 749 (Mass. 1992) (upholding a statute that balances the future fiscal health of Chelsea with the costs of suspending Chelsea’s democratic municipal government for at least a year); Town of Warren v. Hazardous Waste Facil-
In light of this precedent, a court charged with reviewing the Act would most likely attempt to determine whether the Legislature delegated the authority to balance ACEC benefits and costs to EOE A. Such a court might identify the protection of environmentally endangered areas resulting from the designation and intense regulation of ACECs as a relevant benefit. The economic losses felt by the owners of ACEC-designated lands represent the pertinent costs, because ACEC regulations restrict possible uses of their property, and make it more expensive for them to develop that property.

Taking the next step, the reviewing court could identify two fulcrums that are capable of balancing those interests. The first would control how ACECs are regulated—by placing a fulcrum at the point where regulations are potent enough to realize the benefit of preserving critical land, without becoming so burdensome that they strip land of most monetary value to its owner. The second would identify which lands are designated as ACECs—thereby locating a fulcrum at the point where environmentally critical attributes of land become so compelling that the burden of ACEC regulation should be placed on the land and its owner.

It is possible to conclude that the Act delegates the power to place both of these fulcrums to EOE A. Specifically, EOE A has the authority to determine the content of ACEC regulations as the Act states that “[EOEA] . . . shall . . . develop statewide policies regarding the acquisi-

---

218 See Act of Aug. 12, 1974, ch. 806, §§ 2(7), 40(e), 1974 Mass. Acts 807, 808, 821; Dep’t of Envtl. Mgmt., supra note 8, at 3 (describing the purpose of ACEC designation as “the long-term preservation, management, and stewardship of critical resources and ecosystems”).

219 See §§ 2(7), 40(e), 1974 Mass. Acts at 808, 821; Dep’t of Envtl. Mgmt., supra note 8, at 9, 15 (“Within an ACEC, potential projects are prohibited that would result in the loss of up to 5,000 square feet . . . . of Bordering Vegetated Wetland . . . .” ACEC regulations “prohibit the siting of solid waste management facilities within an ACEC.”); Noonan, Environmental Area, supra note 6 (“Development in ACEC-covered areas are subject to stricter environmental reviews under the Massachusetts Environmental Protection Act.”).

220 Cf. supra text accompanying notes 207–217; note 217 (discussing nondelegation cases where fulcrums balanced benefits and costs in other contexts).

221 Cf. supra text accompanying notes 207–217; note 217.

tion, protection, and use of [ACECs] . . . .”223 Moreover, EOE A also has authority to decide which lands will be designated as ACECs.224 Section 40(e) of the Act indicates that EOE A should “identify and designate” ACECs where uncontrolled development would result in irreversible damage to the environment, and lists nine types of areas that might be included.225 More than any other provision, this one might be interpreted as setting a fulcrum that balances benefits to the environment and costs to landowners at the point where development of land would cause irreversible harm to environmental features.226

Nevertheless, a “catch-all” clause later in that same provision seems to militate against this conclusion.227 Specifically, the latter clause states that ACECs might include “such other areas as the [EOEA], after holding public hearings, may determine to be of critical environmental concern . . . .”228 Therefore, this “catch-all” clause eradicates the irreversible damage provision by placing the power over locating the second fulcrum squarely in EOE A hands.229 Simply put, it gives EOE A permission to ignore all the other suggestions in the provision, and determine for itself which lands will become ACECs, so long as it holds a public hearing.230

225 Id. This provision also points to a section of the Massachusetts Code that defines “irreversible damage to the environment.” Id.; see also MASS. GEN. LAWS ch. 30, § 61 (2002) (defining “irreversible damage to the environment”).
226 See § 40(e), 1974 Mass. Acts at 821; cf. supra text accompanying notes 207-217; note 217 (discussing nondelegation cases where fulcrums balanced benefits and costs in other contexts).
228 Id.
229 See id. By way of comparison, if the Act had stated that 5% of all Massachusetts lands should be considered environmentally critical, an actual fulcrum would have been placed. The Legislature would have made the determination that only 5% of Massachusetts land is environmentally critical enough to justify ACEC regulation. The determination of which lands belong in that 5% could then be delegated to EOE A, as a detail of this larger policy. See infra text accompanying notes 238-249 (discussing nondelegation cases where fulcrums balanced benefits and costs in other contexts); cf. Askew v. Cross Key Waterways, 372 So. 2d 913,915 (Fla. 1979) (describing a Florida program nearly identical to the Massachusetts ACEC program, but containing a provision that prohibited the program from “designating more than five percent . . . of the land within the state . . . as an area of critical state concern.”).
230 See § 40(e)(10), 1974 Mass. Acts at 821. In fact, evidence suggests that EOE A does use this “catch-all” clause to largely circumvent the Act, by designating ACECs through a complex procedure that it has designed itself. See MASS. REGS. CODE tit. 301, §§ 12.01–12 (2002). Specifically, EOE A allows “any ten citizens” of Massachusetts to identify and nominate lands that they think are worthy of ACEC designation, reflecting permissiveness that is not contemplated by the Act. Compare id. § 12.05(1), with §§ 2(7), 40(e), 1974 Mass. Acts
In sum, any court reviewing the Act could conclude that the Act bears more resemblance to the statute in *Corning Glass Works*, where policy formation was delegated, than the statute in *Massachusetts Mutual Life Insurance Co.*, where the statute made that determination for itself. Specifically, the determination of how to regulate ACECs, and the decision of which lands to designate as ACECs, represent the fulcrums in the ACEC situation. It would appear that the Act gives both of these powers to EOEa, much like the statute in *Corning Glass Works* gave the power to set a "fair-trade" price to manufacturers. Moreover, unlike the statute in *Massachusetts Mutual Life Insurance Co.*, where a specific tax rate of one percent was set, the Act does not seem to specifically provide any fulcrums.

Ultimately, the Act might embody the special type of circumstance that would compel the SJC to revive the nondelegation doctrine. The court could use the plain language of the Act and comparisons to SJC precedent to decide that the power to balance competing interests in the ACEC context is delegated to EOEa. Based on that conclusion alone, the court could answer “yes” to the first Chelmsford inquiry, and hold that the ACEC program was unconstitutional from its inception because the Act impermissibly delegated legislative authority.

at 808, 821. Moreover, although the eleven criteria for ACEC eligibility bear some resemblance to the “suggestions” from the Act, when the actual decision to designate or not designate an area is made, the EOEa Secretary uses criteria that have no solid basis in the Act itself. Compare Mass. Regs. Code tit. 301, §§ 12.06, 12.09, with §§ 2(7), 40(e), 1974 Mass. Acts at 808, 821. It would appear that EOEa justifies this wide latitude by requiring itself to hold public hearings, thereby placing the activities under the “catch-all” clause of the Act’s section 40(e). Compare § 40(e), 1974 Mass. Acts at 821, with Mass. Regs. Code tit. 301, § 12.08 (“Before designating an area, the [EOEA] Secretary shall hold a public hearing.”).

232 See supra text accompanying notes 220–221.
236 See supra text accompanying notes 185–194.
C. Analyzing the Act Through the Second and Third Chelmsford Inquiries

1. The Second and Third Inquiries: “Guides” That Help Determine Whether Delegations Protect Against Arbitrariness

In the years since Chelmsford Trailer Park, the SJC has not encountered a set of facts that has compelled it to find a violation of the nondelegation doctrine through use of the second and third Chelmsford inquiries. Nevertheless, even when a delegation survives “threshold inquiry” scrutiny, it still must pass some type of second- and third-inquiry scrutiny.

Although the SJC has never said so, these second and third inquiries do not appear to represent rigid requirements, but rather seem more like “guides” that the SJC uses to help alleviate larger nondelegation concerns. Evidencing this flexibility, Massachusetts nondelegation decisions have never found second-inquiry standards to be lacking, because the SJC has: (1) substituted “general guides” for actual standards; (2) inferred standards from the overall purpose of a statute; and (3) borrowed standards from other statutes dealing with similar subject matter.

Moreover, when answering the third inquiry, the SJC has occasionally overlooked a lack of explicit safeguards. For instance, explicit standards were never mentioned in Blue Cross of Massachusetts, Inc. v. Commissioner of Insurance, but a delegation was nonetheless declared constitutional because general guides prevented the recipient of delegated power from enjoying “unfettered discretion.” Almost identically, the SJC did not find explicit safeguards in Tri-Nel Management, Inc. v. Board of Health, but stated that “[i]n regard to the third consideration . . . limitations on content and reasonableness

237 See supra text accompanying notes 146–174.
241 See Blue Cross of Mass., 489 N.E.2d at 1256.
sufficiently demarcate the boundaries of regulatory discretion so that the act provides safeguards to control abuses of discretion."\textsuperscript{242}

These patterns lead to the conclusion that the SJC does not insist upon a rigid application of the second and third \textit{Chelmsford} inquiries. More precisely, since the SJC has found second-inquiry standards in almost any situation—by using general guides, inferred standards, or borrowed standards—it is probable that future delegations will not automatically fail simply for a lack of explicit standards.\textsuperscript{243} Moreover, because the SJC has occasionally accepted delegations lacking explicit third-inquiry safeguards, future delegations without explicit safeguards are unlikely to be summarily declared unconstitutional.\textsuperscript{244} Thus, the question remains what \textit{would} compel the SJC to conclude that a delegation fails second- and third-inquiry scrutiny?

In all likelihood, the SJC would use the second and third inquiries to revive the nondelegation doctrine only if the challenged delegation did not contain a mixture of standards and safeguards sufficient to prevent delegated powers from being used arbitrarily. Some commentators offer support for this proposition by suggesting that a focus on preventing arbitrariness is the nondelegation "trend" at the state level, because many state judiciaries "uphold[] broad delegations when procedures and safeguards are in place to guard against the arbitrary exercise of . . . power."\textsuperscript{245} More importantly, there are clues that the SJC has been influenced by this "trend." In pre-\textit{Chelmsford} precedent that dealt with standards and safeguards, the SJC focused intently upon the "'totality of the protection against arbitrariness' provided in the statutory scheme."\textsuperscript{246} The \textit{Chelmsford} decision itself expressed a desire to protect citizens from "arbitrary" actions.\textsuperscript{247} In addition, even after the formal articulation of the \textit{Chelmsford} inquiries,

\textsuperscript{242} See id. (emphasis added).
\textsuperscript{243} See supra text accompanying note 239.
\textsuperscript{244} See \textit{Tri-Nel Mgmt.}, 741 N.E.2d at 45; \textit{Blue Cross of Mass.}, 489 N.E.2d at 1256.
\textsuperscript{245} Greco, supra note 27, at n.65 (citing FRANK E. COOPER, \textit{STATE ADMINISTRATIVE LAW} 73–91 (1965); KENNETH CULP DAVIS, \textit{ADMINISTRATIVE LAW TREATISE}, § 2.04 (2d ed. 1978); KENNETH CULP DAVIS, 1982 \textit{SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE}, § 3.14 (1982)). But see Rossi, supra note 27, at 1189 (suggesting that the "trend" towards protecting against arbitrariness picked up steam in the 1960s and 1970s, but stalled thereafter).
the SJC has at times remained wary of the “arbitrary exercise of authority” in delegation situations.248

Perhaps most importantly, the Chelmsford inquiries would still function coherently if the second and third inquiries actually served as interrelated “guides” that strive towards protecting against arbitrariness. Specifically, the first Chelmsford inquiry could be thought of as a filter—getting rid of delegations that are clearly impermissible because they give away the very essence of legislative power.249 The second and third Chelmsford inquiries, on the other hand, would be more like complementary “guides” that comb delegations of power passing through the initial filter for other defects—like a lack of standards or a lack of safeguards—that could lead to arbitrary results.250

2. Do Standards and Safeguards in the Act Work Together to Protect Against Arbitrariness?

Thus, in order for judicial review of the Act to precipitate a non-delegation doctrine resurgence using the second and third inquiries, a search for standards and safeguards in the Act would have to yield an overall mixture of the two which fails to protect against arbitrariness. Given the SJC’s willingness to conduct a broad search for second-inquiry standards, it is extremely likely that a reviewing court would

249 See supra text accompanying notes 184–194.
250 See Chelmsford Trailer Park, 469 N.E.2d at 1262; supra text accompanying notes 239–248. Putting these ideas together with those from supra text accompanying notes 184–194, this Note suggests that the Chelmsford inquiries be revised to reflect the current status of the doctrine. This revised test would state that:

In order to determine whether a delegation of legislative authority is “proper,” Massachusetts courts undergo a two-part analysis. First, the courts make a threshold determination of constitutionality—does a delegation give away the power to make fundamental policy decisions? See Chelmsford Trailer Park, 469 N.E.2d at 1262. If so, the statute violates the nondelegation doctrine. See generally supra text accompanying notes 184–194.

If the answer to this threshold determination is no, because only implementation of an already-stated policy is delegated, the courts move on to the second half of the analysis. Specifically, the courts evaluate whether there is overall protection against arbitrariness within a delegation of power. See generally supra text accompanying notes 239–248. To make this determination, courts may consider: (1) whether a delegation provides statutory standards, or other guidance, to direct the implementation of policy; and (2) whether a delegation provides for safeguards that prevent potential abuses of discretion by recipients of power. See Chelmsford Trailer Park, 469 N.E.2d at 1262. If the courts find that a delegation does not protect against arbitrariness, the statute violates the nondelegation doctrine. See generally supra text accompanying notes 239–248.
find some level of statutory standards in the Act. More specifically, standards to govern the content of ACEC regulations could be gleaned from a plausible purpose of the Act, which is to "protect" ACECs from "irreversible damage." Moreover, standards to govern ACEC designation could take the form of nine "suggestions" that the Act offers, listing critical land attributes that might trigger ACEC designation.

However, a court might have more trouble finding explicit safeguards in the Act. In decisions where the SJC has easily found safeguards, there were usually mechanisms put in place by a statute that allowed the Legislature to closely monitor delegated powers. As an example, in Powers v. Secretary of Administration the SJC found such mechanisms because that recipient was required to submit an annual report to the Legislature, and because the recipient was only appointed to a one-year term that could be ended at any time. In the ACEC context, a court might find that the Act imposes restraints on EOEA. In a general sense, it is true that the EOEA Secretary serves at the pleasure of the Governor, that EOEA is required to prepare an annual report of its activities, and that EOEA regulations and decisions are subject to administrative review.

Conversely, a court could also be skeptical that these safeguards actually prevent ACEC-related abuses of discretion. The ACEC program represents but a fraction of EOEA's activities, and the lack of safeguards specifically drafted to regulate the ACEC program could preclude the monitoring of delegated powers to the extent possible in Powers. For example, the Act does not require EOEA to file a report with the Legislature when an ACEC designation is made, nor does it provide an affirmative mechanism for the Legislature to monitor ACEC decisions, nor does it provide a special judicial remedy for those who feel aggrieved by EOEA's ACEC decisions. At the very least, the presence of safeguards in the Act seems debatable.

---

251 See supra note 239.
255 See id. Another safeguard was the fact that the recipient of power was under the direct supervision of the Secretary of Administration. See id.
258 See id. Of course, general administrative safeguards restrict EOEA. See Mass. Gen. Laws ch. 30A, §§ 2, 5 (2002). In the ACEC context, however, where EOEA drafts all regulations itself, one might ask if administrative safeguards really restrain discretion. See id; §§ 2(7), 40(e), 1974 Mass. Acts at 808, 821.
In order to predict whether a court would find this mix of standards and safeguards to be sufficient, it is helpful to compare the Act to situations where the SJC has evaluated delegations with similarly questionable safeguards. Any reviewing court would find it important that the SJC has found protection against arbitrariness in such instances when meaningful limits were placed on how recipients could utilize delegated powers.\textsuperscript{259} For example, in \textit{Blue Cross of Massachusetts, Inc.} the SJC found that a delegation of power to the Commissioner of Insurance was acceptable, even though the statute lacked formal safeguards.\textsuperscript{260} The delegated power in question was the Commissioner’s authority to approve insurance rate increases after finding that certain programs utilized by insurance companies were “acceptable to him.”\textsuperscript{261} The court seemed to believe that meaningful limits were placed on the Commissioner’s power because he could only review company programs and suggest alternatives—and could not force companies to initiate one program or another.\textsuperscript{262}

Likewise, in \textit{Tri-Nel Management, Inc.} the SJC found meaningful limits placed upon delegated powers, even though no formal safeguards were present.\textsuperscript{263} There, a local board of health had been delegated the power to adopt “reasonable health regulations,” and had used that power to ban smoking in all local restaurants.\textsuperscript{264} The court concluded that the local Board of Health could only pass regulations having to do with the health of the community, and any regulation it passed would have to be reasonable.\textsuperscript{265} Perhaps more importantly, the SJC was comforted by the fact that local boards had a long history of regulating local health matters, and that the Legislature itself had extensively dealt with statewide health matters.\textsuperscript{266} The court seemed confident that this long tradition of health regulation placed a meaningful limit on the type of regulation that the local Board could impose.\textsuperscript{267}

\textsuperscript{259} See infra text accompanying notes 260–267.
\textsuperscript{260} Blue Cross of Mass., Inc. v. Comm’r of Ins., 489 N.E.2d 1249, 1256 (Mass. 1986) (stating that a delegation did not give the recipient of power “unfettered discretion”).
\textsuperscript{261} Id. at 1255 n.12.
\textsuperscript{262} See id. at 1256 (noting that the Commissioner had “restricted his discretion in holding that ‘[i]t is beyond the scope of my statutory authority to dictate exactly what . . . programs should be undertaken . . .’”).
\textsuperscript{263} See Tri-Nel Mgmt., Inc. v. Bd. of Health, 741 N.E.2d 37, 45 (Mass. 2001).
\textsuperscript{264} See id. at 41.
\textsuperscript{265} See id. at 45.
\textsuperscript{266} See id.
\textsuperscript{267} See id.
In the ACEC context, it is not as easy for a court to conclude that the Act places meaningful limits on what EOEAs is able to do with its delegated authority. It is probably true that EOEAs is somewhat restrained when it determines the content of ACEC regulations. A court could find that those regulations would have to be reasonable, and that the long tradition of state environmental statutes and regulations provide a model for the type of ACEC regulation that is permissible.\textsuperscript{268} These limits seem similar to those found in \textit{Tri-Nel Management, Inc.}, because reason and regulatory precedent restrain the recipient of power.\textsuperscript{269}

Notwithstanding these observations, the Act's delegation of power to designate ACECs is probably different. In both \textit{Blue Cross of Massachusetts, Inc.} and \textit{Tri-Nel Management, Inc.}, meaningful limits meant that the recipient of delegated powers could not do certain things.\textsuperscript{270} By comparison, EOEAs has far more discretion than the recipients of power in \textit{Blue Cross of Massachusetts, Inc.} and \textit{Tri-Nel Management, Inc.} Specifically, EOEAs is not limited to the "review" power found in \textit{Blue Cross of Massachusetts, Inc.}, because the agency has the affirmative power to decide for itself which areas will become ACEC-designated.\textsuperscript{271} Moreover, though presumably limited by reason, EOEAs is not limited by the regulatory tradition found in \textit{Tri-Nel Management, Inc.}, because state environmental laws—both before and after the Act—have never addressed anything quite like the ACEC designation power possessed by EOEAs.\textsuperscript{272}

In addition, a court might also find EOEAs's wide-ranging latitude to designate ACECs troubling. The Act places few restraints on the process that EOEAs can use to designate ACECs, puts no limit on the amount of state land that EOEAs can designate as an ACEC, and voices no opinion on how frequently EOEAs should designate ACECs.\textsuperscript{273} These realizations could be enough to justify a conclusion that the nondelegation doctrine should be mobilized to strike down the Act.

\textsuperscript{268} Cf. \textit{Tri-Nel Mgmt.}, 741 N.E.2d at 45 (finding meaningful limits because board regulations would have to be reasonable and could be compared to prior statutes).
\textsuperscript{270} See \textit{Tri-Nel Mgmt.}, 741 N.E.2d at 45; \textit{Blue Cross of Mass., Inc. v. Comm'r of Ins.}, 489 N.E.2d at 1249, 1256 (Mass. 1986).
\textsuperscript{271} See § 40(e), 1974 Mass. Acts at 821; \textit{Blue Cross of Mass.}, 489 N.E.2d at 1256.
\textsuperscript{272} See § 40(e), 1974 Mass. Acts at 821; \textit{Tri-Nel Mgmt.}, 741 N.E.2d at 45.
because its mixture of standards and safeguards does not protect against arbitrariness. 274

3. The ACEC Program in Practice: Evidence of Arbitrary ACEC Designations

Even if a court remained convinced that the Act's mixture of standards and safeguards protect against arbitrariness on their face, the real-life example of what EOEA has done with the ACEC program could persuade otherwise. Put another way, where there is smoke, there is usually fire—if a court were persuaded that ACEC designations are arbitrary in practice, it could logically conclude that the Act does not protect against arbitrariness.

In fact, an alert court might detect arbitrariness from a thorough examination of areas that have been designated as ACECs in the years since the program began. 275 Although there are now ACECs in seventy-five Massachusetts cities and towns, covering almost a quarter of a million acres, it is arguable that some of the more environmentally critical areas of the state are not ACECs. 276 For example, Nantucket and Martha's Vineyard—the largest islands in the state—have not been designated as ACECs. 277 In addition, the Quabbin Reservoir—one of the largest man-made reservoirs in the world—has not been designated as an ACEC. 278 Arguably, a rational program would designate these three areas as ACECs, based on the underlying notion that ACECs are meant to be areas "where unique clusters of natural and human resources exist and which are worthy of a high level of concern and protection." 279 Thus, a court might observe that ACEC designations do not strictly correspond to all areas in the state that have critical environmental attributes, raising the possibility that the selection of ACECs is somehow arbitrary.

274 See supra text accompanying notes 239–248.
275 See DEP'T OF ENVT. MGMT., supra note 8, at 16–18.
276 See id. (listing land in the ACEC program before the December 2002 designation); Noonan, Environmental Area, supra note 6 (detailing the amount of lands and a list of towns that were affected by the December 2002 designation).
277 See DEP'T OF ENVT. MGMT., supra note 8, at 16–18.
278 See id.; see also MASS. WATER RES. AUTH., QUABBIN RESERVOIR AND WARE RIVER, at http://www.mwra.state.ma.us/04water/html/hist5.htm (last visited Sept. 21, 2003) (stating that the Quabbin Reservoir supplies the metropolitan Boston area with water, and that the 412 billion gallon waterbody is the largest man-made reservoir in the world devoted solely to water supply).
279 MASS. REGS. CODE tit. 301, § 12.03 (2002).
Digging deeper, a court might find an explanation for such arbitrariness from the process that is used to designate ACECs. Although the EEOA Secretary makes final designation decisions, an area must be nominated before it can be designated. Therefore, nominators are responsible for selecting potential ACECs from all possible state lands. Though any number of public officials can nominate land for ACEC consideration, it is also true that any ten Massachusetts citizens may do so. Further, in order for these nominators to prove that land is eligible for ACEC consideration, they must only show that the parcel in question contains vague environmental “features” from four out of eleven groups crafted by EEOA’s ACEC regulations. As an example of how easy it is for land to become eligible, a court could note that a hypothetical tract of land would be eligible for ACEC nomination if it merely contained: (1) a wet meadow; (2) a stream; (3) land of agricultural productivity; and (4) a natural area. With the bar for ACEC eli-


281 See id. §§ 12.03, .05-.07, .10.

282 See id. § 12.05(1)(a)-(d).

283 See id. § 12.06. In full, the nomination criteria state that:

To be eligible for nomination, an area shall contain features from four or more of the following groups: (1) Fishery Habitat—anadromous/catadromous fish runs, fish spawning areas, fish nursery areas, or shellfish beds; (2) Coastal Features—barrier beach system, beach, rocky intertidal shore, or dune; (3) Estuarine Wetlands—embayment, estuary, salt pond, salt marsh, or beach; (4) Inland Wetlands—freshwater wetlands, marsh, flat, wet meadow, or swamp; (5) Inland Surface Waters—lake, pond, river, stream, creek, or ox bow; (6) Water Supply Areas—floodplain, erosion area, or unstable geologic area; (7) Natural Hazard Areas—floodplain, erosion area, or unstable geologic area; (8) Agricultural Area—land of agricultural productivity, forestry land, or aquaculture site; (9) Historical/Archaeological Resources—buildings, site, or district of historical, archaeological, or paleontological significance; (10) Habitat Resources—habitat for threatened or endangered plant or animal species, habitat for species of special concern, or other significant wildlife habitat; and (11) Special Use Areas—undeveloped or natural areas, public recreational areas, or significant scenic site.

Id. Thus, so long as an area contains one feature from four out of these eleven groups, it can be nominated for ACEC consideration. See id.

284 See Mass. Regs. Code tit. 301, § 12.06(4)-(5), (8), (11); see also Letter from David E. Tully, concerned resident, to Robert Durand, EEOA Secretary 1 (Sept. 27, 2002) (on file with author) (“Under the ‘ACEC Nomination Guidelines,’ there can hardly be any parcel on land within any of the communities affected [by the December 2002 designation] that do not meet the criteria . . . .”). In fact, though this Note does not address the issue, a court might find these regulations to be so vague that they are unconstitutional under the “void for vagueness” doctrine. Compare Mass. Regs. Code tit. 301, § 12.06, with Daddario v. Cape Cod Comm’n, 780 N.E.2d 124, 130 (Mass. App. Ct. 2002) (finding that a
gibility set so low, it is entirely possible that ten Massachusetts citizens could arbitrarily nominate areas that hold special meaning to them, even if those lands were not objectively critical to the rest of the state.285 In addition, with suburban sprawl becoming an increasing concern in Massachusetts, it is possible that citizen-nominators might be motivated more by a desire to halt development in their town than by concern for the environment when nominating ACECs.286

Even if the nomination process were perfect, a court might still be concerned by the ease with which the EOEA Secretary can accept nominations, and designate an area as an ACEC. First, a public hearing is required, though there is nothing to prevent an EOEA Secretary from ignoring opposition to nominations.287 In fact, an attendee at one such hearing made the following observation after the December 2002 ACEC designation:

I'm sure it has come as no surprise to anyone who sat through the . . . ACEC hearings that [EOEA] Secretary Robert Durand has approved these designations. . . . If I thought this issue was going to receive a fair review, I was sadly mistaken. Instead, I sat listening to countless ACEC supporters extolling the virtues of Mr. Durand and vice versa, each insisting that the other had done so much more to further the cause. In contrast, Mr. Durand sat in quiet conversation with an associate statue could be void for vagueness if it is "so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application,' thereby allowing 'untrammeled [administrative] discretion' . . . and arbitrary and capricious decisions . . . ." (quoting Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 411–12 (Mass. 1973)).

285 See Noonan, Environmental Area, supra note 5 (noting that ACEC opponents believe the December 2002 nomination to have been "spearheaded by a handful of supporters" who belong to various pro-environment groups); Letter from David E. Tully, concerned resident, to Robert Durand, EOEA Secretary 2 (Oct. 7, 2002) (on file with author) ("Looking at the average person promoting the [ACEC] nomination/designation, what does this person have to lose? Absolutely nothing, his/her property values [do] not change dramatically, while the person owning the land pays the taxes, [and] carries the burden of ownership while some[one] else enjoys the scenic benefits."). Contra Noonan, Environmental Area, supra note 5 (quoting ACEC proponents as saying that more than ten nominating signatures were gathered in every town affected by the December 2002 nomination).

286 See Benjamin Krass, Note, Combating Urban Sprawl in Massachusetts: Reforming the Zoning Act Through Legal Challenges, 30 B.C. ENVTL. AFF. L. REV. 605, 606 (2003); see also Letter from David E. Tully, concerned resident, to Robert Durand, EOEA Secretary 2 (Oct. 7, 2002) (on file with author) (raising the possibility that the ACEC nominators might have been motivated by a desire to slow land development in the area).

287 See MASS. REGS. CODE tit. 301, § 12.08 (2002).
While an opponent to these designations voiced his concerns.\textsuperscript{288}

After the public hearing, the EOEAA Secretary must consider nine factors in deciding whether to designate nominated lands as an ACEC, though the "strong presence of even a single factor may be sufficient for designation . . . ."\textsuperscript{289} Thus, in order to designate an ACEC, the EOEAA Secretary is only required to hold a public hearing and conclude that one compelling reason for designation is present.\textsuperscript{290} A reviewing court might also note that the EOEAA Secretary has no incentive to seriously consider rejecting an ACEC nomination, because neither the Act, nor ACEC regulations, places a cap on the total amount of land in the state that can be designated as an ACEC.\textsuperscript{291}

Thus, in looking at the real-life administration of the ACEC program, one could observe that current ACECs do not necessarily represent the most critical environmental areas in the state.\textsuperscript{292} It is also possible that the designation process encourages that arbitrary result by permitting as few as ten citizens—whatever their motivation—to nominate land.\textsuperscript{293} The conclusion that the EOEAA Secretary is not forced to correct this arbitrariness would also be justified, because only a low level of review is required before designation, and because there is relatively little incentive for EOEAA to reject nominations.\textsuperscript{294} In sum, a court could reach the conclusion that the overall ACEC designation process is characterized by a degree of arbitrariness.

\textsuperscript{288} Simmons, \textit{supra} note 13. There is also evidence that several citizens sent Durand letters asking him to exclude land from the nomination that did not appear to meet the eligibility threshold—something that Durand ultimately chose not to do. \textit{See, e.g.}, Letter from Lee Anne Gunderson, concerned citizen, to Robert Durand, EOEAA Secretary 2 (Sept. 16, 2002) (on file with author) (comparing the nomination criteria to her land and stating, "as you can see, our property contains one or debatably two features at the most. For this reason alone, our property should never have been included [in the ACEC nomination]."); Letter from Richard R. Smith, concerned landowner, to Robert Durand, EOEAA Secretary 1 (Aug. 23, 2002) (on file with author) (requesting that his land be excluded from the ACEC nomination because "the criteria for nomination, para. 12.06 (1), (2), (3), (5), (6), (7), (9), and (11) do not apply to [my] land").

\textsuperscript{289} \textit{MASS. REGS. CODE tit.} 301, \textsection 12.09.

\textsuperscript{290} \textit{See id.} \textsection 12.08–.09. EOEAA must also make written findings concerning the decision, and make them available to the public pursuant to state administrative rules. \textit{See id.} \textsection 12.11(1).

\textsuperscript{291} \textit{See Act of Aug.} 12, 1974, ch. 806, \textsection 2(7), 40(e), 1974 Mass. Acts 807, 808, 821; \textit{MASS. REGS. CODE tit.} 301, \textsection 12.00–.16.

\textsuperscript{292} \textit{See supra} text accompanying notes 276–279.

\textsuperscript{293} \textit{See supra} text accompanying notes 280–286.

\textsuperscript{294} \textit{See supra} text accompanying notes 287–291.
Thus, it seems possible that a court charged with reviewing the Act could conclude that the ACEC program presents exactly the risk of arbitrariness that the second and third Chelmsford inquiries were designed to prevent. The lack of explicit safeguards in the statute itself, the absence of meaningful limits placed on EOEA's power, and the arbitrary administration of the real-life ACEC program supports this assertion. On these bases, a court might very well conclude that the Act fails second- and third-inquiry scrutiny, and therefore violates the Massachusetts nondelegation doctrine.

CONCLUSION

Without question, delegations of legislative power are necessary to make government work. It is simply unrealistic to believe that legislatures can effectively react to our complex and ever-changing society with statutes that address every minute detail across an infinite spectrum of policy situations. Thus, allowing delegations of legislative power is often appropriate and efficient. Yet, these delegations can only be so broad—federal and state nondelegation doctrines draw lines in the sand that legislative delegations cannot cross. In Massachusetts, one might be tempted to conclude that this line in the sand no longer exists, since the nondelegation doctrine has not been used to invalidate a statute in thirty years. Nevertheless, this Note has argued that the nondelegation doctrine could enjoy a resurgence if the judiciary were confronted with particular types of delegations.

More specifically, this Note has fleshed out the current status of the Massachusetts nondelegation doctrine, in an effort to determine what sort of delegation might compel the SJC to revitalize the doctrine. Generally speaking, delegations of legislative power in Massachusetts must survive the framework of scrutiny set out by the SJC in Chelmsford Trailer Park, Inc. v. Town of Chelmsford. This framework consists of three "inquiries" that the SJC uses to structure its nondelegation analysis. Although the SJC has historically given challenged statutes considerable deference when engaging in these inquiries, it seems likely that the inquiries could be mobilized to invalidate future delegations in two specific situations. First, it is possible that the SJC could someday use the first Chelmsford inquiry as a "threshold determination" to invalidate a delegation of power that gives away the basic responsibility to balance the benefits and costs of a legislative policy.

295 See supra text accompanying notes 251–294.
296 See supra text accompanying notes 238–250.
In the alternate, it seems equally possible that the SJC could use the second and third *Chelmsford* inquiries to invalidate a statutory delegation where the overall mixture of standards and safeguards poses an unacceptable societal risk, because it does not sufficiently protect against arbitrary actions by recipients of power.

This Note has also postulated that the legislative enactment giving rise to the ACEC program might represent the type of delegation that could spark a revival of the nondelegation doctrine. In 1974, when Massachusetts legislators drafted the Act, they delegated broad power to administer the ACEC program to EOEIA. As matters stand in 2003, EOEIA oversees an ACEC program that regulates nearly a quarter of a million acres across seventy-five Massachusetts municipalities, and in some instances, places land-use and development restriction on the vast majority of all land in a particular community.

Should the ACEC delegation be challenged in a Massachusetts court, it would be a candidate for invalidation. First and foremost, it is far from certain that the Act can pass the "threshold determination" represented by the first *Chelmsford* inquiry. More precisely, a court could easily conclude that the Act gives EOEIA the power to balance societal benefits and costs—as represented by the power to craft ACEC regulations, and by the untrammeled authority to determine which state lands should become ACEC-designated. Moreover, it is also unclear that the Act contains a mixture of standards and safeguards sufficient to survive second- and third-inquiry scrutiny in a *Chelmsford* analysis. Especially in the designation process, the risk of arbitrariness seems great, because the Act lacks explicit safeguards, the power delegated to EOEIA is not meaningfully limited, and the real-life ACEC program is plagued by arbitrariness.

In all probability, the demise of the Massachusetts nondelegation doctrine has been greatly exaggerated. Despite the reluctance of the judiciary to strike down statutes using this doctrine over the past thirty years, there are certain types of delegations that could precipitate a rebirth of the doctrine. Unless the Massachusetts Legislature revamps the ACEC program in an effort to take some power back from EOEIA,297 the statute giving birth to that program will remain a candidate to lead such a resurrection.

---

297 For an example of how the Massachusetts Legislature could revamp the ACEC program to insulate it from attack, see *supra* note 229.