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DOES CONGRESS DELEGATE TOO MUCH POWER TO AGENCIES AND WHAT SHOULD BE DONE ABOUT IT?

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

JUNE 14, 2000

Serial No. 106–219

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DOES CONGRESS DELEGATE TOO MUCH POWER TO AGENCIES AND WHAT SHOULD BE DONE ABOUT IT?

WEDNESDAY, JUNE 14, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room 2247 of the Rayburn House Office Building, Hon. Paul Ryan (vice chairman of the subcommittee) presiding.

Present: Representatives Ryan, Terry, Vitter, and Kucinich.

Present: Marlo Lewis, Jr., staff director; Barbara F. Kahlow and Jonathan Tolman, professional staff members; Bill Waller, counsel; Gabriel Neil Rubin, clerk; Elizabeth Mundinger, minority counsel; and Ellen Rayner, minority chief clerk.

Mr. RYAN. The hearing will come to order.

We are still waiting for Congressman J.D. Hayworth to arrive, I'm told, but I see that Senator Brownback is here with us, and the first panel is Congressman Hayworth and Senator Brownback.

Senator Brownback, we'd love to have you get started, and then when Congressman Hayward comes, we'll just include him in the discussion.

The purpose of today's hearing is to examine how best to ensure that congressional statutory intent is reflected in regulations developed and promulgated by the agencies.

Many of us in Congress often have a sense that Federal regulatory agencies are out of control, and they continually try to expand their power beyond the point where Congress indicated it should stop.

Several examples leap to mind. The Environmental Protection Agency asserts that it has authority to regulate carbon dioxide even though Congress has consistently rejected regulatory proposals to control greenhouse gas emissions.

The Food and Drug Administration tried to regulate cigarettes as pharmaceutical products, deviating from the plain meaning of the Food, Drug & Cosmetic Act and the FDA's longstanding interpretation of that act.

The Supreme Court just recently struck down the FDA's tobacco rule in March of this year.

But perhaps the most shocking agency lawmaking example in recent months is the most recent Department of Labor's proposed

regulation to expand unemployment insurance into a program of paid leave for parents who voluntarily quit or take time off from their jobs.

This proposed ruled, popularly known today as Baby UI, could jeopardize the solvency of State unemployment insurance funds; worse, this rule is illegal.

For 65 years, the Department of Labor has interpreted the Federal Unemployment Tax Act as permitting unemployment compensation payments only to persons who are involuntarily jobless, the truly needy.

Furthermore, when Congress enacted the Family and Medical Leave Act, it limited the program to unpaid leave and exempted small businesses.

But under the Department of Labor's rule, unemployment insurance would be used for paid leave and small businesses would not be exempt, clearly deviating from congressional intent.

Why is this shocking? This subcommittee reviewed the Department of Labor's internal legal analyses, and found that the Department of Labor was well aware that the rulemaking lacked a valid grant of statutory authority and probably could not survive a court challenge.

Yet, that did not stop the Department of Labor from charging ahead with this regulation.

I suspect that one reasons agencies ignore statutory constraints on their authority is that Congress has largely dedicated its responsibility to control the cost and scope of regulations.

Ever since the New Deal era, Congress has delegated vast grants of authority to agencies. And until March 1996, when the Congressional Review Act was enacted, Congress had no established process or mechanism for reviewing agency final rules.

However, in over 4 years, Congress has not used the CRA process to veto a single agency rule. So regulatory decisions remain firmly in the hands of non-elected Federal officials.

And this means that when agencies go too far, the regulated public has no one to hold accountable at the ballot box. Agencies are therefore continually tempted to go where no statutory authority has gone before.

Agencies do face constraints of course. The courts, from time to time, strike down agency rules as arbitrary or capricious, or as exceeding a valid grant of statutory authority.

And today we will examine some recent cases where courts have vacated or remanded major agency rules. In particular, we're going to have a look at the *American Trucking Association* v. *EPA,* something that's a very hot topic these days, that's being considered by the Supreme Court in this session.

The *American Trucking* case is noteworthy for invoking something called the non-delegation doctrine, to challenge EPA's new particulate matter and ozone standards.

The non-delegation doctrine provides that Congress may not cede legislative power, the power to make the crucial policy choices for the American people, to another branch of the Federal Government, including a regulatory agency.

Moreover, when Congress delegates regulatory power to an agency, that power must be constrained by an intelligible principle that guides and limits the agency's discretion.

In *American Trucking,* the D.C. Circuit Court of Appeals held that the EPA had construed sections of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power.

The court instructed the EPA to find an intelligible principle within the act that would explain and justify EPA's selection of new PM and ozone standards.

This case has generated enormous controversy, with supporters lauding the court for taking a small but meaningful step to curb regulatory lawmaking and critics warning that the decision, if allowed to stand, would undermine the Clean Air Act and other regulatory statutes.

On May 2000, the Supreme Court agreed to review this case, and that's where we are right now. This case is important.

However, I believe Congress should not rely solely or even primarily on judicial review to check and balance regulatory agencies, and that's why we're hearing from the two witnesses we have here today.

Regulations have the full force and effect of law. Regulations are implicit taxes. When Congress authorizes an agency to regulate, it is in effect delegating the power to make laws and levy taxes.

There is at the very least attention, some might say contradiction, between the post-New Deal regulatory process and Article I of the Constitution, which grants legislative power solely to Congress.

Why has Congress been so quick to delegate? Well, under a delegation system, Members of Congress, such as ourselves, get the credit for enacting popular sounding regulatory statutes but bear none of the responsibility for the cost and burdens of regulatory implementation.

Non-elected bureaucrats take the heat from implementing the statutes that Congress enacts. Politically, this may be a good deal for credit-grabbing, blame-ducking politicians but it means that $700 billion in annual off-budget regulatory costs escape democratic accountability.

It means that the American people live under a regime of regulation without representation.

It is for these reasons, among others, that I'm really very pleased to welcome Senator Sam Brownback of Kansas and Representative J.D. Hayworth of Arizona.

Senator Brownback is the chief sponsor of S. 1348, a bill that would require Congress to approve agency final rules by a majority vote before those rules go into effect.

The House companion bill is H.R. 2301, which is offered and introduced by Representative J.D. Hayworth, who is the man in Congress who brought this issue to the forefront I believe two Congresses ago.

J.D. is the man who paved the way on this issue in the House of Representatives, and who helped get Senator Brownback I believe to introduce this over in the Senate.

We are really pleased to have you here with us today, J.D. I believe that you have 55 cosponsors on your bill, which I am also

proud to be a part of your team, J.D. I'm very excited about hearing your testimony.

We have another panel of witnesses that will be discussing the non-delegation doctrine, and we will introduce them afterwards.

But let me just say that we're very pleased to have you here today. J.D., I know you've been toiling in those vineyards quite a bit. Sam, I know you've done a lot over in the Senate.

We're excited to have you. I understand, Senator Brownback, you have a schedule to keep, so we'd like to start with your testimony, if we may.

[The prepared statement of Hon. Paul Ryan follows:]

Vice Chairman Paul Ryan
Opening Statement
Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?
June 14, 2000

The purpose of today's hearing is to examine how best to ensure that Congressional statutory intent is reflected in regulations developed and promulgated by the agencies. Many of us in Congress often have a sense that Federal regulatory agencies are out of control -- that they continually try to expand their power beyond the point where Congress indicated it should stop.

Several examples leap to mind. The Environmental Protection Agency (EPA) stubbornly asserts that it has authority to regulate carbon dioxide (CO_2) -- even though Congress has consistently rejected regulatory proposals to control greenhouse gas emissions. The Food and Drug Administration (FDA) tried to regulate cigarettes as if they were pharmaceutical products -- flouting both the plain meaning of the Food, Drug, and Cosmetic Act and the FDA's longstanding interpretation of that Act. The Supreme Court struck down FDA's tobacco rule in March of this year.

Perhaps the most shocking agency power grab in recent months is the Department of Labor's (DOL's) proposed regulation to expand unemployment insurance into a program of paid leave for parents who voluntarily quit or take time off from their jobs. This proposed rule, popularly called Baby UI, could jeopardize the solvency of State unemployment insurance trust funds. Worse, it is illegal.

For 65 years, DOL has interpreted the Federal Unemployment Tax Act as permitting unemployment compensation payments only to persons who are involuntarily jobless -- the truly needy. Furthermore, when Congress enacted the Family and Medical Leave Act, it limited the program to unpaid leave and exempted small businesses. Under DOL's proposed rule, unemployment insurance would be used for paid leave and small businesses would not be exempt.

Why do I call this shocking? The Subcommittee reviewed DOL's internal legal analysis and found that DOL was well aware that the rulemaking lacked a valid grant of statutory authority and probably could not survive a court challenge. Yet that did not stop DOL from charging ahead.

I suspect that one reason agencies ignore statutory constraints on their authority is that Congress has largely abdicated its responsibility to control the cost and scope of regulations. Ever since the New Deal, Congress has delegated vast grants of authority to agencies. And, until March 1996, when the Congressional Review Act (CRA) was enacted, Congress had no established process or mechanism for reviewing agency final rules. However, in over four years, Congress has not used the CRA process to veto a single agency rule. So, regulatory decisions remain firmly in the hands of non-elected bureaucrats. And this means that, when agencies go too far, the regulated public has no one to hold accountable at the ballot box. Agencies are, therefore, continually tempted to go where no statutory authority has gone before.

Agencies do face constraints, of course. The courts from time to time strike down agency rules as arbitrary and capricious, or as exceeding a valid grant of statutory authority. And, today, we will examine some recent cases where courts have vacated or remanded major agency rules. In particular, we will have a look at *American Trucking Associations v. EPA*.

The *American Trucking* case is noteworthy for invoking something called the "non-delegation doctrine" to challenge EPA's new particulate matter (PM) and ozone standards. The non-delegation doctrine provides that Congress may not cede legislative power -- the power to make the crucial policy choices for the American people -- to another branch of the Federal Government, including a regulatory agency. Moreover, when Congress delegates regulatory power to an agency, that power must be constrained by an "intelligible principle" that guides and limits the agency's discretion. In *American Trucking*, the D.C. Circuit Court of Appeals held that EPA had construed sections of the Clean Air Act so loosely as to render them "unconstitutional delegations of legislative power." The Court instructed EPA to find an intelligible principle within the Act that would explain and justify EPA's determination of the new PM and ozone standards.

This case has generated enormous controversy, with supporters lauding the Court for taking a small but meaningful step to curb regulatory lawmaking, and critics warning that the decision, if allowed to stand, could undermine the Clean Air Act and other regulatory statutes. In May 2000, the Supreme Court agreed to review the case.

Important as this case is, however, I believe Congress should not rely solely or even primarily on judicial review to check and balance regulatory agencies. Regulations have the force and effect of law. Regulations are implicit taxes. When Congress authorizes an agency to regulate, it is, in effect, delegating the power to make laws and levy taxes. There is at the very least a tension -- some might say contradiction -- between the post-New Deal regulatory process and Article I of the U.S. Constitution, which grants legislative power solely to Congress.

Why has Congress been so quick to delegate? Under the delegation system, Members of Congress get the credit for enacting popular-sounding regulatory statutes but bear none of the responsibility for the costs and burdens of regulatory implementation. Non-elected bureaucrats take the heat for implementing the statutes Congress enacts. Politically, this may be a good deal for credit-grabbing, blame-ducking politicians. But, it means that $700 billion in annual off-budget regulatory costs escape democratic accountability. It means that the American people live under a regime of regulation without representation.

It is for these reasons, among others, that I am very pleased to welcome Senator Sam Brownback of Kansas, and Representative J.D. Hayworth of Arizona, as our first witnesses. Senator Brownback is the chief Senate sponsor of S. 1348, a bill that would require Congress to approve agency final rules by a majority vote before those rules go into effect. The House companion bill, H.R. 2301, introduced by Representative Hayworth, has 55 co-sponsors. I am

proud to be a co-sponsor, because I believe we will not have an accountable regulatory system until Congress takes greater responsibility for regulatory decisions.

Today's witnesses will discuss the non-delegation doctrine, ways to encourage timely Congressional comment on agency proposed rules, and H.R. 2301, among other reform proposals. I would also like to welcome our other witnesses, who will comprise Panel II: David Schoenbrod, Professor of Law, New York Law School and author, Power Without Responsibility: How Congress Abuses the People Though Delegation; Alan Raul, former Office of Management and Budget (OMB) General Counsel and partner, Sidley & Austin; Wendy Lee Gramm, former Administrator, Office of Information and Regulatory Affairs, OMB and Director, Regulatory Studies Program and Distinguished Senior Fellow, Mercatus Center, George Mason University; John Spotila, Administrator, Office of Information and Regulatory Affairs, OMB; and Wendy Wagner, Assistant Professor, Case Western Reserve Law School.

Mr. KUCINICH. Mr. Chairman.

Mr. RYAN. I apologize. The ranking member, Mr. Kucinich.

Mr. KUCINICH. Thank you very much, and I understand the Senator's schedule, and I'll move through this testimony as quickly as possible. I'm also waiting, Mr. Chairman, to go to the floor on an Interior appropriations amendment to Title I, which as soon as they go to three bells, I'm going to have to leave.

But I want to welcome my good friend, Senator Brownback and my good friend Representative Hayworth for their participation.

I had a chance to read the Roll Call page, which I thought was very well-written. I want to thank the Chair for holding this important hearing on the impact of delegation of legislative authority in our system of government.

As I think the Chair knows, and I'm sure the other Representatives and Senators know, I'm not an easy sell on these questions. I mean, at this very moment, when you talk about the powers of Congress, I think some of you will remember that I took a very strong stand about the war powers, that Congress shouldn't give the President the ability to unilaterally declare war and not check with us.

As a matter of fact, I'm with Representative Campbell and a number of other people in a case before the Supreme Court at this very moment. So I take very seriously questions that are raised about the role of Congress and Congress not ceding power.

The Constitution provides that Congress has the authority to legislate. Congress often passes broad statutes and asks agencies to fill in the details through regulation. This allows agencies, which hopefully have the expertise and the staff to address what are often extremely complicated, technical and scientific issues, to move quickly to respond to changes in science and political and social values. But it's very tough to strike this balance, and I know that's what we're concerned about.

Mr. Chairman, I want to share your concern that this process can be abused by both the Congress and the agencies. Congress can duck politically difficult issues by passing broad legislation that sets politically popular goals, and blame the administration when agencies make the tough decisions about who will bear the burden of reaching those goals. Similarly, agencies can overstep their authority and pass regulations which are not authorized by the underlying statutes. I know this is the essence of our participation here today.

Mr. Chairman, I'm looking forward to hearing from the witnesses who hopefully will shed some light on possible ways to protect against such abuse. However, I hope the solution does not further limit our ability to pass competent, politically accountable legislation that's in the public interest.

Statutes and regulations, especially environmental protections, are often based on complicated technical and scientific knowledge. It's not likely that we could duplicate the expertise provided by the agencies and we need to take advantage of this expertise.

Along the same line, we need to be wary of solutions that are scientifically naive and fail to recognize the inherent limitations of scientific principles.

A large number of legal scholars have recently written on this issue when criticizing the D.C. Circuit's recent findings in the PM Ozone case. I'll be inserting some of these critiques into the record.

[The information referred to follows:]

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Article

*63 THE INHERENT LIMITS ON JUDICIAL CONTROL OF AGENCY DISCRETION: THE D.C. CIRCUIT AND THE NONDELEGATION DOCTRINE

Richard J. Pierce, Jr. [FNa1]

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Introduction

In American Trucking Ass'ns v. EPA (ATA), [FN1] the D.C. Circuit shocked the world of administrative law by holding that the most important provision of the Clean Air Act (CAA) [FN2] is unconstitutional as interpreted and applied by the Environmental Protection Agency (EPA). Specifically, a two-judge majority of a panel held that the EPA's construction of section 109(b) of the CAA violates the nondelegation doctrine because the EPA "offers no intelligible principle" that can be used to determine the level at ***64** which a primary ambient air standard should be set. [FN3] The court further held that the EPA cannot apply section 109(b) unless and until it develops and adopts "determinate, binding standards" that the EPA and reviewing courts can apply to determine the proper level for a primary air standard. [FN4] The holding in ATA may be short-lived. It is a good candidate for reversal by the Supreme Court. The issues the ATA court addresses are hardy perennials that are worthy of serious analysis independent of the specifics of the case.

I have three goals in this Article. First, I will argue that all three judges who comprised the panel succumbed to, and contributed to, what Wendy Wagner calls the "science charade"--demanding more of science, and finding more in science, than science can deliver. [FN5] Any decisionmaking standard that purports to be significantly more

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"determinate" and "binding" than the standard the EPA applied would be a fraud. Second, I will argue that the remedy adopted by the D.C. Circuit is profoundly antidemocratic. It would either empower judges or a President to make a major policy decision that binds his successors, thereby severely limiting the power of the people to influence policymaking by voting in Presidential elections. Third, I will argue that the degree of indeterminacy that the court found fatal in the EPA's construction of CAA section 109(b) poses no threat to our constitutional structure or values. It is instead symptomatic of a basic characteristic of our political system: Presidential elections matter.

Part I provides a descriptive overview of the two rulemakings that the court reviewed. Part II describes the majority and dissenting opinions in ATA. Part III explains the different ways in which the majority and dissenting opinions fell prey to and contributed to the science charade. Part IV explains why the goals of the majority are unattainable through adoption of any plausible alternative construction of the CAA. Part V explains why the remedy imposed by the court conflicts with our most fundamental constitutional value: major policy decisions should be made by institutions that are accountable to the people. Finally, Part VI explains why I am not at all uncomfortable with the legal regime the ATA court found to be fatally flawed. That legal regime allows the people to influence agency policymaking by voting in presidential elections.

***65** I. The Rulemakings

Numerous petitions to review two rules in which the EPA revised the primary and secondary national ambient air quality standards applicable to ozone and particulate matter precipitated ATA. In the particulate matter rulemaking, the EPA increased the stringency of the annual and twenty-four-hour-primary standards and added new standards applicable to smaller particles. [FN6] There were hundreds of controverted issues in the particulate matter rulemaking. The controversy over competing levels of tolerance of periods in which particulate concentrations exceed the twenty-four-hour-standard illustrates the typical controversy. Many public health authorities urged the EPA to adopt a ninety-ninth percentile measure, while some industry commentators urged the EPA to adopt a ninety-fifth percentile measure. [FN7] However, the EPA adopted a ninety-ninth percentile measure. [FN8] In the ozone rulemaking, the EPA increased the stringency of the primary ozone standard from 0.12 to 0.08 ppm (parts per million) and made several changes in the form of the standard. [FN9] There were hundreds of controverted issues in the ozone rulemaking, but much of the controversy focused on the appropriate level of the eight-hour primary ozone standard. Many industry groups urged the EPA to adopt a 0.09 ppm standard, while many environmental groups urged the EPA to adopt a 0.07 ppm standard. [FN10] The EPA adopted a 0.08 ppm standard. [FN11]

A few general characteristics of the rulemakings will help to put the issues in context. The EPA considered over one hundred recent studies of the relationships among particulates, ozone, and human health. [FN12] It received over one hundred thousand comments on its proposals and on the studies that were the bases for its proposals. [FN13] The EPA devoted thousands ***66** of pages to the process of discussing the studies, the comments, and its reasons for making each decision in the standard-setting process. [FN14]

II. The Judicial Opinions

The ATA majority began by describing the applicable statutory regime. For each of 130 criteria pollutants, CAA section 109(b) requires the EPA to set a "primary standard" "requisite to protect the public health" with an "adequate margin of safety." [FN15] The D.C. Circuit had previously interpreted section 109(b) to authorize the EPA to consider only human health and to forbid it from considering feasibility or cost in setting primary standards. [FN16]

The majority then held that the EPA's construction of section 109(b) violates the nondelegation doctrine. It is important to follow the majority's idiosyncratic reasoning with respect to the nondelegation doctrine and to understand what it did and did not hold to be unconstitutional. The majority did not hold that the language of section 109(b) violates the nondelegation doctrine. Such a holding would be indefensible in light of the many less determinate statutory standards the Supreme Court has upheld: "public interest," [FN17] "public convenience," [FN18] "fair and equitable," [FN19] and "just and reasonable." [FN20] The majority also did not find fault in the EPA's choice of decisionmaking criteria. The EPA considers "severity of effect, certainty of effect, and size of population affected." [FN21] The majority noted that these criteria were "long ago approved by the judiciary;" they "focus the inquiry on pollution's effects on public health;" and they "pose no inherent nondelegation problem." [FN22]

The majority detected one fatal flaw in the EPA's construction of the statute, however. According to the majority, the

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"EPA lacks . . . any determinate criterion for drawing lines." [FN23] The majority illustrated this point *67 by reference to the EPA's explanation for its decision to set the ozone standard at 0.08 ppm instead of 0.09 ppm or 0.07 ppm:

EPA explains that its choice [of 0.08] is superior to . . . 0.09 ppm, because more people are exposed to more serious effects at 0.09 than at 0.08. . . . In defending the decision not to go down to 0.07, EPA never contradicts the intuitive proposition, confirmed by data in its Staff Paper, that reducing the standard to that level would bring about comparable changes. [FN24]

The majority then reasoned that the EPA's construction violates the nondelegation doctrine by conferring on the EPA impermissibly broad discretion to decide "how much is too much." [FN25] According to the majority, the "EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." [FN26]

The majority then turned to the question of the appropriate remedy for the EPA's unconstitutional statutory construction. The majority declined to hold that the statute itself is invalid, partly because such a holding is precluded by Supreme Court precedents and partly because of the majority's belief that a constitutional construction of section 109(b) "is or may be available." [FN27] Instead it remanded the proceeding to the EPA with instructions that the EPA adopt "determinate, binding standards." [FN28] The majority recognized that this remedy does not respond to a "key function of [the] nondelegation doctrine, to ensure . . . that important choices of social policy are made by Congress . . . ." [FN29] The majority ascribed two other valuable functions to its remedy, however, it will limit agency discretion, and it will provide a basis for judicial review of agency exercises of discretion. [FN30] In order to serve those functions, it seems obvious that the construction must bind the agency for the indefinite future. The majority then suggested potential "determinate, binding standards" the EPA might adopt on remand. [FN31]

The dissenting judge referred to the many circuit court decisions that have upheld and applied CAA section 109(b) and to the many Supreme Court decisions that have upheld delegations much less determinate than section 109(b). [FN32] He also adopted a different interpretation of the EPA's *68 decisionmaking process. Like the majority, the dissent illustrated his point with reference to the EPA's choice of 0.08 ppm, rather than 0.09 or 0.07, as the eight-hour ozone standard. [FN33] According to the dissenting judge, the EPA based its choice of 0.08 ppm, not on differences in degrees of harm to human health, but on differences in kinds of harm to human health. [FN34]

In the next section I argue that both opinions in ATA are symptomatic of what Wendy Wagner calls the science charade, demanding more from science than it can deliver and finding more in science than is there. [FN35] Before I begin that discussion, it is important to recognize the hyperbole in the majority opinion. The majority says that the EPA is "free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." [FN36] That assertion is a gross exaggeration. Three data points illustrate the extreme hyperbole in the court's description of the upper boundary of the EPA's discretion. First, the London Killer Fog of 1952 is believed to have killed about four thousand people per week. [FN37] Second, those catastrophic consequences of air pollution resulted from concentration levels approximately fifty times the maximum levels permitted by the particulate and ozone standards in effect before the EPA conducted the rulemakings at issue. [FN38] Third, numerous studies completed after the EPA set the prior standards found that concentrations of ozone and particulates below the prior standards produce health effects more severe and more widespread than the EPA had reason to believe when it set the prior standards. [FN39] Thus, in order to defend a decision to set new standards that are "a hair below the concentrations yielding London's Killer Fog," the EPA would have to say something to the effect of:

In light of the new evidence that suggests more severe health effects than we previously believed to result from ozone and particulates in concentrations lower than the ceilings we previously established, we hereby increase fifty- fold the primary ozone and particulate standards and permit concentrations that we estimate will produce 3,900 deaths per week, a mere 202,800 deaths per year. We conclude that these new, relaxed standards that allow greater pollution than the United States has ever experienced *69 are "requisite to protect the public health" with an "adequate margin of safety."

No court would uphold such a decision. Scientific uncertainty imposes significant limits on the practical ability of courts to review agency policy decisions, but courts are not quite as impotent as the ATA majority asserts. Of course, no agency would make such an absurd decision anyway.

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The majority's description of the bottom of the EPA's range of discretion may be accurate, however. The language of section 109(b) is susceptible to a plausible interpretation that would authorize the EPA to set standards that produce zero deaths attributable to criteria pollutants, [FN40] and the available data can support a finding that only zero concentrations of ozone and particulates will avoid all loss of life caused by ozone or particulates. [FN41] The EPA has the discretion to choose a zero level of permissible concentration, however, only if courts are the sole source of limits on the EPA's discretion. They are not. As I argue in Parts IV and VI, the President is a far more important source of constraints on agency discretion. No President would seriously consider allowing the EPA to set primary ozone and particulate standards at zero. As the ATA majority recognized, standards set at a concentration of zero would require complete de-industrialization plus implementation of programs to remove all nonanthropogenic sources of particulates and ozone. [FN42] A zero standard is almost certainly unattainable, and no President would seriously consider adoption of a standard that even approaches zero. Even an ozone standard of 0.07 ppm would require complete elimination of all anthropogenic sources of ozone in some locations at certain times. [FN43]

Once you add the President to the courts as a source of constraint on agency discretion, the EPA's range of discretion in the ozone context is ***70** probably no greater than 0.07 to 0.10 ppm, given present technology and our present understanding of the relationship between ozone and human health. Obviously, President Clinton was willing to acquiesce in a 0.08 ppm standard. It is fair to infer that he would not have been willing to acquiesce in a standard of 0.07 or 0.09 ppm. [FN44] It is quite possible that hypothetical future President Gore would be willing to acquiesce in a 0.07 or 0.075 ppm standard, given his well-publicized views on the environment. [FN45] It is also quite possible that hypothetical future President George W. Bush would be willing to acquiesce in a standard of 0.09, or perhaps even 0.10 ppm. That may be the "compassionate conservative" ozone standard. I doubt that anyone who would have any chance of being elected President would be willing to acquiesce in a standard below 0.07 or above 0.10 ppm. A standard below 0.07 ppm would be too expensive in dollars for any politician to tolerate, while a standard above 0.10 would be too expensive in lives for any politician to tolerate. [FN46] It is notable that no member of the large and diverse EPA Ozone Advisory Committee urged the adoption of a standard outside the range of 0.08 to 0.10 ppm, [FN47] and no commentor urged adoption of a standard outside the range of 0.07 to 0.12 ppm. [FN48]

I do not want to minimize the difference between 0.07 and 0.10 ppm. As I discuss in Parts III and IV, that difference can be restated in the form of many thousands of lives and many billions of dollars each year. Thus, the EPA (or more accurately, the President) has substantial policymaking discretion under its own construction of the statute. It is preposterous, however, to assert that either the EPA or the President have the discretion to choose any standard "between zero and a hair below the concentrations yielding London's Killer Fog." That would be true only if you assume both that a court would uphold an EPA decision that increases the permissible concentrations of ozones and particulates fifty-fold and that EPA administrators and/or United States Presidents have a preference for committing political suicide.

III. The Opinions and the Science Charade

In her brilliant article in the Columbia Law Review, Wendy Wagner described and documented: "The Science Charade in Toxic Risk Regulation." ***71** [FN49] In a nutshell, the article demonstrates that every institution of government demands more of science than science can provide. [FN50] This pervasive insistence on scientific answers to all important questions forces scientists and agencies to exaggerate the extent to which science can, or has, answered an important question. As Wagner shows, the science charade manifests itself in many ways that distort decisionmaking and render it difficult for anyone to understand how any health-related decision is made. [FN51] Thus, for instance, scientists and agencies routinely disguise the important value judgments and massive uncertainties that are inherent in all health-related regulatory decisions. [FN52]

We, the people, are the ultimate source of the science charade. We have a powerful antipathy toward ambiguity and a deep faith in science to resolve all important disputes about human health. [FN53] This powerful set of feelings and beliefs is magnified in the context of regulation of toxic risks. We will not tolerate either a decision that creates an avoidable risk of loss of life or a decision to spend large sums of money to avoid uncertain public health risks. [FN54] In short, we will not tolerate either uncertainties or tradeoffs in the context of regulation of toxic risks. Not surprisingly, our agents in government mirror our feelings and beliefs and translate them into statutes and judicial decisions. [FN55]

There is a problem, however. The field of toxic risk regulation is characterized both by the need to make tradeoffs between lives and dollars, and ***72** by massive uncertainties with respect to the magnitude of those tradeoffs. [FN56] As many scientists have discovered when they have attempted to explain the limits of science to a legislative or judicial

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forum, we and our agents in the legislative and judicial branches simply will not tolerate that reality.

Wagner describes scores of occasions on which legislative and judicial bodies have refused to accept the basic realities that pervade toxic risk regulation and have insisted that scientists and agencies answer questions that science cannot answer. [FN57] The single best example is the Supreme Court's decision in Industrial Union Department, AFL-CIO v. American Petroleum Institute, popularly known as Benzene. [FN58] The case involved an agency conclusion that it is impossible to determine the level of exposure at which a substance that is known to induce cancer in humans at high exposure levels begins to induce cancer in humans at lower exposure levels. [FN59] That is not a controversial conclusion in the scientific community. [FN60] Yet, when the agency confronted the Supreme Court with that regrettable limit on the capability of science, a four-Justice plurality simply ordered the agency to do the impossible. [FN61] The plurality went on to demonstrate the Justices' abysmal ignorance of elementary toxicology by providing hypothetical illustrations of large and small risks that have amused and bewildered scientists ever since. [FN62] In describing the hypothetical small and large risks, the Justices omitted data that are crucial in assessing toxic risks. [FN63] ***73** Moreover, the risk the Justices characterized as "plainly acceptable" probably exceeds the risk they characterized as "plainly unacceptable." [FN64]

The ATA case is laced with symptoms of the science charade. The language of section 109(b) provides a good starting point. Congress required the EPA to establish a primary standard for each criteria pollutant at a level "requisite to protect the public health" with an "adequate margin of safety" and a secondary standard "requisite to public welfare." The decisionmaking standard applicable to primary standards is a good illustration of health and safety absolutism, as it suggests strongly that the EPA is required to protect public health at all costs. Every court that has addressed the question has reached the conclusion that the EPA is prohibited from considering either cost or feasibility in setting primary standards. [FN65]

Taken literally, the language of section 109(b) also seems to require the EPA to set primary standards somewhat below the level at which a pollutant is likely to kill people. Congress believed that the EPA could (1) determine through the use of science the concentration of any pollutant at which the pollutant does not kill anyone; (2) set the primary standard a bit below that level; and, (3) set a still lower secondary standard that would avoid other forms of harm, for example, reduced visibility. Congress also believed that every area of the country could meet the primary standard applicable to each pollutant by 1987, as it mandated that result by statute in 1977. [FN66]

At least in the cases of particulates and ozone, each of Congress's beliefs is false. The EPA cannot use science to determine a concentration of particulates and ozone that does not kill some people. Science can only provide rough estimates of the correlation between levels of pollutants and adverse public health effects, including death. Moreover, the best evidence ***74** available suggests strongly that the relationship between concentration and health effects lies on a continuum and that there is no level at which these two pollutants do not kill some people. [FN67] Thus, if the EPA applied the two-step absolute health criterion suggested by a literal reading of section 109(b), it would have to set primary ozone and particulate standards at something like minus 0.2 ppm to zero to satisfy the "requisite to protect the public health" criterion, minus 0.2 ppm to provide "an adequate margin of safety." That would be absurd, of course.

The EPA salvaged this incoherent statutory standard by finding ambiguity in the term "public health." It rejected an interpretation of "public health" that would equate the term with freedom from the risk of death attributable to pollution, and it interpreted section 109(b) to allow it to take an "integrative approach" in setting primary standards, rather than the two-step approach that section seems to require. [FN68] The courts acquiesced in the EPA's creative interpretation. [FN69] In the case of ozone and particulates, the EPA also implicitly interpreted "protect the public health" with "an adequate margin of safety" to be consistent with thousands of deaths per year. Even if every area of the country were in compliance with the new primary standards the court struck down in ATA, the best scientific evidence available suggests that ozone and particulates would continue to kill several thousand people per year. [FN70]

The EPA's interpretation stretches the statutory language near or perhaps beyond the breaking point. Yet, I find it hard to criticize the EPA. An agency has no choice but to engage in disingenuous reasoning when Congress or a court requires it to do the impossible, as both institutions do with considerable frequency in the context of regulation of toxic risks. This background information goes a long way toward explaining the problem the ATA majority identified and attempted to correct. As I explain in Part IV, once the EPA rejected the determinate, but impossible to implement,

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standard Congress placed in section 109(b), it was left with no way of providing*75 an alternative determinate standard that would satisfy the ATA majority.

The dissenting opinion in ATA also contains a typical symptom of the science charade. The dissenting judge would have upheld the EPA's choice of standards because he interpreted the EPA as having drawn a line based on differences in kind, rather than differences in degree, of adverse health effects. [FN71] He cited passages in the EPA statements of basis and purpose to support that interpretation. Thus, for instance, the EPA explained its choice of ozone standards on the basis that "[t]he most certain [ozone-] related effects, while judged to be adverse, are transient and reversible." [FN72] The dissenting judge interpreted that statement as proof that the EPA drew the line between permanent and irreversible effects, and transitory and reversible effects, and/or between certain and uncertain effects. That interpretation is demonstrably false, but it is a typical judicial symptom of the science charade. We want science to provide clear answers to all important questions, so we find scientific answers where they do not and cannot exist.

The EPA statement the dissenting judge relied on may be technically accurate, but it is seriously misleading. Indeed, it was almost certainly included in the agency's statement of basis and purpose in an attempt to mislead a reviewing court. The statement is yet another symptom of the science charade. Since Congress and courts insist that agencies defend their decisions as objective applications of science, an agency must use words that mislead a court into thinking that is what it has done.

If you parse the words the dissenting opinion quotes, and consider those words in the context of the several thousand pages in which the EPA explains the basis for its actions, it is easy to spot the dissenting judge's interpretive error. Two features of the EPA's explanation are sufficient alone to demonstrate the judge's error. First, the EPA predicted that even compliance with the new primary standards is likely to produce several thousand deaths per year attributable to ozone and particulates. [FN73] Death is not a "transient and reversible" effect, so the EPA could not have meant to say that the health effects below 0.08 ppm are "transient and reversible." It said only that the most "certain" effects are "transient and reversible." Thus, for instance at 0.08 ppm, non-fatal incidents of pulmonary distress are more certain than death, but that is also true at every other level. Second, the EPA repeatedly referred to the health effects of ozone and particulates as lying on a "continuum," a relationship that is confirmed by looking at the EPA tables that show the estimated correlation between concentration *76 levels and health effects. [FN74] The EPA predicted only differences in degrees of health effects, not differences in kinds of effects. The estimated number of deaths varies with the concentration level, but the EPA predicted some deaths at each level it considered, including the level it chose. Of course, the degree of certainty of deaths increases from the 0.08 ppm level to the 0.09 ppm level, but it also increases at every other level.

At this point, it is useful to describe briefly the manner in which the EPA (or anyone else) attempts to estimate the health consequences of exposure to toxic substances, and the massive range of uncertainty that surrounds all such estimates. The EPA begins with studies that "find" particular relationships between different levels of exposure and various health effects. In the ozone and particulate rulemakings, the EPA considered over one hundred epidemiological and human clinical studies that had been published since it last changed the primary standards. [FN75] Each study looked at a different population that was exposed to different concentrations of pollutants for different periods of time. Some were "negative effects" studies, [FN76] for example, they found no statistically significant difference in health effects of exposure to the different concentrations that were studied. Most found statistically significant differential effects, however, and most found adverse effects, including deaths, at levels well below the pre-existing primary standards. [FN77] The studies varied greatly, however, with respect to the magnitude of both the absolute effects and the differential effects of exposures to the concentrations studied. Each study was imperfect in important respects. For example, the researchers could not definitively exclude the potential effects of other variables, and the findings of each study were qualified with reference to wide ranges of uncertainty attributable to variables such as sample size.

Each study was critiqued in detail in the over one hundred thousand comments. The EPA responded to those critiques and explained why it attached greater significance to some studies than to others. The EPA emphasized repeatedly that it "places greater weight on the overall conclusions derived from the studies . . . than on the specific concentration-response functions and quantitative risk derived from them" because of the *77 "significant uncertainty" that surrounds the findings of any individual study. [FN78]

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The EPA then used its analysis of the studies as the basis to construct a quantitative risk assessment. The process of risk assessment involves extracting findings from various studies, attaching differential weights to those findings based on an evaluation of the likely level of validity assigned to each, and then applying a variety of statistical techniques to obtain estimates of the likely adverse health effects of exposures to the concentrations under consideration. Thus, for instance, the EPA estimated that retention of the pre-existing ozone and particulate standards, rather than adoption of the new standards, would produce between 3,300 and 17,900 deaths per year. [FN79] To its credit, the EPA emphasized repeatedly the uncertainties that affect all such estimates, but it was not completely candid in disclosing the full magnitude of those uncertainties. As Howard Latin and Tom McGarity have shown, "the estimates provided by existing risk assessment models could vary million-fold, depending upon the model selected." [FN80] Albert Nichols and Richard Zeckhauser explain how different choices of plausible values for each of only three of the many factors that are used in a risk assessment cause the resulting estimates to vary "by a factor of 35,000." [FN81]

The EPA was less than fully candid in another respect as well. It did not make explicit findings with respect to the differential effects of alternative concentrations on the number of deaths caused by pollution, for example, it did not estimate the number of additional deaths that could be avoided by adopting an ozone standard of 0.07, rather than 0.08 ppm. It is easy to infer such an estimate from analysis of the EPA's risk assessment, however. EPA's Advisory Committee noted that the data gathered and evaluated by the EPA show a "continuum of biological responses down to background [nonanthropogenic source] concentrations" [FN82] and no "bright line" that distinguishes the differential effects of any pair of alternative concentrations. [FN83] ***78** In other words, the EPA would have made approximately the same estimate of lives saved by setting the standard at 0.07, rather than 0.08 ppm, that it made with respect to the number of lives saved by choosing a standard of 0.08, rather than 0.09 ppm. In both cases, of course, the estimates would be subject to a massive range of uncertainty.

It follows that the ATA majority was correct in concluding that the EPA's construction of section 109(b) provides the EPA, and reviewing courts, no "determinate, binding standard" that can be used as the basis for choosing a primary ozone standard, at least within the range of 0.00 to 0.12 ppm. [FN84] At this point, the sources of the ATA majority's concerns become apparent. If the EPA chose zero concentration standards, it would shut down the entire economy. [FN85] If it chose to retain the existing standards, it would be accepting the death of about 20,000 people per year. [FN86] Even the choice it made to increase the stringency of the standards a bit required it to choose between saving an additional 10,000 or so lives per year and avoiding additional costs of about fifty-billion dollars a year. [FN87] This seems like an enormous amount of policymaking discretion to confer on someone Chief Justice Rehnquist has referred to as a "politically unresponsive administrator[s]." [FN88] Moreover, the D.C. Circuit has been assigned the task of reviewing the EPA's line-drawing decisions. It is hard to see how the court can perform its duties effectively in light of the massive indeterminacy created by the EPA's construction of section 109(b).

It is easy to sympathize with the extreme frustration of the ATA majority. It is also easy to criticize the majority's solution, however, and to urge its rejection. The majority holds that the EPA's construction of section 109(b) is unconstitutional and that the EPA cannot take any actions to implement that section until it adopts a new construction that includes determinate, binding standards that the EPA and courts can use to determine "how much [pollution] is too much." [FN89] This is the point at which the majority fell prey to the science charade. It assigned the EPA a task that the EPA cannot perform. Indeed, no institution can perform that task.

***79** IV. Alternative Constructions of the Clean Air Act

In this section, I will evaluate four potential alternative constructions of section 109(b) that might appear to comply with the court's mandate. Before I begin that task, however, it is important to recognize that the general problem identified by the ATA majority is ubiquitous. We have tens of thousands of statutory and regulatory provisions that use numbers to draw critical distinctions. In a high proportion of cases, the line-drawing process that produced those numbers is indistinguishable from the process the EPA used to set the ozone standard at 0.08, rather than 0.07 or 0.09 ppm. Yet, the Republic has not fallen.

Two readily accessible numbers illustrate the point. You must be eighteen to vote and twenty-one to buy alcohol in the United States. In both cases, the line-drawing is based on maturity, but everyone knows that maturity does not arrive as a birthday present on either your eighteenth or twenty-first birthday. Maturation is a process that is both gradual and variable. Like the health effects of ozone and particulates, the correlation between age and maturity lies on a continuum with approximately equal intervals separating eighteen year olds from nineteen year olds, nineteen year

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olds from twenty year olds, and twenty year olds from twenty-one year olds. We could as easily defend decisions to make twenty-one the minimum age for voting and eighteen the minimum age for drinking. Indeed, many states had minimum drinking ages below twenty-one until Congress effectively forced them to adopt twenty-one as the minimum age, and twenty-one was the minimum voting age until Congress changed it to eighteen a couple of decades ago.

Of course, those necessarily arbitrary exercises in line-drawing were performed by Congress, thereby avoiding both potential attacks under the nondelegation doctrine and the concerns that underlie the nondelegation doctrine. But Congress cannot possibly make all of the line-drawing decisions that have produced tens of thousands of legally operative numbers in the Code of Federal Regulations. The counter-argument voiced by some is that Congress at least can make the few "fundamental" policy decisions that agencies now make every year. [FN90] The EPA's ozone and particulate rules would seem to fall in that category. They require some institution to make tradeoffs between sacrificing about 10,000 lives per year and spending about fifty billion dollars a year in additional pollution control costs. [FN91]

***80** The argument that Congress should make all "fundamental policy decisions" sounds good in theory, but it collapses completely upon consideration of the institutional limitations of Congress. As I have argued elsewhere, Congress is plagued by a combination of characteristics that render it totally unsuited to the task of drawing quantitative lines in the context of toxic risk regulation. [FN92] Those characteristics include inadequate knowledge, inadequate foresight, inadequate expertise, and a host of severe collective action problems. Congress rarely chooses to use numbers when it enacts regulatory legislation. On the rare occasions when it has chosen to act in that manner, the results have been disastrous. [FN93] I certainly do not want to tell Congress that it must act in that manner. I do not want to demand that the same institution that produced the absurdly unrealistic language of CAA section 109(b) must establish quantitative standards applicable to each of 130 criteria pollutants.

A. Cost-Benefit Analysis

I will begin by evaluating an alternative construction of section 109(b) that the ATA majority did not urge the EPA to consider. The ATA court could not urge the EPA to adopt a construction that permits, or requires, cost-benefit analysis (CBA). The D.C. Circuit has interpreted section 109(b) to preclude consideration of costs, and a panel of the D.C. Circuit is required to adhere to decisions issued by other panels. [FN94] There is no doubt, ***81** however, that the judges who comprised the majority in ATA would like the EPA to adopt a statutory construction that permits, or requires, CBA. Both judges are economically oriented former academics who were appointed by President Reagan, [FN95] and the author of the opinion has urged agency use of CBA in similar contexts. [FN96] In fact, in all likelihood, the judges who comprised the ATA majority were motivated in part by their desire to create a vehicle through which the en banc circuit will have the opportunity to reconsider, and potentially to overrule, the 1980 panel decision that held that the EPA cannot consider costs in implementing section 109(b). [FN97] It is an interesting irony that the excessive discretion that the ATA majority found was attributable in part to a prior judicial decision that had the putative effect of limiting the EPA's discretion.

Contrary to the apparent belief of the ATA majority, CBA has little, if any, potential value to a reviewing court as a means of limiting agency discretion. Indeed, a CBA is likely to be useful to a court only as a modest source of reassurance that the agency has chosen one of countless standards that fall within the massive range of overlap between plausible estimates of the costs and benefits of alternative standards. CBA cannot provide an "objective" estimate of costs and benefits because its results depend critically on value judgments made by the analyst. CBA also cannot provide a "determinate" standard because it is capable of producing only extraordinarily broad ranges of estimates of costs and benefits. Agency rules almost always have the potential to create a wide range of estimated benefits that overlaps significantly with a wide range of estimated costs. Lisa Heinzer ***82** ling's analysis of John Morrall's famous cost of lives saved table is invaluable to illustrate those characteristics of CBA. [FN98]

The results of a CBA can be summarized in one of two ways: estimated costs versus estimated benefits or estimated cost per life saved. In 1986, John Morrall, an economist at the Office of Management and Budget, used the second method to summarize the results of CBAs he had performed of forty-four federal health and safety rules. [FN99] According to Morrall's table, twenty-four of those rules required the incurring of compliance costs in excess of seven million dollars per life saved, the high end of the range of economists' estimates of the value we place on reducing risks

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to our lives. [FN100] Morrall listed thirteen rules with estimated costs per life saved in excess of one hundred million dollars and three rules with estimated costs per life saved in excess of a billion dollars. [FN101] Morrall provided only a limited description of the methodology he used to create his table and none of the data he used for that purpose. Over the next twenty-two years, scores of scholars and witnesses before congressional Committees quoted the Morrall table uncritically to support the proposition that federal regulatory agencies often act irrationally by issuing many rules that require society to incur costs that vastly exceed benefits. [FN102] Lisa Heinzerling's 1998 article in Yale Law Journal should bring that routine practice to an abrupt halt. More importantly for present purposes, that article demonstrates what Heinzerling calls "the perils of precise quantification"--a recurring symptom of the science charade. [FN103]

Heinzerling did what no one else had bothered to do. She obtained all of the data that were the basis for Morrall's estimates. She then used a process of reverse engineering to identify Morrall's methodology, including the many places where he used a particular number of lives saved from a wide range of estimated lives saved and the many places where he inserted contestable values into the calculation process. Morrall often ignored all benefits except lives saved, even though many of the rules had other significant health and environmental benefits. [FN104] He often chose an estimate of lives ***83** saved that was at the low end of the wide range of estimated lives saved that the available data would support. [FN105] He then reduced that number further by using the controversial practice of discounting the value of lives saved in future years. [FN106]

After she identified Morrall's data sources and methodology, Heinzerling then calculated alternative CBAs for each of the twenty-four rules that Morrall had identified as excessively costly. [FN107] In each case, she used estimates of health effects that were within the range of estimates supported by the available data and, with the exception of her refusal to discount the value of future lives saved, she used a methodology that is within the mainstream of the CBA literature. Based on her plausible alternative CBAs, Heinzerling concluded that most of the rules Morrall considered outrageously expensive were actually "bargains." [FN108]

Heinzerling does not prove that Morrall's CBAs are wrong and that hers are right. That is not her point. Rather, she demonstrates that the inherent range of uncertainty in performing a CBA is massive. Heinzerling's analysis of Morrall's CBA estimate of the Occupational Safety and Health Administration's (OSHA's) formaldehyde rule typifies the situation she found. Morrall estimated that the formaldehyde rule would cost $72 billion per life saved. [FN109] Heinzerling explained how OSHA derived its sharply contrasting estimate of $21.8 million per life saved, [FN110] which was less than one three thousandth of Morrall's estimate. She also showed that even OSHA may have underestimated the number of lives that are likely to be saved by the rule, thereby inflating its estimate of cost per life saved. [FN111] Indeed, the D.C. ***84** Circuit criticized OSHA for using data and methodologies that created a downward bias in its estimate of lives saved. [FN112] Heinzerling then explained how OSHA could have used the available data with respect to the health benefits of the rule other than avoidance of fatalities to support an estimate that the formaldehyde rule actually saved lives at a negative net cost per life saved, although she identified serious problems with that interpretation of the data as well. [FN113] Thus, we can use CBA only to show that the plausible estimates of cost per life saved by the formaldehyde rule range from a net negative cost, to OSHA's $21.8 million, to Morrall's $72 billion. Heinzerling found similar differences of over a thousand-fold between Morrall's CBAs and plausible alternative CBAs for the other rules Morrall claimed to be outrageously expensive. [FN114] She even found cases in which Morrall's own CBAs of the same rule differed by a factor of over tenfold. [FN115]

Heinzerling's careful study of alternative CBAs persuaded her that we should abandon completely the use of CBA as a decisionmaking tool. She concluded that the "danger of misinterpretation and misunderstanding is [too] great." [FN116] My reading of her study persuades me that we should continue to use CBA. Heinzerling identified and discussed numerous cases in which agencies declined to issue proposed rules because the agencies concluded that a proposed rule would impose costs massively disproportionate to the benefits it would yield. [FN117] Those cases illustrate the value of CBA to a decisionmaker.

I agree completely with Heinzerling's criticism of many CBAs as illustrative of the perils of precise quantification, however. We should respond to that serious problem by placing greater emphasis on candor in disclosing both the important value judgments that underlie any CBA and the massive ***85** range of uncertainty inherent in CBA. [FN118] No agency, OMB analyst, witness, or scholar should summarize the results of any CBA with an inherently misleading single number or set of numbers, for example, the estimated cost per life saved is X, or the estimated costs are Y and the estimated benefits are Z. The results of any CBA should be summarized only in the form of the range of results that can

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be supported through use of the available data and plausible methodologies. Thus, for instance, the CBA for OSHA's formaldehyde rule should be summarized as producing cost estimates between zero and $72 billion per life saved.

Heinzerling's study provides powerful evidence to refute the belief of many that CBA is a useful tool for application by a reviewing court. Heinzerling found only two cases in which a court rejected an agency rule based on the court's application of CBA. [FN119] That is not surprising, given the extraordinarily wide range of estimates that alternative CBAs can yield. Scientifically illiterate and politically unaccountable judges are incompetent to resolve the science-based, data-based, or value-based disputes that produce CBA estimates that routinely vary by a multiple of over one thousand. Thus, an interpretation of CAA section 109(b) that requires the EPA to use CBA in implementing CAA section 109(b) would not satisfy the ATA majority's demand for a "determinate, binding standard" that would allow the EPA and reviewing courts "to state intelligently how much is too much." CBA is far too value- laden and indeterminate to perform that function.

I would much prefer an interpretation of section 109(b) that permits the EPA to consider CBA for two other reasons, however. First, I am confident that the EPA did, in fact, consider its CBA of the ozone and particulate rules, notwithstanding its claims to the contrary. [FN120] The EPA states that it never considers cost in making decisions under section 109(b). [FN121] Yet, it always conducts a CBA before it takes any such action. For instance, the EPA prepared a 718-page CBA of the proposed ozone and particulate rules. [FN122] The EPA says that it prepares a CBA only to aid states in the process of developing implementation plans, and never considers the CBA in its own decisionmaking. [FN123] Yet, the CBA is available to anyone on the ***86** Internet. [FN124] I cannot believe that no one in the White House, the Administrator's office, and the Advisory Committee spent the two minutes necessary to obtain access to the CBA, and the half hour necessary to read the twenty-two-page executive summary. If no one in the decisionmaking process actually considered costs, I cannot imagine how the EPA chose an ozone standard of 0.08 ppm, rather than 0.07, 0.06, etc. It is clear that each reduction in concentration saves lives. [FN125] It follows that any decisionmaker who actually ignores cost and feasibility would choose a lower standard than the EPA chose.

The EPA Administrator undoubtedly met with the President at some point during the rulemaking process, to tell him that she was considering taking an action that she thought might save about ten thousand lives per year. No President would acquiesce in a decision of that magnitude without first discussing it with the Administrator. I cannot imagine any President who would not then ask the Administrator for some estimate of the cost of the action before acquiescing. I also cannot imagine any President who would acquiesce in the Administrator's proposed action if she responded with either: "I have no clue," or "I think it will require the de-industrialization of the United States." (I doubt that President Clinton has forgotten James Carville's famous advice: "It's the economy, stupid.") Thus, an interpretation of section 109(b) that allows the EPA to consider costs would further the goal of transparent decisionmaking by allowing the EPA to explain how it used CBA in its decisionmaking process.

Second, the ATA court would have found the EPA's CBA reassuring if it had been given access to that document. Using the best available sources of data, plausible assessments of health risks, and defensible value-based methodological assumptions, the EPA estimated that the new rules would cost an estimated $46.6 billion per year and would yield monetary benefits in the range of $21.5 billion to $118 billion per year. [FN126] To its credit, the EPA's CBA repeatedly emphasized the uncertainties inherent in the process of preparing a CBA. CBA is a useful decisionmaking tool only if the decisionmaker understands the massive range of uncertainties inherent in the process of estimating the costs and benefits of a proposed rule.

I have only one serious criticism of the EPA's CBA. By summarizing its cost estimate with a single figure, instead of a wide range, [FN127] and by ***87** summarizing its benefits estimate with reference to a relatively narrow range, the EPA also has succumbed to the science charade. It stated the results of its CBA with much greater precision than the underlying science permits. The EPA stated its benefit estimate in the form of a range, but the range it reported is far too small. Given the enormous range of uncertainty apparent in the findings of the one hundred plus epidemiological studies and the wide range of defensible value judgments that the EPA could have used to calculate the estimated benefits of the rules, a competent analyst could easily defend as plausible benefit estimates that are both far below the low end of the range the EPA reported and far above the high end of the range the EPA reported. [FN128] It is also apparent from the underlying data that the EPA could have used CBA to support its choice of any standard between 0.07 and 0.10 ppm. [FN129] Thus, judicial access to the CBA would be of no help whatsoever to a court that wants to be able to limit the EPA's discretion. By contrast, it is helpful to a President because he can use his values as the basis

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for choosing where to draw the line between protection of public health and costs, given the massive uncertainties inherent in estimating both the costs and benefits of alternative standards. In a democracy, the President's values are the best available proxy for the values of the people.

B. Zero Health Risks

After noting that the EPA was precluded from using CBA by the D.C. Circuit's prior opinions, the ATA majority suggested other ways in which ***88** the EPA might be able to comply with the court's mandate. [FN130] First, the "EPA could make its criterion the eradication of any hint of direct health risk." [FN131] The majority recognized that "[t]his approach is certainly determinate enough." [FN132] It also noted, however, that the EPA has shown "no inclination to adopt it." [FN133] The reasons are obvious. As the majority recognizes, a zero health risk criterion could be satisfied only with zero concentrations of ozone and particulates, which in turn could not be attained even with complete de-industrialization. [FN134] No one who could be elected President would make that tradeoff between public health and prosperity. Indeed, public health would not fare well for long in an impoverished nation.

The majority went on to suggest that the EPA might choose a variant of a no adverse health effects criterion. For this purpose, the EPA "might . . . use standards drawn from other areas of the law, such as the familiar 'more probable than not' criterion." [FN135] In other words, the EPA could use a criterion that requires it to set emissions levels that will eliminate the probability of adverse health effects. Given the available data on the relationship between human health and exposure to ozone and particulates, this criterion also would require the EPA to set maximum permissible concentrations at levels that cannot be attained even with complete de-industrialization. There is no level of ozone or particulates above zero that does not produce a probability of loss of life. [FN136] It is hard to believe that the two economically-oriented conservative Republican judges who formed the ATA majority are seriously urging the EPA to adopt a decisionmaking standard that requires complete de-industrialization. Whatever the majority's agenda may be, that cannot be among its goals.

C. The "Modest Deviation from Stringency" Criterion

The ATA majority suggested another potential constitutional construction of section 109(b) by reference to another agency's constitutionally-permissible construction of a similar statutory provision. [FN137] In 1991, a D.C. ***89** Circuit panel held that the OSHA's construction of section 3(8) of the Occupational Safety and Health Act violated the nondelegation doctrine by providing decisionmaking criteria that were inadequate to limit OSHA's discretion or to provide a basis for judicial review of OSHA actions. [FN138] The author of the majority opinion in ATA wrote that 1991 opinion. The two opinions are almost identical with respect to their holdings, reasoning, and choice of remedies. The only significant difference between the two opinions is with respect to the court's treatment of CBA. Since the D.C. Circuit had not previously held that section 3(8) precludes OSHA from using CBA, the court was free to suggest that OSHA adopt a construction of section 3(8) that requires it to use CBA as a way of complying with the court's mandate to adopt a constitutional construction of section 3(8). The court suggested that OSHA comply with its mandate in that manner. [FN139]

OSHA rejected the court's suggestion. Instead, it attempted to satisfy the court's mandate by adopting a statutory construction that requires OSHA to issue safety standards that ***90** provide "a high degree of worker protection." [FN140] In a 1994 opinion, the same panel held that OSHA's new construction satisfied the nondelegation doctrine by precluding the agency from doing "nothing at all" once it identifies a significant safety risk. [FN141] Presumably, the ATA majority would be equally content with an EPA construction of CAA section 109(b) that requires the EPA to issue primary air quality standards that provide a "high degree of protection" of the health of people who are exposed to criteria pollutants. After all, both the 1991 and 1994 opinions were written by the same judge who wrote the majority opinion in ATA.

I do not understand how the EPA's adoption of a "high degree of protection" criteria for applying section 109(b) would have any effect whatsoever on its degree of discretion in issuing primary air quality standards or on a court's ability to review the EPA actions taken pursuant to section 109(b). That construction seems to be nothing more than a way of paraphrasing the language of section 109(b) and the language the EPA already uses to describe the criteria it uses to apply that section. A decisionmaking standard that requires a "high" degree of protection of human health obviously says nothing that is the least bit helpful in deciding how "high" is too high or too low. At most, such a standard would preclude the EPA from "doing nothing at all" or from issuing ozone and particulate standards that are "a hair below the concentrations yielding London's Killer Fog." As I demonstrated in Part II, however, the EPA does not have that

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discretion today.

The construction that OSHA adopted and the court approved obviously would have no effect on the EPA's discretion to choose any standard at or below the 0.08 ppm standard it chose in its ozone rulemaking. Such a construction would limit only the upper end of the agency's range of discretion. Thus, if its adoption by the EPA had any effect at all, it would require the EPA to adopt a standard of 0.07 ppm or lower. A 0.07 ppm standard would be much more costly than a 0.08 ppm standard. It would require complete cessation of all industrial and transportation activities in some areas during some periods of time, [FN142] which would result in a partial de-industrialization of the United States. Are two conservative Republican judges really trying to force the Clinton Administration to adopt a construction of CAA that requires both President Clinton and all of his successors to impose far more costly air quality rules? I doubt it, but this is a good point to repeat the old cliche: "Be careful what you ask for. You might get it." Hypothetical future President Al Gore might welcome the opportunity to say that he was compelled by the order of two Republican judges to issue more costly air quality rules. Conversely, hypothetical future President George W. Bush would find it hard to live with a construction of the CAA adopted by the Clinton Administration, under compulsion of an order issued by two Republican judges that requires him to issue rules that are far more costly than he would prefer.

D. The "Generic Unit of Harm" Criterion

The ATA majority went on to suggest that the EPA might adopt a "generic unit of harm" criterion "that takes into account population affected, severity [of harm], and probability [of harm]." [FN143] For this purpose, the majority suggested that the EPA might adopt "the approach Oregon used in devising its health plan for the poor." [FN144] Oregon attached values to various health states by polling a sample of citizens. As the ATA majority noted, however, the Department of Health and Human Services concluded that the Oregon approach violated the Americans with Disabilities Act. [FN145] The ATA majority suggested that the EPA could avoid this problem by relying in part on a poll of asthmatics to determine the values they place on the various ***91** states of pulmonary health that correlate with exposure to various concentrations of ozone and particulates. [FN146]

At bottom, this suggested construction would require the EPA to use a peculiar version of a CBA. The new version of a CBA would differ from a traditional CBA in three significant ways. First, it would require much more time and person-hours to implement, because it would require analysts to value more health benefits, such as, non-fatal pulmonary distress, hospitalization, etc. [FN147] Second, it would yield a much higher range of estimated benefits of a rule that reduces permissible ozone and particulate concentrations, both because it would place explicit values on more adverse health effects, and because it would reflect the higher values of the most sensitive subset of the population. Third, it would not include any discussion or consideration of costs, in order to avoid violation of the D.C. Circuit's prior holding that the EPA cannot consider costs in implementing section 109(b).

Like the ATA majority's other suggestions, it is impossible to take the "generic unit of harm" suggestion seriously. Its flaws are obvious. It would just provide a different method of describing the situation that the EPA has already found to exist. The EPA has estimated a variety of adverse health effects of varying levels of ozone exposure, such as, deaths hospitalizations, and incidents of non fatal pulmonary distress. The court urges the EPA to translate each health effect into a common unit of measure, for example, one death equals four hospitalizations or eight non-fatal incidents of respiratory distress. It is hard to see any benefit from such an exercise. It is simply another symptom of the science charade--requiring the illusion of objectivity and quantitative precision in a context in which science is incapable of providing either.

The resulting estimates of generic units of harm at various exposure levels would be worthless as a means of deciding "how much is too much." The generic unit of harm table would show exactly the same relationship between concentration and adverse health effects that the EPA has already found to exist. The best data available suggest the existence of a "continuum," with no clear break points and no thresholds below which no risks to human health exist. [FN148] The generic unit of harm table would show that same continuum. The table would have to be compared with something else to determine "how much is too much." The only logical comparative frame of reference is cost. Yet, the courts have held that the EPA cannot ***92** consider cost. Finally, even if the EPA could identify some legally-permissible comparative frame of reference--perhaps some cleverly disguised surrogate for cost--the result would not comply with the court's mandate. No matter how cleverly it is disguised or how its results are stated, CBA cannot be a

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"determinate, binding standard." It is premised on a series of highly subjective value judgments and it is subject to massive indeterminacy. [FN149]

V. The Court's Remedy Is Anti-Democratic

The ATA majority was motivated by a concern that has been voiced by many respected jurists and academic commentators. Broad statutory delegations of power to agencies allow "politically unresponsive administrators" to make "fundamental policy decisions" that should be made only by elected officials. [FN150] Many people have characterized this phenomenon as a major flaw in our system of constitutional democracy. [FN151] For reasons that I will explain in part VI, I do not share that concern.

I do see, however, two major flaws in our system of constitutional democracy that would be created by the ATA majority's attempt to correct what it perceives to be a fatal flaw. The first flaw is obvious and immediate. Two unelected, life-tenured judges have decided that the United States should forego the opportunity to save about 10,000 lives per year in order to save about fifty billion dollars per year. Judges are the least politically accountable officials. They are the worst possible choice of officials to make such fundamental policy decisions in our system of constitutional democracy. [FN152]

The second unconstitutional and anti-democratic effect of the decision of the ATA majority is less direct and more subtle, but it is equally disturbing. As I understand the D.C. Circuit's 1991, 1994, and 1999 opinions, an agency can save its statute from a holding of unconstitutionality only by ***93** adopting a construction of its statute that binds the agency forever. If my interpretation is incorrect, the opinions are incoherent and meaningless. If an agency remains free to change its construction of the statute in the future, the court has had no effect whatsoever on the agency's degree of discretion or on the ability of reviewing courts to limit agency exercises of discretion. Under that interpretation, the D.C. Circuit has simply used the nondelegation doctrine as a bizarre vehicle to restate the pre-existing legal regime announced in cases such as Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. [FN153]

If my interpretation is correct, the court is ordering President Clinton to make a fundamental policy decision that will bind all of his successors. Such a legal regime would create a real problem for our system of constitutional democracy. Its effects would include reducing significantly the incentive to vote in presidential elections. In the year 2000 election, it is a safe bet that we will have a choice between a Democrat candidate who promises to increase the degree of protection provided by environmental rules and a Republican candidate who promises to reduce the costs of government regulation. Millions of people will have the opportunity to vote their preferences with respect to the critical issue that the ATA majority characterizes as "how much is too much."

Yet, if the legal regime created by the ATA majority is accepted as a permanent feature of our legal system, the voters who comprise a majority in that election will be frustrated to discover that their vote had no effect on any "fundamental policy decision." If hypothetical future President Gore is elected, he will be powerless to increase the degree of environmental protection provided by EPA rules. If hypothetical future President Bush is elected, he will be powerless to decrease the costs of environmental regulation. I would have to reconsider my decision whether to vote in presidential elections in such a dramatically transformed political system. Why bother to vote for a new President if the courts will require him to adhere to all of the major policy decisions of one of his predecessors? I would also be much less comfortable living in such a political system. Our system of government would be much less accountable to the people if all fundamental ***94** policy decisions had to be made either by unelected, life- tenured judges or by Presidents who can bind their predecessors for decades.

VI. Broad Delegations of Power Are Not a Threat to Constitutional Democracy

In this section, I explain why I do not share the belief of the ATA majority that broad delegations of policy making discretion to agencies violate the Constitution and represent a serious flaw in our system of democracy. The answer is simple. "Fundamental policy decisions," like the EPA's ozone and particulate decisions, are not made by "politically unresponsive administrators," except in the most narrow, naive, and formalistic sense. The EPA Administrator is chosen by the President and serves at the pleasure of the President. A President cannot "overrule" or "displace" a decision of the Administrator, but a President can engage in what the D.C. Circuit has characterized as "jawboning" or

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"arm twisting" in an attempt to persuade the Administrator to act in a manner consistent with the President's preferences. [FN154] There is ample reason to believe that Presidents routinely engage in that practice when an agency makes a "fundamental policy decision" and ample reason to believe that presidential jawboning is invariably successful in that context. [FN155] Thus, it is far more accurate to attribute these decisions to the President, as the Supreme Court did in Chevron. [FN156] Moreover, the judicially-imposed prohibition on the EPA's consideration of costs in setting air quality standards does not apply to the President. He can, and undoubtedly does, consider costs and benefits in determining his preferences and, hence, the action he urges the Administrator to take.

The standard Congress included in section 109(b) is far more determinate than the standards it often employs in statutes that delegate power to agencies. [FN157] I have attempted to demonstrate both in this article and elsewhere that it is absurd to expect Congress to make the types of decisions that the EPA made in the ozone and particulate rulemakings, and that it would be destructive in many ways to demand that Congress make all decisions of this type. [FN158] In cases where Congress was able to respond to such a ***95** demand by making a decision, we would get terrible congressional decisions. [FN159] In cases where Congress was unable to comply with such a demand, we would get judicial resolutions of fundamental policy decisions by default. If I am right, we are left with limited choices. First, we could assign the discretion to make fundamental policy decisions to judges. That is one potential result of the decision in ATA. Second, we could force the incumbent President to make a fundamental policy decision that binds his predecessors in perpetuity. That is the other potential result of the decision in ATA. Third, we could assign that discretion to each President, as the Supreme Court held that we must in Chevron. I find that choice incredibly easy. In our system of constitutional democracy, presidential elections matter. If a majority of the electorate disapproves of how the incumbent President decides "how much is too much," they will elect a new President who will draw the line either higher or lower than the incumbent. That is not a threat to democracy. That is democracy. The Supreme Court described the principles that apply to such policy disputes in its unanimous opinion in Chevron:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices--resolving the competing interests which Congress . . . left to be resolved by the agency charged with the administration of the statute in light of everyday realities. [FN160]

[FNa1]. Lyle T. Alverson Professor of Law, George Washington University. I am grateful to Lisa Heinzerling, Tom Sargentich, Wendy Wagner, and the participants in the George Washington works-in-process group for making many helpful suggestions on an earlier version of this Article.

[FN1]. 175 F.3d 1027 (D.C. Cir. 1999). On October 29, 1999, the D.C. Circuit granted rehearing en banc on some issues, but denied rehearing en banc with respect to the issue addressed in this Article. American Trucking Ass'ns v. EPA, 195 F.3d 4 (D.C. Cir. 1999).

[FN2]. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified in 42 U.S.C. § 7407(d) (1994)).

[FN3]. ATA, 175 F.3d at 1036-37. I will address this holding only in part I of the opinion. The Court addressed several other issues in parts II, III, and IV of the opinion.

[FN4]. See id. at 1038 (discussing agency use of such standard and likelihood of arbitrary abuse).

[FN5]. Wendy E. Wagner, The Science Charade in Toxic Risk Regulation, 95 Colum. L. Rev. 1613 (1995).

[FN6]. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) (codified at 40 C.F.R. pt. 50 (1999)) [[hereinafter Particulate Matter Standards].

[FN7]. See id. at 38,678 (discussing comments that use of ninety-ninth percentile would not significantly increase stability).

[FN8]. See id.

[FN9]. See National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (codified at 40 C.F.R. pt. 50 (1999)) [hereinafter Ozone Standards] (replacing current one-hour standard with eight-hour standard).

[FN10]. See id. at 38,870 (separating comments into two distinct groups).

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[FN11]. See id. at 38,868.

[FN12]. See id. at 38,894 (referencing studies used by EPA for ozone standards rulemaking); see also Particulate Matter Standards, 62 Fed. Reg. 38,652, 38,709-11 (1997) (referencing studies used by EPA for particulate matter rulemaking).

[FN13]. See Particulate Matter Standards, 62 Fed. Reg. at 38,654; Ozone Standards, 62 Fed. Reg. at 38,858.

[FN14]. The statements of basis and purpose occupy 244 pages of the Federal Register and incorporate by reference the lengthy analyses contained in the Notices of Proposed Rulemaking, the Criteria Documents, the Advisory Committee reports and recommendations, and the Staff Reports. See Particulate Matter Standards, 62 Fed. Reg. at 38,655; Ozone Standards, 62 Fed. Reg. at 38,859.

[FN15]. American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999).

[FN16]. See id. at 1038.

[FN17]. National Broad. Co. v. United States, 319 U.S. 190, 227 (1943).

[FN18]. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

[FN19]. Yakus v. United States, 321 U.S. 414, 414 (1944).

[FN20]. Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944). For a more complete discussion of the nondelegation doctrine, see 1 Kenneth Davis & Richard Pierce, Administrative Law Treatise § 2.6 (3d ed. 1994 & 1999 Supp.).

[FN21]. ATA, 175 F.3d at 1035.

[FN22]. Id. at 1034-35.

[FN23]. Id. at 1034.

[FN24]. Id. at 1035.

[FN25]. Id. at 1034.

[FN26]. Id. at 1037.

[FN27]. ATA, 175 F.3d at 1038.

[FN28]. Id.

[FN29]. Id.

[FN30]. See id. at 1038.

[FN31]. Id. at 1038-40.

[FN32]. See id. at 1057-58 (Tatel, J., dissenting).

[FN33]. See ATA, 175 F.3d at 1058 (Tatel, J., dissenting).

[FN34]. See id. at 1059.

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[FN35]. See Wagner, supra note 5, at 1613.

[FN36]. ATA, 175 F.3d at 1037.

[FN37]. See id. at 1036 n.3 (citing W.P.D. Logan, Mortality in the London Fog Incident, 1952, Lancet, Feb. 4, 1953, at 336-38).

[FN38]. See id. at 1036-37.

[FN39]. S ee Particulate Matter Standards, 62 Fed. Reg. 38,652, 38,655- 56 (1997); Ozone Standards, 62 Fed. Reg. 38,856, 38,859-60 (1997).

[FN40]. Indeed that seems to be the most plausible interpretation of "requisite to the public health" with an "adequate margin for safety."

[FN41]. The EPA repeatedly referred to all of the adverse health effects of particulates and ozone, including deaths, as lying along a "continuum" with no "discernible threshold" below which the pollutants have no adverse health effects. See generally Particulate Matter Standards, 62 Fed. Reg. at 38,652 (discussing adverse health consequences of different concentrations of particulates and difficulty in determining appropriate threshold level); Ozone Standards, 62 Fed. Reg. at 38,863 (noting adverse health consequences of different concentrations of ozone).

[FN42]. See ATA, 175 F.3d at 1038 n.4.

[FN43]. There are times and places where ozone concentrations exceed 0.07 ppm solely as a result of nonanthropogenic sources. Id. at 1036. High proportions of ozone and particulates have their origin in nonanthropogenic sources. Thus, for instance, up to half of the particulates in the air in Florida originate in nonanthropogenic sources in Africa. See Science Notebook, A Breath of Africa in Miami, Wash. Post, July 19, 1999, at A9.

[FN44]. See infra text accompanying notes 120-30, 155-59.

[FN45]. See generally Vice President Al Gore, Earth in the Balance: Ecology and the Human Spirit (1993) (asserting importance of environmental protection through policymaking).

[FN46]. See infra text accompanying notes 120-30, 155-59.

[FN47]. See Ozone Standards, 62 Fed. Reg. 38,856, 38,864-65 (1997) (showing ranges suggested by those implementing regulations).

[FN48]. See id. at 38,862-65 (noting ranges suggested in comments).

[FN49]. Wagner, supra note 5. For other excellent discussions of this phenomenon, see Howard Latin, Good Science, Bad Regulation, and Toxic Risk Assessment, 5 Yale J. on Reg. 89 (1988); Thomas O. McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L.J. 729 (1979); and William D. Ruckelshaus, Science, Risk, and Public Policy, 221 Science 1026 (1983).

[FN50]. See generally Wagner, supra note 5, at 1645-68 (discussing agency manipulation of science and incentives to do so).

[FN51]. See id. at 1673-89 (articulating consequences of science charade, including affect on public and science).

[FN52]. See id. at 1628-50 (discussing many scenarios where scientific uncertainties are masked by an attempt to set single, quantitative standards).

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[FN53]. See id. at 1651-54 (commenting on public's desire for complete safety from toxic risks).

[FN54]. See Michael B. Gerrard, Demons and Angels in Hazardous Waste Regulation: Are Justice, Efficiency, and Democracy Reconcilable?, 92 Nw. U. L. Rev. 706 (1998) (attributing this in part to a combination of our irrational fear of toxic substances and our demonization of firms that create toxic substances).

[FN55]. See Wagner, supra note 5, at 1645-68 (explaining competing interests of safety from toxic risks and less governmental regulation, which factor into governmental decisionmaking).

[FN56]. See id.; Latin, supra note 49; McGarity, supra note 49; see also infra text accompanying notes 75-81, 94-127.

[FN57]. See generally Wagner, supra note 5, at 1654-71.

[FN58]. 448 U.S. 607 (1980).

[FN59]. See id. at 624-25.

[FN60]. It is usually impossible to determine directly whether exposure to low levels of a toxin causes serious harm. It is often easy to determine that exposure to higher levels causes serious harm, however. It would be possible to extrapolate the effects of lower levels if we knew the shape of the dose- response curve. In most cases, however, it is impossible to know the shape of the dose-response curve.

[FN61]. See Benzene, 448 U.S. at 639-41 (ordering agency to determine exposure level at which a toxin creates a "significant risk" and issue "standards that are reasonably calculated to produce a safer or more healthy work environment" even when science makes task impracticable).

[FN62]. The Court said:
Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it.
Id. at 655.

[FN63]. The Justices did not describe the size of the exposed population, the duration of exposure, or the shape of the dose-response curve.

[FN64]. Using plausible assumptions--an average of 10 drinks of water per day by a population of 260 million over an average life span of 75 years and a linear dose-response curve--the risk the Justices characterized as "plainly acceptable" would kill 71,175 people over 75 years, which breaks down to 949 people per year. [0.000000001 x 260,000,000 x 10 x 365 x 75 = 71,175]. It is much more difficult to make a rough estimate of the number of people who would die as a result of the risk the Justices characterized as "plainly unacceptable." How many people "regularly inhale" gasoline vapors? With self- service gas stations everywhere in the United States except New Jersey and Oregon, I would guess that only about ten thousand people fall in this category. Thus, if I am correct, the "plainly unacceptable" risk would kill about ten people, which is a tiny fraction of the number that would be killed by the "plainly acceptable" risk.

[FN65]. See Natural Resources Defense Council v. EPA, 902 F.2d 962, 969 (D.C. Cir. 1990); see also American Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981) (citing Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980)).

[FN66]. See 42 U.S.C. § 7502 (1988). As of 1999, many areas still have not met the standards. See American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1045-46 (D.C. Cir. 1999) (commenting many areas are far from attaining mandated standards).

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[FN67]. See Ozone Standards, 62 Fed. Reg. 38,856, 38,863 (1997); Particulate Matter Standards, 62 Fed. Reg. 38,652, 38,656 (1997); see also EPA Regulatory Impact Analyses For the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule ES-17 to -18 (1997) [hereinafter RIA] (estimating relatively modest increase in stringency of ozone and particulate standards required by two rules would reduce number of deaths attributable to exposure to particulates and ozone by 3,700 to 17,900 per year).

[FN68]. Particulate Matter Standards, 62 Fed. Reg. at 38,688.

[FN69]. See Lead Indus. Ass'n v. EPA, 647 F.2d at 1161-62 (explaining choice between certain policy approaches was left by Congress to discretion of Administrator and choice will be upheld if rational).

[FN70]. See generally Particulate Matter Standards, 62 Fed. Reg. at 38,652; Ozone Standards, 62 Fed. Reg. at 38,863; RIA, supra note 67.

[FN71]. See ATA, 175 F.3d at 1059.

[FN72]. Ozone Standards, 62 Fed. Reg. at 38,868.

[FN73]. See generally Particulate Matter Standards, 62 Fed. Reg. at 38,688; Ozone Standards, 62 Fed. Reg. at 38,856; RIA, supra note 67.

[FN74]. See Ozone Standards, 62 Fed. Reg. at 38,863; Particulate Matter Standards, 62 Fed. Reg. at 38,652.

[FN75]. See Particulate Matter Standards, 62 Fed. Reg. at 38,709-11 (listing studies used by EPA in formulating particulate matter standards); Ozone Standards, 62 Fed. Reg. at 38,894 (listing studies used by EPA in determining ozone standards).

[FN76]. See Particulate Matter Standards, 62 Fed. Reg. at 38,660 (naming studies taken into consideration by EPA and stating EPA did not ignore studies in reaching its conclusions).

[FN77]. See id. at 38,656-59 (noting results of studies used by EPA in its particulate rulemaking).

[FN78]. Id. at 38,656.

[FN79]. See RIA, supra note 67, at ES-17 to -18.

[FN80]. Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1403 (1992); see also Gerrard, supra note 54, at 727-30 (claiming hard data on risk assessment is difficult to find); Latin, supra note 49, at 91-92 (illustrating results varying a millionfold depending on type of model selected).
The range of uncertainty may be somewhat lower in the context of ozone and particulates because the EPA could use human epidemiological studies rather then the laboratory animal studies that typically must be used as the basis for estimating carcinogenic risks.

[FN81]. Albert L. Nichols & Richard J. Zeckhauser, The Perils of Prudence: How Conservative Risk Assessments Distort Regulation, Reg., Nov./Dec. 1986, at 13, 18.

[FN82]. Ozone Standards, 62 Fed. Reg. 38,856, 38,863 (1997).

[FN83]. Id. at 38,862.

[FN84]. See ATA, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

[FN85]. See id. at 1038 n.4.

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[FN86]. See Particulate Matter Standards, 62 Fed. Reg. 38,652, 38,688 (1997); Ozone Standards, 62 Fed. Reg. at 38,856; RIA, supra note 67, at ES- 17 to -20.

[FN87]. See RIA, supra note 67, at ES-17 to -20.

[FN88]. That is how Chief Justice Rehnquist characterized the Administrator of Occupational Safety and Health Administration (OSHA) in a similar context. See Benzene, 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring).

[FN89]. ATA, 175 F.3d at 1034.

[FN90]. See Benzene, 448 U.S. at 687 (Rehnquist, J., concurring) (stating "when fundamental policy decisions underlying legislation ... are to be made, the buck stops with Congress and the President").

[FN91]. See RIA, supra note 67, at ES-17 to -20.

[FN92]. See Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 N.Y.U. L. Rev. 1239, 1244-47 (1989) [hereinafter Pierce, Role of the Judiciary] (explaining "public interest" theorists believe Congress has shifted to intransitive legislation due to its limited expertise and foresight, while "public choice" theorists claim Congress has shifted to intransitive legislation so members may avoid policy stances and preserve constituent support, yet, Aaron's theorem establishes intransitive legislation is often an inevitable consequence of collective reaction problems); Richard J. Pierce, Jr., The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469, 472-504 (1985) (identifying collective action problems that encumber ability of Congress to make policy decisions).

[FN93]. The best examples of this rare type of congressional action are the Delaney Clauses, the Natural Gas Policy Act of 1978, and the hundreds of absurdly unrealistic statutory deadlines Congress imposes on regulatory agencies. The disastrous effects of these attempts to legislate with precision have been documented thoroughly. See, e.g., 1 Davis & Pierce, supra note 20, § 12.3 (discussing problems created by statutory deadlines); Jerry Mashaw et al., Administrative Law: The American Public Law System 128-47 (4th ed. 1998) (discussing problems created by Delaney Clauses); Richard J. Pierce, Jr., Reconstituting the Natural Gas Industry from Wellhead to Burnertip, 9 Energy L.J., 11-16 (1988) (discussing problems created by Natural Gas Policy Act).

[FN94]. See generally Natural Resources Defense Council, Inc. v. EPA, 902 F.2d 962, 969 (D.C. Cir. 1990) (stating that EPA must consider protecting public health and safety under section 109); American Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981) (citing Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980)) (reiterating economic feasibility may not be considered by EPA).

[FN95]. Judge Williams taught natural resources law at University of Colorado, while Judge Ginsburg taught antitrust law at Harvard.

[FN96]. Judge Williams wrote Part I of the ATA opinion. ATA, 175 F.3d 1027, 1033 n.* (D.C. Cir. 1999). In 1991, he wrote a similar opinion in which he suggested that OSHA adopt a statutory construction that permits, or requires, OSHA to use CBA. International Union, UAW v. OSHA, 938 F.2d 1310, 1318-21 (D.C. Cir. 1991).

[FN97]. The D.C. Circuit would have to stretch the language of section 109(b) even further to hold that it permits the EPA to consider costs, but such an interpretation is potentially defensible. CAA section 109(b) is one of only two federal statutory provisions that has been held to preclude an agency from considering both the cost and feasibility of the standards it imposes. See Wagner, supra note 5, at 1667-68. Cass Sunstein and Richard Stewart have argued that all regulatory statutes should be interpreted to permit consideration of costs. See Richard B. Stewart, Regulatory Jurisprudence: Canons Redux?, 79 Cal. L. Rev. 807, 817 (1991) (reviewing Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State (1990)) (agreeing with Sunstein that costs and benefits should be considered).

[FN98]. See generally Lisa Heinzerling, Regulatory Costs of Mythic Proportions, 107 Yale L.J. 1981 (1998) (arguing

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outcomes of CBAs can vary significantly depending on which estimates are used by entity conducting CBA).

[FN99]. John F. Morrall III, A Review of the Record, Reg., Nov./Dec. 1986, at 25.

[FN100]. Id. at 30.

[FN101]. Id.

[FN102]. See Heinzerling, supra note 98, at 1983-84, 1993-98 (noting no one has ever questioned results of Morrall's study and have continued to cite study over a period of many years).

[FN103]. Id. at 1986.

[FN104]. See id. at 2060-62 (emphasizing Morrall's ignoring of health benefits such as "prevention of reproductive abnormalities and dysfunctions, neurological effects, blood disorders, and other ailments").

[FN105]. See id. at 2025-40 (noting Morrall's choice of low risk estimates made regulations appear much less cost-effective than agencies claimed).

[FN106]. See id. at 2017-24, 2043-56 (explaining Morrall adjusted agency estimates by discounting amount of future lives saved by ten percent each year). Most economists consider discounting of future lives saved essential, but many moral philosophers consider it indefensible. For a brief introduction to this debate, compare John J. Donohue III, Why We Should Discount the Views of Those Who Discount Discounting, 108 Yale L.J. 1901 (1999) (arguing discounting would not undermine rational decisionmaking), with Lisa Heinzerling, Discounting Life, 108 Yale L.J. 1911 (1999) (asserting that discounting lives is about relative worth of lives today versus lives of tomorrow and involves a moral commitment to our future selves and future people). I agree with the economists. I do not believe, however, that economists or economically-oriented judges are competent to make such decisions. Instead, politically accountable officials, such as the president, should make such decisions.

[FN107]. See Heinzerling, supra note 98, at 2017-56 (exposing difference between Morrall's conclusions and agencies' own estimates).

[FN108]. Id. at 1985.

[FN109]. Morrall, supra note 99, at 30.

[FN110]. See Heinzerling, supra note 98, at 2025-28 (contrasting OSHA's cost estimation of rule limiting formaldehyde with Morall's estimate).

[FN111]. See id. at 2027-28 (noting OSHA may have ignored studies which indicated formaldehyde posed a more serious health risk than once believed and failed to use an appropriate dose-response curve).

[FN112]. See International Union, UAW v. Pendergrass, 878 F.2d 389, 395- 96 (D.C. Cir. 1989) (finding OSHA failed to provide adequate justification for formaldehyde standards).

[FN113]. Heinzerling, supra note 98, at 2028.

[FN114]. See generally id. at 2017-60 (attributing differences to Morrall's discounting of expected lives saved by ten percent per year and adjustments to agencies' quantitative risk assessments).

[FN115]. See id. at 2019-20, 2032 (tracing figures to discounting).

[FN116]. Id. at 2065.

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[FN117]. See id. at 2000-14. Heinzerling also criticized the CBAs that were the bases for those decisions. Id. Granting Heinzerling's point that CBA is too indeterminate and value-laden to be useful to a court, I believe that it is entirely appropriate for a politically accountable official, i.e., the president, to make the value judgements inherent in using CBA as a decisionmaking tool. We vote for a presidential candidate because we believe that he shares our values and will apply those values in making policy decisions.

[FN118]. See id. at 2064-70 (considering but rejecting those methods of addressing problem).

[FN119]. See Heinzerling, supra note 98, at 2005-08 (discussing Fifth Circuit's invalidation of EPA's ban on asbestos because its costs exceeded its benefits).

[FN120]. The EPA's use of CBA in its prior decisionmaking under CAA section 109(b) has been well documented. See Wagner, supra note 5, at 1641-44.

[FN121]. See, e.g., Particulate Matter Standards, 62 Fed. Reg. 38,652, 38,701 (1997).

[FN122]. See RIA, supra note 67.

[FN123]. See Particulate Matter Standards, 62 Fed. Reg. at 38,701.

[FN124]. See id.

[FN125]. See id. at 38,688; Ozone Standards, 62 Fed. Reg. 38,856 (1997); RIA, supra note 67 .

[FN126]. See RIA, supra note 67, at ES-12 to -22.

[FN127]. Like Heinzerling, I have emphasized the range of uncertainty that affects benefit estimates. Cost estimates also have wide ranges of uncertainty. The range of uncertainty of the cost of the EPA's ozone and particulate rules is unusually large. The rules would only require states to take whatever action each considers necessary to attain the new standards. Thus, the analyst had to predict how each state would respond to the new standards and how each source would respond to each new state rule over the next decade or so.

[FN128]. The literature on risk assessment and cost-benefit-analysis identifies and illustrates scores of ways in which an analyst's choice of plausible variables and methodologies can yield variations in benefit estimates that vary by a millionfold. See generally Heinzerling, supra note 98, at 2070 (explaining how quantitative risk analysis can harm objectivity of analysis of risk and cost); Latin, supra note 49 (arguing that inadequate scientific knowledge and data often prevent us from obtaining reliable risk assessment); McGarity, supra note 80, at 1403 (suggesting that risk assessment results could vary greatly depending on model selected); Nichols & Zeckhauser, supra note 81, at 18 (explaining how assumptions in risk assessment could effect range of results); Wagner, supra note 5, at 1619 (suggesting there are limits to what science can do). Thus, for instance, Morrall might well rely on the findings of the several "negative effects" studies as the basis for his belief that the ozone and particulate rules would produce no health benefits. Conversely, use of the "Oregon approach," suggested by the ATA majority, would produce benefit estimates far above the upper end of the range of estimates reported by the EPA. See infra text accompanying notes 143-49.

[FN129]. See Particulate Matter Standards, 62 Fed. Reg. at 38,688; Ozone Standards, 62 Fed. Reg. at 38,856; RIA, supra note 67.

[FN130]. See American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038-40 (D.C. Cir. 1999).

[FN131]. Id. at 1038.

[FN132]. Id.

[FN133]. Id.

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[FN134]. See id.

[FN135]. Id.

[FN136]. See Particulate Matter Standards, 62 Fed. Reg. 38,652, 38,688 (1997); Ozone Standards, 62 Fed. Reg. 38,856, 38,856 (1997); RIA, supra note 67.

[FN137]. See ATA, 175 F.3d at 1037 (discussing 1991 D.C. Circuit case involving Occupational Safety and Health Administration's interpretation of section 3(8) of Occupational Safety and Health Act).

[FN138]. See International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991).

[FN139]. See id. at 1318-20 (explaining how cost-benefit analysis is consistent with section 3(8)).

[FN140]. See Control of Hazardous Energy Sources, 58 Fed. Reg. 16,615 (1993) (codified at 29 C.F.R. pt. 1910 (1999)).

[FN141]. See International Union, UAW v. OSHA, 37 F.3d 665, 669 (D.C. Cir. 1994).

[FN142]. See discussion supra note 43 .

[FN143]. American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1039 (D.C. Cir. 1999).

[FN144]. Id.

[FN145]. See id. n.5.

[FN146]. See id.

[FN147]. The EPA did not estimate monetary value of many beneficial effects of new standards. See RIA, supra note 67, at ES-3.

[FN148]. See Particulate Matter Standards, 62 Fed. Reg. 38,652, 38,652 (1997); Ozone Standards, 62 Fed. Reg. 38,856, 38,863 (1997); RIA, supra note 67.

[FN149]. See supra text accompanying notes 95-131 .

[FN150]. See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring) (discussing delegation of powers).

[FN151]. See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 132-34 (1980) (discussing how legislature's authorization that allow persons to make decisions without a clear guiding principle would be invalid and unconstitutional); James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government 93-94 (1978) (suggesting that Congress may not abdicate its obligation to make laws); Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 93 (1979) (arguing unguided practice of delegation by Congress to agency administrators could be harmful and ineffective).

[FN152]. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984) (stating "[j]udges are not experts in the field, and are not part of either political branch of the government").

[FN153]. 467 U.S. 837; see also 1 Davis & Pierce, supra note 20, § 3.5 (discussing scope of Chevron). Some commentors on a draft of this paper suggested a third plausible interpretation of the ATA opinion. They suggested that a newly-elected President could use a two-step decisionmaking process. Under this approach, the EPA would first conduct a rulemaking in which it announces its construction of section 109(b). For example, section 109(b) requires

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maximization of public health benefits short of ending industrialization. If a court upholds that construction, the EPA would then conduct rulemakings to set new section 109(b) standards through application of that construction of the statute. That interpretation of the opinion raises a host of problems, however. For starters, no President would have any hope of completing the process during his term of office.

[FN154]. See Sierra Club v. Costle, 657 F.2d 298, 400-10 (D.C. Cir. 1981) (defining president's power over administrator during rulemaking process).

[FN155]. See 1 Davis & Pierce, supra note 20, at 81-83, § 7.9 (explaining presidential influence over agency decisionmaking).

[FN156]. 467 U.S. at 865-66 (discussing propriety of Presidential policy choices in the interest of his accountability to the people).

[FN157]. See supra text accompanying notes 15-22 .

[FN158]. See, e.g., Pierce, Role of the Judiciary, supra note 92; Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391 (1986).

[FN159]. See Natural Resources Defense Council, Inc. v. EPA, 902 F.2d 962, 969 (D.C. Cir. 1990); see also American Petroleum Inst . v. Costel, 665 F.2d 1176, 1185 (D.C. Cir. 1981) (citing Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir 1980)) (stating Congressional mandate to prohibit agency administrator from considering technical and economic feasibility).

[FN160]. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984).

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THE FALSE PROMISE OF THE "NEW" NONDELEGATION DOCTRINE

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THE FALSE PROMISE OF THE "NEW" NONDELEGATION DOCTRINE

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In a remarkable recent decision, *American Trucking Association, Inc. v. Environmental Protection Agency ("American Trucking")*, a panel of the U.S. Court of Appeals for the District of Columbia rejected the Environmental Protection Agency's ozone rules.[1] The decision, written per curiam by Judge Stephen Williams, is significant because it brings to the fore a new twist on the nondelegation doctrine, reinvigorating a spirited debate that has engaged administrative law scholars since the New Deal.[2] Unlike the traditional nondelegation doctrine, which allows a court to declare a statute unconstitutional if Congress has not provided an "intelligible principle" to guide its delegation of authority to an agency, Judge Williams' approach to nondelegation does not require a court to pass judgment directly on the constitutionality of a statute. Instead, under

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[1] 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), *petition for rehearing denied*, 1999 WL 979463, Oct. 29, 1999 (per curiam). Judge Williams' opinion echoes his previous invalidation of safety regulations in UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) ("*Lockout/Tagout I*").

[2] The debate has hardly passed into history. For example, a recent symposium on the nondelegation doctrine, with contributions by Professors David Schoenbrod, Peter Schuck, and Dan Kahan, among others, appears in volume 20 of the *Cardozo Law Review*. *See, e.g.*, David Schoenbrod, *Democracy and Delegation: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999) (defending revival of the nondelegation doctrine); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999) (rejecting Schoenbrod's proposal); Dan M. Kahan, *Democracy Schemocracy*, 20 CARDOZO L. REV. 795 (1999) (arguing against nondelegation doctrine as democracy enhancing).

the "new" nondelegation doctrine endorsed in *American Trucking* a court evaluates the validity of a statutory delegation based on whether the agency has adopted an interpretation of the statute that provides adequate administrative standards to guide its exercise of discretion.

The normative basis for the new nondelegation doctrine, as Judge Williams and others argue, is the promotion of the rule of law. As we set out below, however, the rule of law benefits of the new nondelegation doctrine are no greater than those delivered by the current, well-accepted means of political and judicial oversight of agency action. At the same time, the rule of law is not the be-all and end-all of regulatory systems. There are countervailing benefits to a system that allows for regulatory flexibility; in fact some degree flexibility is unavoidable. Those benefits are especially important when evaluating the new nondelegation doctrine because that doctrine implements the rule of law only to a limited extent. The thesis of this Essay is that the benefits of the new nondelegation doctrine in promoting the values underlying the rule of law pale in comparison to that doctrine's impact on agencies' abilities to address the particularities of many problems that they are statutorily assigned to remedy.

I. Judicially Enforced Ex Ante Constraints or Ex Post Review?

In *American Trucking Association*, a panel of the D.C. Circuit considered EPA's revisions to national ambient air quality standards (NAAQS) for ozone and small airborne particulate matter. For primary NAAQS, the Clean Air Act requires that the agency set such standards at a level requisite to protect public health, leaving an adequate margin of safety.[3] Contrary to the implicit assumption underlying this statutory provision, it is generally

[3] 42 U.S.C. § 7409.

acknowledged that there are no certain "safe" levels of ozone or small particles in the air.[4] The D.C. Circuit has held in several cases that the EPA may not take costs into account in determining NAAQS.[5] Hence, the level required by the statute depends entirely on how the EPA interprets the term "the public health." In previous rulemaking proceedings, the EPA has set forth criteria for determining NAAQS, considering the seriousness of adverse health effects from violations of the standard, whether those effects are temporary or permanent, and the size of the sensitive population affected by the violations.[6] In revising the ozone NAAQS, the EPA also considered whether naturally-occurring levels of pollution at some places in the nation might exceed the standard, which would render compliance with the NAAQS impossible.[7]

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[4] *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 315 (1999) ("When it is said that a certain level of pollution is 'safe,' what is really meant is that the residual risk is acceptable or tolerable – not that there is no risk at all.").

[5] *See* American Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir.1998); American Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir.1981); Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir.1980).

[6] *See* EPA, National Primary and Secondary Ambient Air Standards for Lead, 43 Fed. Reg. 46, 246 (1978). *See also* EPA, 61 Fed. Reg. 25,566 (1996) (declining to revise the sulphur dioxide NAAQS to protect asthmatics from short-term exposure); Letter from George T. Wolff, Chair of Clean Air Scientific Advisory Committee to Carol M. Browner, EPA Administrator, June 1, 1994, reprinted in 59 Fed. Reg. 58,978 (1994) (unanimous CASAC recommendation that a short-term NAAQS for sulphur dioxide had not been granted because "the effects of such exposures are short term, readily reversible, and typical of response seen with other stimuli). In deciding to revise the ozone and particulate matter NAAQS, the EPA similarly considered "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed." Ozone Final Rule, 62 Fed.Reg. at 38,883/2; EPA, "Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper," at II-2 (July 1996) ("PM Staff Paper"), *cited in* 175 F.3d at 1034-35.

[7] *See* 175 F.3d at 1075.

American Trucking rejected the EPA rulemaking on the grounds that, although the factors it used to revise the ozone and particulate NAAQS were relevant, the agency did not provide a precise description of how it took those factors into account in setting ambient standards. Judge Williams did not merely reject the EPA's explanation of the revised standard as inadequately reasoned or inadequately supported by evidence. Rather, he imposed on the EPA the obligation that it interpret the Clean Air Act in a manner that sufficiently constrains the agency in setting all NAAQS under the statute.[8] In short, Judge Williams' opinion hints that the EPA would have to specify a formula by which it would have to evaluate the affect of ambient air pollution on the public health that would definitively specify how the EPA factors every type of health effect into its decision about whether exposure to a level of pollution threatens the public health. Because Judge Williams invoked nondelegation principles as a basis for this decision,[9] it is not one that Congress could override simply by codifying the factors the that EPA had considered or reaffirming that the EPA had the discretion it assumed under the Clean Air Act.[10]

American Trucking can be interpreted as a judicial effort to require agencies to self-impose ex ante constraints on their discretion, rather than as a traditional application of ex post judicial review. In his opinion, Judge Williams notes that such ex ante constraints are

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[8] "Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone- and PM are reasonable, EPA appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute." 175 F.3d at 1034.

[9] The opinion acknowledges that ordinarily the nondelegation doctrine requires invalidation of the statute. *Id.* at 1038.

[10] "Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own." *Id.* at 1038.

normatively desirable because they they minimize arbitrary decisionmaking by the agency, enhance the likelihood of meaningful judicial review, and help to assure that government is responsive to the popular will.[11] Recent articles by Professor Cass Sunstein and Professor Lisa Schultz Bressman also argue that the new nondelegation promotes the values of the rule of law.[12]

The rule of law serves several functions. First, it reduces uncertainty for those subject to the law, helping them to better plan their affairs.[13] Second, it diminishes the likelihood of government "tyranny" by ensuring that government applies laws generally -- ensuring equal treatment for similarly situated individuals or firms, rather than arbitrary treatment against those who might be disfavored at the moment.[14] Third, the rule of law helps to assure political

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[11] *Id.* at 1038. Judge Williams also noted these concerns in his earlier opinion in *Lockout/Tagout I*, 938 F.2d at 1313.

[12] *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 337 (1999) ("The nondelegation doctrine . . . promotes rule of law values."); *id.* at 350 "While constrained adminisrative discretion [under the new nondelegation doctrine] does not mean congressional lawmaking, it does tend to promote predictability, consistency, and visibility in law, and to ensure against ad hoc discretion by administrators, discretion that might be exercised arbitrarily."); *see also* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, __ YALE L.J. __ (forthcoming 2000). Bressman's recommendation differs from Sunstein's in that she defends the approach of *American Trucking* and argues for its expansion; Sunstein wishes to limit it.

[13] *See* H.L.A. HART, THE CONCEPT OF LAW 121, 134-44 (1961) ("If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist.").

[14] *See* RONALD DWORKIN, LAW'S EMPIRE 95-96 (1986) (noting that his theory of "law as integrity"secures "a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does"); *cf.* HART, *supra* note 13, at 21 ("Legal control is . . . primarily, though not exclusively, control by directions which are in this double sense *general*.") (emphasis in original).

accountability in the sense that, to be effective, rules must be known to the public, which allows for political response to the rules.[15]

Separation of powers and the requirement that the legislative branch adopt rules of general application to govern behavior of those subject to the government's power in theory provide the primary means for ensuring that our legal system reflects the rule of law. But the demands of the modern state call for a more flexible government structure that can gather necessary information about and respond more readily to problems that may call for technical solutions and quick action. Hence, dating at least to the beginning of the twentieth century, and probably to the formation of the United States, executive officials have been given discretion to develop the rules that govern private behavior so long as they are do so pursuant to statutes that give them meaningful guidance about how to exercise that discretion.[16]

Once the reality that officials must be allowed to exercise such discretion is recognized, there is no principled way for the judiciary to draw a line between allowed and prohibited delegations of rulemaking authority. Many commentators have recognized that the nondelegation doctrine is largely unenforceable by federal courts, because the courts are unable to develop principled ways of enforcement.[17] As Justice Scalia has noted, the problem of excess discretion

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[15] *See* LON L. FULLER, THE MORALITY OF LAW 49-51, 92 (rev. ed. 1969) ("I can conceive . . . of no emergency that would justify withholding from the public knowledge of a law creating a new crime or changing the requirements for making a will valid.").

[16] *See* United States v. Grimaud, 220 U.S. 506 (1911) (upholding the Secretary of Agriculture's requirement that ranchers obtain a permit to graze sheep in national forests); The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813) (upholding an Act of Congress granting the President the authority to declare whether either Great Britain or France had ceased violating the neutral commerce of the United States, allowing that declaration to revise specified statutory provisions).

[17] *See* Richard J. Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244-47 (1989); Carl McGowan, *Congress, Courts, and*

is one of degree not type,[18] and unlike other questions of degree with which the courts regulatory deal, there are no "judicially manageable and defensible criteria for distinguishing permissible from impermissible delegations."[19] Hence, except for several now discredited cases decided in 1935,[20] the Supreme Court has upheld all delegations of rulemaking power to agencies that also exercise executive and judicial functions.[21]

The acceptance of legislative delegations to such agencies raises the question of how to structure modern government to serve the interests that the rule of law means to further. Beginning in the late 1960s and through the 1970s, Professor Kenneth Culp Davis suggested that courts allow broad delegations of legislative power, but that they should also require agencies to provide standards to limit their own decisionmaking discretion. In particular, Professor Davis advocated that agencies should have to adopt rules and publicly announce principles that guide

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Control of Delegated Power, 77 COLUM. L. REV. 1119, 1128-30 (1977).

[18] *See* Mistretta v. United States, 488 U.S. 361, 425 (1989) (Scalia, J., concurring and dissenting) ("Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.").

[19] Richard B. Stewart, *Beyond Delegation Doctrine*, 36 Am. U. L. Rev. 323, 324 (1987); *see also id.* at 325-28; Richard J. Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 Am. U. L. Rev. 391, 393-403 (1987).

[20] *See* Schechter Poultry v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[21] Some lower courts, however, have applied to doctrine to invalidate statutes. *See, e.g.*, South Dakota v. United States Department of Interior, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 177 S.Ct. 286 (1996). The doctrine remains alive and well in state constitutional jurisprudence, where high courts of several jurisdictions have held delegations to be violations of state constitutions. *See, e.g.*, Jim Rossi, *Separation of Powers and the Lingering Legacy of Antifederalist Separation of Powers Principles in the States*, 52 VAND. L. REV. __ (1999) (discussing state courts' approaches to nondelegation and providing an institutional design explanation for this distinct approach).

their choices in deciding particular cases, and thereby channel what otherwise might be unbounded discretion in applying law.[22]

Administrative law doctrine, however, generally has not followed Professor Davis' suggestion. The Supreme Court has consistently held that agencies can announce general standards that guide conduct in adjudications, and then can apply those standards in the very case in which the agency announces them.[23] In addition, courts have allowed agencies to liberally grant waivers to their rules, and in some instances have even upheld rules only because the agency has reserved the right to grant such waivers.[24] The courts have consistently favored ex post review over the ex ante standards Judge Williams required in *American Trucking*.

To be sure, some cases have adopted aspects of Professor Davis' call for agencies to limit their own discretion by setting standards ex ante that will bind how the agency adjudicates particular cases. For example, in *Retail, Wholesale and Department Store Union v. NLRB*,[25] the

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[22] *See* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969) ("The key should no longer be statutory words; it should be the protections that administrators in fact provide, irrespective of what the statutes say or fail to say."); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 50 (1971) (opining, with respect to the nondelegation doctrine and the rule of law, that "the emphasis should not be on legislative clarification of" standards, but on administrative clarification). Judge Friendly advocated a similar position, both in academic works and published opinions. *See, e.g.*, HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 5-6 (1962); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1960).

[23] *See* SEC v. Chenery Corp. 332 U.S. 194, 202-03 (1947); NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974).

[24] *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulations and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 441 (1999); Marshal Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L.J. 325, 335 (1996); Jim Rossi, *Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255, 266n.48 (1995).

[25] 466 F.2d 380 (D.C. Cir. 1972)

D.C. Circuit announced a balancing test for determining when an agency abuses its discretion by changing policy in an adjudication and then applying the new policy to conduct that occurred before the new policy was created. The court reversed the NLRB for applying a new striker replacement policy to a company that had fired striking workers prior to the Board's announcement of the new policy in a previous adjudication. In addition, a handful of Supreme Court cases have held that agency decisions that are not based on any ascertainable standards violate the Due Process clause of the Constitution.[26] But these cases are notable in large part because they are represent adoption of Professor Davis' approach only in extreme instances when an agency ignores reasonable reliance interests created by its own prior decisions, or when an agency gives absolutely no basis for its decisions.[27]

Even the case that perhaps best supports the new nondelegation doctrine, *Amalgamated Meat Cutters v. Connally*,[28] does not hold that agencies are bound by their previous policy determinations and interpretations of statutes. *Amalgamated Meat Cutters* rejected a traditional nondelegation challenge to the Economic Stabilization Act of 1970, which gave the President broad authority to issue regulations and orders to stabilize wages and prices. Judge Leventhal, writing for the three judge panel, stated:

> Another feature that blunts the "blank check" rhetoric [of the delegation] is the requirement that any action taken by the Executive under the law . . . must be in accordance with further standards as developed by the Executive. This requirement, inherent in the Rule of Law and implicit in the Act, means that however broad the

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[26] *See, e.g.*, Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968).

[27] In addition, it is noteworthy that while these cases remain good law, virtually all were decided prior the the Supreme Court's reaffirmation that agencies can make policy via adjudication in *Bell Aerospace*.

[28] 337 F. Supp. 737 (D.D.C. 1971).

> discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action.[29]

Judge Leventhal went on to explain the significance of the quoted self-limiting aspect of executive and agency discretion as follows:

> [T]here is an ongoing requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective. This requirement is underscored by the consideration that the exercise of wide discretion will probably call for "imaginative interpretation," leaving the courts to see whether the executive, using its experience, "has fairly exercised its discretion within the vaguish, penumbral bounds" of the broad statutory standard.[30]

More importantly, the opinion clearly asserts that agencies are free to change their approaches and policies regarding wage and price controls if they can justify such changes.[31] In other words, the agency is free to experiment with various policies and interpretations of the statute so long as it provides intelligible reasons for why it chose the policy it did in light of its statutory requirements and past decisions.

This, however, is the essential requirement of ex post review of agency decisions under the arbitrary and capricious standard. Instead of requiring that the agency set some limits on its discretion ex ante, judicial review acts to assure that the agency exercises its discretion responsibly -- that is wisely and accountably.[32] The courts have adopted this approach by

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[29] 337 F. Supp. at 758.

[30] *Id.* at 759.

[31] *Id.* at 748.

[32] *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV.L. REV. 421, 470-74 (1987) (arguing that "hard look" judicial review constrains agencies from engaging in improperly motivated decisions); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 328-30, 432 (contending that heightened scrutiny of agency reasoning preserves both liberal values reflected in the Constitution and progressive values which undergird the administrative state).

uiring agencies to engage in reasoned decisionmaking enforced by ex post review of almost agency exercises of discretion.[33]

The "New" Nondelegation Doctrine and the Rule of Law

We disagree with the claim of Judge Williams, as well as Professors Sunstein and ssman, that the new nondelegation doctrine better promotes the rule of law, especially when doctrine is compared to the ex post approach to judicial review courts already use. In terms he three values underlying the rule of law -- certainty, prevention of tyranny, and ountability -- the new nondelegation doctrine provides little benefit. Unlike Professor Davis' ginal proposal that agencies operate pursuant to announced rules and standards in a making e by case decisions, the new nondelegation doctrine invalidates rules of general applicability the agency has adopted.

These rules already provide the certainty that those subject to regulation need in luating whether an agency will tolerate their behavior. The new nondelegation doctrine does ce it more difficult for the agency to change course, because the agency is required to have culated a constraining interpretation prior to its promulgation of rules. This creates some ease in certainty regarding the future value of the regulatee's investments, but it does not vide any additional certainty regarding what conduct is prohibited or allowed by the rules. In , by threatening judicial override of such rules based on judges' subjective evaluations that discretion left by the agency's interpretation of its statute is too unbounded, the new

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[33] The Supreme Court has stated that a rule

> would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

tor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co., 463 U.S. 29, 43 (1983).

nondelegation doctrine increases the uncertainty about whether regulated entities will have to comply with the rule.[34] As with the more traditional nondelegation doctrine, the new doctrine allows courts to override general legal requirements in a manner that is neither principled nor predictable.

The value of the new nondelegation doctrine as a means of preventing tyranny is also suspect. The agency has already issued a rule of law that applies generally to all that come within its letter. The new nondelegation doctrine does not aim at ensuring neutral enforcement of such a pre-announced rule of law. Rather, it aims to constrain agency discretion before the agency adopts general rules in the first place. In other words, the only kind of tyranny the new nondelegation doctrine might protect against is the possibility that an agency will adopt rules of greater stringency for industries that the agency arbitrarily disfavors. Current administrative law doctrine, however, already contains sufficient political and judicial checks without the new nondelegation doctrine to guard against an agency manipulating the meaning of statutes to arbitrarily penalize disfavored industries.[35] In a rulemaking, were an agency to engage in such arbitrary manipulation of factors made relevant by the agency enabling act, the affected industry is free to participate in agency notice and comment rulemaking proceedings and thus publicly to show the malevolence of the agency rulemaking.[36] The industry might then use this showing to bring political pressure on the agency not to adopt the rule. If the agency adopted the rule

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[34] *Cf.* Richard B. Stewart, *The Reformation of American Administrative Law*, 89 HARV. L. REV. 1667, 1696-97 (1975) (making a similar point about the traditional nondelegation doctrine).

[35] For a discussion of how agency procedures and their relationship to the three constitutionally specified branches provide meaningful checks on agency decisionmaking, see generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541-62 (1992).

[36] *See* 5 U.S.C. § 553 (c).

nonetheless, the industry could challenge any such manipulation as arbitrary and capricious.[37] Under judicially imposed requirements of reasoned decisionmaking, while an agency is not precluded from varying how it applies the law from one rule to the next, it must explain any such variation in that application.[38] Thus, even without the new nondelegation doctrine, agencies are constrained from arbitrarily changing the meaning of their enabling act from rule to rule.

Increased accountability is probably the best argument for the new nondelegation doctrine. Under the doctrine, an agency would have to declare the meaning of a statute that granted the agency significant rulemaking discretion prior to engaging in any rulemaking under that statute. Resolving the meaning of a statute that grants an agency unbridled discretion usually will involve a discourse about the relative weights and tradeoffs of various goals that prompted passage of the statute. Thus, for example, when the Federal Communications Act of 1934 authorized the FCC to issue broadcast licenses to further the public interest, the Act left undecided whether the broadcast license system should promote large, efficient broadcast companies, or smaller stations that, although they would not reach as many listeners or provide

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[37] *See* 5 U.S.C. § 706.

[38] *See* Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co., 463 U.S. 29, 43 (1983) (noting agency's burden of explanation); Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 808-09 (1973) (the agency's ground for departing from previous decisions "must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."). Justice Breyer, while a judge on the U.S. Court of Appeals for the First Circuit, explained this obligation:

> [T]he Board remains free to modify or change its rule; to depart from, or keep within prior precedent, as long as it focuses upon the issue and explains why change is reasonable. Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action.

Shaw's Supermarkets, Inc. v. National Labor Relations Board, 884 F.2d 34, 41 (1st Cir. 1989) (opinion by Judge Breyer) (citations omitted).

as slick programming, would devote attention to issues of local concern.[39] The choice between these two visions of the United States broadcasting system was a value choice, not a decision that flowed from the agency's technical expertise. Similarly, the relative importance that the EPA should put on lives lost versus temporary decreases in quality of life due to reversible illness is a value choice. By forcing the agency to make such a choice from which the agency could not vary in subsequent rulemakings, the new nondelegation doctrine forces the agency to assess carefully the value choices underlying its rulemaking decision. If one optimistically believes that making such value choices explicit will encourage public debate and input in the rulemaking process, then the new nondelegation doctrine can help ensure that the agency's ultimate decision on such choices is in line with those of the nation's polity.

Unfortunately, there are reasons to believe that requiring the agency to commit to a set of value choices independent of the context in which they arise may undermine political accountability. Empirical evidence suggests that even if agency value choices are explicitly revealed, the public does not engage in discussion about such choices; rather, the public tends to focus on the bottom line acceptability of the rules the agency adopts, not the value judgements that lead the agency to those rules.[40] Given this propensity of the citizenry to care about rules

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[39] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (upholding delegation to FCC); *see also* Policy Statement on Comparative Broadcast Hearings, 1 FCC.2d 393 (1965) (specifying criteria for awarding broadcast licenses that emphasize local ownership and management of radio stations).

[40] *See* Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1633-34 (1985) (noting the negative reaction William Ruckelshaus received in response to public fora he held to get guidance on how the EPA should make value judgements, such as the balance it should strike between health risks and unemployment, in setting a standard for airborne arsenic). While this may also be true of congressional decisionmaking, it is not as problematic because accountability of Congress is achieved through elections -- where people can and do focus on the bottom line -- not review of Congress's justification for its laws.

rather than the value choices underlying those rules, the new nondelegation doctrine could have the perverse effect of decreasing accountability. To illustrate how this might come about, consider the EPA's setting of the ozone and particulate NAAQS. Suppose in setting the first NAAQS, in order to satisfy Judge Williams' nondelegation concerns, the EPA provides an indication of the relative impact of lives lost versus temporary but reversible inconvenience from disease. Suppose that compared to the values placed on these effects by the populace, the EPA actually overvalues temporary inconvenience and undervalues lives lost. Because of the precise impacts of the particular pollutant that the EPA addresses in this first NAAQS, the standard is the same as would have occurred had the EPA ascribed the correct -- that is popularly held -- values to these impacts. Because the bottom line rule is consistent with the public's values, and because the public cares only about such bottom lines, there is no challenge to the rule. The effect would be to commit the agency to an incorrect valuation of the effects of lost lives and temporary inconvenience from disease on the public health. The impacts of the next pollutant that the EPA considers might be such that the incorrect valuations results in a standard that the public finds unacceptable. But, because the agency already committed to an interpretation of the statute that leads to this standard, the agency is not free to set the second standard at a level consistent with the underlying public values.

In the previous example, it is assumed that if the agency gets the constraining interpretation wrong, in the sense of interpreting the statute in a manner at odds with the values of the public, then the agency cannot change its interpretation when it adopts the next standard, even if the agency could explain why its initial interpretation was problematic. Were the agency free to change its interpretation, then the new nondelegation would not provide any constraint on

the agency that arbitrary and capricious review does not already provide.[41] The point of this hypothetical is to illustrate that because the public cares about the rules adopted and not the value choices underlying those rules, and because the new nondelegation doctrine requires ex ante constraints on how the agency resolves those value judgements, agency rules may end up being less politically accountable.

In terms of accountability, perhaps even worse than the limitation the new nondelegation doctrine imposes on agencies' abilities to respond to the public's assessment of its rules, is the doctrine's impact on the role of the courts in implementing regulations. The doctrine empowers a court to invalidate an agency interpretation of a statute when the presiding judges believe that the interpretation leaves the agency too much discretion about how to implement the statute. But, the issue of how much discretion an agency should have in implementing a regulatory scheme depends in complex ways on a host of factors. It may be appropriate to give an agency discretion when the regulatory context is so technical that those not well steeped in that context cannot appreciate the impact of various regulatory alternatives. It may be appropriate to give an agency discretion when the statute identifies a public problem that all agree must be alleviated, but the nature of the political system dooms congressional attempts to solve the problem. It may be appropriate to give an agency discretion when the subject of regulation changes too quickly for the Congress to keep up by constantly updating statutes. These criteria for granting agencies discretion cannot be reduced to some principle that courts can then use to determine when and how discretion should be left to the agency. Hence the issue of how to structure agency

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[41] At least one environmental law scholar has concluded that, despite Judge Williams' nondelegation rhetoric, *American Trucking* is really a rejection of the EPA's rule as arbitrary and capricious. *See* Craig N. Oren, *Run Over By American Trucking Part I: Can EPA Revive Its Air Quality Standards*, 29 ENVTL. L. REP. 10653 (Nov. 1999).

discretion, and how much discretion to leave to the agency under any particular statutory scheme, is one appropriately left to the political process. Allowing the judiciary to strike down otherwise reasonable interpretations of statutes on grounds that the interpretation left the agency too much discretion, invites judges — the least accountable government decisionmakers — to substitute their inclinations for the agencies about the wisdom of the regulatory bottom line.

Moreover, as for prevention of tyranny, there is no need to promote accountability by empowering judges to strike down reasonable interpretations of a statute just because the judges find the interpretation insufficiently constraining of agency discretion. In order for an agency decision to survive ordinary post-hoc review under the arbitrary and capricious standard, the agency must articulate how that decision comports with its interpretation and understanding of the statute. Hence, at some point, the agency must reveal its interpretation of the statute, and that interpretation will be subject to judicial and political oversight on the merits.

Some might contend that the lack of judicial accountability under the new nondelegation doctrine is no different from that occasioned by courts striking down agency decisions under the arbitrary and capricious standard.[42] But, judicial invalidation of statutory interpretation under the new nondelegation would be particularly difficult for the political branches to overcome. Agencies have a variety of means to try to put in place policies that underlie rules that courts initially strike down as arbitrary and capricious. An agency can simply readopt the rule with fuller explanation of why the rule makes sense under the statute;[43] it can modify provisions of the

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[42]*See e.g.*, Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity of the D.C. Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L. J. 300, 302-03.

[43]*See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking*, *** NW. U. L. REV. (manuscript at 28-29 &n 115) (forthcoming 2000).

rule the agency considers non-essential to meet judicial demands on review;[44] it can implement the policy on a case by case basis, avoiding problems of finding support for predictions of how the rule would operate outside of the particular factual circumstances of the case before it.[45] Assuming that the new nondelegation is more than merely arbitrary and capricious review in disguise, however, an agency cannot recover from a decision striking an interpretation under that doctrine without adopting a substantially more limiting interpretation of the statute or getting Congress to pass a statute explicitly adopting the rule that was struck.[46]

III. The Flexibility Costs of the New Nondelegation Doctrine

The analysis thus far has demonstrated that the benefits of the new nondelegation doctrine, in terms of furthering the values underlying the rule of law, are at best minimal. Unfortunately, the costs the doctrine would impose by decreasing agency flexibility in rulemaking would be substantial.

Ex ante constraints on agencies are always imperfect, even if those constraints are self-imposed by the agencies.[47] As proponents of dynamic statutory interpretation have recognized,

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[44]*See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking*, *** NW. U. L. REV. (manuscript at 28-29 &n 115) (forthcoming 2000).

[45]*See* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WISC. L. REV. 763, 801-07.

[46]If Judge Williams is serious that the new nondelegation doctrine responds to an interpretation that fails to save a statute from being a violation of the traditional nondelegation doctrine, *see American Trucking*, 175 F.3d at 1038, then Congress would be powerless to adopt a statute that codifies the agency interpretation, as that statute would, a fortiori, also violate the traditional nondelegation doctrine.

[47] For further discussion of the imperfections of ex ante constraints, see Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429 (1999).

the meaning of a statute that best furthers the goals underlying a statute may vary because of changed circumstances and even changed preferences of the polity.[48] The Supreme Court has also recognized the need for agencies to have flexibility in interpreting statutory terms that do not resolve a particular issue facing the agency. In *Chevron*, the Court not only announced that the judiciary should defer to permissible agency interpretations of statutes that the agency administers, but also allowed the EPA to change its interpretation of a provision in the Clean Air Act -- a change that was prompted at least in part by the election of President Reagan.[49]

To understand how the new nondelegation doctrine would forfeit agency discretion, even if the agency exercises that discretion responsibly, consider agency "interpretations" of vague statutory provisions intended to constrain agency decisionmaking. Under the new nondelegation doctrine, the agency would have to adopt a binding interpretation the first time it issues a rule pursuant to those provisions. But, at that time, the agency might not yet have discovered all the factors that ultimately are relevant in applying the statute. For example, returning to the ozone and particulate NAAQS illustration from *American Trucking*, the EPA's experience to date with ambient air pollution may indicate that transient, reversible health effects from such pollutants are not significant compared with other effects. It might therefore be tempted to interpret impact on the public health under the Clean Air Act to exclude such effects. Suppose, however, that ten years from now biologists discover an ambient air pollutant that causes some exposed individuals to have to be hospitalized for years. The effect of the pollutant reverses itself completely after several years, but in the meantime, the victim of the exposure is incapacitated. Under existing

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[48] *Cf.* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

[49] *See* Chevron v. Natural Resources Defense Council, 487 U.S. 835 (1984).

arbitrary and capricious review, the EPA could include such significant reversible impacts in its public health assessment, as long as it could show that these effects differ from those of previously regulated pollution in a manner that justifies consideration of these reversible impacts. Under the new nondelegation approach, once the agency interpreted the statute to omit reversible impacts, the agency could not take these unforeseen impacts into account without Congress amending the statute. Similarly, an agency interpretation may reflect values that the polity no longer holds. As medical improvements increase the quality of life for the elderly, the EPA may want to increase the contribution of extending the life of the old and infirm in its consideration of what constitutes a threat to public health.

IV. Appropriate Means for Imposing Ex Ante Constraints

We do not mean to suggest that ex ante constraints on agencies are per se inappropriate. In order to ensure that agencies not pursue values entirely at odds with those held by the polity, Congress must be able to constrain agencies to remain true to any vision of the agency role adopted by the legislature, and to prevent the agency from exercising powers beyond those granted by the legislature. Ex ante constraints, in the form of specific statutory provisions, play an important role in limiting agency discretion.[50] But, because the factors that go into the determination of the appropriate extent and the means by which agency discretion should be limited are essentially political rather than legal in nature, imposition of ex ante limitations is best left to political processes.[51] The new nondelegation doctrine, as much as the more

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[50] *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 446 (1999).

[51] *Cf.* Jim Rossi, *Hamstringing State Agency Efforts to Promulgate Rules: A Questionable Way to Improve Environmental Regulation,* 29 ENVTL. L. REP. 10735 (Dec. 1999) (arguing that a recent Florida administrative procedure reform that requires the legislature to provide more specific ex ante constraints but relies on courts to enforce these constraints does

traditional doctrine, contravenes this fundamental tenet of administrative governance by vesting courts with authority to determine when such agency imposed ex ante limitations are sufficiently constraining.

It has been argued that the Supreme Court has already recognized the new nondelegation doctrine applied by Judge Williams in *American Trucking*.[52] The argument, advanced in an essay by Professor Bressman in which she argues for wider application of the new nondelegation doctrine, makes a novel link between the U.S. Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board ("Iowa Utilities Board")*[53] and the D.C. Circuit's recent decision in *American Trucking*. Professor Bressman's link between the opinion in *Iowa Utilities Board*, written by Justice Scalia, and the new nondelegation doctrine articulated by the D.C. Circuit in *American Trucking* is at odds with Justice Scalia's previously-articulated concern with courts' abilities to enforce a constitutional nondelegation doctrine.[54] Courts, after all, will have the same problem articulating principles, whether they are evaluating the degree of specificity provided by Congress or by an agency. Our analysis of the normative underpinnings of the new nondelegation doctrine suggests little value to reinterpreting the case as anything but a *Chevron*

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not enhance political accountability); Jim Rossi, *"Statutory Nondelegation": Learning from Florida's Recent Approach to Administrative Procedure Reform*, 8 WIDENER J. PUB. L. __ (forthcoming 1999) (symposium on state administrative procedure) (same).

[52] *See* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, __ YALE L.J. __ (forthcoming 2000).

[53] 119 S.Ct. 721 (1999).

[54] *See supra* note 18 (quote from *Mistretta*). Prior to ascending to the bench, however, Justice Scalia acknowledged that the doctrine may be worth reviving. *See* Antonin Scalia, *A Note on the Benzene Case*, 4 REGULATION, July/Aug. 1980, at 25, 28 ("Even with all its Frankensteinlike warts, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice.").

step two case. Justice Scalia himself characterized *Iowa Utilities Board* this way, finding the words "necessary" and "impair" in the Telecommunications Act of 1996 subject to more than one meaning.[55] At *Chevron* step two, the Court did not defer to the agency, as it often does, but found the agency's interpretation to be unreasonable because the language of the relevant provisions of the Telecommunications of 1996 precluded the agency's interpretation.[56] Justice Scalia did focus on whether the rule contained a "limiting standard" and whether private actors, rather than the agency, would determine the terms of access. In Justice Scalia's view, however, consideration of these factors was not an implicit endorsement of a new nondelegation doctrine; instead, they indicated that the agency had deviated from the statutory criteria that Congress provided.[57] Justice Scalia thus recognized that the province of defining the bounds of agency discretion, ex ante, appropriately belongs to Congress, not to the courts.

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[55] 119 S.Ct. 734 ("We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply [the incumbent's] standard . . . [I]t may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind."); *id.* at 738 ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency, see *Chevron v. NRDC* . . . ."). *See also id.* at 753 (Breyer, J., concurring in part and dissenting in part) ("The Act expresses this last mentioned sharing requirement in general terms, reflecting congressional uncertainty about the extent to which compelled use of an incumbent's facilities will be necessary to avoid waste.").

[56] "Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we must vacate [the unbundled access rule]." *Id.* at 736.

[57] According to Justice Scalia, the Commission's interpretation was "simply not in accordance with the ordinary and fair" meaning of the terms "necessary" and "impair." *Id.* at 739-40. This was because the agency had not adequately supported its interpretation. *See id.* at 735 n.11 ("In a world of perfect competition, in which all carriers are providing their service at marginal costs, the Commission's total equating of increased costs (or decreased quality) with 'necessity' and 'impairment' might be reasonable; but it has not established such an ideal world.").

Although the analogy between portions of Justice Scalia's analysis and *American Trucking* seems plausible, to the extent both cases focus on statutory criteria, when viewed through the lens of nondelegation the cases take divergent approaches in the range of options they leave for Congress. In *Iowa Utilities Board*, the Court left open the possibility that Congress could authorize FCC discretion to adopt the very rule that the Court struck down. *American Trucking*, however, forecloses congressional authorization of the role the EPA granted itself in NAAQS absent more specific ex ante constraints on the agency's discretion. Thus, the Supreme Court cannot be said to have endorsed the new nondelegation doctrine applied by Judge Williams in *American Trucking*.

V. Conclusion

The loss of flexibility might be a cost that the administrative system would be willing to bear if it had no other way to ensure that agencies exercise their discretion responsibly. But, Congress can enact statutes that limit agency discretion ex ante and the courts already use ex post review, under the reasoned decisionmaking standard, to check against abuses of whatever discretion the agency retains. Such review, coupled with political oversight by Congress and the President, has worked somewhat effectively to check the prime candidates for agency abuse: capture of the agency, undue political influence, and imposition of idiosyncratic agency values. Moreover, the new nondelegation doctrine does not solve the problem, inherent in the traditional nondelegation doctrine, of cabining the potential for inappropriate imposition of judges' preferences. In short, the new nondelegation doctrine provides little legitimate extra constraint at significant cost to the regulatory state.

Mr. KUCINICH. I also expect to hear about political accountability. Some argue that agencies are ruled by special interests while Members of Congress, who are politically accountable elected officials, respond, instead, to the public interest.

Well, you know, when you factor through some of the campaign finance debates, it's problematic. Political reality is that special interests do exert influence in Congress, and Congress can draft legislation with special interests sometimes behind closed doors.

And that goes, by the way, for both parties, just so we establish that real quick here. This is not about which party's hands are clean and which party's hands are not clean.

So, on the other hand, there are a number of administrative laws that ensure that all interested parties have the chance to comment on agency rulemaking and the public can review these comments.

I believe any solutions that we consider are to make sure that the process is open, that the decisionmakers are truly politically accountable for their actions.

Finally, Mr. Chairman, I hope that any solution we consider would not make it more difficult to respond to the public interest. As we know, we often learn new scientific facts which significantly affect how to best implement a law. The social and political values change. In response, the public often demands better protections, yet because of certain interests, Congress is slow to respond. I want to make sure that we do not create a procedural maze that makes it even more difficult to enact important public protections.

Mr. Chairman, at my request, you were kind enough to invite Professor Wendy Wagner to testify today. She was expected to testify on a number of these issues, and I was looking forward to exploring them with her during the hearing.

Unfortunately, she's not able to attend because of a family emergency, so I'm going to ask, with the Chair's permission, unanimous consent to insert her testimony in the record, hold the record open to include additional materials, including any answers to questions subcommittee members may want to ask Professor Wagner in writing.

Mr. RYAN. Without objection.

[The prepared statement of Ms. Wagner follows:]

HEARING ON THE TOPIC OF "DOES CONGRESS DELEGATE TOO MUCH POWER TO AGENCIES AND WHAT SHOULD BE DONE ABOUT IT?"

BEFORE THE SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS

OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM

Statement of Wendy E. Wagner

Professor of Law, Case Western Reserve University School of Law

Cleveland, Ohio

June 14, 2000

Thank you, Mr. Chairman, for inviting me to testify on the topic of "Does Congress delegate too much power to agencies and what should be done about it?" I am currently a professor at Case Western Reserve University School of Law, and my research has focussed almost exclusively on how well the three branches of government deal with the science that is so critical to environmental policymaking. I seek in my testimony to bring some of this research to bear on your very important questions about delegation. Specifically, I understand that the Subcommittee is concerned about whether Congress is violating its constitutional duty to make the laws when it delegates policy issues to the agencies. Even if it is acting within the Constitution, however, some members of the Subcommittee are concerned that Congress' broad delegations to the

agencies may amount to "regulation without representation" because agencies are not always candid about what they are doing and are not as politically accountable as Congress. You are thus interested in identifying legal tools that might encourage Congress to take on these harder issues, or that would at least enable Congress to track and control the agencies to ensure that they are acting in a way that is politically accountable.

Let me first say that I am not happy about the status quo either. There are many features of our regulatory state that I believe could be improved upon. I agree wholeheartedly that making the laws and rules more transparent and accountable to citizens should be among the highest priorities of our government.

Unfortunately, however, I am concerned that in trying to fix these problems, not enough effort has been made to try to understand – at a deep level -- why things are as they are. I believe that by neglecting this fundamental inquiry, current reform efforts not only run the risk of failing to identify much better ways to address these problems, but may inadvertently serve to further impair the accountability and transparency of our political branches that we all agree are so critically important.

From the Chair's invitation and briefing memorandum, it is evident that the Subcommittee would like to explore a number of very important questions. I will respond to each question in sequence.

QUESTION #1: ***Does Congress violate the Constitution with its broad delegations to the agencies?***

Up until the past few years, the answer to the question of "Does Congress violate the Constitution with its broad delegations" was "no." Early in this last century, the

courts twice struck down acts of Congress as unconstitutional because they delegated too much of their lawmaking power to the Executive Branch (called the "nondelegation doctrine").[1] But since that time, the Supreme Court has never once used the doctrine to declare a law of Congress unconstitutional, despite at least one opportunity to do so.[2]

The opinion that has dramatically changed the course and content of the nondelegation doctrine, at least in the short term, is *American Trucking Associations v. EPA*.[3] In that case the court does conclude that section 109 of the Clean Air Act is unconstitutionally overbroad, at least with respect to EPA's ozone and particulate rulemakings. However, because the court provides no guidelines for determining when a legislative delegation becomes constitutionally vulnerable under the nondelegation doctrine, it is very difficult to determine what this opinion portends for other laws that Congress has and will pass in the future. In fact, the thinness of the court's rationale and reasoning open the door to considerable future litigation on the central question of when a statute and its accompanying rulemaking violate the Constitution under the nondelegation doctrine.[4]

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[1] *See A.L.A. Schecter Poultry v. U.S.*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).
[2] *See, e.g.*, *Touby v. U.S.*, 500 U.S. 160 (1991).
[3] 175 F.3d 1027 (D.C. Cir. 1999). By all accounts, *American Trucking* completely reinvents the nondelegation doctrine in ways that have, at best, a weak connection to precedent. *See, e.g.*, Robert W. Adler, *American Trucking and the Revival (?) of the Nondelegation Doctrine*, 30 Envtl. L. Rep. (ELI) 10233 (2000).

Indeed, the constitutional pedigree of the old nondelegation doctrine is still an open question. For arguments that the old nondelegation doctrine may not be a constitutionally legitimate doctrine, see Harold J. Krent, *Delegation and its Discontents, Power without Responsibility, David Schoenbrod*," 94 Colum. L. Rev. 710 (1994); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) [hereinafter Sunstein, *Canons*]
[4] *See, e.g.*, Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303 (1999).

Clearly, the status of the "new" nondelegation doctrine is very much in flux. The Supreme Court will soon determine whether this new nondelegation doctrine is a valid interpretation of the Constitution. There is good reason to suspect, however, that the new doctrine will not survive the Court's review, at least if the explosion of commentary by legal scholars is any indicator. Indeed, a survey of the literature that I conducted in preparation for this hearing revealed that a large majority of those who have written about the nondelegation doctrine in general, and *American Trucking* in particular, conclude that the court's reinvention of the nondelegation doctrine in *American Trucking* is wrong.[5] Even academics who are generally at opposite sides of legal issues join together in condemning the D.C. Circuit's opinion. Even more striking is the fact that virtually all of the criticism of the case is directed at the ways in which this "new" nondelegation doctrine will impair the very goal that it purports to advance – political accountability. I do not have time to summarize all of the concerns expressed in these articles and books, but I will highlight some of the problems.

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[5] For the law review commentary concluding that the court's use of the nondelegation doctrine in *American Trucking* is wrong, see Adler, *supra* note 3; Richard J. Pierce, *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 Admin. L. Rev. 63 (2000); Craig N. Oren, *Run Over by* American Trucking *Part I: Can EPA Revive its Air Quality Standards?,* 29 Envtl. L. Rep. (ELI) 10653 (1999); Mark Seidenfeld & Jim Rossi, *The False Promise of the 'New' Nondelegation Doctrine*, 76 Notre Dame L. Rev. (forthcoming 2000); Sunstein, *supra* note 4; *Recent Cases*, 113 Harvard L. Rev. 1051 (2000). For the law review commentary in support of the court's use of the nondelegation doctrine in *American Trucking*, see Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State,* 109 Yale L.J. 1399 (2000).

Much of the commentary on the "old delegation doctrine" (written before *American Trucking*) is either contained or referenced in a recent symposium dedicated to the subject. *See generally* Symposium: *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, Cardozo L. Rev. (January 1999). For still more recent discussions of delegation and the nondelegation doctrine, see David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers 238 (1999) (arguing against the wisdom of nondelegation doctrine based on book-length, empirical study of Congress' delegations); Sunstein, *Canons*, *supra* note 3.

First and of greatest concern is the fact that this new nondelegation doctrine serves to increase the courts' power at the expense of the power of Congress and the Executive Branch.[6] The courts now decide when a statute unconstitutionally delegates too much lawmaking power to the agencies based on criteria that are neither in the Constitution nor in the *American Trucking* opinion.[7] As Professor Sunstein argues "Because the relevant questions are ones of degree, the nondelegation doctrine could not be administered in anything like a rule-bound way, and hence the nondelegation doctrine is likely, in practice, to violate its own aspirations to discretion-free law."[8] The picture becomes still more sobering when one considers some recent studies that suggest that federal judges are not free from political bias.[9]

Second, and perhaps of greater interest to the Subcommittee, the nondelegation doctrine, both new and old, may do little to improve the responsibility and accountability of Congress and the agencies, and could even make them less accountable in some situations.[10] In their recent empirical study on delegation, Professors Epstein and O'Halloran conclude that delegation is often a "a necessary counterbalance to the concentration of power in the hands of [congressional] committees." Invalidating such delegations under the nondelegation doctrine, the authors conclude, "would only push back into the halls of the legislature those issues on which the committee system, with its

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[6] *See, e.g.,* Pierce, *supra* note 5; Sunstein, *supra* note 4. This same concern has also been expressed with regard to the old nondelegation doctrine. *See, e.g.*, Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 Vill. L. Rev. 189 (1999); Krent, *supra* note 3; Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod,* 20 Cardozo L. Rev. 775 (1999); Sunstein, *Canons*, *supra* note 3. For a devastating critique of judicial review of rulemakings more generally, see Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking,* 85 Va. L Rev. 1243 (1999).
[7] *See, e.g.*, Sunstein, *supra* note 4.
[8] Sunstein, *Canons*, *supra* note 3, at text before n.34.
[9] *See generally* Cross, *supra* note 6 (summarizing the empirical literature on this subject).
[10] *See, e.g.*, Schuck, *supra* note 6; Sunstein, *Canons*, *supra* note 3.

lack of expertise and tendency toward uncontrollable logrolls, produces policy most inefficiently--hardly a step in the right direction."[11]

In fact, the new nondelegation doctrine could actually exacerbate the inclination of some members of Congress to dodge their lawmaking responsibilities by passing off hard questions to the agency in the form of broad delegations. According to the D.C. Circuit's rulemaking, laws that delegate considerable policymaking authority to the agency will be upheld as long as the agency provides "intelligible principles." Some members of Congress might see this as a tremendous boon. They will not need to worry about broad delegations under the new nondelegation doctrine, since the agency will still be stuck repairing them. Even if the agency fails to develop the intelligible principles needed to resurrect the law, however, it will be the "unintelligible rules" of the Administration, rather than the broad delegations of Congress, that will receive the stamp of judicial disapproval. Moreover, in most if not all cases, the first response to this judicial invalidation will not be a better law from Congress, but another effort by the agency to develop the illusory "intelligible principles" that the court seeks.

The nondelegation doctrine will also limit, potentially substantially, the range of legislative tools that Congress will have at its disposal to respond to the demands of the public.[12] Certainly Congress will be less able to rely on delegations to agencies to overcome legislative deadlock on important public policies. Congress could also find itself unable to provide agencies with the flexibility they need to establish appropriate

[11] Epstein & O'Halloran, *supra* note 5, at 237-38.
[12] *See, e.g.*, Sunstein, *Canons*, *supra* note 3.

regulations in areas where the scientific information or other critical inputs change at a rapid pace.[13]

Even worse outcomes could arise with respect to increasing the political accountability of the agencies. There are at least two problems that will likely arise if agencies are required to provide intelligible principles for all constitutionally vulnerable rulemakings. First, in some rulemaking exercises (and perhaps many) there is no overarching formula or set of principles that can be credibly developed to capture the many case-specific choices that must be made for each specific standard or rule.[14] To ignore this reality and require intelligible principles that guide the larger rulemaking effort will either force the agency to develop guidelines that are far too inflexible, or it will cause the agency to work even harder to disguise its true decisions under layers of artificial technical explanations and formulas. Second, by requiring the agency to develop "intelligible principles" that all rulemakings must follow, many of the resulting rulemakings will necessarily be less, rather than more responsive to the needs of the public. Forcing an agency to develop such overarching principles in setting air quality standards, for example, prevents the agency from responding to changes in science, political values, and social values.[15] A Republican President will be bound by the "intelligible principles" developed by the administrative officials of his Democratic predecessor.[16]

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[13] *See, e.g.*, Epstein & O'Halloran, *supra* note 5; Seidenfeld & Rossi, *supra* note 5.
[14] *See, e.g.*, Adler, *supra* note 3; Oren, *supra* note 5; Pierce, *supra* note 5; Seidenfeld & Rossi, *supra* note 5.
[15] *See, e.g.*, Pierce, *supra* note 5; Seidenfeld & Rossi, *supra* note 5.
[16] *See* Pierce, *supra* note 5, at 93-94 (providing this example).

QUESTION #2: ***Does Congress delegate too much?***

Although the correct answer is probably "yes, Congress does sometimes delegate too much," a very good case can be made that Congress delegates just enough, or perhaps not even enough. The public, for example, may prefer broad delegations if they are the only way of overcoming legislative deadlock on timely and important social problems.[17] Additionally, under some policymaking circumstances, broader delegations to the agencies may be essential to maximize the political accountability and competency of the resulting policies.[18] If, for example, a policy is likely to require adjustments as the relevant science changes, and the science is expected to change, then delegation is preferable.[19] Experience with the Delaney Clause provides a good example of what can happen when Congress passes a narrow delegation that precludes the agency from adjusting the policy to the changing science. By mandating an absolute ban on any carcinogenic risk in drugs and food additives, Congress foreclosed the agency from utilizing foreseeable advances in science that would have allowed it to isolate very low, "de minimis" cancer risks that pose little health threats. A broader delegation of authority would thus likely have been much more in keeping with sound policy and ensuring political accountability than the narrow delegation that Congress did pass.[20]

Broader delegations to the agencies may also be preferable in circumstances where a problem is simply too complex for Congress to efficiently resolve at a legislative

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[17] *See, e.g.,* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. Econ. & Org. 81 (1985).
[18] *See generally* Jerry L. Mashaw, Greed, Chaos, Governance: Using Public Choice to Improve Public Law (1997); Schuck, *supra* note 6.
[19] *See, e.g.,* Seidenfeld & Rossi, *supra* note 5.
[20] *See, e.g.,* Richard A. Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?,* 5 Yale J. on Reg. 1 (1988).

level.[21] Put bluntly – in some complex areas, Congress may be prone to make mistakes that have the potential to misdirect the resulting policy. Indeed, many of Congress' mandates in the environmental area can be criticized for framing the agency's task improperly.[22] Section 109 of the Clean Air Act is probably the best example of this. Rather than delegating too broadly, one can just as easily conclude that Congress' delegation was too narrow since it prevented the agency from considering costs – even at the extreme – in deciding how to protect the public health.

Moreover, in all of these cases, broad delegations are not only likely to result in more competent policy, but the resulting policy is also likely to be more transparent and accountable than can be achieved with narrower delegations.[23] If one compares Congress' 1990 amendments to the Clean Air Act with EPA's recent ozone and PM rulemakings, it is not at all clear that Congress' efforts to resolve issues in a single complex statute did a better job at ensuring political accountability and transparency than did the agency rulemakings. Congress' 1990 amendments of the Clean Air Act occupy nearly 100 pages in the Congressional Record[24] and the statute has been hailed as "one of the most complex pieces of regulatory legislation . . . ever adopted, and one of the most impenetrable."[25] Yet because of the rushed deliberations, Congress did not have time to prepare a joint conference report explaining the basis for the hundreds of compromises and decisions made in drafting this important law. It is thus impossible for citizens to decipher from the record of yes or no votes what issues their elected officials favored.

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[21] *See generally* Epstein & O'Halloran, *supra* note 5.
[22] *See, e.g.,* Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. Ill. L. Rev. 181.
[23] *See, e.g.*, Epstein & O'Halloran, *supra* note 5; Mashaw, *supra* note 18; Schuck, *supra* note 6.
[24] Congressional Record (pp. H13101-13197) (Oct. 26, 1990).
[25] Nickel, *Now the Race to Regulate*, 1991 Envtl. Forum 18-22 (Jan.-Feb. 1991).

By contrast, in EPA rulemakings a citizen at least has the legally protected right: to review a proposed rule, its underlying justification, and the factual record; to comment on the proposed rule; and to attempt to have a court strike down the rule if the citizen believes that this process was not followed, the rule is arbitrary, or the rule falls outside the bounds of the authorizing statute. While EPA's rulemakings are hardly exemplary with regard to their transparency and accountability, in some circumstances they appear at least as good as, and likely better than, Congress' efforts.

Experience also suggests that the important goals of political responsiveness and accountability are not always served with a narrow delegation to an agency. A broader legislative delegation of authority to the FDA to permit "de minimis risk" relating to carcinogens in drugs and food additives would likely have been more politically responsive than the Delaney Clause, which bans products that pose any cancer risk.[26] Likewise, if EPA had broader authority in setting air quality standards (for example, if the agency were allowed to consider costs in some specified way), EPA would have the legal flexibility it needs to be more forthcoming about how its standards are determined.[27] Even the brownfields debacle that arose as the result of an overly rigid Superfund statute could have been avoided had Congress provided a broader delegation of authority to the EPA to exempt certain parties or sites from potential liability.[28]

While in hindsight broader delegations may actually improve the accountability and competency of policy in specific areas, broader delegations are clearly not a cure-all.

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[26] *See, e.g.*, Merrill, *supra* note 20.
[27] *See, e.g.*, David L. Faigman, Legal Alchemy: The Use and Misuse of Science in the Law (1999); Pierce, *supra* note 5; Oren, *supra* note 5.
[28] *See, e.g.*, Wendy E. Wagner, *Learning from Brownfields*, 13 J. of Natural Resources & Envtl. Law 217 (1997-98).

The transparency and political accountability of agency rulemakings – even under broader delegations -- is far from perfect.

QUESTION #3: ***What can we in Congress do about [these broad delegations to agencies] to make sure the agency rules are accountable and transparent?***

A. The Problem and its Causes

Criticisms of the accountability and transparency of agency rulemakings appear to fall into two separate categories, at least if one uses the criticisms of EPA's ozone and PM rules as a representative example. In these recent rulemakings, the EPA is first criticized for failing to consider the social costs that would result from its air quality standards. As a result, critics argue that the agency's rules are not politically responsive or accountable -- they reflect neither the will of Congress nor the preferences of the public. Second, the EPA is criticized for failing to clearly identify the values it considered when setting the air standards. This is the crux of the "intelligible principle" problem that the D.C. Circuit identifies in *American Trucking*.

However, Congress and the courts are at least as much to blame for these problems than the Executive Branch. Congress is clearly to blame for the first accountability problem – the fact that EPA's ozone and particulate standards did not adequately consider the costs of compliance. The Clean Air Act mandate has been read for over twenty years to prohibit the agency from considering costs in setting air quality standards under section 109.[29] The agency had no choice but to follow the law, however inappropriate under the circumstances.[30]

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[29] *See, e.g.*, *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).
[30] *See, e.g.*, Pierce, *supra* note 5; Oren, *supra* note 5.

With regard to the second accountability problem -- the failure of the agency to provide more accessible accounts of the underlying value choices and nonquantitative factors that guide their rulemakings – the courts, ironically, deserve much of the blame. A series of appellate opinions, inspired the Supreme Court's *Benzene* case in 1980,[31] have demanded that the agencies justify their rulemakings at a level of scientific and analytical precision that does not and cannot exist.[32] *American Trucking* is the most recent example of the judiciary's unrealistic demands that agency rules be based on analytical formulae and definitive criteria. Yet by requiring an unrealistic level of analytic and scientific precision, these rulings provide strong incentives for the agency to disguise their value choices behind a façade of scientific justifications and technical models.[33] Some courts, then, effectively require, or at least reward, agencies for acting in ways that are not transparent or accountable.

2. Possible Cures

The preceding analysis of the causes of the agency's accountability problems provides insights that can be used to develop and evaluate competing reform proposals. I will first address the two reform proposals identified in the Chair's briefing memorandum for this hearing. As discussed at length in the beginning of my testimony, the new nondelegation doctrine will likely do more harm that good with respect to the goal of increasing the political accountability of Congress and the agencies. Similarly, H.R.

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[31] *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).
[32] See, e.g., *Gulf South Insulation v. Consumer Product Safety Commission*, 701 F.2d 1137 (5th Cir. 1983) ; *Asbestos Information Assn. v. OSHA*, 727 F.2d 415 (5th Cir. 1984); *Corrosion-Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).
[33] *See, e.g.*, Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 Georgetown L. J. 729 (1979); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Columbia L. Rev. 1613, 1661-67 (providing support in cases and commentary).

2301, while a creative effort, also appears capable of exacerbating existing problems of accountability, rather than solving them (even putting to one side the delays that are likely engendered by the proposal). The protracted policymaking process required under this bill may only serve to raise the barriers still further for citizens who wish to participate on national issues of importance to them. The reform is also likely to cause the agency to be less, rather than more candid about sources of error and its underlying value judgments in order to survive Congress' review. And most significantly, it is not at all clear that the reform bill will force Congress to do a better job drafting laws that resolve difficult policy questions. Indeed, I would imagine that under H.R. 2301 some members of Congress could find it still easier to pass overbroad, vague, and possibly incomprehensible delegations to the agency. Under the bill, members of Congress will always have a second (and possibly a third and fourth) opportunity to consider the issues when the agency's rulemakings are legislatively considered. Even more conveniently, under the bill some members of Congress have the opportunity to game the process in order to please constituents on both sides of an issue. During the legislative process, such a member could support a broad, "public spirited" delegation. But once the agency attempts to implement that statute, the same member could then protect his other constituents by consistently voting down the regulations and complaining of agency incompetence or over-reaching.

So what other options are there? As the Chair has noted, members of Congress should continue to read rulemakings they care about and comment on them. If the transparency and political accountability of agency value judgments is the dominant concern, then members of Congress should emphasize these issues in their comments and

take appropriate steps to ensure (i.e. through oversight hearings) that the agency responds to them. Congress could also provide incentives for improved transparency in agency rulemakings by identifying and policing the best and worst rules of the year. Another obvious reform is for Congress to legislatively reverse agency rulemakings that it feels strongly about.[34] Finally, adjusting the courts' approach to judicial review through minor amendments to the Administrative Procedure Act might also assist in increasing the transparency and accountability of the agencies' rulemakings. For example, the courts could be instructed to provide extra deference to agency technical and policy choices provided the agency has expressed its choices in clear and accessible ways.[35] Encouraging a more constructive approach to judicial review will make it easier for agencies to acknowledge their value judgments, and thus make it easier for Congress to oversee the agency's activities.

SUMMARY

In sum, I agree that there is considerable room for improving the transparency and political accountability of Congress' and the agencies' policymaking activities. However, the reforms proposed in the Chair's briefing memorandum for this hearing are not the way to fix the problem. Instead, attention should be focused on reducing the courts' unrealistic demands for technical explanations when those explanations are insufficient to capture the necessary value choices that the agency must make in fulfilling its statutory mandate. In addition, Congress should focus on ensuring that its delegations provide the agencies with the flexibility they need to consider the factors that Congress deems important when developing rules. Together, these two reforms are much more

[34] *See, e.g.,* Schuck, *supra* note 6 (suggesting various mechanisms by which Congress can affect agency rulemakings).

likely to fulfill the Subcommittee's important goal of bringing government closer to the people.

[35] *See, e.g.*, Cross, *supra* note 6; Oren, *supra* note 5; Wagner, *supra* note 33.

Statement that would have been read into the record as oral testimony on June 14
Wendy E. Wagner

Thank you, Mr. Chairman, for inviting me to testify today. I will deliver my testimony directly in response to your two questions.

First, ***Does Congress delegate too much?***

Obviously, a good part of the answer depends simply on whether one agrees with the President's policies. In the mid 1980s, for example, the majority in Congress so distrusted the President on environmental issues that that Congress amended statutes to severely restrict the power of the agencies

But as I understand it, you are also interested in the deeper and more apolitical question of whether Congress compromises the accountability of the policymaking process when it delegates broad authority to the agencies.

In this regard, I do NOT believe that Congress IS compromising accountability in the case of a number of broad delegations. Indeed in some circumstances, Congress may actually be enhancing accountability and responsiveness to the public by granting broad authority to the agencies.

I will outline at least 3 circumstances when broader is better:

1. *Broader is better when delegations are the only way to overcome legislative deadlock on problems of interest to the public.* If the public prefers delegation to deadlock, then delegating is the politically responsible solution.

2. *Broader is better when Congress is unlikely to have the necessary information or resources to solve a problem competently or openly. In short, when the issues are very complex.*

   For example, consider Congress' 1990 amendments to the Clean Air Act. That law, which is of extraordinary importance to the American public, occupies nearly 100 pages of tiny print in the Congressional Record. Yet because of its rushed deliberations, Congress did not have time to even prepare a joint conference report explaining the basis for the hundreds of compromises it made in drafting this important law. Is this type of lawmaking more accountable or responsive to the public than an ageny's rulemaking? At least for the agency's rule, the public can access the agency's rationale, they can comment on the rule, and, if they are dissatisfied, they can challenge the rule in court, lobby Congress to change it, and consider it as a factor in the next Presidential election.

3. *Broader is better in policy areas where information or values are likely to change quickly. Under these circumstances, broader delegations that provide the agencies*

flexibility are generally most responsive to the needs of the public. This is an obvious point. Congress cannot expect to keep abreast of the changing science and other new information and amend the laws each time the science changes. And when Congress has tried to legislate the details, the results have sometimes been disastrous. The inflexible Delaney Clause under the Food Drug and Cosmetic Act AND the unforgiving liability rules of Superfund were both narrow, rigid delegations that denied the agencies essential authority to adjust the law to changing conditions. The problems created by both of these narrow delegations have been very costly are not yet fully corrected.

NOW, Assuming that there is a problem of agency accountability as a result of a delegation, what can be done about it?

First, I firmly believe that the nondelegation doctrine and the related "intelligible principles" requirement in American Trucking are not the answer.

As I indicate in my written testimony, a large majority of law professors who have written on the new nondelegation doctrine in American Trucking argue that the opinion is wrong. There are a number of reasons for this condemnation of the opinion, not the least of which concerns the constitutional and legal legitimacy of the new doctrine.

But the opinion has also been heavily criticized for the ways in which the "intelligible principles" requirement will actually serve to impair, rather than improve, the agency's political accountability and honesty regarding its value choices. As much as we might wish differently, in most environmental rulemaking exercises there is no overarching formula or set of principles that can credibly be developed to capture the many pollutant-specific choices that are required for each standard.[1] To ignore this reality either forces the agency to develop guidelines that are far too inflexible, or it causes the agency to work even harder to disguise its true decisions under layers of artificial technical explanations and formulas.

So what can be done? I have two specific suggestions that are supported more fully in my written testimony.

First, Congress needs to amend statutory mandates to the extent that they preclude agencies from considering factors that Congress deems important. EPA cannot be blamed for failing to be candid about the way it considered costs in setting the air standards. This is Congress' fault. And Congress can fix it by amending the Clean Air Act.

Second, Congress should command the courts to back off, rather than increase their scrutiny of the agencies. Some courts, including the American Trucking court, have required agencies to justify their rulemakings at a level of scientific and analytical precision that does not and can not exist. By requiring this unrealistic level of technical support, these rulings provide strong incentives for the agency to engage in a "science charade." In order to survive judicial review, the agencies will disguise the uncertainties

and value choices behind a façade of scientific justifications and technobabble. Congress should intervene and explicitly prohibit the courts from demanding this level of quantitative precision.

Together, these two reforms are much more likely to fulfill the Subcommittee's important goal of increasing the accountability of both Congress and the agencies.

With your permission, Mr. Chairman, I would also request that this revised copy of my written testimony be entered into the record. I have added citations that identify at least some of the sources that support my statements.

Thank you.

Mr. KUCINICH. I thank the Chair again for holding this important hearing. I look forward to the testimony of Senator Brownback and Representative J.D. Hayworth.

Thank you very much.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

Statement of Rep. Dennis Kucinich
Ranking Minority Member
June 14, 2000 Hearing on Delegation

Mr. Chairman, thank you for holding this important hearing on the impact of delegation of legislative authority on our system of government.

The Constitution provides that Congress has the authority to legislate. However, Congress often passes broad statutes and asks agencies to fill in the details through regulation. This is understandable because agencies have the expertise and staff to address what are often extremely complicated technical and scientific issues. This also allows the agency to more quickly respond to changes in science and political and social values.

However, Mr. Chairman, I share your concern that delegation can be abused by both Congress and by the agencies. Congress can duck politically difficult issues by passing broad legislation that set politically popular goals and blame the Administration when agencies make the tough decisions about who will bear the burden of reaching those goals. Similarly, agencies can overstep their authority

and pass regulations which are not authorized by the underlying statutes.

Mr. Chairman, I am looking forward to hearing from the witnesses who will hopefully shed some light on possible ways to protect against such abuse. However, I hope that the solution does not further limit our ability to pass competent and politically accountable legislation that is in the public interest.

Statutes and regulations -- especially environmental protections -- are often based on complicated technical and scientific knowledge. Because members of Congress are elected, there is a great deal of turnover at both the member and staff level. It is not likely that we could duplicate the expertise provided by the agencies. We need to take advantage of agency expertise in order to pass competent legislation.

I also expect to hear a lot about political accountability today. Some argue that agencies are ruled by special interests while members of Congress -- who are politically

accountable elected officials -- respond, instead, to the public interest. Unfortunately, these arguments ignore the political reality that Congress is also beholden to special interests. And it is easy for Congress to draft legislation with special interests behind closed doors. On the other hand, there are a number of administrative laws that ensure that all interested parties have the chance to comment on agency rulemaking and the public can review these comments. I believe any solutions that we consider ought to make sure that the process is open and that the decisionmakers are truly politically accountable for their actions.

Finally, Mr. Chairman, I hope that any solution we consider would not make it more difficult to respond to the public interest. As you well know, we often learn new facts that would significantly impact how to best implement a law. For example, science on the dangers of pollution indicate that we need more stringent protections. Social and political values also change. For instance, the possibility of regulating tobacco has become more popular as we learned more about the devastating dangers it presents.

In response, the public often demands better protections -- whether it be on the issue of clean air, tobacco, or otherwise -- yet, because of special interests, Congress is often slow to respond. I want to make sure that we do not create a procedural maze that makes it even more difficult to enact important public protections.

Mr. Chairman, at my request, you invited Professor Wendy Wagner to testify today. She was expected to testify on a number of these issues and I was looking forward to exploring them with her further during the hearing. Unfortunately, she is not able to attend because of a family emergency. I ask unanimous consent to insert her testimony in the record and to hold the record open to include additional materials including any answers to questions subcommittee members may want to ask Professor Wagner in writing.

Mr. Chairman, thank you, again, for holding this important hearing and I look forward to the testimony.

Pollution Can Save Your Life

Gordon/Knickerbocker

6-17 NYT

By T. H. Watkins

WASHINGTON

The Environmental Protection Agency has announced that it will issue a regulation in July intended to reduce tropospheric, or ground-level, ozone by 10 percent. This action, several alert conservative economists have revealed, means that the agency not only is determined to pauperize us but is also out to kill us.

Reducing ground-level ozone, the main component of urban smog, would decrease the incidence of asthma and other respiratory diseases — by as many as 1.5 million cases a year, according to the American Lung Association. But conservative analysts like Wendy L. Gramm and Susan E. Dudley, have wondered out loud whether tropospheric ozone has anything to do with respiratory problems.

T. H. Watkins, a consulting editor for Audubon magazine, has written numerous books on history and environmental subjects.

Even if it does, Dr. Gramm and Ms. Dudley wrote last week in The Wall Street Journal, a 10 percent reduction would be too expensive: the E.P.A. estimates that the new rule could cost $6.3 billion a year, while its benefits amount to a paltry $2.1 billion. Clearly, it would be fiscally irresponsible to do anything but let the victims of ozone-rich smog sicken and die.

Even worse, the conservative analysts say, the E.P.A. proposal ignores the health benefits of tropospheric ozone — it is good for you, they contend, because it helps screen out ultraviolet-B radiation, a cause of sundry skin cancers, including lethal melanomas. Just as surely as a well-placed bullet will prevent someone from having a heart attack, then, daily doses of tropospheric ozone could keep you from getting a killer melanoma. Providing your lungs don't collapse first.

Smog is good. Trees are bad.

Other experts say the filtering effect of tropospheric ozone is minuscule, but let's not get technical. The revelation of the previously unsung benefits of a major pollutant could revolutionize environmental decision making.

At night, do trees exude carbon dioxide, which is harmful to humans if inhaled directly? You bet, but we could virtually eliminate this threat if we stepped up forest destruction.

Can you get salmonella from a bad salmon? Sure. Is there a better reason to let all the salmon in the fisheries of the Pacific Northwest die from the effects of dams and clear-cutting (see above)? Does someone occasionally fall into a swamp and drown? Fill the wetlands and you've got your problem solved.

For too long, the E.P.A. and other predatory agencies have ignored these and many other benefits of habitat destruction and air and water pollution. But, incredibly, there is more. Many conservative critics say the new E.P.A. rule would make goods and services more expensive, reducing disposable family income.

That charge has been leveled against the agency for years, of course, though so far it doesn't appear that your average family has lost a nickel of mall money because of anything the E.P.A. has ever said or done. But this time is different. This time the agency intends to kill.

Dr. Gramm and Ms. Dudley, citing a study by the Office of Management and Budget, say that every $9 million to $12 million decline in aggregate personal income is associated with one statistical death. Thus, they contend, their estimates of the full costs of the E.P.A. proposal — which are much higher than the agency's own estimates — mean the new regulation would kill 7,000 people a year.

My God. Isn't it bad enough that the E.P.A. wants to deprive us of our melanoma-shielding smog? It also wants to kill 7,000 people a year by reducing their aggregate personal income. In our spineless devotion to environmental regulation, we are about to turn another killer loose.

This is a danger the nation ignores at its peril. In the meantime, now that summer is here I'm going to go find me a good inversion layer and hunker down in a life-preserving mist of tropospheric ozone. Kaff kaff. □

Mr. RYAN. Thank you, Dennis.

Mr. Vitter, would you like to make an opening statement?

Mr. VITTER. No.

Mr. RYAN. At this time, I'd like to ask unanimous consent that the statement from Congresswoman Chenoweth-Hage be inserted into the record.

Without objection.

[The prepared statement of Hon. Helen Chenoweth-Hage follows:]

Statement of Congressman Helen Chenoweth-Hage
Subcommittee on National Economic Growth,
Natural Resources and Regulatory Affairs
Committee on Government Reform
B377 Rayburn House Office Building
June 14, 2000

Thank you Chairman McIntosh, I would like to thank the Subcommittee for holding this hearing, "*Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?*" This is an extremely important topic. For far too long, Congress has been too willing to grant regulatory agencies excessive authority.

Mr. Chairman, all too often the House and the other body ignore the requirements of the Constitution and delegate authority, that is most properly administered through Congress, to third-party quasi-executive agencies. This is simply unacceptable. Our founders were clear when they wrote in the Constitution, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Article I, Section I). The founders didn't say that the legislative power should be vested in a government agency controlled by bureaucrats. They were very explicit, the Congress has the legislative power.

For literally the past 65 years, we have ignored this truism. We have delegated, assigned, transferred, overlooked, disregarded, and neglected this power. It is now time to take the first steps to reverse this inexcusable disregard for the requirements of the Constitution.

Today, I look forward to hearing from our witnesses about this timely and sensitive issue. In particular, I look forward to Congressman Hayworth's testimony concerning the H.R. 3201, the Congressional Responsibility Act of 1999. As an original cosponsor of this legislation, I would like to emphasize its particular value. By taking away the 'right' of final rulemaking from the executive agencies and restoring it to the Congress we will once again let our government be guided by the Constitution.

Mr. Chairman, over two hundred years ago, James Madison wrote in *Federalist 47*, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." If we are not careful to abide by his sage advice, I fear that we will head down the same self-destructive path of the Roman empire. While not an empire, America should learn from the history of one of the great republics.

Time and again, history has proven that highly centralized and bureaucratized forms of government fail, and fail miserably. Non-delegation of our legislative power will *increase* our accountability to the American people and reaffirm our commitment to the republican form of government given to us by out forefathers.

Thank you, Mr. Chairman.

Mr. RYAN. Senator Brownback.

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you very much, Mr. Chairman.

And if you'll pardon an old man's musings here for a moment, it's a great pleasure to be able to be here and testify in front of you where I got to work for a number of years, and I'm delighted in being able to work with you and now to be able to address you as chairman; I guess one of the pleasures of growing older. So I appreciate the opportunity to do that.

Mr. RYAN. Thank you, old man. [Laughter.]

Senator BROWNBACK. I feel it a number of days, too.

Let me quote the Constitution. One guy came out to Kansas to work with a group that I was with there, and a person in the crowd held up a copy of the Constitution and he commented, he said, you know, isn't that a terrible thing when you get outside of Washington, and people start waving around the Constitution. Can you believe it? I always know when I'm outside of Washington. People know the Constitution.

And I thought it telling that the rest of the country maybe knows it better than people here in this town.

But you can look at Article I, Section 1, right after the Preamble begins, "All legislative powers herein granted shall be vested in a Congress."

Pretty clear. The founders clearly believed that this included the power to regulate. As they had noted, John Locke's wise admonition that "the legislative branch cannot transfer the power of making law to any other hands." This is John Locke.

They understood that if a transfer did occur, legislators would no longer be responsible for the laws that the government imposes on the people. They would be waiving their authority that they were to represent the people for, and they could not do that.

And for the first 150 years of the republic, the Supreme Court held that the transfer of legislative powers to another branch of government was unconstitutional.

In the late 1920's, the Supreme Court essentially succumbed to some political expediency, reversed itself, and upheld a law which allowed Congress to delegate its authority.

The case of *J.W. Hampton, Jr. & Co.* v. *United States,* started Congress down a slippery slope that we've gone a long ways down.

Since then, Congress has ceded its basic legislative responsibility to executive branch agencies that craft and enforce regulations with the full force of law.

But perhaps the most pernicious aspect of delegation is that voters can no longer hold government accountable. Originally designed to be the most accountable branch of government, congressional responsibility and accountability has clearly eroded. The fundamental link between voter and lawmaker has been severed.

A handful of broadly written laws has spawned a virtual alphabet soup of government agencies, and an overwhelming regulatory burden that undermines the very idea of representative government.

Many regulatory analysts believe more consequential law is generated in the executive branch than in the legislative branch.

The Federal Register, which in 1995, churned out some 4,713 final rules, according to the Office of Management and Budget, states in its purposes that it "provides a uniform system for making available to the public regulations having legal effect."

In short, the executive branch has assumed the lawmaking authority given to the Congress. I think it's wrong.

I frequently get constituents in Kansas asking well, how did that happen that some regulation went into effect or something happened that was an extraordinary action, and they said, don't you guys have the authority of law? I mean, aren't you the legislative body?

To which I respond, yes, we are the lawmaking body, but here's what's taking place. They don't understand it. They then start whipping out and saying, well, I thought in the Constitution, it said this.

We've waived and given up that authority.

Under the Congressional Responsibility Act that Congressman Hayworth has been the champion of, that I'm pushing in the Senate, all rules and regulations would have to come before the Congress before they could be enacted into law; simple, clear, direct, I might also add, constitutional.

Congress would then have to have an up or down vote on the proposed rule or regulation before it could take effect. The bill provides for consideration of rules and regulations in an expedited manner, unless a majority of members vote to send it through the normal legislative process.

Under the bill, if Congress did not act, then the rule would, by default, die. This approach not only puts Congress back in control of the legislative process, it ends the horrendous practice of delegation without representation, and makes Congress accountable to the laws that affect the lives of every American. It's about the return of power, responsibility and authority back to Congress.

I should note that this concept is non-partisan and ideologically neutral and in fact was first offered by then-Judge Steven Breyer who wrote that we should end delegation as a means to satisfy, "the literal wording of the Constitution's bicameral and presentation clauses."

The Constitution really has suffered greatly this century. I think we need to restore it to its rightful preeminence as a guarantor of our freedoms, the protector of our liberties, and the guiding force for our form of government.

Delegation today is as wrong as taxation without representation in the 1700's. With enactment of this legislation, we send that clear message that it's Congress that legislates, it is Congress that passes the law.

And, Mr. Chairman, let me just add a couple of additional notes, if I could on this because I think this is extremely important, particularly where we've gotten to the point today that people question the role of Congress.

They see a lot of things happen on an international scale to them, or that they see driven on international agreements.

They see things happening in the executive branch to them.

And they're wondering, I thought the responsible branch to us, the representative branch was the one to pass the laws. And yet they see and sense, and I think frankly rightly so, more happening on an international and a national basis than legislation happening at the congressional level.

This is the sense that people are developing and it's because we've allowed this power to go ahead and accrue further and further into the executive branch. It's time to stop.

We've got nine sponsors to this legislation in the Senate. This is I believe the first hearing, perhaps the second and the first in this Congress on this bill, and I think it's important that it start getting some airing out so that people can look at it and say, we need to get this back where the founders intended.

Thanks for holding the hearing, and I want to thank the person that's championed this for so long, J.D. Hayworth, who's really carried the torch for a long time.

[The prepared statement of Senator Brownback follows:]

STATEMENT BY SENATOR SAM BROWNBACK

Mr. Chairman, Committee members, I am honored to be able to testify here today.

Today, I am here to testify regarding the Congressional Responsibility Act of 1999 originally introduced by my good friend, Congressman J.D. Hayworth, during the 104th Congress and reintroduced in the 105th, and the 106th. It is a bill which I am sponsoring in the United States Senate, where we currently have 9 cosponsors.

The underlying issue before us today is not about regulatory reform, or even about the unmitigated power of federal agencies—its about the Constitution—and it is about Congress.

For much of this century Congress has abdicated one of its most fundamental responsibilities —the creation of law—to unelected, unaccountable bureaucrats in the executive branch of the federal government.

My bill, and the bill being considered before us today is about returning power to Congress, and ultimately it's about returning power to the people who elected us.

The myriad rules and regulations promulgated by the myriad executive branch agencies have the full force of law; and yet the Congress is not accountable. Our constituents can be taxed, fined, even imprisoned and all without any congressional action.

Although we seldom seem to follow the intent of the Constitution, I think it is crucial that we begin again to live by the document that gave us our form of government. After the preamble to the Constitution, Article I, Section 1 begins: "All legislative powers herein granted shall be vested in a Congress."

The Founders clearly believed that this included the power to regulate, as they had noted John Locke's wise admonition that, "the legislative [branch] cannot transfer the power of making law to any other hands." They understood that if this transfer did occur, legislators would no longer be responsible for the laws that government imposes on the people.

And for the first 150 years of our republic, the Supreme Court held that the transfer of legislative powers to another branch of government was unconstitutional. In the late 1920s, the Supreme Court, essentially succumbing to political expediency, reversed itself and upheld a law which allowed Congress to delegate its authority. The case, *J.W. Hampton, Jr. & Co. v. United States*, started Congress down a slippery slope. Since then, Congress has ceded its basic legislative responsibility to executive branch agencies that craft and enforce regulations with the full force of law.

But perhaps the most pernicious aspect of delegation is that voters can no longer hold government accountable. Originally designed to be the most accountable branch of government, Congress has grown increasingly irresponsible. The fundamental link between voter and lawmaker has been severed. A handful of broadly written laws has spawned a virtual alphabet soup of government agencies and an overwhelming regulatory burden that undermines the very

idea of representative government.

Many regulatory analysts believe more consequential law is generated in the executive branch than in the legislative branch. The *Federal Register*, which in 1995 churned out some 4,713 final rules according to the Office of Management and Budget, states in its purpose that it "provides a uniform system for making available to the public regulations...having legal effect."

In short, the executive branch has assumed the law-making authority given to the Congress.

I think this is wrong.

Therefore, along with Congressman Hayworth, I have introduced legislation that would restore the constitutional responsibility of the Congress over the formulation of all laws by making executive branch agencies accountable to the American people through their representatives in Congress.

Under the Congressional Responsibility Act all rules and regulations would have to come before the Congress before they could be enacted into law. Congress would then have to have an up or down vote on the proposed rule or regulation before it could take effect. The bill provides for consideration of rules and regulations in an expedited manner, unless a majority of Members vote to send it through the normal legislative process. Under the bill, if Congress did not act then the rule would, by default, die. This approach not only puts Congress back in control of the legislative process it ends the horrendous practice of delegation without representation—and it

makes Congress accountable to the laws that effect the lives of every American. It is about returning power, responsibility and authority back to Congress.

I should note that this concept is non-partisan and ideologically neutral, and, in fact, was first offered by then Judge Stephen Breyer who wrote that we should end delegation as a means to satisfy "the literal wording of the Constitution's bicameral and presentation clauses."

The Constitution has suffered greatly this century—I think we need to restore it to its rightful preeminence as the guarantor of our freedoms, the protector of our liberties, and the guiding force for our form of government.

Delegation is as wrong today as taxation without representation was in the 1700s. With enactment of this legislation, we will send a clear message to the bureaucrats in Washington and to the American people at home: Congress must not delegate its constitutionally-granted powers.

Thank you Mr. Chairman.

Mr. RYAN. Thank you, Senator.

Congressman Hayworth.

STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. HAYWORTH. Mr. Chairman, thank you very much.

And as I look at my one-time colleague in the House, now serving in the Senate, I don't see a great deal of gray in that brown hair.

To my good friend, the ranking member, the gentleman from Ohio, thank you for reading the piece in Roll Call. And for purposes of full disclosure and my own vanity, I'm just sorry they don't have an updated picture. If you notice, there was an additional ham hock underneath my chin which causes me great despair, but I'll try to update a picture and of course there's not much improvement anyway.

And to my good friend from Louisiana, who joins us here today, it's good to have you here on the subcommittee, and I do want to thank you for this opportunity to testify about whether Congress delegates too much authority and power to Federal agencies.

The answer to the question is quite simple: yes. Congress delegates far too much power to unelected, unaccountable Federal bureaucrats.

One of the most important reforms we as a Congress can undertake is reclaiming our constitutionally granted power to make laws.

My testimony today will focus on the practice of unconstitutionally delegating legislative powers to the executive branch, the effects of that delegation, the flaws of the Congressional Review Act, and why we should now enact the Congressional Responsibility Act.

As was mentioned earlier, Mr. Chairman, last year I reintroduced the legislation as H.R. 2301, and my good friend who sits fittingly to the right of me right here at this table, Senator Brownback, introduced companion legislation as S. 1348 in the Senate.

The goal of our bill is simple, to take back the constitutionally-granted power of Congress to make laws. Senator Brownback stated it earlier. It appears in the Constitution following that incredibly beautiful and practical preamble.

Article I, Section 1 states, all, let me emphasize the word all, all legislative powers herein granted shall be vested in a Congress of the United States.

But amazingly, for the last 60 years, Congress has been allowed to delegate its constitutionally granted power to make laws. In fact, the Supreme Court has not invalidated a single delegation of power since 1935.

For the first 150 years of our republic, however, the Supreme Court held that the transfer of legislative powers to another branch would be unconstitutional.

Not only does designating legislative power run counter to Article I, Section 1, it also clearly violates the Constitution's separation of powers clause by making the executive branch both the maker and enforcer of laws.

James Madison wrote in the Federalist Papers that the consolidation of authority into one branch was tyrannical. Unfortunately,

by allowing the executive branch to be both the maker and the enforcer of laws, we have created the tyrannical branch James Madison so feared.

In 1999, the Federal Register had 4,538 proposed rules, in essence, 4,538 laws. By contrast, Congress did not even propose, let alone vote on, that many bills.

The cost of the regulations appearing in the Federal Register in 1999 comes down like this. $758 billion, to think of it another way, $7,500 for the median two-earner family, or for the economists who join us here today, 19 percent of the gross domestic product.

This imbalance demonstrates why many regulatory analysts have concluded that more consequential law is generated in the executive branch than in the legislative branch, as Senator Brownback mentioned in his testimony.

Our founders also knew that by vesting lawmaking powers solely in Congress, the people could hold the legislative branch accountable for its actions.

By delegating the powers to Congress to the executive branch, the people had no recourse because executive branch employees are the folks who craft these rules and regulations. And of course they are unelected and not directly accountable to the people.

Delegation gives life to bad laws because it allows legislators to make ambiguous laws for which they can take credit, without having to take responsibility for the legal consequences or the costs of these regulations.

Essentially, and this phrase may be especially apt for me, delegation allows Congress to have its cake and eat it too. Congress can reap the benefits of delegation and its excesses by helping constituents through the complexities of Federal regulations.

At the same time, and again neither party has ownership of this little piece of political rhetoric, we in Congress can blame those confounded bureaucrats for misinterpreting our intent in drafting laws to begin with.

So it's a very interesting game but it has profound consequences. We're in the congressional two-step. We can play both sides and win. But the loser in all of this is the people.

Delegation also allows powerful special interests to expend substantial resources in private to benefit the few at the expense of the many. Simply put, if we're really to restore integrity, responsibility, and confidence in our Federal Government, one of the best ways we can do this is by ending this unconstitutional delegation of legislative powers to the executive branch.

The 104th Congress realized the executive branch was wielding too much power in the legislative process so in March 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act.

A provision in the bill known as the Congressional Review Act [CRA], now allows Congress to review new regulations and prevent those regulations from taking effect.

Now while I'm a strong supporter of the CRA as an important first step in having Congress assert more influence into the regulatory process and take back its constitutionally granted responsibilities, I regret that it has not yet been used to overturn one proposed rule or regulation.

In fact, not one disapproval motion has even made it to the Senate or House floor for a vote. There are many reasons why the CRA has not been used. The most important reason may be the fact that it takes a two-thirds majority to overturn a rule as the executive branch is almost certain to veto a disapproving resolution of the rule that the executive branch creates.

Therefore, executive branch employees can still craft rules and regulations that are supported by a minority.

I have more, Mr. Chairman. If you'd like me to continue, I shall, but I'm happy to submit the rest of my remarks for the record and take your questions. Whatever it is the will of the committee and the ranking member, I stand patiently and expectantly for your verdict.

[The prepared statement of Hon. J.D. Hayworth follows:]

Statement of the Honorable J.D. Hayworth

Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs

Hearing on Whether Congress Delegates Too Much Power to Agencies

June 14, 2000

Mr. Chairman, members of the subcommittee, and distinguished guests, thank you for allowing me this opportunity to testify about whether Congress delegates too much power to federal agencies. The answer to this question is quite simple: yes, Congress delegates far too much power to unelected, unaccountable federal bureaucrats. One of the most important reforms Congress can undertake is the taking back of its constitutionally granted power to make laws. My testimony today will focus on the practice of unconstitutionally delegating legislative powers to the executive branch, the effects of delegation, the flaws of the Congressional Review Act, and why we should enact the Congressional Responsibility Act.

As you know, Mr. Chairman, last year I reintroduced the legislation as H.R. 2301, and my good friend and former colleague in the House, Senator Brownback, introduced companion legislation, S. 1348, in the Senate. The goal of our bill is simple: to take back Congress's constitutionally-granted power to make laws.

As Senator Brownback stated earlier, Article I, Section 1 of the Constitution clearly states, "All," and let me emphasize the word "all," "All legislative powers herein granted shall be vested in a Congress." Amazingly, for the last 60 years, Congress has been allowed to delegate its constitutionally-granted power to make laws. In fact, the Supreme Court has not invalidated a single delegation of power since 1935. For the first 150 years of our republic, however, the Supreme Court held that the transfer of legislative power to another branch was unconstitutional.

Not only is delegating legislative power antithetical to Article I, Section 1 of the Constitution, but it also clearly violates the Constitution's "separation of powers" clause by making the executive branch the **maker** and **enforcer** of laws. It was James Madison who wrote in the Federalist Papers that the consolidation of authority into one branch was tyrannical. Unfortunately, by allowing the executive branch to be both the maker and enforcer of laws, we have created the "tyrannical" branch that Madison so feared.

In 1999, the *Federal Register* published 4,538 proposed rules, in essence laws. By contrast, Congress did not even propose, let alone vote on, this many bills. The cost of these regulations was an amazing $758 billion, or in realistic terms $7,500 for the median two-earner family or 19 percent of the gross domestic product. This imbalance demonstrates why many regulatory analysts have concluded that more consequential law is generated in the executive branch than in the legislative branch.

Our Founders also knew that by vesting law-making powers solely in Congress, the people could

hold the legislative branch accountable for its actions. By delegating Congress's powers to the executive branch, the people have no recourse, because the executive branch employees that craft these rules and regulations are unelected and unaccountable.

Delegation gives life to bad laws because it allows legislators to make ambiguous laws for which they can take credit without taking responsibility for their legal consequences or their costs. Essentially, delegation allows Congress "to have its cake and eat it too." Congress can reap the benefits of delegation and its excesses by helping constituents through the complexities of federal regulations. At the same time, it can blame bureaucrats for misinterpreting its intentions. The legislator can play both sides and win. Unfortunately, the loser in all of this is the electorate.

Delegation also allows powerful special interests to expend substantial resources in private to benefit the few at the expense of many. Simply put, if we are to restore integrity, responsibility, and confidence to the federal government, one of the best ways we can do this is by ending the unconstitutional delegation of legislative powers to the executive branch.

The 104th Congress realized the executive branch was wielding too much power in the legislative process, and in March 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA). A provision in the bill, known as the Congressional Review Act or CRA, now allows Congress to review new regulations and prevent them from taking effect.

While I am a strong supporter of the CRA as an important first step in having Congress assert more influence in the regulatory process and take back its constitutionally-granted responsibilities, I regret that it has yet to be used to overturn one proposed rule or regulation. In fact, not one disapproval motion has even made it to the House or Senate floor for a vote. There are many reasons why the CRA has not been used. The most important reason may be the fact that it takes a two-thirds majority to overturn a rule, as the executive branch is almost certain to veto a disapproving resolution of a rule that it creates. Therefore, executive branch employees can still craft rules and regulations that are supported by a minority.

Unlike the CRA, the Congressional Responsibility Act would require every rule or regulation to be approved by a simple majority vote of both houses of Congress. However, it would also only take a majority to defeat a rule or regulation. In the cases where Congress disagrees with a rule being promulgated by the executive branch, the Congressional Responsibility Act would force the executive branch and Congress to work on a compromise rule in order to pass Congress and be signed by the President. In other words, it would force the executive branch agencies to work with Congress in formulating new rules or regulations.

The CRA also creates an interesting twist in the legislative process that is worth examining. Through the CRA, the executive branch still takes on some of the functions of the legislative branch by crafting laws. However, the legislative body takes on the role of the executive branch by vetoing, that is disapproving, the legislation. The executive branch will likely veto the veto, thus reassuming its proper constitutional powers.

The final problem with the CRA is the fact that it may not pass constitutional muster because the

CRA is similar to the legislative veto that was struck down in *INS v Chada*. On the other hand, the Congressional Responsibility Act would pass constitutional questions because it would reaffirm Article I, Section 1 of the Constitution and the "separation of powers" clause.

Mr. Chairman, with that in mind, I would now like to briefly explain our legislation. The Congressional Responsibility Act will require Congress to vote on all rules and regulations, as defined in section 551(4) of title 5, United States Code, except those regulations of particular applicability, any interpretive rule, general statement of policy, or any regulation of agency organization, personnel, procedure, or practice. The Congressional Responsibility Act will apply only to new regulations and will not be retroactive.

Detractors will say that there is no way that Congress has the time to review all rules and regulations that are promulgated by the executive branch. Regardless of the time implications, it is Congress's duty to review rules and regulations, as enumerated in Article I, Section 1 of the Constitution. Furthermore, I have frequently had the honor and privilege of serving as Speaker Pro Tempore. On several occasions, I have presided over largely ceremonial debate in which we took several hours to name federal installations after noteworthy Americans. I ask you: If we can name courthouses, airports, military bases, and other places, don't we have enough time to vote on the rules and regulations that profoundly affect the citizens of this country?

With these time constraints in mind, however, the Congressional Responsibility Act provides an expedited procedure for considering rules and regulations. Within three days after an agency promulgates a rule, the Majority Leader of both the House and Senate (by request) must introduce a bill comprised of the text of the regulation. If the bill is not introduced in three days, any Member thereafter may introduce the bill. The bill is not referred to a committee unless a majority of Members agree to send it through the normal legislative process. Within 60 days of being introduced, however, the legislation must come before the respective chamber for a vote. The bill shall be limited to one hour of debate and cannot be amended. If a majority of Members of the body vote for the bill, it is sent to the other body for approval. Upon approval of both bodies, the legislation is sent to the President to sign or veto.

Other opponents of this legislation might argue that this would delay the implementation of rules and regulations. In reality, though, it would not. Rules and regulations are often the subject of lengthy lawsuits. For example, the final rule for leaded gasoline took nearly 10 years to promulgate because it was the focus of intense litigation. Congress becomes the final arbiter in rule-making and the Congressional Responsibility Act states that a regulation contained in a bill is not an agency action for the purpose of judicial review under chapter 7 of title 5, United States Code. This would bring to a halt the litigation that delays implementation of regulations.

Finally, opponents of our concept will say that this is a backhanded attempt at regulatory reform. Again, the Constitution makes clear that all legislative powers shall be vested in Congress. Article I asserts that this legislative power includes the power to regulate. By returning the power to regulate to Congress, we will make Congress accountable to the people for all federal laws. This will make for better government, a laudable goal which we, as well as the American people, desire.

Mr. Chairman, the Congressional Responsibility Act will not only reaffirm our constitutional principles but it will reaffirm the American people's confidence in the federal government. I am of the opinion that delegation is one of the root causes of the American's people disenchantment with Congress and the federal government. We can take a step in the right direction by ending unconstitutional delegation of powers. By taking this step, we will help restore confidence and integrity to the federal government. This is a step this Congress should be willing to take.

Mr. Chairman, I know Senator Brownback has touched on the bipartisan support for this bill. I want to reemphasize this and point out the fact that the Congressional Responsibility Act was borne out of a concept that now-Justice Stephen Breyer wrote about in a 1984 law review article in which he extolled the virtues of replacing the legislative veto by an expedited procedure for Congress to pass rules and regulations. Other notable scholars from the left and right embrace this concept. In fact, Nadine Strossen, President of the American Civil Liberties Union (ACLU), strongly supports this concept. In addition, Judge Robert Bork and other conservative scholars have written extensively on this subject. What I am getting at is simple; there are no partisan stripes in this debate because this concept is supported by both conservatives and liberals. It just makes common sense to revert back to the principles of the Constitution.

A defining episode in the evolution of the United States was the Boston Tea Party. Scores of American patriots rallied behind the slogan of "no taxation without representation." Today, I believe the American people are rallying to a similar cry against the executive branch agencies who are running our country by bureaucratic fiat. The new rallying cry for the 21st century may well be "no regulation without representation." Congress must take back its constitutionally-granted powers to enact laws.

Mr. Chairman, I again want to thank you, as well as the subcommittee members and our distinguished guests. We often talk about reforming the way Washington works. Enactment of the Congressional Responsibility Act by this Congress would demonstrate to the American people how serious we are about achieving this goal. Mr. Chairman, I welcome any questions you, or any other members of the subcommittee, might have.

Senator BROWNBACK. If I could, Mr. Chairman, I'm going to need to get back over to the Senate side, but thank you very much for allowing me to be here, and thanks for holding this hearing.

Mr. RYAN. Thank you. Thank you very much for coming by, Senator Brownback. We appreciate all your work.

Mr. Hayworth.

Mr. HAYWORTH. Yes, sir?

Mr. RYAN. Why don't we start with just a dialog and then we can finish it up.

Mr. HAYWORTH. Sure, that's great.

Mr. RYAN. I thought what you mentioned about the CRA was a very important point, which is the CRA doesn't really work because it's not used at all.

Why do you think it's not used? And if it's a political problem, then don't you believe that we need to have more of an active mechanism, rather than the passive mechanism that the CRA is?

Mr. HAYWORTH. That's precisely the reason. And as I mentioned in the testimony, when you have to have a super majority vote to make a change, that just functionally ensures that those around here who are in the business of counting votes and planning a legislative calendar have to really have the alarm bells go off to even begin that process. And so it's proven very impractical.

And the other thing, it's almost the whole input/output question, the question of process. And of course what our legislation, the Congressional Responsibility Act, provides for is the reassumption by the legislative branch of its rightful role.

It's all well and good to promulgate regulation. Indeed at the dawn of the progressive era, it was Theodore Roosevelt who said, let's bring experts into government, men and women of science.

But as we've seen, like most good ideas, somehow when Washington gets a hold of them, the reality doesn't really match the vision. The fastest growing portion of the law, it appears to me, is the whole cottage industry of regulatory law and regulatory lawyers and the fact is now, among many folks, legal scholars and those who interpret American jurisprudence, you have this phenomenon of people who say, well, yeah, you have the Constitution, but you have this body of regulatory law.

And some people quite seriously have given that regulatory law more precedent. So we're just simply saying, let's start at the beginning, let the regulators promulgate the rules, bring it to the House and the Senate in expedited fashion, and vote on it so we restore our rightful role under Article I, Section 1.

Mr. KUCINICH. Would the gentleman yield?

Mr. RYAN. Yes.

Mr. KUCINICH. I'm going to have to leave in a moment, but I wanted to congratulate Representative Hayworth on his presentation. As I said, I read the article you wrote in Roll Call. I do have real concerns about the erosion of congressional authority, whether it's with respect to the executive branch, with respect to the WTO and these other world or global organizations, and I think that you're raising some points that need to be responded to, to remind people what this is all about.

And I do have some concerns of course, particularly with respect to the EPA how this might work out. But I think it's important to

have this kind of debate because we need to refresh everyone's memories as to what government's about. And I think that it always is helpful to explore the Constitution and try to get some sense of what this experiment in democracy has always been about.

So while we may not be in agreement on some things, I can tell you that I think that this kind of a debate is healthy for our country, and I thank you.

Mr. HAYWORTH. I thank my friend, the ranking member. If I could just make the point again, you're right. This knows no partisan stripe, just to reaffirm it. It appears formally in my testimony, and I think Senator Brownback touched on it briefly.

A lot of the germination of this idea or bringing this to bill form really came from then-Judge Steven Breyer, before he was Mr. Justice Breyer, a Clinton appointee to the Supreme Court, it was Judge Steven Breyer who wrote in 1984 in a law review article how really you reassert Constitutional authority, especially in the wake of the decision made in *INS* v. *Chadha* on the legislative veto.

And at the same time, Nadine Strossen of the ACLU, not somebody with whom I line up on every issue of public policy——

Mr. RYAN. You were her "man of the year," weren't you?

Mr. HAYWORTH. Pardon me? I think I was the man of—well, I won't go into that because none of those cheap bad jokes——

Mr. KUCINICH. Representative, I want to thank you for being here. I have to go.

Mr. HAYWORTH. Thank you, I understand, Mr. Kucinich. So I think we have, this shows really that our political spectrum is not linear when it comes to this. You don't have a situation where it's right versus left or Republican versus Democrat come to this.

Mr. RYAN. Well, J.D., let me ask you because, I think that's a very profound point that this is not a Republican/Democrat issue, but given that fact, don't you think that Congress has become cozy with the idea of delegation, the two-step as you mentioned.

You can pass the vague law, you can take credit for it, then when your constituents are under the opression of the regulatory implementation of it, you can say I really feel for you, sorry this is happening to you. It's the regulatory agency, it's not me. I'll see what I can do to help you.

And then we go through the maze of trying to help our constituents through this regulatory framework which is because of the delegation.

Do you think we're going to be able to get this passed? And what do you think it's going to take to get this done and to get members off this cozy?

Mr. HAYWORTH. Well, I thank you, Mr. Chairman, for having this subcommittee hearing. I think this is an important first step.

Because again, as I mentioned earlier, with the legal community and others quite fairly who could claim some jurisdiction over this, there is a bias in favor of the breadth and body of regulatory law and regulatory precedent.

And I think that is cause for great concern. But what I find heartening, the previous writings of now-Justice Breyer, and input of Judge Robert Bork, many other legal scholars, at least the embrace of the concept by some of the folks from the ACLU, so I think you have the makings of a grand coalition across party lines.

But you are quite right to reiterate for the record what we have going on right now is the Washington two-step where we can say, look at the laws we've passed on one hand, and on the other hand, have a situation where constituent rights are calls, and it's added a whole new area of constituent service.

And at the risk of sounding like a poor impersonation of Bill Murray and Caddyshack, we have a situation where you have really turned the Constitution on its ear because you have a duly elected Member of Congress, either in writing or—probably in writing instead of a phone call—but something alone the lines of:

Dear Mr. and Mrs. Unelected, Unaccountable Federal Bureaucrat, won't you please, please, please, please take a second look at the way you are administering this rule to my constituent because I remember working on this in Congress and we meant something totally different from the way you're interpreting it.

And I make that somewhat jocular statement because you really need to laugh to keep from crying because what has happened is a perversity of what our founders intended because we have taken the power, the very thing to distinguish us in the first three words of the Constitution, We, the People, in this Constitutional Republic, where we operate on the consent of the governed, we have taken away accountability by taking legislative powers from the hands of those who stand at the bar of public opinion every 2 years, in a unique institution that our founders created in Article I, we have taken that away and we have put power in the hands of folks who are unaccountable, and that is where you have all the bureaucratic inertia and red tape and other terms that are probably too colorful for congressional testimony in mixed company that I shant go into.

It is a severe problem, and I hope the jocularity of my comments only serve to reflect just how serious a structural systemic problem this is when you ignore the Constitution, ignore the warnings of our founders, and somehow end up with this hodgepodge that we face today.

Mr. RYAN. Thank you very much, Congressman Hayworth. Thank you very much for your leadership on this issue, and we look forward to working with you on this in the future.

Mr. HAYWORTH. Thank you, sir.

Mr. RYAN. I appreciate you coming by and testifying.

Now we'll call panel II to the desk. On panel II, we have David Schoenbrod, a professor of law at New York Law School, and author of "Power Without Responsibility: How Congress Abuses the People Through Delegation."

We have Alan Raul, former Office of Management and Budget general counsel, and partner at Sidley & Austin.

We have Wendy Lee Gramm, former Administrator of OIRA, OMB, and director of Regulatory Studies Program & distinguished senior fellow at the Mercatus Center at George Mason University.

And John Spotila, the Administrator of OIRA.

As Mr. Kucinich said, Wendy Wagner, who is an assistant professor at Case Western, had a family emergency and could not be joining us today, but her statement shall be included in the record.

If each of you will stand, please.

[Witnesses sworn.]

Mr. RYAN. Mr. Schoenbrod, we'll start with you and move down. If you could start, and if we could ask our witnesses to please try and keep your comments within the 5-minute rule because we want to get to some good questions as well.

STATEMENT OF DAVID S. SCHOENBROD, PROFESSOR OF LAW, NEW YORK LAW SCHOOL, ADJUNCT SCHOLAR, CATO INSTITUTE

Mr. SCHOENBROD. Thank you, Mr. Chairman.

My written testimony makes for pivotal points.

First, legislators want to avoid politically difficult choices. Second, they avoid those choices in many ways, one of which is to delegate lawmaking authority to administrative agencies. Third, the result is that legislators fail to fill their fundamental function under the Constitution, to be responsible for the scope of the national government; and fourth, Congress could, if it wished collectively to do so, take responsibility.

Because these points are obvious to anybody in Washington, I will not belabor them now, but rather go on to discuss what can be done to restore the Democratic accountability that was guaranteed to the people under the Constitution.

What about the courts as a solution to the problem?

The courts can do more and there are signs that they are. The Supreme Court's decision in the legislative veto case, and in the line item veto case, as well, in *Loving* v. *United States,* and in *AT&T* v. *Iowa Utility Board,* and now the lower court's decision in *American Trucking,* are all hopeful signs.

But the courts work incrementally; whereas, the problem we have today is massive and structural. If the problem is to be solved, the political branches must do more than stand on the sidelines and cheer the courts on. Congress, in particular, has an independent responsibility to uphold the Constitution.

But what could Congress do to play its part? One option is for Congress to make the hard choices in the statutes themselves. Now that's the ideal thing. It's what Mr. Raul calls for and I'm all for it, but I have my doubts about how realistic it is.

We have a massive body of statute already on the books which ducks the hard choices.

Moreover, the incentives, realistically speaking for individual legislators, are not to do this. Why? Because any time you face the hard choice and the other guy ducks it by taking the high ground, you suffer politically. Besides, then you marginalize yourself because nobody wants to listen to you if you rain on the parade of happy promises.

So functionally, I think the realistic outcome will be that most of the time, Congress is going to want to duck the hard choices, so long as we operate under the current political ground rules.

So what we really have to do is to change the ground rules. The genius of the Congressional Responsibility Act is that it would change the ground rules. You can duck the hard choices but they're coming right back at you.

That's the great thing about it. And at the same time, they come back at you with all the expertise of the agencies so you have the best of both worlds.

With a statute like the Congressional Responsibility Act, then the political incentives all change. You get the benefits of standing for the Constitution. That's great.

But the question is, is it going to get passed. Now, you know what's happened is that the congressional leadership in the Senate has been putting the brakes on the bill. The same has been going on in the House.

And the reasons for this are all together clear. If, for example, the Republicans come forward with the bill, there's no question that they're going to get demagogued on it. It's an easy kind of issue to demagogue.

And so we really have to change the political environment in which this issue comes up. But I think that could be done, and I think it could be done for the kinds of reasons that Senator Brownback and Congressman Hayworth talked about.

This is an issue that people understand. In the cab on the way over here, the cabdriver asked me what's the hearing about, and I said the hearing is about does Congress delegate too much power to agencies and what should be done about it.

He said, well, why do they want to hear about that? They know the answer. [Laughter.]

On basic structural questions like this, questions about congressional responsibility, about cheating on the basic ground rules of politics with the American public, people understand it. That's why they supported unfunded mandate reform. That's why they support term limits because they know that long terms come out of cheating. That's why they support the balanced budget concept. That's why they support the line item veto.

Now some of these reforms were not successfully executed, but I think the potentials in there with the right kind of leadership in Congress to bring the issue back to the people, to get the kind of broad based support we need to make the real change that ought to take place.

[The prepared statement of Mr. Schoenbrod follows:]

TESTIMONY OF DAVID SCHOENBROD

IN HEARINGS ON

"DOES CONGRESS DELEGATE TOO MUCH POWER TO AGENCIES AND WHAT SHOULD BE DONE ABOUT IT?"

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.
JUNE 14, 2000

I am a professor at New York Law School and author of *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale U. Press, 1993) and many other publications on delegation of legislative authority. I am also an adjunct scholar at the Cato Institute.[1] During most of the 1970s I was a staff attorney at the Natural Resources Defense Council. Among my responsibilities at that time was to head the litigation campaign to reduce the lead content of gasoline. Because Congress failed in 1970 to take responsibility for lead in gasoline and instead delegated open ended authority to the Environmental Protection Agency, lead was left in gasoline a decade longer that would have been the case if Congress itself could not have used delegation to avoid responsibility. I will not provide detailed support for this assertion here, because I have done so in print before. "Confessions of An Ex-Elitist," *Commentary*, November, 1999 at 36. Instead, I will squarely address the broader question posed by the subcommittee, "Does Congress Delegate Too Much Power to Agencies and What Should Be Done About It?"

Congress fails the people in its most important job of all – to take responsibility. The Constitution was designed to force the individuals we elect to Congress to take responsibility. The reason was clear to those who had fought to overthrow Britain's colonial rule. The rallying cry "no taxation without representation" stood for the broader proposition that the power to control the scope of government should reside in representatives whom the people can hold accountable.

The Constitution assigns to our representatives in Congress the most important questions about the scope of government. They are given responsibility to levy taxes, impose regulations, appropriate our money, or authorize combat. Because government can't do any of these things without their vote, if we don't like anything that government does, we know exactly whom to vote out of office.

The Constitution is thus first and foremost a contract between the governed and governing in which power comes with the responsibility for its use and Congress is the primary vehicle through which the people can hold the government accountable. Congress generally honored this, the real contract with America, from the late 1700s to the early 1900s. But, by the end of the 1900s, the members of Congress have given up any pretense of living up to their end of the bargain. Consider the record:

" *Regulation.* Starting under Republicans, accelerating under New Deal Democrats, and then reaching break neck speed under President Richard Nixon, Congress and the president have worked together to delegate most of Congress's responsibility for making the regulatory laws to administrative agencies. Statutes authorize agencies to issue the regulations needed to achieve popular goals such as clean air. But, it is only when these regulations get issued on the agency's letterhead that the inevitable costs and disappointments become apparent. So, the elected legislators get to take credit for announcing popular goals and shift the blame for making the hard choices, such as how

[1] This testimony expresses my own views rather than those of either the Cato Institute or New York Law School.

clean to make the air and who shall bear the clean-up burden, to unelected bureaucrats.

- *Taxation.* Congress cannot yet get away with delegating to the Internal Revenue Service the power to set the income tax rates. Nor do legislators want to delegate the power to write the fine print of the tax laws because it is in the fine print that legislators create the tax breaks through which they extract campaign "contributions." But, on taxes less visible than the income tax, Congress does get away with delegating responsibility. For example, in the 1996 telecommunications statute, Congress gave the FCC the power to levy a tax rate on long distance phone service. This taxation without representation is reflected on everyone's phone bill.

- *War.* Until the mid-twentieth century, Congress guarded its prerogative to approve wars, whether declared or undeclared. An exception was made for emergencies, but presidents still had to promptly seek a congressional decision on whether to continue hostilities. The first breach of this constitutional tradition came with our entry into the Korean War in 1950. It was euphemistically dubbed an international police action. More unilateral than international, a real war not police work, this conflict has provided the precedent for presidents to launch a whole series of armed conflicts without congressional approval. Congress permits this end run on the Constitution because legislators can march in the parade if things go well and carp at the president if things go badly.

- *Spending.* Legislators are only too happy to take responsibility for items of spending popular with their supporters. The problem for legislators is that items that are popular in one constituency are unpopular in others. Legislators take credit for the popular and avoid responsibility for the unpopular by combining thousands of items into a single huge appropriation statute. That way, legislators avoid voting separately on items unpopular with their own constituents. The resulting run away spending produced popular support for the line-item veto. Congress opted in the Line Item Veto Act of 1996 to grant the president outright power to delete items from the budget. The Supreme Court declared the act unconstitutional because repealing an appropriation is as much a legislative action as enacting it in the first place and that the Constitution gives the power over appropriations to Congress alone. Congress could now enact another form of the line-item veto in which the president is empowered to force Congress to vote up or down to delete particular items of spending from the budget. No one questions the constitutionality of this kind of legislative veto, but it is going nowhere in Congress because such item-by-item responsibility would take all the fun out of spending other people's money.

Some legislators claim to lack the time to discharge the responsibilities assigned to them in a Constitution written when the world was a much simpler place. Their excuse is bogus. They spend far less time discharging their constitutional duties than doing what is constitutionally optional, but politically convenient such as casework, naming things, and raising money, and running for reelection all year every year. Legislatures are only too happy to take responsibility in far more detail than the Constitution requires when it comes to tax breaks and pork barrel spending. Surely, on the rare occasions when we launch military hostilities, legislators can find

the time to vote "aye" or "nay" on whether it is worth risking the lives of our troops.

Surely, also, they have time to discharge their constitutionally assigned responsibility for regulation. To do so, they need not and should not undertake all the kinds of work now done by regulatory agencies. But, our elected lawmakers must do the one aspect of that work that the Constitution assigns uniquely to them– make the laws.

Making the laws does not require Congress to micro-manage regulation. It is enough for Congress to enact the general rules of conduct. As Justice Lewis Powell once wrote, "Congress is most accountable politically when it prescribes rules of general applicability." For example, Congress did enough in a subsection of the Clean Air Act that requires EPA to respond to each toxic chemical by issuing regulations for each industry requiring that all plants bring emission rates down to the level achieved by the plants in the 12th percentile of cleanliness. Thus, in relatively few words, Congress could state the general rule without getting into the nitty-gritty of every pollutant or every industry that emits that pollutant. Nonetheless, Congress made itself responsible for striking the balance between the competing claims of environmentalists and industry. Disappointed environmentalist and industrials know precisely whom to blame for the regulations that results.

To make the significant choices, Congress need not state its general rules in numeral terms. Congress did enough when it prohibited employers from discriminating on the basis of gender except when it is a bona fide occupational qualification. That general standard leaves many questions to be resolved industry by industry, but nonetheless provides a bench mark by which to make them. Far more typically, however, Congress ducks the hard choices.

Congress has a practical way to reclaim the responsibility that it abdicated wholesale. Justice Stephen Breyer suggested in a law review article written before he went on the Supreme Court that Congress could enact a statute requiring that no agency regulation go into effect unless enacted by Congress the constitutional way. The agencies could then do the research and drafting, but Congress would still have to take the responsibility. Breyer suggested that the statute include an expedited procedure that would whisk the agency bills through with little debate and no amendment unless a majority in either house thought one needs more deliberate consideration. The Breyer concept is the basis for the Congressional Responsibility Act bill.

Some legislators complain that the Congressional Responsibility Act would require Congress to vote on too many regulations. An astronomical numbers of regulations do issue forth from federal agencies every year. Most of them are relatively trivial. But, there are many ways of dealing with the trivia without clogging the legislative machinery and still require legislators to take responsibility for the important choices. The lesser regulations could be put in bundles and voted on wholesale. Provision should be made for a significant minority to take any item out of the bundle and have it voted on separately. A second best alternative would be for less important regulations to be excepted from the process altogether. The best approach of all would be for Congress to use the opportunity of taking responsibility to reconsider the volume of work it places on agencies and, by implication, the even greater volume of work that these regulations impose on states, localities, and the public generally. Congress has been more willing than it

should be to launch new regulatory programs and elaborate old ones because, with delegation, it gets the credit without doing the work or taking the responsibility.

The claim that the Congressional Responsibility Act would take too much time to implement is a red herring. Those who make the claim do not advocate changes in the bill to reduce the amount of time its implementation would take. Why? Because their real objective is to allow legislatures to continue to shirk responsibility and agencies to exercise power.

Our irresponsible Congress is thus not a problem peculiar to Democrats or Republicans, but to politicians. The more thoughtful people from both parties see the irresponsibility for what it is. Justice Antonin Scalia, asked what was "the most significant development in the law over the past thousand years," nominated "the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people." He went on to point out that the form of representation in our Constitution helps to protect liberty because government cannot enlarge itself without the support of the House, Senate, and president. Delegation short circuits that protection of liberty by giving that power to bureaucrats. Similarly, Senator Bill Bradley wrote: "Federal bureaus are often unaccountable [and] delegation of rule-making is one of the reasons. Everyone needs to assume responsibility, not shirk it."

Mr. RYAN. Thank you, Mr. Schoenbrod.

Mr. Raul.

STATEMENT OF ALAN CHARLES RAUL, FORMER GENERAL COUNSEL, OFFICE OF MANAGEMENT AND BUDGET, PARTNER, SIDLEY & AUSTIN

Mr. RAUL. Thank you.

Professor Schoenbrod didn't mention, I was his taxi driver coming over. [Laughter.]

No, no. I'm just kidding.

Mr. Chairman and members of the subcommittee, my name is Alan Raul. I'm a partner in the Washington, DC office of Sidley & Austin. I'm testifying today in a personal capacity.

Thank you for the opportunity to testify on the issue of delegation of congressional power to administrative agencies.

In particular, it's a great honor for me to appear on this distinguished panel, each of whom in different ways is a hero of mine, and certainly on this issue.

Professor Schoenbrod deserves profound credit for reinvigorating the thinking on the nondelegation doctrine through his important book "Power Without Responsibility."

I know that it influenced my own personal thinking, as well as others involved in various aspects of the issues.

Wendy Gramm is a former colleague at OMB. Any OIRA Administrator is a hero to the Nation, and I will include Mr. Spotila in that category as the current incumbent, and therefore victim of numerous slings and arrows.

Wendy Wagner, is a hero as well, and I'm sorry that she's not here. I have cited Professor Wagner's article, the Science Charade of Toxic Risk Regulation, both in the full text of my testimony here today as well as in briefs that I was privileged to submit on behalf of Senator Hatch and Congressman Bliley as amici in the *American Trucking Association* case in the D.C. Circuit. That case is now pending before the Supreme Court.

I commend the committee for addressing this issue now, as the Supreme Court is poised to consider the implications of the nondelegation doctrine for EPA implementation of the Clean Air Act in the *American Trucking* case.

This case is crucial because it presents a challenge to one agency's unilateral decision to overhaul environmental policy, and at the same time transform the Nation's economy dramatically without a congressional mandate or a scientific imperative to do so.

Of course, the environment must be protected in the public interest, but EPA must exercise its administrative functions within the parameters established by the Constitution.

An executive agency may simply not take the country in a major new regulatory direction without warrant from Congress.

This same issue was also at play in the Supreme Court's recent invalidation of the FDA tobacco rule in *Brown & Williamson* v. *FDA*. I believe there is certainly a reasonable case, which I would support, for the regulation of tobacco, but it should come from Congress and not as a usurpation by the executive branch through FDA.

Similarly, the dispute in *American Trucking* is not about the Nation's commitment to protecting and cleaning up the environment. That is nearly universal and certainly a commitment which I share.

In fact, EPA's data demonstrate a phenomenal success story in this area, through the efforts of various Congresses, Administrations, and EPA, the air has become vastly cleaner and healthier over the last 30 years.

So the debate instead is over the scope of EPA legal authority under the Constitution to commit enormous additional resources, without any assurance that such resources will not be wasted.

While Congress may have the constitutional power to throw the country's money away, which I don't think it generally does, EPA certainly does not.

It should be noted that EPA may be the rare administrative agency in the United States and perhaps anywhere in the world that believes itself to be legally precluded from adopting cost-effective regulatory standards.

I think that this issue is going to be considered by the Supreme Court in the *American Trucking* case, which the *Lead Industries* Association decision decided by the D.C. Circuit in 1980, which barred EPA from considering cost-effectiveness.

Much of the mischief in the Clean Air Act and environmental regulation derives from not an act of Congress or perhaps even from a lack of precision by Congress, but rather from an interpretation by the D.C. Circuit Court of appeals in the *Lead Industries* case in 1980. That decision held that the Clean Air Act precludes EPA from considering costs and, more importantly, cost-effectiveness in setting standards under the Clean Air Act.

If the Supreme Court is likely to overrule the *Lead Industries* decision because it is inconsistent with its own *Benzene* decision. In *Benzene,* the Supreme Court found there was a requirement that regulatory agencies, in that case OSHA, regulate on the basis of a finding of "significant" risk, thereby leading to a balance between the risks and the costs imposed.

I think they'll find the same factors are relevant under proper construction of the Clean Air Act.

I would note that the *Lead Industries* decision was decided in 1980, and I believe Professor Schoenbrod was involved in the argument of that case in an earlier incarnation, 5 days prior to the decision of the Supreme Court in the *Benzene* case.

We might not be here today having this hearing if the Supreme Court decision had been handed down first and the D.C. Circuit in 1980 had had the opportunity to consider the Supreme Court's decision in *Benzene.*

What steps should Congress take to enhance accountability? We are talking about the nondelegation doctrine, which is of course a constitutional provision under Article I, Section 1, that provides all legislative powers are to be exercised by Congress.

Since 1935, which was the last time that the Supreme Court has struck down any act of Congress under the doctrine, the doctrine is made very much alive. It is applied now, not as a basis to strike down statutes, but rather as a rule of construction to limit excessive usurpations by the executive branch under broad mandates.

So what can Congress do to rein in those broad mandates? First I think, as Mr. Hayworth testified earlier, the Congressional Review Act should be utilized more frequently. Not one measure has been brought to a vote for disapproval on any regulation since the act has passed. That certainly is a measure which is on the books and could be utilized.

And perhaps in connection with that, OMB review and GAO review could be promoted and further strengthened to get independent analysis.

Congress should adopt a regulatory budget which recognizes that regulatory expenditures by society are every bit as important as tax expenditures or fiscal expenditures, so that they should be disciplined.

The executive branch's incurring of regulatory expenditures or impositions should be disciplined.

Congress of course should set regulatory standards with greater precision in the laws. As Professor Schoenbrod mentioned, in the *Iowa Utilities* case the Supreme Court ruled that the Telecommunications Act of 1996 was a model of ambiguity. Clearly, there's a responsibility up on the Hill for drafting with greater precision.

I also think that Congress should consider what I've dubbed the "Honest and Cost-Effective Regulatory Policy Act." It's important that the assumptions that agencies use, the uncertainties that are factors in their decisionmaking, should be disclosed, their default assumptions and so on, the policies that are implicit in the scientific choices that they make.

But also and perhaps equally important, agencies like EPA should not only be empowered but encouraged to consider the cost-effectiveness of their regulations to ensure that society's resources are not wasted.

The question of diverting additional resources, enormous resources for environmental protection, such as EPA's ozone rule, is not that environmental protection is not worthwhile; of course, it is. But if $9 billion are being spent to recover $1 billion worth of benefits, according to some of EPA's own data, that's an unnecessary diversion of society's resources that could be better deployed for other forms of environmental protection, public health protection, fighting cancer, and so on.

I would also, in closing, suggest that the Supreme Court, starting in 1993, decided three cases beginning with the Daubert decision which required Federal judges to serve as gatekeepers for the reliability and relevance of the scientific evidence that is presented in court in civil litigation.

Civil litigation is very important, but administrative litigation involving judicial review to ensure accountability of agency action, is often at least as important.

If you're talking about judicial review of agency action that can affect the entire society, it is at least as important in that context that judges look very carefully at the scientific methodologies and the relevance and reliability of the science that agencies use in setting their regulatory standards based on science.

So I would encourage the Congress to adopt legislation bringing Daubert-type principles into administrative law.

Thank you, Mr. Chairman.

[The prepared statment of Mr. Raul follows:]

Testimony on the Constitution's Nondelegation Doctrine

Before the Subcommittee on National Economic
Growth, Natural Resources, and Regulatory Affairs
Committee on Government Reform
United States House of Representatives

June 14, 2000

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Mr. Chairman and Members of the Subcommittee, I would like to thank you for the opportunity to testify today on the delegation of congressional power to administrative agencies. I commend the Subcommittee for addressing this important issue. Your inquiry is particularly timely now that the Supreme Court is poised to consider the implications of the nondelegation doctrine for the Environmental Protection Agency's implementation of the Clean Air Act in *Browner v. American Trucking Associations.*[1] The *American Trucking* case is crucial because it presents a challenge to one agency's unilateral decision to overhaul the nation's environmental policy, and transform the nation's economy dramatically, without a congressional mandate or scientific imperative to do so. The environment must be rigorously protected in the public interest, but EPA must exercise its administrative functions within the parameters established by the Constitution. An executive agency may simply not take the country in a major new regulatory direction without warrant from Congress.

[1] Together with C. Boyden Gray, I am privileged to represent *amici* Senator Orrin G. Hatch and Congressman Tom Bliley in this case. We submitted the principal briefs on the nondelegation issue before the initial D.C. Circuit decision in American Trucking. Copies of those briefs and related *Wall Street Journal* articles have been lodged with the Committee. I am testifying today solely in my personal capacity.

One should be clear that the dispute in American Trucking is not about the nation's commitment to protecting and cleaning up the environment, which is nearly universal, and which I most certainly share. Indeed, EPA's own data demonstrate a phenomenal success story.[2] As a consequence of the efforts of Congress, numerous Administrations, and EPA, the country's air has become vastly cleaner and healthier over the past 30 years. The debate is instead over the scope of EPA's authority to commit enormous additional resources without any assurance that such resources will not be wasted.[3] In essence, while Congress may have the constitutional power to throw the country's money away,[4] EPA does not. It should also be noted that EPA may be the rare administrative agency in the United States, and perhaps anywhere in the world, that believes itself to be legally precluded from adopting cost-effective regulatory standards.

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[2] EPA reports major reductions in concentrations of lead, carbon monoxide, sulfur dioxide, coarse particulate matter (dirt, dust, soot), nitrogen dioxide, and smog in the nation's air. Office of Air Quality Planning and Standards, EPA, *National Air Quality and Emissions Trends Report, 1998*, at 1 (last modified June 2, 2000) <http:www.epa.gov/oar/aqtrend98>. As recently noted in the Washington Post, the agenda for clean air and water was set by President Nixon in the 1970's, and "[t]he good news today is that the country has succeeded with that agenda beyond most expectations." Jonathan Rauch, *There's Smog in the Air, But It Isn't All Pollution*, Wash. Post, Apr. 30, 2000, Outlook, *available at* 2000 WL 19606397.

[3] In the case of EPA's ozone rule, for example, EPA's own conservative estimate of the *incremental* annual costs to become incurred by society was $ 9.6 billion. Innovative Strategies and Econs. Group, EPA, *Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12 ("*NAAQS Impact Analysis*"). At the same time, EPA's own Clean Air Scientific Advisory Committee ("CASAC") advised the agency there was no or negligible incremental health benefit from tightening the standard: CASAC advised that "there is no 'bright line'" distinguishing any of the alternative standards as "significantly more protective of public health." Letter from George Wolff, Chairman, CASAC, to Carol Browner, Administrator, EPA, (Nov. 30, 1995) (regarding CASAC Closure on the Primary Standard Portion of the Staff Paper for Ozone 3). EPA's own cost-benefit analysis estimated total yearly benefits from $1.5 to $8.5 billion, thus considerably below the costs incurred. *NAAQS Impact Analysis* E-17.

[4] Which it generally declines to do!

As I will discuss more fully later in my testimony, the rule against boundless congressional delegation of its lawmaking power is an indispensable element of our constitutional scheme of separation of powers.[5] The Constitution allocates power among the three coordinate branches of government, and the Framers entrusted the Congress with the exclusive power to make the laws and fundamental policy choices. In the first instance, it is Congress that must decide who is regulated and for what purposes. While is well within its power for Congress to establish rulemaking agencies to implement those policy choices based on agency experience, Congress cannot transfer to any other branch or agency "powers which are strictly and exclusively legislative."[6] This principle, known as the nondelegation doctrine, requires that, when Congress grants agencies rulemaking or any other power, it must base this delegation on an "intelligible principle" that imposes the constraint of law on the agency's power.[7]

Since 1935, the Supreme Court has not struck down any Act of Congress for being an unconstitutionally broad delegation of legislative power. This has led many to pronounce the nondelegation doctrine dead, but this understanding is wrong. In the intervening years, courts have used the nondelegation doctrine as an important canon of statutory construction, not to strike down statutes, but rather, to preserve them by reading implicit limits into seemingly boundless grants of authority. An example of this approach is the 1980 *Benzene*

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[5] *Field v. Clark*, 143 U.S. 649, 692 (1892).

[6] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

[7] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 640-46 (1980) (Stevens. J.).

case (*Industrial Union Department v. American Petroleum Institute*).[8] In that case, a plurality of the Supreme Court read the statute to limit OSHA's regulatory power, prohibiting the agency from regulating concentrations of benzene too weak to pose a "significant risk" to safety or health. Although the Court invalidated the regulation at issue, it saved the statute by imposing this limiting principle on an otherwise over-broad delegation.

Similarly, in the *American Trucking* case, the D.C. Circuit properly invoked the nondelegation doctrine as a canon of statutory construction to invalidate EPA's National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter.[9] As I will discuss, the EPA failed to identify, understand, and adhere to the constraints on its authority that Congress has imposed under the Clean Air Act and later statutes. As a result, the agency effectively arrogated to itself untrammeled *legislative* power. The Court of Appeals was certainly correct to invoke the nondelegation doctrine as a check on EPA's usurpation of power that can only be properly exercised by Congress.

In my view, Congress has, at least in recent years, generally adhered to the constitutional principle of nondelegation, even in statutes such as the Clean Air Act that give far-reaching power to administrative agencies. Complex technological problems of national and international scope like water and air pollution require extensive expert analysis and vetting of possible solutions. Members of Congress, who must give their attention to a myriad of diverse issues facing this country, simply will not become technically expert in every field in which they

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[8] *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (hereinafter, *Benzene*).

[9] *American Trucking Ass'ns v. United States Envtl. Protection Agency*, 175 F.3d 1027, 1034-37 (D.C. Cir.), *modified and reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 68 U.S.L.W. 3719 (U.S. May 23, 2000) (No. 99-1257), 68 U.S.L.W. 3735 (U.S. May 30, 2000) (No. 99-1426).

legislate.[10] As Congress has recognized many times, the administrative process, properly conducted and limited, is the appropriate means of implementing cost-effective solutions and standards based on scientific evidence. Notice-and-comment rulemaking allows for substantial, and often technically complex, scientific and economic input from affected parties in a manner than cannot be replicated before Congress. Far from limiting public participation in government, a properly controlled administrative process actually encourages it through the notice-and-comment process.

Even broad statutory delegations work within the constitutional framework when the judiciary enforces intelligible principles to constrain the administrative agency. This is the background upon which Congress has granted agencies broad authority – with the understanding that intelligible limiting principles are to be read into the statutes. Therefore, the problems that have emerged recently, as in the *American Trucking* case, are a result, not of congressional abdication of its responsibilities, but of the failure of courts and agencies to respect fully nondelegation principles.

As a way of avoiding any constitutional infirmities, agencies themselves often adopt intelligible limiting principles and apply them when the statutes granting them authority are broad. But sometimes, agencies such as EPA proceed in rulemaking under self-servingly broad interpretations of their power; and sometimes they explicitly or implicitly justify their self-conceived statutory mandates by manipulating science and data to support their position.[11]

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

[11] In a leading scholarly article, Wendy Wagner has exposed what she terms "science charades" in agency rulemaking. For example, despite the lack of consensus among agency scientists on the proper level for an earlier ozone standard, and a compromise struck to avoid economic problems, "EPA's public account of its rationale in selecting [the] standard revealed none of the underlying policy considerations, but rather gave readers the opposite impression that the

Honesty in rulemaking, so critical to the implementation of congressional will, as well as democratic accountability, is sacrificed. Under the doctrine developed in the *Chevron* case,[12] courts have been inconsistent, at best, in their task of guarding the congressional prerogative to make legislative judgments, often granting the agency excessive deference.[13]

Even if the Supreme Court vindicates the nondelegation principles invoked by the D.C. Circuit when it considers the *American Trucking* case, the question remains for Congress as to whether it should continue to invest such broad delegations of substantive rulemaking authority with limited procedural constraints in administrative agencies. The question is especially pressing given that courts will in all likelihood continue to give those agencies considerable leeway in statutory interpretation. I believe that Congress (and the courts) could dramatically improve the quality and value of regulation by placing (and enforcing) reasonable limitations on agency authority.

In my testimony today, I plan to review the nondelegation doctrine, its origins and its evolution to a canon of statutory construction today. Then I will discuss the D.C. Circuit's decision in the *American Trucking* case and the necessity that the EPA be permitted, in fact instructed, to take cost-effectiveness and the significance of health risk into account when promulgating air quality standards. Finally, I will outline a set of steps that Congress can take, regardless of the Supreme Court's ultimate decision when it hears *American Trucking* later this

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standard was selected based on scientific evidence." Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1641 (1995).

[12] *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (requiring courts to give agencies considerable deference when interpreting ambiguities in the statutes they are charged with enforcing).

[13] *But cf. Kelley v. EPA*, 15 F.3d 1100, 1109 (D.C. Cir. 1994) (applauding "the clarity EPA's regulation would have provided," but denying *Chevron* deference and ruling that EPA had no choice but to turn again to Congress to seek limitation on lender liability under CERCLA).

year, to rein in administrative discretion and ensure that agencies remain truly accountable to the public and Congress.

I. The Nondelegation Doctrine

The principle that Congress may not delegate its lawmaking power to another branch of government stems from Article I of the Constitution, which vests "[a]ll legislative powers herein granted" exclusively in the Congress of the United States. The doctrine is also implicit in the Due Process Clause; if the Executive were given the power to make, as well as execute, the laws, this unfettered discretion would be a prescription for tyranny. Thus, where property rights or fundamental liberties are at stake, courts have been particularly stringent in applying the doctrine.[14] This is because due process "of law" requires that Congress have defined the law before the federal government can deprive people of their life, liberty, or property for its violation.[15] In its origins, the concept of due process arose in response to executive encroachment on property rights and liberties without the constraint of law,[16] and those concerns in modern form are very much alive today.

Of course, it has long been recognized that Congress cannot govern without delegating some authority to the Executive to implement its policy choices. As Jefferson said, "'Nothing is so embarrassing nor so mischievous in a great assembly as *the details of*

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[14] *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 415, 433 (1935) (criminally enforceable order); *Benzene*, 448 U.S. at 645 (Stevens, J.) ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view. . . .")

[15] *Panama Refining*, 293 U.S. at 433.

[16] *See Hurtado v. California*, 110 U.S. 516, 529-32 (1884).

execution.'"[17] From the earliest days of the Republic, Congress has delegated broad authority in certain fields to the Executive. In the eighteenth century it was the implementation of the customs and shipping laws;[18] today it includes environmental regulation. The Supreme Court has recognized the propriety, as well as the necessity, of such delegations.[19] But that it not to say that the Court has allowed the outright transfer of lawmaking power to the Executive – such action has been consistently forbidden. The Court therefore has required that the statute in question provide an "intelligible principle" by which the executive can conform its action to the congressional will.[20]

This prohibition on overly broad delegations of legislative power serves an important purpose in our democratic system beyond safeguarding citizens from the dangers of unfettered executive power. As the Supreme Court has emphasized, the nondelegation doctrine ensures good and responsive government:

> "By allocating specific powers and responsibilities . . . to a branch fitted to the task, the Framers created a National Government that is both *effective and accountable*. Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.... The clear assignment of power to a branch, furthermore, *allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance*."[21]

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[17] *Loving v. United States*, 517 U.S. 748, 758 (1996) (emphasis added).

[18] *Field*, 143 U.S. 649; *J.W. Hampton*, 276 U.S. 394.

[19] *Wayman*, 23 U.S. at 42.

[20] *J. W. Hampton*, 276 U.S. at 409.

[21] *Loving*, 517 U.S. at 757-58 (emphasis added) (citation omitted).

As I have mentioned earlier, the Supreme Court has not invalidated a statute on nondelegation grounds since 1935,[22] but the doctrine survives as an important canon of statutory construction. As the Supreme Court stated in 1989, the doctrine is now in practice "limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations *that might otherwise be thought to be unconstitutional*."[23] It was exactly this type of use that was made of the doctrine in the *Benzene* case. If the Court accepted OSHA's statutory interpretation in that case, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the [nondelegation doctrine]. A *construction of the statute that avoids this kind of open-ended grant* should certainly be favored."[24]

Since 1935, the Supreme Court has increasingly recognized that Congress must be able to develop some policymaking functions to administrative agencies to confront the problems of the modern age,[25] and the Court has drawn on many resources to narrow broad statutory texts in defining the "intelligible principle." These include the statutory purposes and context, the legislative history, fit with other statutes, implications for individual rights, and past administrative practice. This flexible approach to nondelegation assures that each branch

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[22] *See A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining*, 293 U.S. 388; *see also South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) (striking down Indian Reorganization Act, which authorized the Secretary of the Interior to acquire lands in trust for Indian tribes), *vacated in light of changed position by the Government*, 519 U.S. 919 (1996).

[23] *Mistretta v. United States*, 488 U.S. 361, 373 n. 7 (1989) (emphasis added).

[24] *Benzene*, 448 U.S. at 645 (emphasis added) (citations omitted) (opinion of Stevens, J., writing for four justices; Justice Rehnquist, concurring, would have struck down the statute on nondelegation grounds, id. at 672-76). *See also Kent v. Dulles*, 357 US. at 129.

[25] *See, e.g., National Broad. Co. v. United States*, 319 U.S. 190, 219 (1943); *Yakus v. United States*, 321 U.S. 414, 425-26 (1944); *Loving*, 517 U.S. at 766-67.

performs its assigned function in a way that promotes accountable and effective government. The Executive implements the law based on its technical/scientific/administrative expertise and exercises limited discretion and judgment to fill the gaps left by Congress. The Judiciary polices usurpations or aggrandizements by the other branches and ensures accountability and due process, while respecting the policy choices of the political branches. Ultimately, however, the fundamental policy choices must be made by Congress.

II. *American Trucking* and Cost-Effectiveness

Seen in this light, the invocation of the nondelegation doctrine in *American Trucking* is not a departure from precedent. The EPA had promulgated new NAAQS that were not dictated by scientific judgment. The agency overstepped its function of (a) applying expert judgment (b) to scientific evidence (c) to execute the Congressional will, and exercised a purely legislative function. It chose to overhaul U.S. environmental regulation, and potentially transform the U.S. economy, without a congressional mandate or scientific imperative to do so. The agency did not have conclusive data upon which it could make an expert determination. It simply decided to set extreme new standards because EPA itself thought it would be good policy.[26] What's worse, the EPA sought to disguise this "legislative" judgment as a scientific finding, thereby impairing accountability to both Congress and the public. To understand why it did so, one must understand the backdrop of judicial interpretation of the Clean Air Act.

In the 1980 *Lead Industries* decision, the D.C. Circuit had held that EPA may not consider costs in setting national ambient air quality standards (NAAQS), but may set standards

[26] In addition to the $9.6 billion cost of compliance with the new ozone standard, EPA, no doubt conservatively, has estimated that the *annual* cost of *partial* compliance with the new particulate matter standards will be $8.6 billion. *NAAQS Impact Analysis* at ES-12.

only on the basis of health and welfare criteria.[27] This decision was in error. Congress never precluded the agency from considering cost-effectiveness in setting environmental standards under the Clean Air Act. The *Lead Industries* court reached its decision by relying principally on a particular slant on the legislative history rather than upon any express prohibitions against cost considerations contained in the act itself.

Assessing the costs and benefits of environmental and public health regulation is not only proper, but in some cases necessary, to set standards. This argument, in fact, will be considered by the Supreme Court when it hears *American Trucking*. Indeed, because certain kinds of pollutants, including ozone and particulate matter, are "non-threshold" pollutants, cost-effectiveness in combating a significant risk is the only democratic and ethical way to draw the line. ("Non-threshold" means that there is no concentration level for the pollutant below which it is safe and above which it is harmful. Instead, "non-threshold" pollutants exist on a continuum in which steadily decreasing levels of pollution lead to declining -- but non-zero-adverse health effects.[28]) For "non-threshold" pollutants, the decision to set the NAAQS level at one point in this spectrum as opposed to any other must be based on something other than pure science, such as degree (or significance) of health risks, implementation costs, and technical feasibility.[29] Whether it chooses to set standards high or low, for EPA to make any rational NAAQS decision

[27] *Lead Indus. Ass'n v. Environmental Protection Agency*, 647 F.2d 1130, 1148-49 (D.C. Cir. 1980).

[28] *American Trucking,* 175 F.3d at 1034-35.

[29] *See* Wagner, *supra* note 11, at 1613, 1619-22; American Automobile Manufacturers Association (AAMA) Comments on the Ozone NAAQS at 46 (when there is no bright line between a pollutant level that is harmful and another level that is not, as in the case of ozone, costs of compliance play a large part in EPA standard-setting); AAMA Comments on the Particulate Matter NAAQS at 59 (when research science has been unable to discover a bright line, policy judgments based on costs must implicitly play a role).

for a non-threshold pollutant, it must balance various factors and cannot rely solely on health effects. Nonetheless, because of the holding in *Lead Industries*, EPA is required to claim its standards are dictated solely by science and health considerations. The judiciary is thus as much to blame as the agency for misconstruing the statute to preclude considerations of "significant" risk and cost-effectiveness. In reality, however, since science does not dictate the outcome, EPA actually does draw lines based on nonscientific criteria, but it does so covertly.[30]

But neither the text of the Clean Air Act nor its legislative history precludes consideration of cost-effectiveness and the relative significance of the health risks involved. The *Lead Industries* decision was simply wrong, as well as irrational. Almost certainly, it would not have come down the same way if it had been decided after, rather than five days before, the Supreme Court's *Benzene* decision. Moreover, any interpretation of the Clean Air Act must make sense of the statutory scheme of environmental regulation as a whole. This scheme includes other, later-passed statutes, which should be construed *in pari materia* with the Clean Air Act provisions governing air quality standards.[31] For those provisions of the Clean Air Act to make sense after the passage of the 1990 Amendments[32] and regulatory reform statutes such

[30] 1 William H. Rodgers, *Environmental Law: Air and Water* § 3.8, at 252 (1986) ("EPA routinely prepares cost analyses when its sets the ambient standards" even though admitted "use of this information to develop the standards would bring a summary reversal" by the courts under current doctrine); Wagner, *supra* note 11, at 1642-43 & n.101 (discussing evidence in an earlier rulemaking that "[t]he economic impacts of the selected standard or alternate standards … were clearly considered by the Administrator").

[31] *Cf. Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 68 U.S.L.W. 4339, 4404 n.17 (2000) ("it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted"); *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000).

[32] Pub. L. No. 101-549, 104 Stat. 2399 (1990). The 1990 amendments obligate EPA to "conduct a comprehensive analysis of the impact of the [Clean Air Act] on the public health, economy, and environment of the United States," and to "consider the costs, benefits and other effects associated with compliance with each [NAAQS]." 42 U.S.C. § 7612(a).

as the Unfunded Mandates Reform Act[33] or Small Business Regulatory Enforcement Fairness Act,[34] they cannot be read to preclude considerations of cost-effectiveness.

I want to briefly talk about what I mean by "cost-effectiveness." The idea is not to save industry money, but to avoid squandering society's resources. Misdirected – or cost-ineffective – environmental regulation not only wastes scarce resources, but it also diverts the wherewithal (and political will) to combat other, more pressing environmental and social needs. Decisionmaking that balances costs, benefits, and significance of risks does not mean that EPA is barred from proposing a rule that will cost industry a lot of money. Nor does it mean that EPA must necessarily set standards at the precise point dictated by cost-benefit analysis. Cost-effective decisionmaking also does not preclude the EPA from adopting "technology-forcing" standards; that is, standards that cannot be met when issued, but which force industry to come up with better ways of controlling pollution. If EPA in fact determines, honestly and transparently, that the health and welfare benefits to be gained by such standards are *worth* the cost society will bear as a result, that is certainly appropriate. But like any rational actor, EPA should not (and presumably will not) demand wasteful expenditures of resources (and the concomitant inability to use those resources for other social good) where the environmental gains will be negligible, speculative, or relatively low.

In sum, today's scientific data simply do not dictate the level at which EPA must set air quality standards.[35] Since EPA cannot admit the non-scientific bases for its line drawing, the agency massages the data it does have to support what is in fact basically the agency's an

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[33] Pub. L. No. 104-4, § 205, 109 Stat. 48, 66 (1995) (codified at 2 U.S.C. § 1535).

[34] Pub. L. No. 104-121, § 241(b), 110 Stat. 857, 864-65 (1996) (codified at 5 U.S.C. § 604).

[35] *American Trucking*, 175 F.3d at 1034-37.

unadorned legislative judgment. Under *Lead Industries*, it must hide that determination, frustrating proper oversight by Congress, the courts, and the public.

III. Agencies as the Source of Limiting Principles

Although the D.C. Circuit in *American Trucking* properly invoked the nondelegation doctrine to constrain EPA's rulemaking, it did so in a way that may give agencies too much leeway and undermine the judicial role. The court remanded the case back to EPA for "[t]he agency [to] make the fundamental policy choices."[36] Under the nondelegation doctrine, however, it is Congress that must make the fundamental policy choices, and the judiciary must vindicate those choices. Under the D.C. Circuit's approach, by contrast, if the agency makes the fundamental choices as to the nature of its statutory power, and then those choices are accorded deference, *Chevron* would trump the nondelegation doctrine.

Administrative interpretation of a statute is one factor to consider in deriving intelligible limiting principles,[37] but it cannot displace the judicial function of ensuring the constitutionality of the delegation. *Chevron* should not be extended to agency development of constitutionally required limiting principles.[38] Courts should provide appropriate guidance for constitutional and statutory construction. Judicial inquiry must be especially searching and independent when the very issue is the extent of delegation power granted to the agency, and not simply the meaning of a substantive details the agency is charged with enforcing. Furthermore, judicial review must be sensitive to the *scope* of agency power under the statute. The broader the

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[36] *Id.* at 1038.

[37] *See Lichter v. United States*, 334 U.S. 742, 783 (1948).

[38] The Supreme Court has begun to recognize that in some instances, *Chevron* deference goes too far. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662-63 (2000) (statutory interpretations outside of the notice and comment process do not deserve *Chevron* deference).

grant of power to the agency, the less likely it is that Congress intended the agency's interpretations to escape probing judicial scrutiny. Moreover, Congress can be presumed to demand more agency accountability when the agency is setting standards with enormous implications for broad sectors of the US economy or society,[39] rather than making narrowly tailored expert decisions based on determinable facts under relatively limited and specific circumstances.[40]

In the Clean Air Act, Congress delegated rulemaking authority to an agency, EPA, better able to gather and develop scientific evidence for its standards than Congress itself would have been. But Congress would not have given to EPA such broad authority as to make what amounts to legislative judgments without constraints.

IV. What Steps Should Congress Take?

Even though the Clean Air Act, like most statutory enactments, is not an unconstitutionally broad delegation, it is clear that Congress must take action to enforce agency accountability and conformity to the legislative will. What steps should it take to restore the proper balance?

Regarding the Clean Air Act , Congress should supply limiting principles in the Act, if the Supreme Court does not. It should expressly authorize (and encourage) EPA to apply

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[39] *See Benzene*, 448 U.S. at 645 (Stevens, J.) ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary [of Labor] . . . unprecedented power over American industry ....").

[40] As the D.C. Circuit has said, when the "'scope [agency power] increases to immense proportions, as in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), the standards must be correspondingly more precise.'" *Michigan v. United States EPA*, No. 98-1497 *et al.*, 2000 WL 180650, at *14 (D.C. Cir. Mar. 3, 2000) (quoting *International Union, United Auto. Workers of Am., UAW v. OSHA* ("Lockout/Tagout I"), 938 F.2d 1310, 1317 (D.C. Cir.1991)). *See also Brown & Williamson*, 120 S. Ct. at 1301 ("we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

principles of cost-effectiveness in promulgating NAAQS (thereby overruling *Lead Industries*), and it should expressly adopt the *Benzene* "significant risk" standard. Indeed, overruling of *Lead Industries,* and the application of *Benzene*, should solve any constitutional problems the statute (and subsequent agency action) might have.

In administrative law generally, Congress should recognize that the system appears to be creaking in some regards. Congress delegates broadly. Sometimes this is out of administrative necessity, but more often it is to avoid difficult policy compromises. Congress is thus guilty, on occasion, of prescribing highly ambiguous mandates, leaving the law to uncertain resolution by agencies and courts.[41] Agencies hide policy judgments, default assumptions and uncertainties in order to avoid judicial and political scrutiny or controversy. Unfortunately, this behavior is not confined to the EPA, but EPA succumbs most frequently because it believes that it cannot consider (or admit to considering cost-effectiveness) in environmental regulations. Finally, courts defer excessively to agencies' purported fact-finding and scientific expertise.

To enhance agency accountability, Congress could consider a variety of measures:

- It should *utilize the Congressional Review of Agency Rulemaking Act*[42] more aggressively to scrutinize dubious agency regulation.
- It should *adopt a regulatory budget* that provides fiscal discipline to the regulatory process.
- It should *enact regulatory standards with greater precision.* When Congress adopts a vague "regulate in the public interest" criterion, it abdicates its legislative responsibility in favor of policymaking by unelected bureaucrats and litigators.

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[41] *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999) (the Telecommunications Act of 1996 "is in many important respects a model of ambiguity or indeed even self-contradiction").

[42] 5 U.S.C. §§ 801-808.

- Congress should also *enact a "Honest and Cost-Effective Regulatory Policy Act"* to ensure that all agencies, including EPA, do not have to hide their considerations of cost-effectiveness when they establish regulatory requirements, and to ensure the public get its money's worth out of government regulation. Through enhanced congressional, Office of Management and Budget, and General Accounting Office oversight, society's regulatory expenditures could be less wasteful; resources would be conserved and redirected to address compelling social needs.

- Under the requirements of this Act, *agencies should be required to disclose their implicit policies, assumptions and uncertainties*, and they must be compelled to recommend new legislation to Congress when they believe their existing authority is inadequate.

- Congress and the courts should jointly improve scientific decisionmaking by agencies and *ensure effective judicial review.*

  - Congress should enact *Daubert*[43] in the context of administrative law to ferret out dishonesty, shoddy research, or "science charades."

  - Congress should *instruct the courts to accord Chevron deference more circumspectly* when agencies are interpreting the boundaries of their own authority.

The Framers bequeathed to us a scheme of separated powers that both preserves liberty and ensures effective and accountable government. Administrative agencies, despite their importance in modern governance, must not be allowed to arrogate to themselves the essentially legislative power to make pure policy judgments unconstrained by congressional directive. Congress should act now to take greater responsibility for the content of the laws and to ensure that administrative agencies remain faithful to its will, and are honest and open in their deliberations.

Thank you.

[43] *Daubert* v. *Merrill Dow Pharms. Inc.*, 509 U.S. 579 (1993) (authorizing district courts to exclude expert testimony lacking scientific validity).

Mr. RYAN. Thank you, Mr. Raul.

Dr. Gramm.

STATEMENT OF DR. WENDY L. GRAMM, DISTINGUISHED SENIOR FELLOW DIRECTOR, REGULATORY STUDIES PROGRAM, MERCATUS CENTER, GEORGE MASON UNIVERSITY, FAIRFAX, VA

Ms. GRAMM. Thank you very much, Mr. Chairman.

I'm pleased to be here and I should point out that we should all listen to the wisdom of the taxi drivers.

I'd like to summarize my testimony.

In response to the question you posed, my answer is yes. Congress has delegated too much authority to the executive branch.

In addition, sometimes the executive branch has taken authority not given it. Agencies have indeed expanded on the authority granted. The end result is the same. Agencies have too much power over American individuals and businesses as well as over State and local governments.

Regulations have been growing unchecked and agencies are not sufficiently accountable to the public with regard to the exercise of this power, and estimates are now that regulations cost Americans more than $700 billion per year.

Congressman Hayworth pointed out the most recent estimate of $758 billion per year.

For the past two decades, Congress and every President since President Nixon, have tried to implement procedures to assure accountable and reasonable regulations. We've had studies and commissions, like the Commission on Federal Paperwork.

We've had laws like the Paperwork Reduction Act, the Reg Flex Act, UMRA, SBREFA, and the CRA, and we've had Executive orders instructing agencies to perform analyses.

Unfortunately, these past laws and procedures have not been very effective at controlling the problem of unduly burdensome regulation or the expansion of agency authority, in part because the analysis required by many of these laws must be prepared by the agency writing the regulation, not a disinterested party in the issue.

The voice of the citizen or average consumer is not well-represented in the regulatory debate. Furthermore, there is little truly unbiased analysis of the impact of a regulation in the rulemaking process.

Such analysis could help agencies write better regulations, avoid the consequences of unduly burdensome regulations, as well as help Congress in its oversight role.

For these reasons, I established the Regulatory Studies Program at the Mercatus Center, George Mason University. Our objective is to advance knowledge of regulations and their impact on society by providing careful, high quality analyses of agency rulemakings from the perspective of the public interest.

Since our first public interest comment in December 1996, our program at Mercatus has commented on 45 regulatory proposals, ranging from EPA's ozone and particulate matter proposals to OSHA's ergonomics to the Army Corps of Engineers' nationwide

wetlands permitting process, to the SEC's market fragmentation concept release and several agencies' privacy regulations.

While the Mercatus Center has written many analyses, there's clearly a need for more and better analysis that is independent of the agency writing the regulation.

For these reasons, I have supported and continue to support the establishment of some kind of congressional Office of Regulatory Analysis.

In my view, Congress cannot carry out its responsibilities effectively without such analysis, and the American public will be better served if regulatory burdens are accounted for and monitored.

And let me just pick up on a point that Alan Raul made recently. It's also been my view that not only is analysis needed, but also so is a really true and accurate measure of the cost of regulations. As soon as Americans begin to track—Americans and Congress—begin to track regulations the way we track expenditures in our fiscal budget, we will pay more attention, we will monitor, and everyone I think will be more accountable and make the agencies more accountable for the costs that they impose.

Thank you very much.

[The prepared statement of Dr. Gramm follows:]

Statement of Dr. Wendy L. Gramm, Distinguished Senior Fellow
Director, Regulatory Studies Program, Mercatus Center,
George Mason University, Fairfax, Virginia

Before the Committee on Government Reform
United States House of Representatives

June 14, 2000

Mr. Chairman and Members of the Committee: Thank you for inviting me to testify on the question, "Does Congress delegate too much power to agencies and what should be done about it?" Please note that this testimony reflects my own views and not that of the Mercatus Center or George Mason University.

My response to your questions is yes, I believe agencies have too much power over American individuals and businesses, as well as over state and local governments. In addition, agencies are not sufficiently accountable to the public with regard to the exercise of this power. In some cases, Congress has delegated too much authority to agencies or has written laws that are vague or do not explicitly limit agency authority. In other cases agencies have taken and used power beyond Congressional intent.

When Congress has not explicitly delimited the authority of the Executive branch, the Constitutional principle of non-delegation requires the agency to specify an "intelligible principle"-- a rationale -- that explains the limits of their authority. That is, the agency is not free to regulate at will.

This issue is currently before the Supreme Court in the case American Trucking Associations v. EPA. In this case, a panel of the District of Columbia Circuit Court of Appeals remanded EPA's ozone and particulate matter standards to the agency to articulate a rationale for the standard EPA chose in that rulemaking.

The Regulatory Studies Program of the Mercatus Center at George Mason University, intervened in this case twice-- once at the proposed rule

stage, and again this spring at the request for certiorari stage. In March of 1997, Mercatus wrote a Public Interest Comment on the EPA's proposed standards for ozone and particulate matter. The analysis (available at www.Mercatus.org) cited problems with EPA's analysis that were echoed in the DC Circuit's opinion, which found EPA exercised authority that amounted to an unconstitutional delegation of power. The analysis pointed out that EPA's regulations not only were extraordinarily costly, but they would be harmful to public health. A majority of EPA's own science advisors could not agree that EPA's proposal would enhance public health.

On March 14, 2000, the Mercatus Center filed an amicus brief on the writ of certiorari, agreeing with petitioners that the DC Circuit Court's opinion was correct concerning EPA's overly expansive exercise of authority, but also agreeing with a cross petition filed by the American Trucking Associations that the Supreme Court should consider lower court precedents, specifically the Lead Industries case, that currently are read to limit EPA's ability to consider cost in establishing standards under the Clean Air Act.

This case is not the only time that EPA has overstepped its authority regarding regulations, in my view. For example, in what are referred to as Tier 2 regulations under the Clean Air Act, EPA has proposed regulations that, according to the Mercatus Center analysis, do not comport with the requirements of the Clean Air Act. Specifically, the Clean Air Act Amendments of 1990 state that new "Tier 2" vehicle standards must be (1) necessary, (2) feasible, and (3) cost-effective. According to our analysis, EPA did not meet any of these 3 criteria in setting the standards.

EPA is also not the only agency that has exceeded Congressional intent. For example, Congress clearly never intended for the Commodity Futures Trading Commission (CFTC), or the Securities and Exchange Commission (SEC) for that matter, to regulate financial products sold in over-the-counter markets. Yet the CFTC has threatened to do just that, and the SEC is waiting in the wings to enter if the opportunity arises, despite the concerns raised by the President's Working Group on Financial Markets.

The result (of Congress delegating or the agencies taking too much authority) is a growing burden of regulation, and a rulemaking process that is not accountable to the public. Estimates of the total burden of regulation

exceed $700 billion per year, and the rate of growth appears to be unchecked.

As a result of the steady growth in regulations, Congress and every President since President Nixon have tried to create mechanisms to improve the rulemaking procedures. In 1977, for example, the Commission on Federal Paperwork was established. The recommendations of this Commission resulted in the Paper Reduction Act of 1980 and the creation of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. The Regulatory Flexibility Act sought to reduce the burden on small businesses. More recently, the Unfunded Mandates Reform Act, and the Congressional Review Act in the Small Business Regulatory Enforcement Fairness Act (SBREFA) represent attempts by Congress to ensure that regulations are not overly burdensome.

Unfortunately, these past laws have not been very effective at controlling the problem of excessive regulations. First of all, they require the agency or the executive branch to analyze the regulation it is proposing. It is difficult for the agency that has decided to propose a regulation to be truly unbiased regarding the regulation. It is sometimes difficult even for OMB to provide unbiased analysis. While Congress should provide the oversight to ensure that regulations do not usurp Congressional authority and that the regulations implement the will and intent of Congress, Congress is disadvantaged by the lack of information and a good source of independent analysis.

What might be done to remedy the situation? A promising concept is the establishment of a source for independent analyses of regulatory proposals for the benefit of Members of Congress. There are several proposals being considered this session, and I have testified before this Committee in the past (March 11, 1998) concerning similar proposals.

I strongly support the intent of these proposals that would promote independent analysis of major regulatory proposals. Analysis from the perspective of the public interest that is independent of any special interest, including the interest of the agency proposing the regulation, should be part of all major regulatory proposals.

The need for careful analysis of federal regulations prompted the establishment of the Regulatory Studies Program at the Mercatus Center at

George Mason University. The objective of the program is to advance knowledge of the impact of regulations on society by providing careful, high quality analyses of agency rulemaking proposals from the perspective of the public interest. Since the first public interest comment in 1996, Mercatus has commented on 45 regulatory proposals ranging from OSHA's ergonomics proposals to the Army Corps of Engineers' nationwide wetlands permitting process, and the SEC's market fragmentation concept release. We have analyzed 12 regulations already this year. Recent comments addressing FDA's required labeling for trans fatty acids, the US Postal Service's regulation of private mail services, and regulations concerning privacy.

While the Mercatus Center has written many analyses, there is clearly a need for more careful and unbiased analyses of agency regulations. Mercatus is just one organization, and cannot cover the whole range of agencies and regulatory proposals. There is room for more such organizations. In my view, Congress cannot carry out its responsibilities effectively without such analysis.

In conclusion, I support any attempt to provide good quality analysis of government regulations. Indeed, more analysis of existing regulations, non-major regulations, guidances and other regulatory initiatives would be valuable as well. Congress needs an independent and objective perspective, which, when combined with our Regulatory Studies Program and OIRA in the Executive branch, will contribute to better informed policy makers.

Proposals to require analysis of Executive branch regulatory proposals can help Congress and agencies become more accountable to the public for the regulatory burdens that are imposed on the American people. These regulatory burdens are hidden taxes, and should be accounted for and monitored.

Mr. RYAN. Thank you, Dr. Gramm.
Mr. Spotila.

STATEMENT OF JOHN T. SPOTILA, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SPOTILA. Good afternoon, Mr. Chairman, and members of the committee.

The administration has worked hard to improve the Federal Government's regulatory system. We hope that today's discussion will lead to further progress in this important area.

Sound regulation is essential in our society. At the President's direction, we have concentrated on ensuring that new regulations provide as much benefit as possible to the American people while minimizing burdens.

We have encouraged regulations that are streamlined, customer friendly, and cost effective. We have looked for opportunities to substitute innovative alternatives for traditional command and control regulations.

We have also changed the way we enforce regulations. Agencies have increasingly moved from an adversarial approach to a partnership approach that rewards efforts to reach outcome based roles, such as cleaner air and safer workplaces.

While our job is not complete, we have made real progress, and we must build on that progress as we look to the future.

In some instances, laws are very specific about what agencies can do and what they must include in the regulations they issue. In other areas, agencies have more discretion in how to implement Federal programs or take other action.

At the President's direction, OMB's Office of Information and Regulatory Affairs [OIRA], helps agencies strike the right balance. For significant rules, we work to ensure that agencies ask the right questions, consider relevant data, employ sound analysis, and balance competing concerns in a reasonable, practical way.

We are very conscious of the constitutional framework in which we operate. While the executive branch bears much of the responsibility for sound regulation, agencies must always act in compliance with the statutory authority granted to them by Congress.

Implementing legislative policies can present a complex and difficult challenge. Laws passed by Congress often provide general grants of authority to agencies to achieve particular policy goals.

In such cases, Congress recognizes that it cannot anticipate and account for every relevant real world factor. Instead, it gives agencies the discretion necessary to deal with changing circumstances and detailed program needs.

The agencies must use this discretion wisely and with a practical bent. For the most part, we believe they do a good job, exercising in a principled and careful manner the discretion given them by Congress.

In developing regulations, public involvement is essential. The President has emphasized that there is no better way to achieve common sense regulation than to draw on the common sense of the American people. When those affected by regulations participate in

the development process, we often end up with a much better product.

This emphasis reinforces the statutory requirement, the notice and comment rulemaking established more than 50 years ago by the Administration Procedure Act [APA].

It also extends to more recent legislation that has added new procedures to encourage public participation.

Agencies now engage in more outreach and communication than ever, and their decisions on rules are better for it.

For more than 50 years, individuals and businesses who believe they had been adversely affected by agency regulations have had the right, under the APA, to seek judicial review of regulatory decisions. This is an important check on any agency rules that exceed relevant statutory authority or that have not complied with applicable APA procedures.

In a series of important cases, the Supreme Court has developed standards used by courts to review agency regulatory decisions.

The Supreme Court has acknowledged the important role of agencies in issuing regulations. It has confirmed that agencies should have broad discretion in interpreting legislation and implementing statutory directives in their areas of responsibility.

This discretion is not unlimited, however, and on occasion the courts have found some rules to be inappropriate. The fact that regulations are challenged in court and sometimes overturned does not mean that the regulatory system is broken. Both the legislative and executive branches of our government work hard at helping and protecting the public.

Given our complex world and the often difficult problems that laws and regulations address, some of these actions will be controversial. Occasionally, the courts strike down a law as unconstitutional or a regulation that's not in compliance with the law.

The checks and balances of our Constitutional system work to protect our citizens by reviewing the actions of both the legislative and executive branches.

We believe the Federal regulatory system today works well to serve the interests of the American public. Federal agencies make good faith efforts to develop, assess, implement and enforce regulations that implement important government programs.

The system is not perfect, however, and we share your interest in improving it further. We welcome the opportunity to work with the Congress on constructive efforts in this area.

Thank you, Mr. Chairman. This concludes my remarks.

[The prepared statement of Mr. Spotila follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT OF THE HONORABLE JOHN T. SPOTILA
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
before the
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND
REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

June 14, 2000

Good afternoon, Mr. Chairman and Members of this Committee. Thank you for inviting me here today to discuss the Federal government's regulatory system. The Administration has worked hard to improve the regulatory system so we can more effectively serve the American people and promote public health and safety, strengthen economic growth, and protect the environment. We hope that today's discussion, which addresses fundamental issues about how the federal government should work, will lead to further progress in this important area.

The Federal Government serves its citizens in many ways, protecting them from threats to their health and safety, promoting education and the environment, strengthening the economy, helping them start and succeed in business, giving them good information, and safeguarding national security. In all of these cases, Congress has passed legislation, delegating to these agencies the responsibility for implementing laws, delivering programs and services, and enforcing national standards. One important means to accomplish these goals is the use of sensible regulation by federal agencies.

Sound regulation is essential in our society, and the President has accorded it a high priority, as witnessed by Executive Order 12866 on "Regulatory Planning and Review." At his direction, we have concentrated on ensuring that new regulations provide as much benefit as possible to the American people and that they minimize burdens. We have encouraged regulations that are streamlined, customer-friendly, and cost-effective. We have looked for opportunities to substitute innovative alternatives for traditional "command-and-control" regulation. We have also reviewed existing regulations to identify those that could be revised, eliminated, or rewritten in plain language.

The process has not been perfect and the job is not complete. We have made real progress, however, and it is important that we build on that progress as we look to the future. Improving the way we develop regulations is only part of the story here. We have also changed the way we enforce regulations. At the President's direction, agencies have increasingly moved

from an adversarial approach that sanctions people and businesses for inadvertently violating regulatory provisions, to a partnership approach that rewards well-intentioned efforts to reach outcome-based goals, such as cleaner air and safer workplaces. By providing the leadership necessary to change the culture of regulation, President Clinton has demonstrated a deep appreciation for the importance of having an Executive Branch that is responsive to the needs and wishes of the American people.

The Administration's Regulatory Philosophy and Principles

In 1993, the President issued Executive Order 12866, which set forth his regulatory philosophy. He pointed out that the Government has a fundamental responsibility to govern wisely and carefully, regulating only when necessary and only in the most cost-effective manner, with full recognition of the proper role of State, local, and tribal governments.

He then called on agencies, to the extent permitted by law, to adhere to a set of twelve guiding principles:

- Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
- Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.
- Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.
- In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.
- When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entitles, and the public), flexibility, distributive impacts, and equity.
- Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

- Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.
- Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.
- Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.
- Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.
- Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and government entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.
- Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

The President's guidance to the agencies in Executive Order 12866 sets an important framework for striking a proper balance in new regulations. In some instances, laws are very specific about what agencies can do and what they must include in the regulations they issue. In other areas, agencies have discretion in how to implement Federal programs and issue necessary regulations. Exercising such authority can be a complex and difficult challenge. As we continue to address issues in the "New Economy," agencies must consider the new opportunities presented by information technology while remaining sensitive to legitimate public concerns about privacy, consumer fraud, and security.

Executive Order 12866 also instituted important procedures – procedures similar to those developed in previous administrations – to help agencies exercise their authority to develop new regulations. The President directed the Office of Management and Budget (OMB) to coordinate and review Executive branch efforts in this regard. More specifically, he called on OMB's Office of Information and Regulatory Affairs (OIRA) to review draft significant rules to ensure compliance with the Executive Order. OIRA works to ensure that each regulatory agency asks the right questions, considers relevant scientific and other data, employs sound analysis, and balances competing concerns in a reasonable, practical way. OMB and agency staff now meet with interested outside parties under Executive Order 12866 to listen to their concerns and

suggestions. These meetings are an important part of the OMB clearance process for both proposed and final rules.

We are very conscious of the constitutional framework in which we operate. While the Executive Branch bears much of the responsibility for sound regulation, Federal agencies must act in compliance with the statutory authority granted to them by Congress. When they develop and promulgate regulations, they do so to implement legislation. In a very real sense, Executive Branch agencies work together with the Congress in all their efforts, whether they seek to operate Social Security, Medicare, and Medicaid, ensure food safety, maintain the safety and soundness of the banking system, reduce air pollution, protect consumers from dangerous products, or ensure that workplaces are safe. Each of these objectives has a foundation in law and each of the rules concerned must comply fully with the law.

Implementing legislative policies presents a complex and difficult challenge. Laws passed by Congress often provide general grants of authority to agencies to achieve particular policy goals. Congress recognizes that it cannot anticipate and account for every real-world factor affecting the situation it seeks to address with legislation. Accordingly, it gives agencies the discretion necessary to deal with changing circumstances and detailed program needs. The agencies must use this discretion wisely and with a practical bent.

For the most part, Federal regulatory agencies do a good job, exercising in a principled and careful manner the discretion given them by Congress. The Department of Commerce (DOC) provides an example of an agency exercising restraint in implementing a statute. It initially proposed a rule under the Fastener Quality Act that would have required certain fasteners (such as nuts and bolts) to conform with their manufacturing specifications. The public comment period demonstrates that, while the proposed regulation closely followed the statute, it was overly broad. After reviewing the comments, Commerce refrained from issuing the final rule and, instead, worked with Congress to amend the legislation. Immediately after the amendments passed, DOC issued a more tailored final rule that now achieves the same level of public protection at a fraction of the cost. Through a common sense approach, the Department reduced the projected compliance cost of $500 million for the proposed rule to $20 million under the final rule. Commerce continued to work with Congress and the industry on legislation that further amended the statute to achieve additional cost reductions.

Public Involvement in the Rulemaking Process

This Commerce Department regulation is also an excellent example of how public involvement helps the rulemaking process. The President has emphasized the importance of engaging the public in the development of regulations. When interested parties and the general public participate actively in rulemaking, they inevitably improve the final product. There is no better way to achieve common sense regulation than to draw on the common sense of the American people.

This approach reflects the statutory framework for rulemakings established more than 50 years ago by the Administrative Procedure Act (APA). This statute requires agencies to publish notices of most proposed rules and solicit written comments. It also reflects the impact of several recent statutes, which have added new procedures to encourage more public participation in rulemaking.

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which the President strongly supported, is particularly important in this regard. It created special panels that allow OIRA, the Small Business Administration's Chief Counsel for Advocacy, the Environmental Protection Agency, and the Occupational Safety and Health Administration (OSHA) to discuss regulations under development with small business representatives from the industries affected. The panels have been successful. They have often identified potential changes that have improved the proposed regulation and benefitted small businesses. A panel convened to discuss EPA's Proposed Rule on Wastewater Pretreatment Standards for Industrial Laundries, for example, recommended that EPA solicit public comment on a "no-regulation" alternative to this proposed rule. Comments from small entity representatives during the panel process and comments on the published proposal convinced EPA that industry discharges were not significant enough to warrant national clean water standards for industrial laundries. Once it saw that there was little need for regulation, EPA withdrew its proposal.

The Congressional review provisions of SBREFA added further strengthening of congressional oversight of new regulations. It required agencies to submit new final rules to Congress for review. Within sixty (60) days, Congress may enact a "joint resolution of disapproval" under expedited procedures for any rule to which it objects. The Congressional Review Act (CRA) gave OIRA the responsibility to designate final rules as "major" if they are likely to result in an annual effect on the economy of over $100 million, a major increase in costs or prices, or significant adverse economic effects. For those major rules, CRA delays their effective date for 60 days to ensure that Congress has full opportunity to review them before they become binding.

Many regulations also contain information collections that are subject to the Paperwork Reduction Act of 1995 (PRA). This statute provides the public with two opportunities to comment on the need for and burden of new regulatory reporting and recordkeeping requirements. Under the PRA, agencies must obtain OMB approval for all information collections. OIRA's review of new regulations thus also includes a separate review of associated information collections.

The President's Executive Order 12866 emphasized the importance of this notice and comment procedure in 1993, calling on each agency to "provide the public with meaningful participation in the regulatory process." The President stressed this point further in 1995 when he urged agencies to get out of Washington to speak directly with the American people, to form partnerships with those affected by regulation, and to negotiate with, not dictate to, the regulated community.

A New Culture of Regulatory Enforcement

In our efforts to improve the Nation's regulatory system, we have concentrated on developing tailored and cost-effective rules based on sound science and good information, and on reinventing or eliminating existing rules that are obsolete or no longer make sense. We know, however, that the American people are not just affected by how agencies write rules. They also care how agencies administer and enforce them. In a very conscious way, we have set out to change the culture of enforcement in the agencies. Where appropriate, we have moved away from a former emphasis on procedural requirements and the imposition of fines for those that do not comply, creating instead a system that stresses partnership with responsible members of the regulated community. We focus more on the results of regulation, offering compliance assistance to those who need help in meeting requirements, while reserving traditional enforcement for those who choose deliberately to avoid compliance.

OSHA is one agency that has seen the value of increasing compliance assistance to fulfill its mission, rather than relying exclusively on enforcement. In its May 1995 Reinvention Report, OSHA committed to expanding its use of creative partnerships with employers, common sense rulemaking, and expanded outreach, rather than relying on traditional enforcement approaches. By partnering with management and labor, OSHA has since improved workplace safety and health for the vast majority of employers who want to do the right thing, while targeting enforcement resources on the most dangerous workplaces and the few "bad apples."

OSHA has created local partnerships emphasizing compliance assistance. They now involve more than 4,500 work sites with nearly 110,000 workers. Firms in these partnerships have dramatically improved their safety performance. For example, the Steel Erectors Safety Association of Colorado and OSHA entered into a cooperative agreement involving 38 steel erector contractors. Working together, they designed a "100% fall protection" program. Also, in Colorado, Project HOMESAFE, a partnership between OSHA and the National Association of Homebuilders, delivers safety training to residential construction firms in the greater Denver area. A partnership between the Kansas Independent Oil and Gas Association and OSHA's Wichita office reduced fatalities from as many as five per year to zero. Working with OSHA and the New Jersey State Police, the State of New Jersey has identified and fixed 2,559 hazards that posed risks to highway construction workers at more than 185 construction sites.

The agency's premier partnership, its Voluntary Protection Program, now includes more than 600 work sites, including small businesses for the first time. Voluntary Protection Program sites serve as models, and some participants have volunteered to mentor other small businesses that want to develop effective safety and health programs. These work sites experience injury and lost workday case rates on average 50% below industry rates for their respective industries. Indeed, a New Jersey small business that recently received its Star designation in the program reported an injury and illness rate more than 80% below the industry averages.

OSHA has found that partnerships with the regulated community often allow it to address priority issues without new regulations. After working with stakeholders to consider how best to deal with 18 priority workplace hazards, OSHA concluded that at least 10 of them could be corrected without resorting to regulatory action. For example, OSHA worked with the National Institute for Occupational Safety and Health and the Asphalt Paving Manufacturer's Association to redesign asphalt paving machines so that the machine operator would no longer be exposed to asphalt fumes.

OSHA's consultation program, which operates totally separate from enforcement, is available to small businesses in almost every state. An OSHA consultant will inspect a business site at an owner's requires and provide a confidential safety and health assessment. Congress codified the consultation program during the 105th Congress. With additional funds in 1999 and this year, OSHA also has added 44 new compliance assistance officers in its area offices. These specialists serve as the point of contact for employers and employees looking for information on workplace safety and health or seeking specific training. The President's budget for 2001 includes funding to place one of these specialists in every OSHA area office to give every business a local OSHA official to call for help.

EPA is also using voluntary partnership approaches as part of its efforts to encourage compliance and the prevention of environmental problems. Working together with business and industry, EPA has found that strong economic performance and strong environmental performance often go hand in hand. EPA now has more than 20 national, voluntary partnerships. Many EPA regions also have their own programs. Some of these programs focus on improving environmental performance across an entire business sector. The printed wiring board industry, for example, joined EPA's Design for the Environment Program to help their members operate in a more efficient, environmentally sound manner. The industry has now cut its annual use of formaldehyde by 240,000 pounds, reduced water use by 400 million gallons, and energy use by 15 billion BTU. More than 7,000 organizations currently participate in EPA's voluntary partnership programs. According to EPA, participants in 1998 collectively conserved 1.8 billion gallons of clean water, eliminated 7.8 million tons of solid waste, prevented air pollution equivalent to taking 13 million cars off the road, and saved an estimated $3.3 billion. These results are a strong testament to the value of partnership.

The IRS has also been emphasizing new approaches. The Small Business/Self Employed Operating Division will soon provide end-to-end service to small businesses and the self-employed. When it becomes operational this October, it will seek to redouble the IRS's current program to help small businesses better understand taxes and reduce their compliance burden.

Role of the Judicial Branch in Agency Rulemaking

For more than 50 years, individuals and businesses who believe they have been adversely affected by agency regulations have had the right under the Administrative Procedure Act to seek

judicial review of regulatory decisions. This is an important check on any agency rules that exceed relevant statutory authority or that have not complied with applicable APA procedures. In a series of important cases, the Supreme Court has developed standards used by courts to review agency regulatory decisions under the APA. Often, the courts examine the statutory authority granted by Congress to an agency to decide if the agency exceeded its authority. The Supreme Court has acknowledged the important role of agencies in issuing regulations. It has confirmed that agencies should have broad discretion in interpreting legislation and implementing statutory directives in their areas of responsibility. This discretion is not unlimited, however, and the courts do on occasion find that agency actions are inappropriate.

In some cases, statutes that establish regulatory management procedures explicitly invite the courts to adjudicate disputes. The Regulatory Flexibility Act (the Act), for example, requires Federal regulatory agencies to analyze the impact of their regulations on small businesses and to consider alternatives that would be equally effective in achieving public policy goals without unduly burdening small businesses. For many years, there was no specific private right of judicial review of agency compliance with the law. Small business leaders lobbied for judicial review without success. Early in this Administration, both President Clinton and Vice President Gore endorsed the concept of allowing a right of judicial review for any failures to comply with the Act. With their support, Congress included a right of Reg Flex judicial review in SBREFA. This right of judicial review has had an impact on regulatory agencies. There is now much more sensitivity to the importance of regulatory flexibility analysis.

From time to time, regulations are subject to court review. The fact that regulations are challenged in court and sometimes overturned does not mean that the regulatory system is broken. To meet public needs, Congress must pass laws and regulatory agencies must implement them. Both the Legislative and Executive Branches of our government work hard at helping and protecting the public. Given our complex world and the often difficult problems that laws and regulations address, some of these actions will be controversial. The courts are available to resolve many such disputes. Occasionally, the courts strike down a law as unconstitutional or a regulation as not in compliance with the law. The checks and balances of our constitutional system work to protect our citizens by ensuring that both Legislative and Executive Branch actions are permissible.

Conclusion

We believe the federal regulatory system today works well to serve the interests of the American public. Federal agencies make good faith efforts to develop, assess, implement, and enforce regulations that implement important government programs. The system is not perfect, however, and we share your interest in improving it further. We respect your oversight role and welcome the opportunity to work with the Committee on constructive efforts in this area.

Thank you, Mr. Chairman. I am available to answer any questions you may have.

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Mr. RYAN. Thank you, Mr. Spotila.

Did I pronounce your name correctly, Spotila?

Mr. SPOTILA. Spotila, yes.

Mr. RYAN. Spotila, OK.

I'd like to start with you before we go through the rest of the panel, and Mr. Terry has just joined us now.

Mr. Spotila, on May 18 of this year, the chairman of this subcommittee, Chairman McIntosh, wrote OMB Director Jack Lew about the Department of Labor's pending at OMB final rule entitled, "Birth and Adoption Unemployment Compensation," which we all refer to as Baby UI.

The chairman objected to a number of things. First, the absence of a regulatory impact analysis, the absence of a Paperwork Reduction Act submission for the Baby UI experiment prior to its finalization, and the absence of a specific congressional delegation for the Department of Labor's proposed expansion of the 65-year-old unemployment compensation system, which was designed for the truly needy people who are unemployed involuntarily.

Under what specific congressional delegation of authority did OMB and OIRA approve the Department of Labor's Baby UI rule?

Do you agree with the Department of Labor's own internal legal analysis documents that admit that the Baby UI rule will not withstand a court challenge? And if not, why not?

Mr. SPOTILA. I believe that the Director did answer that letter but let me go into more detail than he went into.

We did review that regulation under Executive Order 12866, as we do other significant rules.

Mr. RYAN. It was a letter from you. It was just a couple of paragraphs. It didn't go into enough detail, so if you could expand a little bit.

Mr. SPOTILA. That's what I'm saying, let me go into a little more detail now.

Let me start with the agency's determination of its regulatory authority because I think that's something you've referenced earlier today and will be a key issue.

The Department of Labor and its Solicitor conducted a legal analysis internally. They conclude that, just as they have exercised authority in the past to interpret the statutory reference to being "able and available for work," just as they've interpreted it in the context of training and of illness and temporary layoffs and I think in other instances as well, they came to the conclusion, from a legal standpoint, that they had authority to extend this particular opportunity for States to enable the States to adopt legislation that would allow parents to apply for unemployment compensation when they take time off to take care of a new birth or an adopted child.

That's a legal analysis that my office did not attempt to make independently. We did review the fact that they had made that internal determination. And we did have some discussions, including internally with OMB counsel, Mr. Raul's successor, to make certain that that was a credible legal argument.

We recognize that reasonable people will differ just as others have commented that they had questions about this authority.

Ultimately, in conducting our review under the Executive order, we concluded that the Department had a credible enough legal position that we could proceed. We then turned to the question of regulatory impact analysis.

The initial proposal of this rule had predicted that it would have minimal effect because it worked on the assumption that only a few States would take advantage of it.

The Department received a lot of comments to the extent that that was not likely to prove true, that in fact more States would take advantage and the impact would be broader.

And so the department did a regulatory impact analysis which we reviewed in some detail. In fact, my staff worked closely with them on that.

Our sense is that—the sense of my staff is that the ultimate analysis was actually pretty good, and it reflected a number of public comments that had been received which included estimates of numbers and cost impacts and the like.

So it is something we actually gave some thought to.

And on the issue of the Paperwork Act submission, which you referenced, this is again a rule which will authorize States to take other action.

Our sense was that it did not contain an information collection at the moment. There was, therefore, not something that we could traditionally review under the Paperwork Act, although we certainly are interested in how the States might take action to implement this in the future.

We do work pretty closely with agencies whenever an information collection is involved. In this particular case, we concluded that it was not appropriate to do a paperwork review since the rule itself did not contain an information collection.

Mr. RYAN. So what specific congressional delegation of authority are you citing to justify OMB's legal analysis which seems to contradict the Department of Labor's own legal analysis that concedes that there is no statutory authority here?

Mr. SPOTILA. Actually, we relied on the Department of Labor's internal legal analysis that they had authority. They take the position that they have the authority to interpret the Federal Unemployment Compensation statutes, including this requirement that individuals be able to work and available for work.

They have taken the position, and not just in this instance, that they have the authority to interpret that provision. While we looked at that analysis, we did not do, nor would we normally do, an independent legal analysis of their individual authority.

Mr. RYAN. Well, let me move on to the RIA, why did OMB not require public comment on the draft RIA, the Baby UI, rule before the rule was finalized?

Has the OMB ever approved an agency's final major rule prior to public comments on its RIA?

Mr. SPOTILA. Actually, yes.

I asked my staff this question. I'm told there has been a long practice—it doesn't happen all the time—but it's happened more than 40 times in the last 5 years, for example——

Mr. RYAN. It's happened more than 40 times in the last 5 years?

Mr. SPOTILA. In the last 5 years is what I was told by my staff. In these instances, an agency has published a proposal without an impact analysis and has gotten comments suggesting they should do one, including often comments indicating what the cost impact would be.

They then actually do an impact analysis which we review in detail, and then they include that analysis in their final rule.

Mr. RYAN. For major rules. If you could, that's an interesting statistic. I had not heard that before. Could you please provide for the record the list of 40 major rules that did not receive public comment before the RIA?

Mr. SPOTILA. We'll attempt to do that. As I say, my staff had briefed me on this as I came here today, so we'll put that list together and send it to you.

Mr. RYAN. Yes. We'll give you time if you could give that to us for the record.

Mr. Schoenbrod, let me go to you.

And then I'll come back to you, Mr. Spotila.

In the *American Trucking* case, Cass Sunstein commented, in the wake of the *American Trucking* decision that the nondelegation doctrine had only one good year, 1935.

Do you disagree with this statement?

What case law, including specific statements therein, do you think Congress needs to be aware of to understand the importance of the nondelegation doctrine in current jurisprudence?

And do you believe that other cases since 1935 have helped us in constricting regulatory nondelegation?

Mr. SCHOENBROD. Well, when Professor Sunstein wrote that about the one bad year, he was having one bad moment. [Laughter.]

His concept of what nondelegation is, is very limited. He ignores the line item veto case, ignores the legislative veto case, he ignores many other precedents where the Supreme Case in one way or the other has given force and vitality to the nondelegation idea.

For one example, the void-for-vagueness doctrine, which says that laws can't be enforced, police can't enforce laws if there isn't a clear rule of conduct is, in and of itself, a nondelegation idea.

Now, the court has to acknowledge the obvious, has not been altogether straightforward about this in dealing with the line item veto and the legislative veto. It said it wasn't talking about delegation. Most legal scholars disagree with that kind of distinction. They don't really buy the court's compartmentalization.

Aside from striking down statutes, Cass Sunstein himself has written about many instances where the court has used the nondelegation idea to limit grants of statutory authority as it did in the *Benzene* case, as Alan Raul talked about this.

My book, "Power Without Responsibility" in chapter 2, cites many, many cases where the delegation idea has had vitality before and after 1935.

Mr. RYAN. Thank you.

Mr. Raul, I'd like to ask you a question, but before I do, I'm going to go and Mr. Terry's going to take over the chair, but there was something new to these New Hampshire debates, if you watched the Presidential elections, where you had this very interesting dy-

namic where each of the Presidential contenders could ask each other questions.

And I'd like to ask you to start thinking about who on the panel you would like to ask a question, what question you would like to ask them, and then ask away and get an answer, and we'll try and keep the discussion within 5 minutes.

I think that's a great way to go when it comes to doing witness testimony.

It sounds like we've got a vote coming.

Mrs. Gramm, I would like to ask you to tell me specifically how you think this congressional Office of Regulatory Affairs will work.

Mr. Raul, if you could comment briefly on section 109 of the Clean Air Act which instructs the EPA to set National Ambient Air Quality Standards [NAAQS], at a level requisite to protect public health with an adequate margin of safety.

That's a very, very important comment there. But the EPA assumes that particulate matter and ozone may harm public health at any level above zero. The EPA also assumes that when setting a NAAQS, it may not consider the cost, the feasibility, or the health hazards of poverty, as you mentioned in your testimony.

Doesn't this mean that under the EPA's reading of section 109, the EPA could prohibit all emissions from all sources, in other words, implement essentially a policy of de-industrialization?

Isn't it clear that Congress never intended to delegate such power to EPA?

I was interested in a comment you made in your testimony where you thought that EPA saw itself as rare among other regulatory agencies with respect to this perspective.

Could you please comment on that?

Mr. RAUL. Sure.

Well, with regard to the rarity of EPA's position, I think the Clean Air Act, certain aspects of the Clean Water Act, and certain other statutes that are administered by the Environmental Protection Agency are, within my experience, somewhere between rare and unique in that they have been construed by courts, and in some cases by Congress, to preclude considerations of cost effectiveness. No other agency is operating under a similar statutory framework.

OSHA, to some extent, considered itself to be in a non-cost-effectiveness consideration mode before the *Benzene* decision, and the Supreme Court set them straight on that.

The Food & Drug Administration, the Department of Transportation, U.S. Department of Agriculture, are all, to my knowledge, operating under principles that allow them to balance costs and benefits.

Similarly, in the rest of the world, to the extent that I'm familiar with it, executive agencies, regulatory agencies set cost-effective regulations that are reasonable balances to protect our public and their public against significant risks.

It is really only EPA that has what is perceived to be a statutory framework that precludes consideration of cost effectiveness and efficiency in regulation.

Not all of this is due to EPA's own misguided or churlish view. As I indicated, the D.C. Circuit, in 1980, with regard to the Clean

Air Acts provisions that we've been talking about, said that EPA really could not consider the question of cost effectiveness in regulations, even though, as you quoted, Mr. Chairman, from section 109, the language says nothing about the inability to consider the effectiveness of the regulation that the EPA would set in order to protect the public.

You have got words like endanger, safety, adequate. All of these certainly would allow for the agency to consider how significant is the risk, how effective is this regulation that we're proposing in abating that particular risk.

It is that type of analysis that the Supreme Court engaged in in the *Benzene* case when it applied nondelegation principles to rein in the agency.

So when I say that EPA views itself as rare, I don't know whether they consider themselves rare. My point was they are rare in that their statutes, as construed by the courts, really seem to require the agency to throw cost effectiveness to the winds.

We should recognize that, often, we have a very limited science mandate that doesn't answer all the questions.

Mr. RYAN. Well, going further, and taking your point even further, given the broad parameters here, isn't it true that the nondelegation principle is applied here because with EPA's interpretation, you could possibly implement a policy of de-industrialization, and doesn't that then say that this is clearly not what Congress intended in statutory authority?

Mr. RAUL. Sure, right.

Well, in the case of the Clean Air Act rules, which at the time were perhaps the rules with potentially the greatest impact on society, there really is a question of whether Congress would have intended, in its grant of authority to the agency, that the agency could go that far down the road to imposing such dramatic costs on society.

Really, though, the costs are not imposed merely on industry. I think there's a misconception that cost-benefit analysis, requirements of cost-effectiveness, and so on are really a one-sided ideological perspective designed to preserve industry from incurring excessive costs.

We're talking about society's resources here. So in the case of the Clean Air Act Rules, which are, according to EPA's own conservative estimates, in the range of at least $10 billion compliance each, and in the case of particulate matter, it's about $10 billion for compliance for partial attainment.

I don't think that even the agency believes that the particulate matter standards proposed in the Clean Air rules under discussion could be achieved by industry. So it was $10 billion for partial compliance.

Now I see the parallel in the *Brown & Williamson* v. *FDA* case over regulation of tobacco. This is an area which, again, impacts society and people throughout the country so profoundly, where Congress has spoken on this issue a number of times and has never provided the authority to the agency. One must analyze where you're talking about these dramatic impacts on the economy, the society, the possible reduction in economic output such as the de-

industrialization that you've mentioned, could it possibly be that Congress intended to delegate such power.

In the *Brown & Williamson* case, Justice O'Connor said that, where such sweeping impacts are possible, it's only common sense that Congress did not intend the agency to go this far without a more express warrant to do so.

Mr. RYAN. Thank you, Mr. Raul.

Ms. Gramm, I'd like to ask you—I have to go and will turn it over to Mr. Terry—I'd like to ask you to explain how you think this congressional Office of Regulatory Analysis would work, and then I'd like to read later the testimony of the New Hampshire-style questioning.

If each of you would think of a question to ask each other. I find that the experts are sitting out here, and it's interesting to hear the give-and-take and the Q&A between witnesses and what that offers to help enlighten us.

So after your question, Ms. Gramm, if you could each ask each other a question, one witness to one other witness, a witness of your choosing, we'd appreciate that.

Thank you.

Ms. GRAMM. OK, thank you.

You ask about how a congressional Office of Regulatory Analysis would work, and I would just say, use as a model, a shadow OIRA, to perform independent, high-quality analysis of agency regulations at the proposal stage.

Use guidelines that OMB has prepared about how to do regulatory impact analyses. Evaluate the agency with regard to whether or not they have followed the law, including the intent of the law or have they gone beyond the law. Have them review the rulemaking proposal, whether or not this solves the problem, whether or not there was a market failure to begin with that called for a regulation, unless it was a regulation that was explicitly required by the law.

Ask the question of whether or not the agency has considered different alternatives, what might be other alternatives; whether or not the Federal Government is the appropriate level to regulate if there was a market failure.

You can also ask if a very good cost benefit analysis, weighing the benefits and the costs of the regulation in order to maximize net benefits was done.

I would suggest that all this analysis be done at the proposal stage so that this information can be put into the rulemaking record of the agency's file.

And I would also say that such information would be helpful for Congress in its oversight function if the rule goes final without taking into account the independent analysis.

My view is that even when I was at OIRA trying to perform these functions, I felt the need for some outside independent analysis because even OIRA, as part of the administration, is not entirely unbiased in its review of the agency regulations.

Mr. TERRY [presiding]. Thank you.

Ms. GRAMM. Do I get to ask a question? [Laughter.]

Mr. TERRY. I have a question, but I'll let my question be the closing question. We do have votes coming up here in a few minutes.

Actually, we did this in Nebraska a few years ago, so we'll let New Hampshire take the credit though.

Mr. RAUL. Can we get the taxi driver back up here. [Laughter.]

Mr. SCHOENBROD. In spite of the taxi driver, I have a question to ask Mr. Spotila.

It seems to me, it strikes me that you, in your present position, know as much as anybody about how the process of reviewing agency rules works, because you do it.

So I'm wondering whether you agree with then-Judge Breyer when he floated this idea that's behind the Congressional Responsibility Act. I want to be clear, Judge Breyer wasn't saying he was favoring this but he said it could work. As a practical matter, congressional responsibility could work, and he had a number of formats under which it could take place.

What I'm asking you, is can you imagine some format where as a practical matter, the idea behind the Congressional Responsibility Act could work.

After you answer, I'd love to hear Dr. Gramm because she had the same kind of experience.

Mr. TERRY. That would probably be the Iowa plan to ask two questions. [Laughter.]

Mr. Spotila, if you would answer that question.

Mr. SPOTILA. Thank you, Mr. Chairman.

Mr. TERRY. Actually, that's a good question. I appreciate that.

Ms. GRAMM. Can Mr. Hill help me with an answer to that too.

Mr. SPOTILA. Let me start by saying that the administration hasn't taken a position on the bill, so I don't want to state an administration position.

Rather, I'll give you an initial reaction if you will. I think that we have some concerns; I would have some concerns as to the practicality. We start certainly by being very deferential to the Congress. When the Congress makes decisions about what it needs to do its job, clearly we're deferential to those decisions.

So certainly in an overall atmosphere of respect, I still try to look to the practicality of it.

I think that many of the instances where people are most concerned about regulations come because of statutes where the Congress found it very difficult to be specific, either because the subject was very complex, or because it was too difficult to reach a consensus.

They then delegate authority to an agency which goes through an extended comment period, does outreach to the public, does a lot of analysis and all the rest, comes up with what may well be a very complex and extensive rule.

I'm not sure that it's practical to expect that when that rule comes back to the Congress in this construct, in the context of limited debate, probably limited—perhaps limited additional analysis over and above what the agency has done—that you're going to get the kind of, you know, long and extensive consideration by the Congress that would really add meaningfully to the ultimate decision-making.

You might get a political judgment again, but you wouldn't necessarily get significant input on the merits, simply because the Congress is so busy doing other things.

And, if you then added to it a long list of these rules coming, one after another, each of which may have years of work behind it, I'm not saying that it's impossible but from a practical standpoint, I think the Congress might find that very difficult to manage.

The real difficulty here is in getting the agencies to do the job right in the first instance. To get the Congress to delegate as specifically and as clearly as possible, so that the parameters become clear, and then to get the agencies to do their job properly.

That's why in my testimony and in the work we've been doing, our emphasis has been in trying to improve the way the agencies do it. Because I think ultimately that's where the solution lies.

Mr. TERRY. Mr. Schoenbrod, do you want to have a quick analysis of——

Mr. SCHOENBROD. I'm actually encouraged by what he says because it seems to me the purpose of the Congressional Responsibility Act is not for Congress to add additional cogitation. Certainly we get enough cogitation in the Federal Register.

The purpose of the act is to get Congress to take responsibility. And so if it's possible for Congress to do that, I'm glad to hear that.

Mr. TERRY. Ms. Gramm, do you have a question?

Ms. GRAMM. Well, my view, in response to that question was that I think, even if it is hard for Congress, that that is what their job is. It might be a very useful exercise at the beginning, and it may make them do some of the other things that will really make them pay attention to the regulatory costs that are being imposed on the American people.

You have to do this in Congress every day for the fiscal budget side, so you can have a situation maybe where there are things that can be done in a similar way for the regulatory side.

It's not going to be easy, but that's exactly the point.

My question that I have is for my colleague here. And that is having had, over the last 2 years, reviewed some of the regulations that have come out, I have a whole series of questions that I would love to have your answer on.

For example, the Clean Air Act——

Mr. TERRY. This is a great example of congressional responsibility right here. [Laughter.]

Ms. GRAMM. Well, I wold point out that under the Clean Air Act Amendments of 1990, in fact those amendments state that for tier two vehicle standards, EPA must consider whether or not new tier two standards are necessary, feasible, and cost-effective. This is in the Clean Air Act Amendment.

So there is cost-effectiveness on this part of the Clean Air Act Amendments that were put in in 1990. And our analysis pointed out that EPA failed all three of those tests: That those standards in fact were not necessary, and in some areas they would make the air quality worse off—in certain midwest areas, for example. And they technologically were not feasible and certainly not cost-effective.

In OSHA's ergonomic standards, for example, we have a situation where OSHA does not have a very good definition, a very explicit definition of what a musculoskeletal disorder is.

And currently, you have many businesses that have been trying very hard to try and reduce those disorders. And yet we have a pro-

posal that is going forward and I have a question about how did that get out of your scrutiny.

You have the Army Corps of Engineers' nationwide wetlands permitting process which withdrew automatic permitting procedure and expedited permitting procedure for small parcels of property that had minimal environmental impact, and that expedited process was pulled a year ago, and with enormous impact; it would account for maybe, in the proposal stage, some 86 percent of the Army Corps of Engineers' workload.

And so my question is, did you consider the effect of the regulation on the workload, the impact on property owners, the delay that would occur?

FDA's recent required labeling for transfatty acids—and I won't go on and on, this is my last—transfatty acids. For example, FDA has not allowed truthful statements about transfatty acids, and yet in this proposal, FDA is suggesting a label that would be indeed incorrect, but in FDA's opinion, it would be OK because it would make people think that transfatty acids were like saturated fats and therefore we could free ride on that information that consumers think that saturated fats are bad, and so they were proposing something that was indeed incorrect.

And so my question is, how does this comport with your testimony of trying to make regulations that indeed make sense, and follow the Presidents', including this President's Executive order.

Mr. TERRY. All right.

To whom is that directed? [Laughter.]

I'm just kidding.

Mr. Spotila.

Mr. SPOTILA. I was going to ask for a ruling of the Chair there, Mr. Chairman.

Ms. GRAMM. And you're allowed to ask a nasty question too.

Mr. SPOTILA. Well, I guess I should start by saying the lord's work is never done. [Laughter.]

Ms. GRAMM. And I'm sympathetic.

Mr. TERRY. Response?

Mr. SPOTILA. On the tier two rule, clearly an important rule, there was an examination of feasibility, technological feasibility, both as to engines and fuel.

The determination was that there is technology out there to do it. There were some issues about cost, but the technology does exist. I met with both industries, and both of them acknowledge it exists.

The necessity of it relies upon the need to achieve important reductions in nitrogen oxide emissions in areas that currently fail to meet the 1-hour ozone National Ambient Air Quality Standards.

As far as being cost effective, this is something we spent a lot of time on. EPA estimated that the control cost was, as I recall, something less than $2,000 a ton in cities that are at or above the standard.

There are some areas where we had issues, local issues, as to cost effectiveness. Ultimately, we did do a rigorous analysis and concluded that the benefits did justify the costs in that instance.

On ergonomics, of course, we have a proposed rule and it's out for comment. We've gotten thousands of comments, and the process

continues. These issues, including definitional issues, will be very important to be resolved before any final rule could be put out. We welcome the kinds of comments that we've gotten from yourself and others to help inform that decision.

On the other two rules, the Corps of Engineer rule and the FDA rule, I have not been personally involved in either of them that I recall, and so I'd have to abstain in terms of that, but I certainly welcome comments and would welcome any kind of further discussion on it.

Mr. TERRY. Did you have 30 seconds that you'd like to make a comment in response to the answer, Ms. Gramm.

Ms. GRAMM. No, I'll just be happy to give him our public interest comment; I brought some of these along with me.

Mr. TERRY. Very good.

Mr. Spotila, do you have a question for anyone?

Mr. SPOTILA. I certainly would not want to pass up this opportunity.

Mr. Raul was so kind to me when he called me his hero at the beginning of his remarks, that I'd like to ask him a question.

Mr. RAUL. No good deed goes unpunished.

Mr. SPOTILA. But it's not a nasty question. You know, I'd like to make use of this.

I know that you follow what's happening in the regulatory area. I'm interested in your thoughts looking forward, leaving aside the possibility of any legislative change, as to what rules in particular you think I should give most attention to.

And in the context of this discussion, where perhaps could I have the most value in the course of performing my duties?

Mr. RAUL. You honor me by directing that question to me. I think that Dr. Gramm has just given you a nice list.

Mr. SPOTILA. I knew that I would get her suggestions. I didn't have to ask her.

Mr. RAUL. And I follow the rules of course when invited to do so on behalf of clients, and more generally as a matter of my own legal and policy interests when important policy issues, regulatory policy issues are involved.

I know that the ergonomics rule, in particular, is one which poses many issues, both in terms of its reasonableness and perhaps with regard to its authority as well, but it's one that's generated enormous comments.

As a matter of interest, the organics rule, which has been up through OMB and at USDA, poses I think interesting issues as to the law required the Organic Foods Production Act required certain standards for organic foods, that the administration, not unreasonably, decided were quite onerous, and the rule came out of the organic community was not too pleased with the result.

I think OMB had actually performed a useful service in the first instance, and now will need to bring the second rule into compliance with what perhaps the Congress and the organic community had expressed an interest in and what the intent was.

That's not a criticism. I'm just saying these are interesting issues as to implementing the congressional intent, responding to the interest of the affected community, so certainly ergonomics is one

that I would say is quite controversial and would warrant your attention.

Mr. TERRY. Does that conclude?

Mr. RAUL. That does indeed.

Mr. TERRY. Let me ask you, you're the last one to ask a question. We can recess for 20 minutes to half an hour, for you to come back, or you can sit there and say——

Mr. RAUL. I can ask it very quickly.

Mr. TERRY. I only have 4 minutes.

Mr. RAUL. If I could, if that would be the end of the hearing, maybe I should do it.

Mr. TERRY. Yes.

Mr. RAUL. I don't want to gang up on Mr. Spotila, especially since his question to me was so kind.

I would redirect it back to the committee and perhaps as a question to be directed really to EPA and the administration, and that is, if I'm correct that EPA views itself as precluded from considering cost-effectiveness in the Clean Air Act regulations and elsewhere, do they favor that, and would they be willing to support legislation recommended to Congress that would lift the 1980 interpretation by the D.C. Circuit that precludes consideration of cost effectiveness and join with industry and other members of the public who would like to see more reasonable, rational regulations, not to require that the most cost-effective rule be adopted, but only to permit cost effectiveness to be considered.

That would resolve the *American Trucking* case.

Mr. TERRY. I think those are very good points. We'll put them in the record.

Mr. Spotila, we will be sending you additional written questions, as usual, that we'd appreciate your written responses to.

This subcommittee stands adjourned.

[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

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INDEPENDENT

June 15, 2000

BY FACSIMILE

The Honorable John T. Spotila
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Spotila:

This letter follows up on the June 14, 2000 hearing of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, entitled "Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?" As discussed during the hearing, please respond to the attached followup questions for the record.

Please hand-deliver the agency's response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, June 30, 2000. If you have any questions about this request, please call Subcommittee Staff Director Marlo Lewis or Professional Staff Member Barbara Kahlow on 225-4407. Thank you for your attention to this request.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich

Q1. OMB/OIRA Clearance of DOL's Baby UI Major Rule. On May 18, 2000, I wrote Office of Management and Budget (OMB) Director Jack Lew about the Department of Labor's (DOL's) pending-at-OMB final rule, entitled "Birth and Adoption Unemployment Compensation," popularly known as Baby UI. I objected to: (a) the absence of a regulatory impact analysis (RIA), (b) the absence of a Paperwork Reduction Act (PRA) submission for the Baby UI experiment prior to its finalization, and (c) the absence of a specific Congressional delegation for DOL's proposed revision of the 65-year old unemployment compensation system -- which was designed for the truly needy. On June 13th, you wrote me, stating "We forwarded a copy of your letter to the Department of Labor (DOL) and have considered your concerns about the rule's legal basis and compliance by DOL with Executive Order 12866 and the Paperwork Reduction Act. ... We believe that DOL has addressed in a satisfactory manner the concerns raised in your letter."

a. Since DOL has "consistently interpreted these provisions [of the Federal Unemployment Tax Act (FUTA)] as requiring that State UI laws contain tests to assure that UI is paid only to workers who lose their positions when employment slackens and who ... cannot find other work," i.e., workers who are "involuntarily unemployed" (DOL letter to Senator Patrick Leahy, July 17, 1997), under what specific Congressional statutory delegation of authority (i.e., under FUTA or any other Act), did OMB's Office of Information and Regulatory Affairs (OIRA) approve DOL's Baby UI rule, which would provide paid leave to workers who voluntarily quit or take time off from their jobs? Also, since there are no "able and available" requirements for the unemployment compensation program in Federal law, under what specific Congressional statutory delegation of authority did OMB/OIRA approve DOL's Baby UI rule? Do you agree with DOL's internal legal analysis documents that admit that the Baby UI rule will not withstand a court challenge? If not, why not?

b. You testified that, in the last five years, OMB has allowed at least 40 agency final major rules to be published without prior Congressional and public comment on their RIAs. You agreed to identify those 40 major final rules for the hearing record. When did it become OMB's practice to publish major final rules without public comment on their RIAs? Was this practice deliberately instituted as a matter of policy, or is it a pattern that has become apparent only in hindsight? If the former, please provide any documents discussing the pros and cons of OMB's decision to adopt such a practice. Finally, notwithstanding any possible change in OMB policy, why did OMB/OIRA not require Congressional and public comment on the draft RIA for the Baby UI rule before finalization of the rule, especially since DOL's estimates were seriously challenged by many commenters?

c. DOL's RIA includes a 1½ page discussion of regulatory alternatives, without cost estimates for each of them. The RIA also states, "Who is likely to Experience Costs ... the costs will ultimately be passed on, through employer taxes, in the

same manner as other benefit expansions" (p. 2). Please provide for the hearing record OMB's analysis of how DOL's RIA comports with each best practice in OMB's "Economic Analysis of Federal Regulations Under Executive Order 12866" (popularly known as OMB's "Best Practices Guidances"), especially the absence of cost estimates for regulatory alternatives. If DOL's RIA does not comport, why did OMB/OIRA clear DOL's final rule?

d. Why didn't OMB/OIRA require a regulatory flexibility analysis (RFA) for the Baby UI rule which, unlike the Family and Medical Leave Act, does not exempt small businesses? Why didn't OMB require DOL to consult with small businesses, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA), for all major rules affecting small businesses? As former General Counsel of the Small Business Administration (SBA), are you concerned about the substantial and costly effects the Baby UI rule will have on small businesses? Do you fear any precedential impact of DOL's ignoring the SBREFA and RFA requirements for the Baby UI rule?

e. In the preamble to its final rule under the caption Paperwork Reduction Act, DOL states, "**If** the evaluation of this experiment requires information collections ... we will seek OMB approval at that time" (emphasis added). Since the Federal Reports Act of 1942, OMB has been required to approve the paperwork associated with agency experiments. Why did OMB clear the Baby UI rule without first approving the associated paperwork for this experiment? Has OMB ever approved an agency's final major rule for an experiment prior to public comments on the paperwork associated with the experiment? If not, why did OMB do so for Baby UI?

Q2. <u>OMB/OIRA Clearance of EPA's PM-Ozone Rules</u>.

a. **OMB's Review of EPA's Disregard of Cost.** In *Lead Industries Association v. Environmental Protection Agency* (647 F.2nd 1130, 1148-49, D.C. Cir. 1980), the D.C. Circuit Court of Appeals held that the Environmental Protection Agency (EPA) may not consider cost in setting national ambient air quality standards (NAAQS). EPA followed *Lead Industries* when, in 1997, it set new NAAQS for particulate matter (PM) and ozone. However, the Appeals Court's opinion appears to be inconsistent with Sections 101(b)(1) and 312(a) of the Clean Air Act (CAA). Please address for the hearing record the following questions regarding OMB's review of EPA's PM and ozone standards.

i. Section 101(b)(1) specifies, as a core purpose of the CAA, "to promote ... the productivity capacity of its [the Nation's] population." Clearly, if the CAA is to promote productivity, then EPA must be allowed to consider cost when promulgating NAAQS. Does OMB agree? If not, why not?

Please provide any analysis OMB may have conducted on this topic during its review of the PM and ozone rules.

ii. Section 312(a) requires EPA to "conduct a comprehensive analysis of the impact of the [CAA] on the public health, **economy**, and environment of the United States," and to "consider the **costs**, benefits and other effects associated with compliance with each [NAAQS]" (emphases added). There would be little point to EPA's conducting a "comprehensive analysis" of the benefits and costs associated with NAAQS, if EPA were prohibited from considering cost in setting NAAQS. Does OMB agree? If not, why not? Please provide any analysis OMB may have conducted on this topic during its review of the PM and ozone rules.

iii. If OMB's review concluded that the Court of Appeals decided correctly in *Lead Industries*, please identify the specific provisions of the CAA, if any, that prohibit EPA from considering cost.

b. **OMB's Review of the Constitutionality of EPA's Construction of the CAA.** CAA Section 109(b)(1) requires EPA to set NAAQS at a level "requisite to protect the public health" with an "adequate margin of safety." EPA assumes that PM and ozone may harm public health at *any* level above zero. EPA also assumes that it may not, when setting NAAQS, consider cost, feasibility, or the health hazards of reduced economic growth. Thus, under EPA's reading of Section 109, EPA could prohibit *all* PM and ozone emissions from *all* sources -- in other words, institute a policy of deindustrialization. However, Congress did not intend to delegate such power to EPA, because one of the CAA's core purposes is to "promote" the Nation's "productive capacity."

i. Does OMB agree that Section 109 does not grant the virtually unlimited discretion EPA assumed when it set the NAAQS for PM and ozone? If not, why not?

ii. Please provide any analysis OMB may have conducted on the scope of EPA's discretion under Section 109 during its review of the PM and ozone rules.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

August 8, 2000

The Honorable David M. McIntosh
Chairman, Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of June 15, 2000, enclosing additional questions from the Subcommittee as a follow-up to the June 14, 2000, hearing entitled "Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?" In your letter, you expressed a number of legal concerns that you have with two regulations, one issued by the Department of Labor (DOL) and one by the Environmental Protection Agency (EPA). As you may know, legal challenges have been filed against both rules, and the cases are in litigation. Since the rules are the subject of ongoing litigation, OMB is not in a position to comment on the specific legal issues that you have raised. However, OMB can offer the general comment that the Administration believes that it had the legal authority to issue the rules. My response on the remaining issues is detailed below.

Department of Labor "Baby UI" Regulation

In your letter, you asked about DOL's "Baby UI" rule, that is, DOL's final rule on "Birth and Adoption Unemployment Compensation." As the President noted in describing the regulation in his radio address on June 10, 2000, fifteen states have considered the legislation permitted by this rule. He went on to say, "In this strong economy, I hope states will take advantage of this new option, and I believe those which do can provide this new benefit while still preserving the fiscal soundness of their unemployment insurance programs. The first few months with a newborn are precious ones, and no parent should have to miss them."

At the hearing, the subcommittee asked about the number of times that agencies have issued final rules as major after designating them non-major at the proposal stage. When I responded that it had happened over 40 times since 1995, the subcommittee asked that we identify those major rules for the hearing record. The list of these rules is attached as Exhibit 1. Indeed, as the list indicates, more than 160 final major (or economically significant) rules have been issued in this manner since 1981. In your June 15th follow up letter, you asked when this became OMB practice and whether it was deliberate. As indicated, this has been OMB practice

since it began reviewing regulations in 1981 under Executive Order 12291. It is not unusual for agencies and/or OMB to determine, based on public comment, that a rule is "major" or "economically significant."

You have asked about the treatment of alternatives in DOL's regulatory impact analysis (RIA) for the Baby UI rule. OMB's guidance to agencies on "Economic Analysis of Federal Regulations Under Executive Order 12866" specifies that the "Economic Analysis should show that the agency has considered the most important alternative approaches to the problem and provide the agency's reasoning for selecting the proposed regulatory action." Consistent with this guidance, DOL presented in its RIA for the Baby UI rule an examination of five alternatives to the rule or to certain aspects of the rule. DOL assessed the benefits and costs of each of these alternatives compared to the policy it selected and explained why alternatives were not chosen.

Environmental Protection Agency PM-Ozone Regulations

In your letter, you asked about OMB's review of EPA's 1997 rules on ozone and particulate matter (PM) National Ambient Air Quality Standards (NAAQS), including constitutional issues that are currently in litigation. As part of its submission to OMB, EPA included an assessment of the potential costs and benefits of the regulatory action, as required by E.O. 12866. OIRA reviewed this analysis. During its review of the rule, OMB did not prepare an analysis of the legal issues raised in your letter regarding whether the D.C. Circuit in 1980 correctly decided the Lead Industries case.

Sincerely,

John T. Spotila

Enclosure

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich

ENCLOSURE KEPT ON FILE WITH THE SUBCOMMITTEE

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INDEPENDENT

August 24, 2000

BY FACSIMILE
The Honorable John T. Spotila
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Spotila:

This letter follows up on your August 8, 2000 incomplete reply to my June 15th questions, following up on the June 14th hearing of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, entitled "Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?"

On June 14th, you testified that, in the last five years, OMB has allowed at least 40 agency final major rules to be published without prior Congressional and public comment on their regulatory impact analyses (RIAs). You agreed to identify those 40 major final rules for the hearing record. Instead, your August 8th reply includes a printout of rules since 1981 reclassified from non-major to major rules, without any indication whatsoever about their RIAs, if any, and public comments on them before finalization. Please provide the specifically-requested information about recent RIAs without any public comment.

Please hand-deliver the agency's response to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building not later than noon on Friday, September 8, 2000. If you have any questions about this request, please call Professional Staff Member Barbara Kahlow on 226-3058. Thank you for your attention to this request.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable Dennis Kucinich

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INDEPENDENT

June 22, 2000

Via Facsimile
Wendy Wagner
Professor of Law
Case Western Reserve University School of Law
Fax: (440) 892-1158

Dear Ms. Wagner:

I am sorry that you were unable to testify at the Subcommittee's hearing last week on the delegation of legislative authority. I found your written testimony to be very interesting and was looking forward to exploring the issues that you raised in greater detail at the hearing. Unfortunately, this was not possible. I am pleased that you are willing to answer my questions for the record. I have attached the questions and look forward to your reply.

Sincerely,

Dennis J. Kucinich

Dennis Kucinich
Ranking Member
Subcommittee on National Economic Growth,
Natural Resources and Regulatory Affairs

enclosure
cc: Subcommittee members

Questions for the Record for Professor Wendy Wagner

Mr. Raul notes in his written testimony that he -- along with C. Boyden Gray -- represented amici -- Senator Hatch and Congressman Bliley -- in the American Trucking case. Similarly, Ms. Gramm testified that she works for the Mercatus Center which intervened twice in the case. **Did you represent anyone in the American Trucking case or is your interest in this opinion purely academic?**

In May 1999, a two-judge majority of a three-judge D.C. Circuit panel found that the EPA construed the Clean Air Act (CAA) so loosely as to render it an unconstitutional delegation of the legislative power when it enacted the new PM/Ozone standards. This finding will be reviewed by the Supreme Court. It is my understanding that a number of prominent legal scholars have criticized this portion of the D.C. Circuit's opinion in the American Trucking case. **Is that right?**

Are some of these scholars -- such as Professor Richard Pierce -- concerned that the finding does not take into account the scientific limits involved in setting standards for pollutants -- such as ozone -- which are dangerous to human health at any level?

Do some of these scholars believe that the court's interpretation of the nondelegation doctrine could force the EPA to set a standard in a way that is not in the public interest?

During the hearing, many witnesses and members expressed concern about how much legislative authority Congress has been delegating to the agencies. **Are there procedures in place already that allow Congress to take back some of its legislative authority**?

At the hearing, there was a great deal of discussion about the Congressional Responsibility Act. **What are your views on this piece of legislation?**

Mr. Raul testified that "EPA may be the rare administrative agency in the United States, and perhaps anywhere in the world, that believes itself to be legally precluded from adopting cost-effective regulatory standards." This is a pretty harsh criticism of the EPA.
However, wasn't it the courts that found that Congress specifically precluded EPA from considering costs when setting NAAQS?

Mr. Raul testified that, if courts played a more aggressive role in reviewing agency rules -- as they did in the Benzene case, it would help improve agency accountability. He also cites your article in support of some of his arguments. **Could you comment on these issues?**

Would you like to comment on other aspects of the other witnesses' written testimony?

Response to Questions for the Record
Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs
"Does Congress Delegate Too Much Power to Agencies and What Should be Done About It?"

Wendy E. Wagner, Professor, Case Western Reserve University School of Law

Mr. Raul notes in his written testimony that he – along with C. Boyden Gray – represented amici – Senator Hatch and Congressman Bliley – in the American Trucking case. Similarly, Ms. Gramm testified that she works for the Mercatus Center which intervened twice in the case. Did you represent anyone in the American Trucking case or is your interest in this opinion purely academic?

My interest in American Trucking is exclusively academic. I do not represent anyone with an interest in American Trucking and have declined all opportunities to consult in litigation or represent clients since I joined the CWRU faculty in 1992.

In May 1999, a two-judge majority of a three-judge D.C. Circuit panel found that the EPA construed the Clean Air Act (CAA) so loosely as to render it an unconstitutional delegation of legislative power when it enacted the new PM/Ozone standards. This finding will be reviewed by the Supreme Court. It is my understanding that a number of prominent legal scholars have criticized this portion of the D.C. Circuit's opinion in the American Trucking case. Is that right?

Yes. Among those academics who have written or spoken about the opinion, an overwhelming majority have criticized the court's use of the nondelegation doctrine. There are a number of reasons for this condemnation of the opinion, not the least of which concerns the constitutional and legal legitimacy of the new doctrine. Indeed, even academics who are generally at opposite sides of legal issues agree that the court's use of the nondelegation doctrine was wrong. It also worth underscoring that virtually all of the "greats" in administrative law have weighed in against the opinion. Indeed, in my eight years of academia, I have never seen such a strong consensus develop against an opinion.

In my written testimony, I cite the current articles about American Trucking that I was able to locate in my research (one professor has written in favor of the opinion; six professors have written against the opinion). Those who have dedicated at least one article to condemning the court's use of the nondelegation doctrine are:

Robert Adler, Professor at the University of Utah School of Law
Craig Oren, Professor at Rutgers-Newark School of Law
Richard Pierce, Professor at George Washington University Law School
James Rossi, Professor at Florida State University Law School
Mark Seidenfeld, Professor at Florida State University Law School
Cass Sunstein, Professor at University of Chicago Law School

The case has also been the subject of criticism at various conferences and informally among academics. Every professor I have discussed the opinion with at these sidebars

and conferences agrees that it is incorrect. Furthermore, to my knowledge none of the professors who have either written critically of the opinion or voiced their criticisms at conferences have any financial stake in the case: they approach the case only as a matter of academic interest.

Are some of these scholars – such as Professor Pierce – concerned that the finding does not take into account the scientific limits involved in setting standards for pollutants – such as ozone – which are dangerous to human health at any level?

Yes. Professor Pierce criticizes the judges for engaging in a "science charade" – that is, for ignoring the reality that the standard-setting process requires agencies to make a number of value choices when establishing regulations due to the limits of science. Rather than providing the agency with the policy space to make these value choices openly and honestly, Professor Pierce and others argue that the "intelligible principles" requirement imposed on EPA in American Trucking will actually serve to impair, rather than improve, the agency's political accountability and honesty regarding its value choices. The court's implicit requirement that the agency develop an overarching formula or set of quantifiable criteria to guide its standard-setting requires the impossible from the agency. As Professor Pierce concludes: "This is the point at which the majority fell prey to the science charade. It assigned the EPA a task that the EPA cannot perform. Indeed, no institution can perform that task." Richard J. Pierce, Jr., *The Inherent Limit on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 Admin. L. Rev. 63, 78 (2000).

As much as we might wish differently, in most environmental rulemaking exercises there is no overarching formula or set of principles that can credibly be developed to capture the many pollutant-specific choices that are required for each standard. To ignore this reality either forces the agency to develop guidelines that are far too inflexible, or causes the agency to work even harder to disguise its true decisions under layers of artificial technical explanations and formulas.

Do some of these scholars believe that the court's interpretation of the nondelegation doctrine could force the EPA to set a standard in a way that is not in the public interest?

Yes. In order to have any meaning independent from the court's more traditional option of remanding the agency's standard as "arbitrary and capricious" under the Administrative Procedures Act, the "intelligible principles" requirement under the nondelegation doctrine seems to require the agency to develop a formula or set of criteria that binds it in the future. Yet this inflexible ex ante set of principles (even assuming that they could be developed despite the limits of science and the case-specific nature of the standard-setting process) work against the public interest by locking in both the science and the inevitable political choices. A Republican President will be bound by the "intelligible principles" developed by the administrative officials of his Democratic predecessor. In addition, the agency will be hamstrung in its efforts to respond to changes in science and social values. As a result of the intelligible principles

requirement, then, the agency ultimately could be less responsive, rather than more responsive, to the needs of the public.

During the hearing, many witnesses and members expressed concern about how much legislative authority Congress has been delegating to the agencies. Are there procedures in place already that allow Congress to take back some of its legislative authority?

Yes, there are a number of procedures in place that allow Congress to take back its legislative authority. The most obvious is Congress' power to legislatively override agency policies established under broad delegations, either by amending the original statute or by passing a new one. In the mid-1980's, for example, when Congress distrusted the President on environmental policies, it worked methodically to narrow the delegations in its amendments to major environmental laws. While there are dangers to narrow delegations that I outline in my testimony (e.g., narrow delegations may be dangerous in circumstances when Congress is unlikely to have the necessary information or resources to solve a problem competently or openly, or when the relevant information or values are likely to change quickly), if Congress is unhappy with the President's policies, it has full power to revise the mandates and narrow its delegations.

Congress also exercises control over the agencies through its budget and oversight authorities. Indeed, it has used these authorities aggressively in the past to limit the extent to which agencies like the EPA can implement various policies. Professor Richard Lazarus provides a superb account of the power of congressional oversight in his dual articles entitled "The Tragedy of Distrust in the Implementation of Federal Environmental Law" and "The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves?)," in Law & Contemporary Problems, Autumn 1991.

Finally, Congress engages in more indirect forms of oversight by mandating procedures for rulemakings and providing the courts with jurisdiction to ensure that the agencies stay within the bounds of the statute and follow all required procedures. If the agencies overstep their authority, for example by promulgating rules that are outside the bounds of the authority that Congress provided, the courts are mandated, pursuant to the Administrative Procedure Act, to remand challenged rules. For example, when the Fish and Wildlife Service declined to list the Spotted Owl as a threatened or endangered species, in spite of a strong scientific consensus that the Owl was on the brink of extinction, the court remanded the agency's decision finding that Congress had not left the agency with the discretion to decline a listing for nonscientific reasons. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

Thus, Congress is in the driver's seat with respect to controlling agency discretion. While agencies may sometimes find unexpected wiggle room within a restrictive mandate, there is a great deal that Congress can and has done to control agency policymaking authority.

At the hearing, there was a great deal of discussion about the Congressional Responsibility Act. What are your views on this piece of legislation?

Putting to one side the wisdom of imposing significant added demands on Congress' scarce resources, it is not at all clear to me that the Act will achieve its intended goal of improving Congress' accountability. In fact, it seems quite probable that members of Congress who seek to dodge responsibility for making difficult policy choices will find even more opportunities for evasion and disguise under the Act's procedures than under the status quo of broad delegations. For example, under the procedures established by the Act, members of Congress might be able to "game" the system by voting for a public-spirited piece of legislation, only to vote down the subsequent agency regulations on the pretense that the agency has somehow disappointed congressional expectations. Because they get two bites of the apple – first in passing the initial law and second in voting on the final regulation -- members of Congress might also become more careless during the initial, legislative stage precisely because they retain control over the final regulations. Rather than increasing the competency of legislative mandates, then, the Act could cause members to become more careless and ineffective. Finally, it will be more difficult for voters to monitor the legislative activities of their representatives. Concerned citizens will need to follow policies through Congress twice – once in the passage of the law and again in the passage of the regulations – a process that will increase the costs of participation significantly. Citizens will also find it more difficult to interpret the votes and related activities of their representatives given the greater opportunities for gaming the system described above.

Since Congress can legislatively veto a regulation by amending the statute, I am also unclear why this Act provides Congress with any greater power than it already has. At the same time, the costs of the process, not only in resources but also in the delay of timely regulations, will undoubtedly be substantial.

Mr. Raul testified that "EPA may be the rare administrative agency in the United States, and perhaps anywhere in the world, that believes itself to be legally precluded from adopting cost-effective regulatory standards." This is a pretty harsh criticism of the EPA. However, wasn't it the courts that found that Congress specifically precluded EPA from considering costs when setting NAAQS?

Based on the context of his statement, it appears that he is referring to the EPA's activities specifically in the case of setting ambient air quality standards under Section 109 of the Clean Air Act. In that legal setting, EPA is prohibited from considering costs in setting standards, at least according to the D.C. Circuit's reading of the statute which Congress has had two decades to correct. To the extent that cost-effectiveness is neglected in setting air quality standards, then, the fault lies with Congress, not with the EPA. With respect to EPA's regulatory activities more generally, I am not sure what type of examples or support Mr. Raul might have for his statement, and thus cannot comment more specifically on his general conclusion. In my own research on the EPA, however, I have not found that agency "believes itself to be legally precluded from adopting cost-effective regulatory standards." Indeed, there are a number of occasions

when the EPA has put economic and industrial concerns *ahead* of their mandated responsibilities to protect human health and the environment. *See. e.g.*, Jonathan Lash et al., A Season of Spoils: The Reagan Administration's Attack on the Environment (1984).

Mr. Raul testified that, if courts played a more aggressive role in the reviewing agency rules – as they did in the Benzene case, it would help improve agency accountability. He also cites your article in support of some of his arguments. Could you comment on these issues?

I agree wholeheartedly with Mr. Raul that environmental standard-setting efforts require considerable policy judgments due to the limits of science. I also agree that EPA far too often obfuscates or covers over those judgments and makes them appear as if they were scientifically ordained. Ironically, however, Mr. Raul and I seem to reach completely opposite conclusions on what the proper remedy should be for this problem with respect to judicial oversight. In my research, I have become increasingly convinced that it is cases like Benzene that *cause* the agencies to hide their policy judgments under the disguise of science, rather than the reverse. By correlating the survival rate of an agency standard with the extent of technical explanations garnered in its support, the courts offer agencies strong and virtually inescapable incentives to conceal policy choices under the cover of scientific judgments and citations. Detailed support for this conclusion is provided in several of my recent articles, *see, e.g., The Science Charade in Toxic Risk Regulation*, 95 Columbia L. Rev. 1613, 1661-67, 1701-19 (1995); *Congress, Science and Environmental Policy*, 1999 U. of Illinois L. Rev. 181, 274-86; *Judicial Review of Statistical Analyses in Environmental Rulemakings, in* Statistics in the Courtroom 281,282-86, 292-96 (Joseph Gastwirth ed. 2000).

In these articles I have argued that in order to provide agencies with the appropriate incentives to become more forthright about the underlying value choices in their rulemakings, Congress should amend the Administrative Procedure Act to require the courts to give agencies more, rather than less discretion. The courts should, however, ensure that the agencies provide explanations that are clear and accessible to a lay audience. Recent articles on the unimpressive performance of the courts in restraining themselves from second-guessing agency policy judgments, *see, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking,* 85 Va. L Rev. 1243 (1999); Richard J Pierce, Jr. *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300, serve only to further reinforce the need for reforms that require courts to defer to agency policy choices.

Would you like to comment on other aspects of the other witnesses' written testimony?

I agree wholeheartedly with Professor Schoenbrod that some members of Congress may attempt to dodge responsibility for making controversial or difficult policy decisions through the use of broad delegations, and I also agree that certain narrow legislative delegations in our environmental laws, like the technology-based requirements in Section

112 of the Clean Air Act, have been implemented more successfully and expeditiously than broader delegations. I do not agree, however, that narrow delegations are always possible or appropriate for a number of reasons identified in my written testimony. I also disagree with Professor Schoenbrod on the extent to which the Congressional Responsibility Act will improve the accountability of Congress. As discussed above and in my written testimony, I believe that it is far more likely that the Congressional Responsibility Act will provide members with *more*, rather than fewer opportunities to evade responsibility.

I also agree completely with Mr. Raul that agencies, including the EPA, too often obfuscate the policy and value choices that are inevitable in setting quantitative standards to protect public health and the environment. I disagree strongly with Mr. Raul's suggestion that greater judicial oversight will help solve this problem, however. As stated in my responses previously and supported more fully in my written testimony, it has become clear that the courts have caused much of the accountability problems that we see in the agencies because of their unrealistic technical and evidentiary demands, exemplified in cases like Benzene and American Trucking.

In her written testimony, Professor Gramm fails to provide evidence to support her contention that EPA and other agencies regularly exceed their legislative authority and remain unaccountable for their rulemaking activities. Thus I cannot comment on these statements. To the extent that Professor Gramm provides more specific statements (e.g., she suggests that EPA erred in its PM/ozone standard-setting effort to consider costs and applauds the D.C. Circuit's opinion in American Trucking opinion), however, I disagree for the reasons stated above and at length in my written testimony. On the other hand, I find myself in agreement with much of Professor Gramm's recommendations that, at least at an ideal level, Congress should ensure that it understands and conducts competent oversight of significant agency rulemakings. It is beyond my competency to comment on the extent of the resources needed to support this effort and the prioritization of this project over other congressional activities, however. Obviously, Congress would want to undertake its own cost/benefit analysis before committing to such a resource-intensive project and be sure that it will be able to make effective use of the resulting analyses. I also cannot comment on Professor Gramm's suggestion that the Mercatus Center at George Mason University provides Congress with balanced information on regulations since I am not familiar with the Center or its funding sources.

I unfortunately cannot comment on Mr. Spotila's written testimony. I accessed the written testimony of the other three witnesses through the Subcommittee's home page on the internet, but only the testimony of majority witnesses was posted. Indeed, the omission of minority testimony seems contrary to one of the fundamental goals of this hearing –to ensure greater congressional accountability by providing voters with complete information on important issues.

Legal Backgrounder

Vol. 14 No. 28 July 23, 1999

NONDELEGATION DOCTRINE'S REVIVAL COULD LIMIT REGULATORY ACTIVISM

by

Daniel E. Troy

A divided panel of the United States Court of Appeals for the District of Columbia recently invalidated the EPA's interpretation of a regulation contained in the Clean Air Act. Although the holding in *American Trucking Assoc. v. E.P.A.* was not novel, the majority's reasoning was potentially far-reaching. Specifically, Judges Stephen F. Williams and Douglas H. Ginsburg held that the EPA's construction of two sections of the Act was so broad as to render the Act an unconstitutional delegation of legislative power to an administrative agency. Many academics and business advocates have long urged the courts to reinvigorate the nondelegation doctrine, which has been essentially unheard from since 1935. This decision may signal the beginning of the revival of a legal doctrine that could substantially limit the discretion of agencies and ultimately require more congressional accountability.

Nondelegation Doctrine. The nondelegation doctrine holds that Congress may not cede its power to make law to another branch of the federal government or to an administrative agency. The reason for the doctrine is straight-forward: If legislative power can be delegated to executive branch agencies or the courts, then the Constitution's grant in Article I to Congress of *all* legislative power can be made meaningless.

During the early part of this century, when the administrative state was in formation, the Supreme Court often invoked this doctrine to invalidate innovations such as the creation of independent agencies with quasi-legislative authority. As the courts began to lean in the direction of President Franklin Delano Roosevelt and his Depression-era policies, the doctrine suffered the same fate as the Commerce Clause, and was gradually ignored. However, unlike the Supreme Court's recent treatment of the Commerce Clause such as in *United States v. Lopez*, 514 U.S. 549 (1995), where the Court struck down the Gun Free School Zones Act as exceeding Congress's power under the Commerce Clause, the Supreme Court has yet to reinvigorate the nondelegation doctrine. Indeed

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in *Mistretta v. U.S.*, 488 U.S. 361 (1989), the Supreme Court rejected arguments that the nondelegation doctrine prevents Congress from allowing the U.S. Sentencing Commission to fix sentencing guidelines.

Judicial tolerance of broad delegations to agencies seemingly hit a high point in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Many agencies, scholars, and judges have read *Chevron* as requiring courts to defer to an agency's construction of a governing statute if that interpretation is permissible. (A better, and more modern, view of *Chevron* employs it as a tie-breaker only after a statute has first been found to be ambiguous). The narrow *Chevron* view of judicial oversight of delegated power was novel primarily because it withdrew from the courts their traditional role in statutory construction. *Chevron* thus represents the nadir of the nondelegation doctrine, since it apparently defers so substantially to agency decisions.

This brief history does not mean, however, that some justices and academics have not, from time to time, suggested reinvigorating the doctrine. For example, while sitting as an Associate Justice, William Rehnquist argued that the Court "ought not to shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era." *Industrial Union Dept't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (Rehnquist, J., concurring); *see also American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., concurring). According to Rehnquist's "strong" version of the nondelegation doctrine, Congress should not be allowed to "simply avoid[] a choice which was both fundamental for purposes of [a] statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Id.* In the same vein, New York Law School Professor David Schoenbrod has been the most forceful voice among a growing chorus of academics calling for revival of the nondelegation doctrine in order to promote democratic accountability. *American Trucking* picks up on this trend and, if extended, could eliminate some of the effects of *Chevron* through stricter judicial oversight of agency interpretation of statutes.

The Ruling. *American Trucking* addressed the question of how the EPA should set rules to effectuate a Clean Air Act mandate that it fix national ambient air quality standards (NAAQS). Specifically, section 109(b)(1) of the Act requires the EPA to set NAAQS at a level "'requisite to protect the public health' with an 'adequate margin of safety.'" To implement this language, the EPA promulgated a series of standards it would assess in making this determination, including "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed." Or, as Judge Williams put it, the "EPA basically considers severity of effect, certainty of effect, and size of population affected." The problem as the majority saw it was that, although the EPA had identified the factors it would consider, neither the statute nor the agency's guidelines indicated how those individual standards were to be employed. That is, for the EPA to say that it will look at "the nature and severity of health effects" does not demonstrate the threshold level of effects at which the EPA will intervene.

Judges Williams and Ginsburg held that these vague standards failed even the more relaxed version of the nondelegation doctrine. (Williams and Ginsburg did refuse to apply the more rigid nondelegation doctrine, the Rehnquist version from *Industrial Union*.) They read current Supreme Court nondelegation jurisprudence as endorsing a moderate approach wherein "'Congress is not confined to that method of executing policy which involves the least possible delegation of discretion

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to administrative officers.'" *Mistretta v. U.S.*, 488 U.S. 361, 379 (1989), citing *Yakus v. U.S.*, 321 U.S. 414, 425-26 (1944). They found that the EPA had set reasonable standards for carrying out its mandate, but had failed to promulgate an "'intelligible principle' to channel its application of these factors...[and] the nondelegation doctrine requires such a principle." Williams analogized the situation to a congressional command that the EPA "select 'big guys,' and [the] EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement...is fatally incomplete. The reasonable person responds, 'How tall? How heavy?'" In essence, the majority held that EPA had construed the statute to grant the agency a degree of discretion and lawmaking that can only be properly exercised by Congress.

In dissent, Judge David Tatel contended that the EPA's interpretation was no more vague than many other agency regulations tolerated by the Supreme Court. Tatel emphasized that "the record shows that EPA actually adhered to a disciplined decisionmaking process constrained by the statute's directive to set standards 'requisite to protect the public health' based on criteria reflecting the 'latest scientific knowledge.'"

Implications. The D.C. Circuit's ruling signifies a key change in the future of the Clean Air Act. It is also highly relevant as to how other agencies interpret regulations; moreover, it might affect Congress's consideration of future legislation.

First and foremost, *American Trucking* overturns the EPA's interpretation of the power granted it under sections 108 and 109 of the Clean Air Act. (The case has been appealed to the full D.C. Circuit, and is therefore not yet final.) The EPA will therefore have to interpret the rules again to make them comport with nondelegation principles. At a minimum, this will give American businesses a much better sense of what is and is not allowed. To satisfy the court's mandate, EPA will have to do more than just formulate the broad criteria it will evaluate in fixing NAAQS, such as adoption of a non-zero residual risk standard. EPA will have to articulate the "intelligible principle[s]" it will follow to "channel its application of [the law]." EPA will also have to explain why it chose one specific NAAQ versus any other.

Moreover, as noted, *American Trucking* has implications far beyond environmental law. *American Trucking* indicates that within the *Chevron* category of cases — those instances where Congress has not addressed the precise question at issue as to a regulation — agencies are further constrained by nondelegation principles. In interpreting grants of power from Congress, agencies will have to articulate rules that will actually guide behavior, and which can be explained. As Judge Tatel noted in dissent, this requirement could affect a wide ambit of regulatory frameworks — from the FCC's authority to "issue regulations 'as public convenience, interest, or necessity requires,'" to the Secretary of Agriculture's ability to approve interstate compacts that serve a "compelling public interest."

Furthermore, agencies may also be more constrained in their efforts to interpret their own statutes to give themselves limitless discretion, a device they often employ to enhance their own power by finding an ambiguity, thus invoking *Chevron* deference. It is important to note, however, that *American Trucking* does not mean that Congress can no longer cede power to administrative agencies. Nor does the decision necessarily mean that Congress must stop its long-standing practice of leaving regulations unclear and vague for the agencies to clarify. It does, however, constrain agencies' interpretations of those mandates, and may resurrect a legal theory with the power to ultimately affect those two phenomena.

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Even though *American Trucking* is binding in the D.C. Circuit only, it is likely to be an important precedent. By statute, the D.C. Circuit hears a large portion of the nation's administrative law cases. Also, because of the Circuit's recognized expertise in administrative law, other circuits that have similar cases on their docket are likely to take note of *American Trucking*.

Indeed, *American Trucking* could even have some influence on Congress. It is possible that Congress might recognize the importance of being more precise in its delegations to agencies. On the other hand, Congress has much to gain from the practice of crafting regulations as vaguely as possible, both as a matter of practical expedience, as well as the necessity for legislative compromise.

Supreme Court? It is not yet clear whether the D.C. Circuit will hear the case *en banc,* nor is it certain that the U.S. would seek review of the case in the Supreme Court. There is a reasonable likelihood, however, if the Court were to take the case, it could at least partially resurrect the nondelegation doctrine. After all, this is the same Supreme Court that resuscitated the Commerce Clause after fifty years, *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free School Zones Act), developed the anti-commandeering principle, *New York v. U.S.*, 488 U.S. 1041 (1992) (striking down provisions of the Low-Level Radioactive Waste Disposal Act); *Printz v. U.S.*, 521 U.S. 898 (1997) (striking down background check requirement of Brady Act unconstitutional), and invalidated the line-item veto, *Clinton v. New York*, 524 U.S. 417 (1998) (Line Item Veto act violates Presentment Clause). The cumulative effect of these rulings is to constrain the post-New Deal latitude given Congress to act creatively within the scope of Article I. A stricter construction of the nondelegation doctrine might fit in nicely with this line of cases. Further, the Supreme Court's emphasis on strict adherence to the procedural rules embedded in the Constitution (the presentment clause and bicameralism requirement for example) might serve as the foundation for the return of the nondelegation doctrine.

Moreover, merely because *American Trucking* relied on a narrow form of the nondelegation doctrine does not mean that the Supreme Court would do so as well were it to take the case. Although this possibility is quite speculative, the justices could even adopt a more stringent, and more generally applicable, interpretation of the nondelegation doctrine that limits congressional grants of power to agencies.

It is unlikely that *American Trucking* heralds the death of the independent agencies or the end of broad delegations to executive branch agencies. After all, *Lopez* did not limit Congress to the days when congressional regulation was limited to things in "interstate commerce" only. Returning some bite to the nondelegation doctrine, however, might remind Congress that, regardless of the complexity and size of the administrative state, it alone retains the power — and responsibility — to legislate for the general welfare.

Conclusion. For decades, the nondelegation doctrine has been a dormant fixture in administrative law casebooks. If the D.C. Circuit's opinion in *American Trucking* is followed by other courts or by Congress, it could help shape the way in which agencies are given power, as well as how they define the limits of the authority granted them, thus returning the doctrine to the forefront of academic, judicial, *and* policymaking concern.

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The Wall Street Journal
Wednesday, March 22, 2000

Ignoring the Constitution Is a Bad Habit

By Alan Charles Raul

Yesterday the Supreme Court invalidated the Food and Drug Administration's attempt to regulate tobacco products as medical devices or "nicotine delivery systems." The case, *FDA v. Brown & Williamson Tobacco Corp.*, will have a salutary effect on the future course of executive vs. legislative power. It is also a good reminder that the court must decide only legal issues, not social ones.

The five-justice majority and the four dissenters agreed on three things: First, since there is no remaining doubt that smoking is dangerous, the question of the FDA's legal authority does not turn on the open-and-shut medical answer. Second, until 1995 FDA officials repeatedly and consistently disclaimed any jurisdiction over cigarettes and other tobacco products. Third, the decision to regulate tobacco was one with "enormous social consequences."

Before getting to these "enormous social consequences," the justices analyzed the FDA's assessment of the relevant legal definitions. The FDA followed a rigorous, yearlong rulemaking process during which it received more than 700,000 public comments, more than it has received on any other proposed regulation. The FDA also determined, reasonably enough, that tobacco products are drug-like within the meaning of the relevant statute, in that nicotine is a powerful chemical that affects the "structure or function" of the body.

In order to assert jurisdiction, however, the FDA was legally required to find that tobacco manufacturers *intend* their products to affect the structure or function of the body. The agency's handling of this element became quite controversial because it provided the ostensible answer to the question of what had changed to justify the agency's dramatic new assertion of regulatory authority. The FDA claimed it had, only recently, obtained evidence that the tobacco industry "knew nicotine achieved appetite-suppressing, mood-stabilizing, and habituating effects through chemical (not psychological) means, even at a time when the companies were publicly denying such knowledge," in the words of Justice Stephen Breyer's dissent.

Prior to 1995, the agency's "intent to affect" judgments were based not on what manufacturers knew, but on what they *said*—that is, on their advertising and promotional claims. The majority decided not to address the FDA's authority to resolve "intent to affect" questions, nor did it question the agency's dubious assertion that its information was in fact new. Justice Breyer's dissent rightly argued, without disagreement from the majority, that a new administration has the authority to make different decisions from its predecessors: "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."

Justice O'Connor
Common sense prevailed.

The important question, then, is what are the "bounds established by Congress"? The majority of the court yesterday found that Congress's decisions over many years clearly indicated the legislators' intention that tobacco policy should be left for Congress to set, for better or worse. Congress had, in fact, regulated tobacco by instituting a mandatory warning label. It had also subsidized the cultivation of tobacco.

Tobacco policy, thus, is a complex matter. So how did the FDA come off thinking it should displace Congress from setting social policy in this arena? For starters, Congress often punts on tough questions, and there is evidence that they did so here. In the FDA Modernization Act of 1997, Congress temporized brilliantly, asserting that the law was not to "be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product."

Even so, the Constitution assigns *all* legislative powers to Congress and directs the president to recommend any measures he deems "necessary and expedient" to the legislative branch. Congress may not want the job, and an aggressive, well-intentioned executive branch may be willing to get it done. But that doesn't mean they're free to ignore the Constitution.

"We must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency," Justice Sandra Day O'Connor wrote in yesterday's decision. In this case the court was guided not only by common sense but by constitutional discipline. Tobacco products undoubtedly should be regulated in the public interest. But not at the cost of the checks and balances that are vital to our democracy.

Mr. Raul is a Washington lawyer.

THE WALL STREET JOURNAL TUESDAY, MAY 18, 1999

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REVIEW & OUTLOOK

Red Light for Regulators

"Ludicrous," yelped someone from the Sierra Club when a federal appeals court on Friday struck down the Clinton Administration's new clean air standards. Actually a lot of us—perhaps umpteen million Americans who've tried to comply with any old rule someone in Washington dreamed up—have been wondering when the courts would rediscover the "non-delegation doctrine" cited in Friday's decision.

Fashioned by the Supreme Court in 1928, here's one of the things it said way back when: A key function of the non-delegation doctrine is to "ensure to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." Sounds sensible to us. But opinions differ; commenting on the case in a New York Times editorial on Saturday, reporter Linda Greenhouse said the doctrine had been "non-issue" since the New Deal. "Nonetheless, the flame has never quite died among conservative legal scholars and judges."

In the columns nearby, Boyden Gray and Alan Raul suggest that the doctrine's application may not be all that hoary, nor will it permit the sky to darken with soot. The three-judge panel unanimously questioned the Environmental Protection Agency's selective use of science in formulating its rule, and in a 2 to 1 decision ruled that Congress had violated the Constitution's separation of powers by delegating too much of its authority to the EPA. If upheld by the Supreme Court, the decision could have far-reaching effects.

The core opinion, written by Judges Stephen Williams and Douglas Ginsburg, found that the EPA had interpreted the Clean Air Act so as to give it carte blanche authority to issue ozone standards and to regulate microscopic soot particles. Examining these rules, the court identified a certain "indeterminacy." It concluded that the agency "offers no intelligible principle by which to identify a stopping point." We suspect that more than a few independent businessmen visited over the years by the ghostbusters from EPA, OSHA and the rest have themselves marveled at the variability of any such "stopping point."

An EPA spokesman says the agency will appeal because the ruling is one of the "most disturbing" it has ever faced. It's about time.

That 1928 ruling's reference to Congress being reflective of the popular will is especially appropriate. Some 25 years ago, the popular will was indeed to clean up the nation's air and water. Despite some lingering problems, that goal has been accomplished. Fat striped bass are again being pulled from the Hudson River by sport fishermen. But Congress, as is widely recognized, got lazy, enacting legislation written in impossibly vague language, such as the Americans With Disabilities Act, and then offloading the you-figure-it-out job to bureaucrats who have no political accountability.

It was inevitable that this obvious imbalance and the bureaucrats' overreaching would cause a reckoning. In a world of more "orderly governmental administration" (again, the Court in 1928), the so-called new Democrats of the Clinton Administration would themselves have rationalized these bureaucracies' outsized powers. But this EPA's attempt to wave pollution toward zero shows no such restraint was ever in the cards. Some things will never change.

The appeals court's invalidation of the EPA's big-ticket air quality standards is one of the bigger events in the recent history of the federal establishment. It may yet bring about a Supreme Court ruling on the degree to which such agencies can be left alone to make up the rules of American life.

The Courts Thwart the EPA's Power Grab

By C. Boyden Gray
And Alan Charles Raul

Last week a three-judge panel of the U.S. Court of Appeals for the District of Columbia threw out the Environmental Protection Agency's sweeping ozone and particulate-matter rules. Citing a doctrine known as "nondelegation," the judges held that the EPA was exercising too much power, effectively making rather than enforcing the law. The decision could have far-reaching implications for all government rulemaking, but it should not have come as a shock. The EPA's usurpation of legislative power has provoked significant controversy in recent years, and the only surprise is how long it took for the courts to bring it under control.

Contrary to much prevailing opinion among both journalists and lawyers, the nondelegation doctrine is not some arcane, obscure and benighted legal relic of the pre-New Deal era. The doctrine has been alive and well, serving primarily as a canon of judicial construction to save otherwise overly broad statutory grants or agency claims of legislative authority from being held unconstitutional.

The most important regulatory example of the doctrine's use was in the Supreme Court's 1980 decision *Industrial Union Department v. American Petroleum Institute*, which involved the Occupational Safety and Health Administration's regulation of benzene. The court was faced with a claim that OSHA has untrammeled discretion to choose any regulatory policy in the spectrum between not regulating at all and imposing rules so stringent that they take an industry to the brink of economic ruin. The justices used the nondelegation doctrine essentially to rewrite the statute, limiting OSHA to regulation of "significant" risks.

The question is whether future policy will be set by Congress or the unelected managers of the EPA.

A decade later, the D.C. Circuit, in the so-called "lock-out, tag-out" decisions written by Judge Stephen Williams (who wrote last week's EPA decision as well), invoked the doctrine and the benzene decision to place additional limits on OSHA.

An accident of timing allowed the EPA to escape these constraints for nearly two decades and retain its license to choose between doing nothing at all and shutting down an industry. The governing case (*Lead Industries Association v. EPA*) gave the EPA this broad power because it was issued by the D.C. Circuit five days *before* the Supreme Court's benzene decision, and thus was unaffected by the latter ruling. But it was only a matter of time before the EPA's power would collide with the Supreme Court's limitations.

For those subject to the EPA's unchecked authority, the day of reckoning came none too soon. EPA issued these rules in July 1997 despite:

- Its science advisory board's admonition that the new ozone rule did not deal with any new significant risk not already addressed by the rule it replaced.
- The board's inability to identify any proper level of fine particulate matter to regulate.
- Universal recognition that extensive research was necessary to develop any implementing regulations for particulate matter.
- Unrebutted evidence that the ozone rule could cause more public health harm than good.

Unconstrained by any coherent principle, the rules were the ultimate example of legislative horse trading. The EPA declared that in order to defuse some political opposition, it was going to exempt or favor its political allies, such as farmers, certain small businesses, and that section of the country (the Northeast) that provided political support for the rules. "The new rules do not reflect the inescapable result of the available science, but simply the judgment of a political appointee," said Rep. John Dingell (D., Mich.), one of the principal architects of the Clean Air Act.

The D.C. Circuit's decision to overturn these rules is not inherently antienvironmental. It leaves the EPA with considerable power to decide how much environmental protection the country needs. The court simply said the EPA is not omnipotent. Its power must be limited by "intelligible principles" that Congress incorporated into the Clean Air Act. The representatives who face the voters' music must call the agency's tune.

This decision does nothing to impair the EPA's implementation of Congress's explicit directives in the 1990 amendments to the Clean Air Act, such as its recent auto and gasoline rules. The real question is whether future policy will be set by Congress or the unelected managers of the EPA. At present, EPA has presented no reason for going beyond the provisions of the 1990 Clean Air Act Amendments, which the agency has not yet fully implemented. EPA's backdoor efforts to regulate greenhouse gases will also come in for closer constitutional scrutiny. Without express congressional authorization to address "global warming," the agency should not be deciding for itself how to do so.

The dissenting opinion in the D.C. Circuit decision closed with the observation that if the states had difficulty implementing the new EPA standards, they could go back to Congress and ask for repeal. But this formulation turns the Constitution on its head. It's not Congress's job to review EPA initiatives, but rather the EPA's job to carry out congressional initiatives. And it's the courts' role to keep the other players honest.

Mr. Gray and Mr. Raul are Washington lawyers. They filed briefs on behalf of Rep. Tom Bliley and Sen. Orrin Hatch arguing that EPA's rules should be struck do

Cardozo Law Review
January, 1999

Symposium
The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives
Democracy and Delegation

*767 REMARKS TO THE BOARD OF TRUSTEES OF THE NATURAL RESOURCES DEFENSE COUNCIL [FNa1]

David Schoenbrod [FNaa1]

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I look back with fondness on my years at the Natural Resources Defense Council ("NRDC") and have looked forward to meeting with old friends today. I am going to review the triumphs and failures of pollution control, using the Clean Air Act [FN1] as an example, draw some lessons, and propose a basic reform.

I. Triumphs and Failures

When increasing air pollution created public concern in the 1960s, many states and cities enacted meaningful laws. To stave off control, auto manufacturers and electric utilities asked Congress to interpose an ineffectual federal bureaucracy. The result was the 1965 [FN2] and 1967 [FN3] Clean Air Acts. In 1970, when the state and local laws were only beginning to take effect, severe smog struck the East Coast and California. Ralph Nader blamed Congress. Legislators responded by enacting the 1970 Clean Air Act, [FN4] claiming that this time they made the hard choices.

The 1970 Clean Air Act did make a hard choice about new cars. They would have to be ninety percent cleaner starting with the 1975 model year. This rule was a stab in the dark, but Congress adjusted and tightened it in following years. Today new cars are amazingly clean.

As to all the other pollution sources--from giant industrial plants to corner dry cleaners--the 1970 Clean Air Act made no ***768** rule of conduct, no law. Rather, it delegated the job of making the laws to the Environmental Protection Agency ("EPA") and the states, telling them to reduce all pollutants to safe levels by 1977, regardless of cost.

This scheme largely failed. The pollutant most on the public mind in 1970 was lead in gasoline--as the bumper stickers read, "GET THE LEAD OUT." The ninety percent law for new cars forced them to use unleaded gas, but 100 million old cars would still use leaded gas in 1975. EPA quickly set out to use its delegated lawmaking power to reduce the lead in the gas that would be used by these old cars. But the agency was quietly warned off by members of Congress who had loudly supported the 1970 Clean Air Act starting in 1972. I filed lawsuits to force EPA to act and won. But EPA under Presidents Nixon, Ford, and Carter kept coming up with new excuses for delay. Only after most of the 100 million old cars had been junked, making the marketing of leaded gas unprofitable for large refiners, did EPA ban lead in gas. Our efforts produced some modest reductions in lead pollution over several years. But, by comparison, millions of infants would have been saved from heavy exposure to a mind numbing pollutant if Congress could not have passed the buck. Congress would have had to respond in some way to the popular outcry. The likely compromise would have required refiners to remove much of the lead in the early 1970s because adding more than a little lead is only marginally profitable. Instead of taking the heat for doing a good thing that would have pleased no one entirely, Congress told EPA to do the perfect thing--protect health without regard to cost.

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The perfect stymied the good repeatedly under the Clean Air Act. EPA closed its eyes for twenty years to most carcinogenic air pollutants to avoid the political fallout of having to issue cost oblivious standards for them. Only in 1990 did Congress break the logjam by enacting a standard pegged to the emissions of the cleaner plants in each industry. But, of course, onto this good law Congress tacked further instructions requiring EPA to achieve future perfection.

The 1970 Clean Air Act purported to deal with interstate pollution by putting EPA in charge. Because it lacked the political muscle to take on contending states, EPA has never ruled against interstate pollution. Finally, in 1990 Congress enacted a rule for one kind of interstate pollution--power plant pollutants that contribute to acid rain.

***769** While Congress promised in 1970 that EPA would make sure that the states achieve the national health standards by 1977, this deadline has been receding to a more distant future. Yet, EPA claims that the Clean Air Act was a great way to make progress because the states were forced to reduce major stationary source pollutants. However, the laws that the states imposed in the 1960s, when they acted of their own accord, reduced these pollutants three times more than those enacted in the 1970s, when EPA was in charge.

II. Lessons

1.Pollution control works best when the legislature makes the law. The clear successes have come from legislatures: for example, the clean up of new cars and the legislated standards on toxic pollutants and acid rain in the 1990 Clean Air Act. [FN5] No one thinks the legislature is perfect. Environmentalists worry that industry's money counts for too much. Industry worries that voters will not realize that they too pay for pollution control. In the end, environmentalists have done well when Congress has faced the hard choices. For example, a Brookings Institution study argues Congress has reduced new car emissions too much. [FN6]

2. When Congress delegates, it cheats. It cheated by pretending to decide how much to clean up, but covertly leaving this tough choice to EPA. For example, the authors of the 1970 Clean Air Act officially instructed EPA to protect health without regard to cost but wanted the agency to consider costs without implicating them. [FN7] EPA has done so under Republicans and Democrats alike. Now, with the battle raging over revisions of the ozone and particulate standards, EPA is not being entirely forthright in claiming that it cannot consider cost. The "regulatory reform" bills that would put environmental protection on a cost-benefit standard also cheat, because that standard is so malleable.

Congress also cheated by claiming to do the states a favor by letting them apportion the clean up burden among polluters. This was no favor. Congress gets to take credit for promising a perfectly clean environment; states get to take the blame for imposing the costs.

3. When Congress cheats, the people and the environment lose. ***770** By cheating, Congress ducked the issues that it alone has the capacity to resolve, such as interstate pollution and leaded gas. Congress ducks the issue of priorities. It imposes costly environmental mandates on states and cities, ignoring that priorities must be set in the real world. Under these mandates, NRDC attorneys, myself included, filed lawsuits against New York City requiring action on air pollution, watershed protection, combined sewer outfalls, sludge disposal, and more. But, to pay for these and the many other mandates from on high, the city must take money from other appealing purposes such as education, hospitals, or public safety. Because each mandate is absolute, massive sums get spent without anyone deciding that the priorities make sense.

By cheating, Congress also promises that EPA will achieve more than its resources, time, and political support allow. When EPA proposes to make a hard choice, industry and environmental groups get legislators to pressure the agency. Under such political cross currents, EPA stalls. The rules that do eventually emerge are politics dressed up as science. Back in the early seventies, we used to think that EPA was so political because Presidents Nixon and Ford were in charge. But when President Carter brought our friends into high office, we learned that

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the problem is the institution, rather than the people. The political economy of EPA forces it to strike a balance between the cosmic political forces when its actions might provoke Congress to reduce its power. But when the agency would inflict only many small harms on powerful interests or big harms on weaker ones, Congress as a whole is unlikely to interfere. Individual legislators and White House operatives still exert pressure. But other forces that act upon the agency are perennial. Congress has written thousands of pages of detailed instructions into its delegations, taking no heed of the harm they may do because the blame will fall on the agency. EPA has 18,000 employees, all in search of what they consider meaningful roles. State bureaucrats, working through their professional associations, want EPA to wrest regulatory power and money for them from the state legislatures.

The consequence is a regulatory regime with which the best intentioned industrial corporations cannot hope to comply. When they do not, they get hit with fines disproportionate to fault or harm. Just ask the many NRDC alums who work on environmental compliance for these corporations. Worse off are the smaller businesses, the governments, the farmers, and the property owners. They cannot afford to hire NRDC or EPA alums to staff ***771** a compliance office that will help them avoid the worst pitfalls of environmental regulation.

Environmental protection has taken a wrong turn against which the grandfather of modern environmentalism, Aldo Leopold, warned when he wrote of the kind of conservationist more taken with his own prowess than with nature. Among many others, he included the poets who write bad verse on birchbark and:

the professional, striving through countless conservation organizations to give the nature-seeking public what it wants, or to make it want what he has to give.

Why, it may be asked, should such a diversity of folk be bracketed in a single category? Because each, in his own way, is a hunter. And why does each call himself a conservationist? Because the wild things he hunts for have eluded his grasp, and he hopes by some necromancy of laws, appropriations, regional plans, reorganizations of departments, or other form of mass wishing to make them stay put. [FN8]

It is Congress that has turned environmental law into mass wishing--perfectly healthy air by 1977, zero discharges to the water by 1985, and other absurdities. It has been the only game that Congress has seen fit to set up in this town. NRDC has played that game with maximum advantage to the environmental side. Now is the time to see that it is the wrong game.

The mass wishing has not only failed, but it also endangers the environment. A public, otherwise sympathetic to environmental protection, is angry about overly fussy regulation and politicians who evade personal responsibility. Environmental law suggests the anger is reasonable. The consequences so far are the Unfunded Mandate Relief Act of 1995, [FN9] and majorities in support of term limits and a balanced budget amendment. While these initiatives may fail, the anger and its causes will remain. Congress may respond in a way that does real harm to the environment, especially if hard times return.

The mass wishing also departs from the roots of environmentalism. Aldo Leopold set out to teach ordinary people about the environment because he believed that those who do not understand nature will make bad decisions about it. No understanding is needed for voters to wish or Congress to promise. Rather, the laws come down from the agency experts on high. Leopold, in ***772** contrast, wanted to save the environment from the bottom up. His vision was not unlike that of the Framers of the Constitution, many of whom were thoughtful naturalists. They sought to root the laws in popular support by requiring that they be made by elected legislators. Such laws will reflect human nature and so therefore will not be perfect. But, the quarter century since Earth Day has demonstrated a corollary to Leopold's teaching: those who cannot accept human nature will make bad decisions about how government should protect nature. I urge the National Resources Defense Council to include democracy among the natural resources it defends. In other words, it should continue to educate the public, fight for the necessary laws, and enforce them in court, but also to insist that the laws be made by legislators, and to the extent practicable by the legislators closest to the people.

III. Proposals for Reform

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1. Congress should stop delegating lawmaking power to EPA. There are many possible means to this end. I will mention two. This morning, quite by coincidence, Senator Sam Brownback and Congressman J.D. Hayworth announced the introduction of a bill barring agency rules from going into effect unless enacted into law. [FN10] The bill already has many sponsors. Their bill may seem heavy handed because the Federal Register includes many trivial as well as important rules. But that is just the point. Congress happily requires trivia because the delay, complexity, and confusion are suffered by agencies, states, cities, and the public, rather than the legislators themselves. Were Congress to feel the pain that it imposes, it would see the wisdom of simplifying what it imposes on others. A second approach would be for Congress to rewrite and simplify the various regulatory statutes, taking back lawmaking responsibility as it goes.

2.Congress should tackle the issues that it alone can solve. State regulation and interstate compacts will sometimes fail to control interstate pollution adequately. State regulations will also fail sometimes to protect adequately national treasures, such as the great national parks. Some goods, just as cars, may need to be regulated nationally. Congress has been slow to do its job and still is not done with it. Yet, it freely tells the states on how to do theirs.

3. Congress should let states decide how to deal with the local ***773** pollution. The states reacted to environmental concerns in the 1960s more quickly than did the national government. Why, then, are the states--even those that led the way in the 1960s--so often in EPA's dog house? Congress has made it so. It claims credit but forces the states to take the blame for allocating the regulatory costs and paying for the improvements. It lets EPA force state legislatures to give their power over lawmaking and money to state bureaucrats. No wonder elected state officials have turned recalcitrant. The national government should stop imposing national pollution laws on local pollution problems. Instead, EPA should offer the states and the public information on local pollution levels, reports on their health consequences, and information on how to control pollution.

This reform would, I recognize, dismantle our whole way of making environmental law and, as such, raises many issues, which I would be happy to discuss. As pleased as I am that NRDC has initiated this dialogue today, it should be broadened to include the wider environmental community. It needs to begin to discuss how the environment can be protected in ways that are more democratically accountable and more responsive to the varying wishes of local communities. To launch that discussion, I propose that NRDC host a debate in its magazine. I volunteer to participate. [FN11]

[FNa1]. (c) 1997 by David Schoenbrod. The author delivered these remarks to the board and senior staff of the National Resources Defense Council on March 12, 1997, in Washington, D.C. He was an attorney with NRDC from 1972 to 1979.

[FNaa1]. Professor, New York Law School. I am deeply indebted to Ross Sandler, former colleague at NRDC and present colleague at New York Law School, for his extremely helpful suggestions. I also thank Sena Kim-Reuter, New York Law School Class of 2000, for her research assistance.

[FN1]. 42 U.S.C. §§ 7401-7671g (1994).

[FN2]. Pub. L. No. 89-272, 79 Stat. 992.

[FN3]. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

[FN4]. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7401).

[FN5]. Pub. L. No. 101-549, 104 Stat. 2399.

[FN6]. Robert W. Crandall et al., Regulating the Automobile (1986).

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[FN7]. See David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 65-66 (1993).

[FN8]. Aldo Leopold, A Sand County Almanac: With Essays on Conservation from Round River 282 (Ballantine Books 1970) (1949).

[FN9]. Pub. L. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

[FN10]. See Congressional Responsibility Act of 1997, S. 433, 105th Cong.

[FN11]. This offer was not accepted.

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Symposium
The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives
Democracy and Delegation

*731 DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS

David Schoenbrod [FNa1]

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Introduction

High officials tell us that we can be proud to live in a democracy because we have elected them. That tale does not altogether convince voters today. Large majorities tell pollsters that government has somehow eluded their control. [FN1]

Nor should the tale be convincing. The Constitution established an indirect democracy. Indirect democracy works only if the people's elected representatives assume personal responsibility for the key decisions on the scope of government. To impose such responsibility, the Framers, elitists though they were, structured the Constitution to force members of Congress to take responsibility for decisions to increase the scope of government. Article I of the Constitution establishes as a prerequisite for the most important decisions to increase the scope of government--imposing laws, levying taxes, appropriating money, and committing armed forces to combat--that such actions be approved by majorities in both houses of Congress. [FN2] Their votes must be recorded and therefore be made available to their constituents if as few as twenty percent of the legislators request it. [FN3] So, government may not expand its powers in any controversial way unless voters know just whom to blame if blame there be.

There is, of course, one other elected federal official in our constitutional scheme--the President--who also has a role in ***732** growing the government. [FN4] The President's role, however, was designed not to enhance democratic accountability, but rather to check rash or partisan decisions by Congress. [FN5]

Although the Constitution established congressional responsibility as the main engine of our indirect democracy, members of Congress have evaded responsibility by delegating legislative powers to the executive branch. The result, as I have argued, is that democracy suffers. [FN6]

My argument has prompted criticism by participants in this symposium. For example, Professor Jerry Mashaw, who had been scheduled to speak, but did not, contends that delegation does no harm to democracy; [FN7] Professor Dan Kahan contends that democracy is a meaningless concept; [FN8] and Professor Peter Schuck argues that delegation is a policy choice that Congress is entitled to make. [FN9] This Article responds to each of them after placing the question of delegation's impact on democracy in historical context.

I. A Brief History of Elitist Excuses for Delegation

Jerry Mashaw and Dan Kahan are not the first to try to explain away the harm that delegation does to democracy. Rather, they are the rearguard in a parade of futility. [FN10] The effort to square delegation with democracy is pervasively futile because the drive for delegation, from the beginning of the twentieth century, stemmed from a desire to reduce government's accountability to ordinary voters.

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A. How the Modern Elite Undermined Accountability

The Constitution gave voters real control over government during most of the nineteenth century, according to historian Robert *733 H. Wiebe. [FN11] The democracy was far from perfect; only white men could vote. Nonetheless, high officials did have to account to ordinary people who were thoughtfully entitled to a meaningful say in the role that government played in their lives. [FN12]

That democracy was undercut at the beginning of the twentieth century, according to Professor Wiebe, by the rise of what he calls "the national class." [FN13] The national class are the leaders and budding leaders of the institutions with clout on the national scene: the nationally oriented corporations and unions, the nationally oriented quarters of the professions and media, the nationally prestigious universities, and of course the federal government itself.

The national class thought that ordinary people should not have the power to hold government accountable. That power should come not from what ordinary people pride themselves on--self-support--but rather from what the national class had to offer--specialized knowledge. [FN14] Members of the national class thought, and many still feel, that experts armed with science and insulated from politics were better equipped to govern than elected officials accountable to ordinary people.

In order to shift control of government from voters to experts, the national class supported two basic changes in American government. First, it set out to discourage voting by the lower classes, particularly recent immigrants and freed slaves. Poll taxes and stricter voter qualifications were aimed not just at African-Americans, but also at all races of the lower class. These restrictions contributed to a sharp drop in voter participation. [FN15] In addition, changes in law restricted the use of public spaces for the public electioneering by parties and other fraternal organizations that had previously played an integral role in attracting the lower class to the polls in droves. [FN16]

Second, the national class sought to insulate the government from accountability at the polls. It campaigned to transfer governmental power from institutions that were most accountable to ordinary voters to institutions more in the control of the national *734 class. [FN17] It succeeded; power was transferred from the states to the national government and, within the national government, from Congress to the executive and the judiciary. [FN18] From its inception, the core purpose of delegation was to undercut democratic accountability.

Government by expert came to the fore at the national level during World War I; it grew under Herbert Hoover who ran for President as the "Great Engineer," that is, the great expert; and it grew still more under President Franklin Roosevelt. According to Professor Wiebe:

What Hoover's New Era modeled, Roosevelt's New Deal expanded and refined. It would be absurd to minimize the differences in policy, mood, and leadership between the two administrations: millions of Americans understood. But popular participation in government was not one of them. Despite the image of an approachable president and his open government, New Deal decisions occurred even more commonly than ever behind Washington's closed doors. . . . Thurman Arnold's Folklore of American Capitalism (1937), often cited as the New Deal's most significant commentary on government, derisively dismissed the very thought of popular rule.

. . . Policy itself fragmented into a multitude of exclusive dialogues among administrative officials, congressional committees, and powerful citizens. By the 1940s it was quite common for the same cluster of officials and citizens to write a law in private, then execute it in private, with just a quick public peek into the process as it was enacted. Few laws were designed for more than a tiny minority to comprehend. [FN19]

World War II, and later the Cold War provided a succession of new reasons to further centralize power in Washington, particularly in the executive branch. Going to war in Korea without congressional approval completed what Arthur Schlesinger, Jr., has called the "capture by the Presidency of the most vital of national decisions, the decision to go to war." [FN20]

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Consider how far the top national leadership--Congress and the President, Democrats and Republicans alike--have gone to insulate Congress from responsibility for the most important exercises of national power. As I was writing the initial draft of this Article, four instances came to mind. First, President William ***735** Clinton cooly contemplated an attack upon Iraq without asking for congressional authorization. President Clinton, like his predecessor, George Bush, seems to think that he can launch a premeditated military attack without Congressional approval. [FN21] Rather than insisting upon doing its duty under the Constitution to decide whether to commit our armed forces, Congress has found it convenient to delegate that decision to the President. As John Hart Ely persuasively argued in War and Responsibility, [FN22] such an arrangement is both unconstitutional and likely to get us into more conflicts because of the tendency of presidents to use foreign battles to divert attention from domestic embarrassments. Second, the Line Item Veto Act [FN23] delegated to the president authority to unilaterally repeal spending items and certain provisions of the tax code. [FN24] Senator Patrick Moynihan stated that the line item veto was a "formula for executive tyranny . . . [and that i]f L.B.J. had had this power, we would have had Nero." [FN25] Fortunately, the United States Supreme Court has since held this act unconstitutional. [FN26] Third, Congress pervasively delegates to unelected agency officials the power to impose regulatory laws on society. Fourth, Congress has begun to delegate to agencies the power to impose taxes. [FN27]

We now have war, regulation, and taxation without representation.

B. The Supreme Court's Attempts to Square Delegation with Democracy

For well over a century after the adoption of the Constitution, the Supreme Court held that the Constitution prohibits members of Congress from bestowing upon others their personal responsibility ***736** for enacting laws. [FN28] When national class legislation began to delegate lawmaking authority to federal agencies at the turn of the century, there had to be a rationale to square the delegation with the Constitution. [FN29]

1. The First Rationale: Congress Did Not Delegate

The first rationale put forth was that the statutes did not delegate the power to make the laws but rather only granted the power to enforce laws enacted by Congress. [FN30] The supposed laws were, from my perspective, not laws at all because they provided no discernible rule of conduct. Nonetheless, this first rationale was more naive than disingenuous. The national class had the conceit that its expertise could pour meaning into these empty congressional formulations, and so doing was more akin to factfinding than lawmaking. Thus, the national class could think there was clear meaning in statutory standards that, to a modern mind, were hopelessly vague. [FN31]

Many scholars have incorrectly concluded from this first rationale that the nondelegation doctrine was never more than a dead letter before reactionary justices invoked it in 1935 to strike down early New Deal legislation. [FN32] But, on at least three occasions prior to 1935, the Supreme Court struck down federal statutes for delegating lawmaking authority. [FN33] Two of those statutes delegated lawmaking authority to state legislatures and a third to courts and juries. State legislatures and juries are not the sort of institution controlled by the national class. The Supreme Court was quicker to notice implicit delegations ***737** of legislative power when the delegates were not members of the national class. [FN34] The same class bias persists in Supreme Court delegation cases to the present day, as delegations to agencies generally are upheld, while delegations to other official bodies are reviewed under labels other than "delegation" and often are found constitutionally deficient. [FN35]

2. The Next Rationale: The "Intelligible Principle Test"

As Congress began to delegate lawmaking power more blatantly, the Court could no longer pretend that there was no delegation. So, in J.W. Hampton & Co. v. United States, [FN36] decided in 1928, the Supreme Court held that Congress could delegate the power to make the law if it provided "an intelligible principle" to guide the agency lawmakers. [FN37] The Court did not, however, explicitly admit that Congress could delegate the power to make law. That did not come until five years later, when it said that the statute in Hampton delegated legislative power in a "permissible"--that is, a minor--way. [FN38] But the implication was clear in 1928. Even such a fervent believer in government by expert as President-elect Herbert Hoover reacted angrily at the departure from constitutional tradition: "There is only one commission to which delegation of that authority can be made. That is the great commission of

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[the voters'] own choosing, the Congress of the *738 United States and the President. It is the only commission which can be held responsible to the electorate." [FN39]

New Deal legislation forced the recognition that Congress had delegated its legislative power in a manifestly major way. Two decisions, Panama Refining Co. v. Ryan [FN40] and A.L.A. Schechter Poultry Corp. v. United States, [FN41] struck down various provisions of the National Recovery Act for delegating legislative power without "an intelligible principle." [FN42] Although it is fashionable to decry these decisions as the product of reactionaries, Justice Brandeis joined in both majority opinions while Justice Cardozo dissented in Panama Refining but concurred in Schechter.

The threat posed by the court-packing plan and the appointment of new justices made it necessary for the Supreme Court to find some guise under which to uphold major delegations of legislative power. One tactic was for Congress to fill the delegating statutes with enough palaver about statutory goals so that the Court would at least have something to talk about in concluding that the statute provided "an intelligible principle." [FN43] The pretense was that Congress was somehow still in charge. As everyone who had seen Mr. Smith Goes to Washington [FN44] knew, the whole idea was to take the key policy decisions from the selfish people in Congress and give them to the agencies controlled by the good man in the White House. A more fitting rationale had to be found.

3. The Final Rationale: Congress Can Repeal Agency Laws

The Supreme Court's final rationale is that delegation does no real harm to democracy because Congress retains the power to enact *739 a statute, repealing whatever agency-made laws that it does not approve. [FN45] This rationale reverses the burden that the Constitution places on those who want to expand the powers of government by imposing a new law. Under the Constitution, the proponents of the new law must bear the burden of getting it approved by the House, the Senate, and the President. [FN46] Under the last rationale, inaction by either House is sufficient for the agency-made law to stay in effect. There are, of course, many ways to prevent a controversial bill from coming to the floor for a vote, and legislators are only too willing to avoid controversial votes. As a result, laws are sustained without any legislative accountability.

The Supreme Court understands perfectly well that legislators bear little responsibility for inaction, and so it refuses to rely upon legislative inaction in interpreting statutes. [FN47] It is utterly unprincipled to claim that legislative inaction, somehow squares delegation with Article I of the Constitution. Indeed, the Supreme Court has come close to recognizing this much. In INS v. Chadha, [FN48] it stated, "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." [FN49]

Congress has recently provided us with a laboratory experiment to see if legislators are willing to step forward to repeal agency laws with which they disagree. In the name of congressional responsibility, Congress enacted the Congressional Review Act, [FN50] which sets up expedited procedures for floor votes to repeal new agency laws before they go into effect. [FN51] In the first eighteen months of this procedure, agencies promulgated thousands of regulations, many of which have been criticized by legislators. But the Senate voted on only one of them, and the House on none. [FN52] The experiment shows that legislators react to responsibility as vampires do to garlic--they flee. [FN53]

*740 In sum, with the Supreme Court's blessing, Congress has transformed its responsibility for the laws from a right of the voters to an option of the legislators.

C. The Harm to Democracy

The problem that legislators have with the Constitution is that they must take responsibility for both the benefits and costs of new laws. However they vote, they will offend some constituents. Rivals for reelection can easily search the Congressional Record to discover their opponent's voting record. The incumbents do not know in

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advance which of their votes will come back to haunt them at the next election and therefore have to worry about the wishes of their constituents on every vote.

Delegation has allowed legislators to rewrite the ground rules of democracy to help entrench themselves in office. They can pretend to deliver the best of everything to everyone by commanding agencies to promulgate laws to achieve popular statutorily prescribed goals. [FN54] The statutes are framed so that legislators can skirt the hard choices. This permits legislators to claim much of the credit for the benefits of the laws but shift to the unelected agency officials much of the blame for the inevitable costs and disappointments when the agency fails to deliver all the benefits promised. Come the next election, rival candidates will search the Congressional Record in vain for evidence on where the incumbent stood on the hard choices. Moreover, when some constituents complain that the agency has delivered too few of the benefits promised, and other constituents complain that the agency has imposed too much cost, the incumbent can build electoral support and raise funds by doing casework. Legislators can do casework for both sides in the same regulatory dispute because casework, unlike votes on the floor of Congress, is not publicly recorded. [FN55]

Delegation thus allows members of Congress to function as ministers, who express popular aspirations (through enacting lofty statutory goals) and tend to their flocks (by doing casework), rather than lawmakers who must make hard choices in passing laws. In a book that argues that delegation has enhanced legislators' chances of reelection, Morris Fiorina writes:

So long as . . . congressmen . . . function principally as national ***741** policy makers . . . reasonably close congressional elections will naturally result. For every voter a congressman pleases by a policy stand he will displease someone else. The consequence is a marginal district. But if we have incumbents who deemphasize controversial policy positions and instead place heavy emphasis on nonpartisan, nonprogrammatic constituency service . . . the resulting blurring of political friends and enemies is sufficient to shift the district out of the marginal camp. [FN56]

With delegation, legislators can escape being ejected from office except upon grounds that would oust a minister from the pulpit--scandal. In those exceptional cases when incumbents do lose an election, their defeat is far more likely to be caused by some escapade or chicanery than by how they shaped the law. [FN57] Entrenched encumbency is a marker for what is a profound problem-- that legislators have rewritten the ground rules of government to evade responsibility.

II. Professor Mashaw's Post Hoc Rationalizations for Delegation

Jerry Mashaw argues that delegation does no harm to democracy and therefore distances himself not only from the initial proponents of delegation, but its modern proponents, most of whom make no such claim as well. [FN58] To reconcile delegation with democracy at this stage would require a counterintuitive, post hoc rationalization of heroic proportions. If anyone has the intelligence and verve to construct such a rationalization, it is Jerry Mashaw. His recent book, entitled Greed, Chaos, and Government, [FN59] is terrific, but its effort to reconcile delegation with democracy has deep problems. To demonstrate, I will examine each of his rationales.

A. Mashaw I: Delegation Does Not Stop Us from Picking Legislators Whose Ideologies Accord with Our Own

Mashaw asks, and I quote him at length to give his argument its full force:

***742** Do we really want to choose our representatives (or hold them accountable) on the basis of specific votes concerning specific legislation which, but for constitutional necessity (a nondelegation doctrine with bite), they would have cast in more general terms? How exactly does it help us in choosing legislators to judge them on the basis of preference expressions that are not the expressions they would give, but for the constitutional necessity of being specific?

Even if we were to imagine that statutory precision would be informative, it is hard to envisage how rational voter calculation is appreciably improved. When one votes for Congressperson X, presumably one votes on the

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basis of a prediction about what X will do in the next time period in the legislature. How much better off are voters likely to be in making that prediction--that is, in determining how well Congressperson X is likely to represent them over a range of presently unspecified issues--by knowing that he or she voted yes or no on the specific language in certain specific bills in some preceding legislatures?

After all, the voter will also know that X could not have controlled all or even a substantial portion of the language of those bills. Votes must have been cast "all things considered." Therefore, when making a general appraisal of X's likely behavior in the future, it is surely much more important that voters know the general ideological tendencies that inform those votes (prolabor, probusiness, prodisarmament, prodefense) than that X votes for or against the particular language of [a] particular bill. I know of no one who argues that statutory vagueness prevents the electorate from being informed on the general proclivities of their representatives. [FN60]

Actually, Mashaw does know someone "who argues that statutory vagueness prevents the electorate from being informed on the general proclivities of their representatives," and it is I. As Mashaw states a few pages later:

David Schoenbrod clearly seems to believe that more specific information is always better information for the purposes of democratic accountability. In his view, "delegation allows legislators to convey information selectively, withholding opinions about the hard choices while providing opinions that embrace popular aspirations. The Clean Air Act and many other regulatory statutes have passed by wide margins for this reason, not because Congress reached a consensus on difficult subjects." ***743** Schoenbrod continues: "The ideological poses that legislators strike and the laws that emerge from agencies often bear little resemblance to each other. . . . Indeed delegation makes it possible for legislators to espouse internally inconsistent ideologies (for example, avoiding economic dislocation and protecting health). They need not join issue over inconsistencies because they are talking at the symbolic level of goals rather than at the concrete level of rules."

. . . I have no quarrel with Schoenbrod that legislators do all these things in the context of broad delegations of authority to administrators. My argument is that not all of these things are unqualifiedly bad, and that those things that do reduce accountability are equally available to legislators in the context of enacting highly specific legislation.

. . . .

The Clean Air Act that Schoenbrod uses as an example for his view as easily supports mine. There are indeed some critical gaps in this statute and its many amendments that leave substantial policy discretion to administrators. On the other hand, the statute goes on for hundreds of pages, many of them containing hypertechnical provisions that few citizens could possibly understand. Moreover, to the extent that the Clean Air Act and its amendments do things that dramatically depart from citizens' expectations, I would suggest that they are largely in the detailed provisions, not the broad aspirational sections. Voters do not read bills and would have little chance of understanding most of them if they did. Hence, legislators can selectively convey information about legislation whether they legislate specifically or generally. [FN61]

While Mashaw and I agree on much, I still think he is profoundly wrong. For starters, he conflates whether the statute is specific or general with whether the statute states the law or delegates. [FN62] As Mashaw himself points out, the Clean Air Act delegates lawmaking authority in the most exhaustingly specific terms. In contrast, the one section of the 1970 Clean Air Act that actually stated the law--the provision requiring new car makers to reduce emissions of three specified pollutants by ninety percent--is comparatively simple in its basic concept. [FN63] It is not the detail ***744** for which the legislators are responsible, but rather the law enacted. When Congress enacts a law, it must take responsibility not only for the benefits promised, but also for the duties imposed. But when Congress delegates, its fingerprints are not left on the duties imposed on the public, and the more detail included in the delegation, the easier it is for legislators to obscure their responsibility for the eventual costs and disappointments. [FN64] My book contains two extended case studies, one being the Clean Air Act, which show precisely how legislators use delegation and the related phenomenon of casework to give voters an impression of their ideology that differs from how they actually exercise their power. [FN65]

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Mashaw argues that statutes that do not delegate will not make legislators accountable because voters do not read statutes. Thus, legislators can characterize their actions as they choose. [FN66] Mashaw is both right and wrong. It is true that voters do not read statutes, and bully for them. Mashaw is wrong anyway because the fulcrum of legislative responsibility is not the statute, but the floor fight. With delegation, the floor fight is avoided because almost all legislators can vote for a bill that calls for clean air and jobs too. That is why the 1970 Clean Air Act passed almost unanimously. [FN67] Without delegation, the bill would have to contain clauses like, "widget plants shall emit no more than X pounds of sulfur per ton of widgets produced." Such a clause is open to an amendment to delete it from the bill or substitute "Y pounds" for "X pounds." Legislators have to stand up and be held accountable on the hard choices. That is why one of the only contested provisions of the 1970 Clean Air Act was on the amendments to the one true law in the statute--limiting emissions from new cars by ninety percent. [FN68] Floor fights are newsworthy and attract public interest. The local papers will point out how the local representatives voted. By the next election, legislators will have made many controversial choices. They will be known for how they act on hard choices and not just for what they say.

Unlike Mashaw, members of Congress understand that delegation lets them avoid responsibility. That is why they go to great lengths to use delegation to avoid blame not only for regulation, but also for raising their own salaries. [FN69] If, as Mashaw argues, legislators do not truly avoid blame through delegation, they would not be so reluctant to invokethe Congressional Review Act to try to repeal agency laws with which they disagree.

In an attempt to show that ending delegation would be of no benefit, Mashaw points out that spending bills are full of detail, yet "perhaps nowhere in American politics do legislators make better use of selective information and creative incoherence than in explaining to the American people what has been done in constructing the federal budget." [FN70] Mashaw is right about the legislative appropriations process, but he is wrong to think that legislative lawmaking would work the same way. [FN71]

There is an accountability loophole in the Constitution for appropriations, but not lawmaking. The Constitution's provisions on appropriations were drafted with the expectation that Congress would ***746** not run planned budget deficits except to deal with emergencies. [FN72] So long as Congress acted according to that expectation, it could not benefit one interest group without hurting some other group by reducing an appropriation or imposing a tax. Thus, interest would tend to thwart interest, as James Madison predicted. [FN73] When that balanced budget expectation collapsed, more than a century later, Congress could give to Paul without seeming to take from Peter, because the cost of the appropriation is flung forward in time to be borne by persons yet to be identified. In contrast, with lawmaking, a law that benefits Paul will restrict Peter now, and Peter generally will have notice of this law and know whom to blame.

Congress takes further advantage of the loophole in accountability for appropriations by lumping thousands of spending items together and voting on them wholesale. There is an implicit agreement in the Senate by which most members do not support amendments that strike items of spending, even those with support in their own states. The reason for the deal is that if such items were individually subject to vote, each senator would lose the ability to deliver pork to his constituents. What holds these thieves' agreement together is that no senator has a Peter for a constituent who is complaining loudly that a particular item of spending hurts him. But Peter is there when Congress imposes rules of conduct. Unlike the appropriations' agreements, an agreement to prevent the rule-by-rule consideration of proposed laws would collapse under its own weight.

In sum, just because the Constitution has a loophole that permits legislators to hide the ball on spending is no excuse to let them violate the Constitution by hiding the ball on lawmaking.

Even if Mashaw were somehow correct in asserting that delegation ***747** does not hinder voters in picking legislators with similar ideologies, he is wrong in thinking that there is no loss of democracy. In the democracy that is our birthright under the Constitution, voters are not consigned to picking representatives in the hope that their representatives' ideologies will lead them to act in the future as we want. Rather, we can punish legislators who we think voted unwisely by removing them from office at the next election. But with delegation, legislators can distance themselves from much of the blame that results from making decisions on new laws.

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Even though legislators may personally share our ideological preferences, political incentives lead them to delegate in ways that do not produce laws that coincide with our views. For example, because they escape much of the blame for the inevitable costs of creating new federal lawmaking programs and also much of the blame for the inevitable failure of these programs to produce the benefits promised, legislators are skewed towards creating and enlarging an agency's lawmaking jurisdiction, making its goals more ambitious, its methods more intrusive, and its procedures more complicated. The upshot is that, in lawmaking, the national government, particularly the executive branch, increasingly takes jurisdiction over matters that might otherwise be left to the political branchesof state or local government, the common law, or private ordering.

While the problem is often too much regulation, sometimes it is too little regulation. Because legislators also escape blame for the resulting disappointments when agencies fail to deliver on statutory promises, Congress is insensitive to the delay and uncertainty that frequently results when the agency lacks the political muscle needed to make, expeditiously, the hard choices that Congress ducked. [FN74] What first alerted me to the dangers of delegation was that the Environmental Protection Agency ("EPA") was years too late in exercising its delegated power to stop the danger posed to young children from leaded gasoline. I am convinced that the national government would have dealt with leaded gasoline as a health hazard years earlier if Congress could not have delegated that responsibility to the EPA in 1970. [FN75]

In sum, even if voters could correctly discern incumbents' ideologies in the sense that Mashaw means (for example, "pro ***748** business" or "pro-labor"), delegation skews legislators' political incentives in ways that favor the national class over ordinary voters. Favoring insiders over outsiders is different than favoring left over right; remember, Standard Oil was a big proponent of the New Deal's National Recovery Act. [FN76]

The early proponents of delegation were correct; it is a way to insulate the "experts" from the pressures of elective politics. Once the 1970s arrived with their emphasis on participatory democracy and talk of "power to the people," the rationale in favor of delegation has been repackaged to make it sound less elitist. While the talk is different, the walk still has all the swagger of "power to the insiders."

B. Mashaw II: We Can Hold Legislators Accountable for Delegating

Mashaw also argues that we can hold legislators accountable for delegating:

The dynamics of accountability apparently involve voters willing to vote upon the basis of their representative's record in the legislature. [In this sentence, he is correcting the last of the flaws that I identified in his previous argument.] Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is it that we are not being represented? [FN77]

Notice that Mashaw's theory allocates to voters the responsibility to stop legislators from delegating rather than allocating to legislators the responsibility of convincing voters that the Constitution should be amended to allow delegation.

Mashaw's allocation of responsibility is wrong-headed on many levels. It is not as if voters get to choose between candidates who delegate and those who do not. When the Republicans in Congress think environmental regulation is too aggressive, they do not replace the Clean Air Act with a regulatory regime in which Congress takes responsibility or even use the Congressional Review Act to challenge regulations such as the new ambient air quality standards for ozone and particulate matter. Instead, they introduce legislation that would delegate in ways that would make it harder to regulate strictly. Indeed, the Washington Post took exception to a recent Republican environmental bill on the basis that ***749** the way for Congress to change the EPA's priorities is to stop delegating and start taking some responsibility. [FN78]

That will not happen readily, however, because delegation gives the electoral advantage to those who duck the hard choices. As I said before, delegation is not so much an issue of left versus right as insiders versus outsiders.

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With insiders having such a significant stake in delegation, outsiders opposed to delegation face a tremendous organizational challenge. Moreover, it is hard to get ordinary voters to focus on the issue. It is human nature to care more about what a particular piece of legislation does to one directly rather than whether the process by which the legislation is passed will do indirect harm by undermining democracy in the long run. Even law students have to be hit on the head by us professors to get them to look beyond the direct consequences in cases about the structure of government and see the long-term stakes. Ordinary voters are apt to care more whether a particular bill seems to help them than whether it delegates. For example, even in 1970 when there was a public outcry against Congress because it had dropped the ball on air pollution by delegating broadly to agencies and Congress promised explicitly that it would make the "hard choices," Congress easily got away with delegating again. The 1970 statute camouflaged its delegation with the kind of spurious detail that even an expert such as Jerry Mashaw confuses with nondelegation. [FN79]

Despite these organizational and informational obstacles, the political effort to stop delegation has gained ground in recent years. Presently, more than seventy representatives and thirteen senators support a bill to end delegation and alternative bills also have substantial support. [FN80] But if this effort does not succeed, and it may well not, it does not mean that the voters have had fair representation on this issue.

Voters would be represented more fairly if delegation were addressed as the constitutional issue that it is. In 1935 after the Supreme Court decided the cases striking down instances of delegation, President Roosevelt considered seeking amendments to the Constitution to authorize delegation but decided to maintain a "studied silence" on amending the Constitution during the 1936 ***750** presidential election and refrained from initiating the amendment process afterwards for fear of losing Democratic congressmen during the 1938 election. In the end, he decided to either pack or intimidate the Court rather than present the delegation issue to the public. [FN81] The Court's "change in time that saved nine" was not, in Bruce Ackerman's term, "a constitutional moment," but rather a constitutional stupor brought on for the convenience of those in power in all three branches of the federal government. [FN82] It is in order to guard against such self-dealing that the Constitution requires that the states be involved in the constitutional amendment process. [FN83]

Few people who, unlike professors, are not paid to study and opine upon the structure of government have the time, knowledge, and inclination to do the work that Mashaw says voters need to do to claim their democratic birthright. They must read all the grist in order to guess candidates' ideologies and then wage a meta-political campaign to get legislators to assume responsibility for the hard choices. Like Henry Higgins in My Fair Lady who sings, "Why can't a woman be more like a man," [FN84] Mashaw argues, "Why can't ordinary voters be more like me?" Because they are not, for delegation still means "power to the insiders."

C. Mashaw III: We Still Have Democracy Because the President Is Accountable for the Laws

Mashaw also argues in a section entitled "Accountability in a Presidential System" that "the flexibility that is currently built into the processes of administrative governance by relatively broad delegations of statutory authority permits a more appropriate degree of administrative, or administration, responsiveness to the voter's will than would a strict nondelegation doctrine." [FN85]

Notice that Mashaw talks about "responsiveness" not responsibility. In other words, he claims that the administration will give voters what they want, not that it will be more meaningfully accountable ***751** for what it does. This is government "for the people," not government "by the people." [FN86] Mashaw is correct to refrain from claiming that the President is meaningfully accountable to the voters for the laws promulgated by appointees. With delegation, the public loses the right to have both its elected representatives and its elected President take personal responsibility for the law. In exchange, it gets the right to have someone appointed by an elected President take responsibility.

The President is not as accountable for agency laws as members of Congress are for enacted laws. The President, who does not have to publicly sign off on agency laws, may deny responsibility for them. Moreover,

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the Framers included the requirement that bills be presented to the President not out of any sense that the President was more accountable than Congress, but rather because the President was less accountable to particular interest groups and thus more inclined to protect liberty. [FN87] A President has less reason than a member of Congress to worry that a position taken on a particular law will affect reelection prospects. The President's responsibility for any one law is, after all, diluted by the electorate's concern about a host of other issues involving, for example, national defense, foreign affairs, and law enforcement.

In any event, voters who would disagree with any one agency law are likely to agree with others. Since voters must take or leave presidential positions wholesale, it is unlikely that the President will suffer much political tension over any one agency law. Of course, voters must also take or leave legislative positions wholesale when they elect members of Congress, but in any one legislative district there are likely to be only a limited number of issues of particular local concern. A position taken by an incumbent on any one such issue could cause five percent of the voters to choose the challenger, thereby producing a ten percent swing. That risk would force many incumbents to pay careful attention to constituents' concerns when voting on a law. Given the difficulty of holding the President accountable for the laws that bureaucrats adopt, it is no wonder that we tend to think of countries where only the chief executive is elected as undemocratic. [FN88]

***752** Why does Mashaw think that an administration that is democratically accountable to the voters in only a very diluted sense would be more responsive to the voters' wishes? He does not explain why the administration should be responsive at all but implicitly assumes that it will be so. Unspoken, but still there, is the old national class conceit that experts, if left to their devices, will act in the public interest. So, yes, Virginia, there is a Santa Claus, but it is worth considering why Saint Nick, the agency administrator, will pay much attention to the voters' desires other than to prevent the President from losing the next election, assuming it is still the first term. One possibility is that Saint Nick does not want to stir up public opinion to such an extent that Congress will trim the agency's power. This might explain why the EPA under Presidents Ford and Carter did not use its power to make Los Angeles cut gasoline supplies by eighty percent to meet Clean Air Act deadlines and why the EPA under President Reagan did not scrap the regulations that were slowly reducing the lead content of gasoline. [FN89] So long as the agency does not profoundly anger large numbers of voters, and instead only slightly irritates large numbers of voters or badly harms only smaller numbers, it need not fear that Congress will take away its power.

Now, it would be nice to think that Saint Nick would use his freedom of action in the public interest, but agencies, and the administrations of which they are a part, have numerous agendas that involve coalition building. Such "log rolling" is reason to suspect Mashaw's unspoken premise that the agency will be "responsive."

Mashaw's explicit argument is not that the administration is responsive, but that Congress cannot be. In particular, he conjures up the possibility of a "Law of Conservation of Administrative Discretion" under which it is difficult for Congress to decide too many of the specifics of government such that any attempt to do so will lead to a wooden form of administration, unresponsive to the popular will. Here, again, Mashaw confuses the issue of specificity with that delegation. To avoid delegating, Congress need only state the law. It can leave to others discretion in matters such as law interpretation, prosecutorial discretion, and remedy. I have explained elsewhere why that allocation of responsibility not only accords with the requirements of Article I, but also with its purposes. [***753** FN90] As for the one area where Congress cannot delegate--making the laws--agencies are sometimes much slower than Congress. [FN91]

Moreover, there are many ways that delegation reduces, rather than increases, discretion outside of Congress. As already discussed, delegation skews political incentives so that jurisdiction is shifted to national administrative agencies from the political branches of state and local regulators, common law courts, and private ordering. There is reason to believe that delegation has encouraged far more such centralization than we need or that we would have had if members of Congress had taken responsibility for the laws. [FN92] Rigidity is introduced not just through the centralization of control, but also through the formalistic rule-bound methods of federal administrative law that are far more rigid than what it often replaces. For example, a city council can directly decide how to respond to a particular local environmental problem, while when the EPA has jurisdiction, local

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responses must be in accord with an elaborately detailed federal chain of command. [FN93]

Mashaw has a second and final reason for claiming that the administration is more responsive--Arrow's Theorem. Arrow's Theorem states that, under certain conditions, democratic choices cannot be stable. An explanation of the theorem goes as follows:

Assume that three children--Alice, Bobby, and Cindy--have been pestering their parents for a pet. The parents agree that the children may vote to have a dog, a parrot, or a cat. Suppose each child's order of preference is as follows: Alice--dog, parrot, cat; Bobby--parrot, cat, dog; Cindy--cat, dog, parrot. In this situation, if pairwise voting is required, then majority voting cannot pick a pet. [FN94]

A majority (Alice and Cindy) will vote for a dog rather than a ***754** parrot; a majority (Alice and Bobby) will vote for a parrot rather than a cat; and a majority (Bobby and Cindy) will vote for a cat rather than a dog. [FN95]

In these rather peculiar circumstances, a majority will never reach a stable conclusion. Relying on Arrow's Theorem, Mashaw concludes that "delegating choice to administrators is but another way of avoiding voting cycles through the establishment of dictators." [FN96] "Dictators" is, as I have been arguing, not that far from the right word.

While Arrow's Theorem may give Alice, Bobby, and Cindy a reason to delegate to their parents the choice of their pet, it does not give Congress a plausible excuse to delegate to agencies the task of making law. Empirical research has shown that Congress is not prey to the kind of voting cycles that plague these hypothetical children. Moreover, the assumptions upon which Arrow premised his theorem do not hold true in the United States Congress. For example, Arrow's Theorem assumes that voters' preferences are not arrayed along some continuum, but rather are topsy-turvy, like those of Alice, Bobby, and Cindy. However, studies show that preferences within Congress tend to be arrayed along a liberal-conservative continuum. [FN97]

In addition, only experts, certainly not real parents, would choose such a stupid way to select the family pet. Nor were the Framers so stupid in designing the Article I legislative process. Even if the House or Senate were caught in a voting cycle over dogs, cats, and parrots, an individual President would not be, and additionally the President may veto any legislation. Of course, the House and the Senate can override a presidential veto if a two-thirds majority of both bodies so vote. Overrides of vetoes are unlikely to lead to voting cycles. As theorists have recently shown, based upon some plausible assumptions about voting preferences, a requirement of at least a sixty-four percent majority will ordinarily ***755** prevent voting cycles. [FN98] In sum, Arrow's Theorem is interesting, but it provides no excuse for delegating to Mashaw's dictators.

D. Mashaw and Welfare

As the discussion of accountability of the President shows, Mashaw attempts to prove that delegation is compatible with democratic accountability by arguing that it enhances welfare. That is why he uses the language of "responsiveness" rather than "responsibility." While this panel's topic is the impact of delegation on democracy not welfare (and I believe in separation of panels), I cannot resist a few brief comments on Mashaw's argument that delegation enhances welfare.

Mashaw suggests that delegation enhances welfare by avoiding logrolling in Congress. His argument is to put lawmaking in the hands of an executive that he labels "responsive" to the voters. He fails to notice that logrolling takes place in the Executive as well, although it goes by different names, such as "coalition building." His is an argument by characterization.

Mashaw is also incorrect in dismissing the arguments of Peter Aranson, Ernest Gellhorn, and Glen Robinson that the blame-shifting allowed by delegation reduces welfare. [FN99] Mashaw writes that their "claim rests on a much more general proposition--that the free play of political life, assuming self- interested constituents and self-

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interested legislators, makes all legislation disbeneficial (or most of it anyway)." [FN100] He goes on to dispute the more general proposition. Let us say that Mashaw is correct. Suppose that bills with a prospect of passage are evenly split between those that produce more benefits than costs and those that produce more costs than benefits. Even under this supposition, Aranson, Gellhorn, and Robinson are correct in their claim that the blame-shifting allowed by delegation reduces welfare. After all, the blame-shifting skews the political incentives faced by legislators, desensitizing them to the blame they deserve for costs they indirectly impose and the benefits they indirectly withhold by consigning laws needed now to the limbo of agency rulemaking.

***756** Whether delegation enhances or reduces welfare depends upon a number of other factors such as agency expertise, differences in the politics of agency and legislative lawmaking, differences in agency and legislative procedures, judicial review, and others. I have stated at length elsewhere why I think that, on balance, delegation does more harm to welfare than good. [FN101] Mashaw's book is unresponsive to my arguments about delegation and welfare. It would be pointless to repeat my arguments here.

Whether delegation reduces welfare and democracy is important as a matter of politics and policy but should be largely irrelevant as to whether it is constitutional. If the constitutionality of departures from the letter of Article I of the Constitution rides too much on instrumental analysis, then what Article I requires becomes a question of policy. On policy issues, the political process ordinarily should and does trump the judicial process. The upshot is that the politicians get to make the constitutional ground rules of government as they go along. The upshot is the kind of ersatz democracy that we now have.

III. Professor Kahan and Making Nonsense of "Democracy"

Professor Kahan responds to my claim that delegation undercuts democracy with an essay entitled Democracy, Schmemocracy. [FN102] His premise is that democracy is an empty concept; his conclusion is that my claim is devoid of meaning.

His premise is incorrect. He tries to show that "democracy" lacks any core content by suggesting two quite different concepts of the word--a pluralist conception in which "official decisions conform to the aggregated preferences of the electorate" [FN103] and a civic republican conception in which "official decisions are reached through a process of reflective deliberation." [FN104] He then shows that no form of government uniquely maximizes both of these concepts of democracy and that delegation might be argued to increase both.

Professor Kahan misdefines democracy. The root meaning of the word is, from the Greek, for rule by the people. The primary definition in the dictionary is "government by the people exercised directly or through elected representatives," and none of the secondary ***757** definitions correspond to Kahan's. [FN105] Kahan's pluralist conception of democracy is not democracy. It speaks to whether government gives the people what they want, not whether the people exercise direct or indirect control over it. It is like Mashaw's version, "government for the people," not "government by the people." [FN106]

Kahan's civic republican spin on democracy is also not democracy. It speaks to the process by which the rulers decide, not whether the people have a role in ruling themselves.

As Professor Kahan misunderstands democracy, a government run by a benign philosopher king would constitute a perfect democracy. Professor Kahan is one dictionary short of being an effective apologist for the administrative state.

Kahan's understanding of democracy is impoverished, as well as mistaken. He understands it as some compromise between self-rule, where the people rule themselves directly, and paternalism, where the people are ruled by philosopher-experts. But the Framers opted neither for direct democracy nor paternalism. They opted for an indirect democracy in which representatives of the people ruled, but only through a legislative process in which different groups of elected officials checked and balanced each other. [FN107] As Professor Marci

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Hamilton explains, many of the most reflective of the Framers believed that representatives owe their constituents their conscience, not slavish adherence. [FN108] These Framers viewed our democracy as based on leadership and accountability. Kahan views democracy as some balance between followership and nonaccountability.

Kahan's conception not only dilutes accountability, but also makes the entire enterprise of government less reflective, from top to bottom. The Framers wanted Congress to be forced to face the hard choices partly because voters would learn from the clashes between the representatives of voters with opposing desires. In contrast, under Kahan's dumbed-down conception of democracy, elected legislators get to avoid the hard choices by delegating. At best, this means that voters do not get to learn by seeing their representatives wrestle with the hard choices. At worst, this means that the representatives pretend no choice has to be made in instructing the delegates to produce benefits without costs. The ***758** delegates are left with the unedifying job of providing political cover for the legislators. For example, we have the spectacle under the Clean Air Act of the EPA pretending that it sets ambient air quality standards without regard to cost. The upshot is neither accountability nor reflection.

Despite his loud protests of semantic ambiguity, Professor Kahan understands full well the core meaning of democracy. It is the visceral appeal of this core meaning that makes him set out, as he acknowledges, to try to deflect the charge that delegation undercuts democracy. [FN109] He is thinking, I suppose, that no one can claim delegation undercuts democracy when there is no one, correct design for a democracy, as the word is commonly understood. A democracy can be direct or indirect. If indirect, various powers can be granted to a single elected official or to a chamber of them, there may be one legislative chamber or more, the terms of office may be X years or more, and, directly relevant to the delegation issue, the power to make law may be allocated to one set of officials or another. Moreover, in selecting between alternative designs, maximizing democratic accountability is only one of the considerations. Indeed, the Framers were also concerned with the pluralistic and civic republican virtues that Kahan claims to mistake for democracy.

While there are many possible designs for a democracy, there is one particular design for democracy in the Constitution. It was understood to require, as I argued at length in my book, that the power and responsibility for lawmaking be in the legislative process. [FN110] With that as my benchmark, I argued that delegation significantly reduces democratic accountability. [FN111] Whether it in fact does do so is the issue that separates Jerry Mashaw and me.

Professor Kahan claims that I have no sure benchmark because he says it is debatable whether the Constitution was intended to require that the laws be made in the legislative process. [FN112] His argument at this juncture is even thinner than when it tries to reduce democracy to rule by a benign despot. It amounts to one sentence in which he invokes the debate about whether the Framers believed in a complete separation of powers. [FN113] Clearly they did not, as can be seen, for example, in the Presentment ***759** Clause, which gives the President a limited veto over Congress's exercise of legislative powers. [FN114] But whether the Framers believed in complete separation of powers is besides the point. The delegation issue is not whether there will be complete separation of powers, but rather whether the elected representatives will be on the hook for the kind of hard choices identified in Article I.

Believing the Constitution to be ambiguous on whether delegation of the power to make law is permitted, Kahan thinks he has caught opponents of delegation in a bootstrap argument. He claims that the only way we can overcome the ambiguity in the Constitution is by claiming that delegation undercuts democracy. [FN115]

Here, again, Kahan is incorrect. The argument that the Constitution forbids delegation is based upon the text and context of the Constitution, the understandings of the Framers, and the judicial interpretations closest in time to the Constitution's adoption. I will not repeat the arguments here because I have recorded them elsewhere. [FN116] The point is that the democracy-based argument is not the primary argument for the claim that the Constitution forbids delegation, but rather one of the reasons why the Framers intended the Constitution to forbid delegation. It is the proponents of delegation who have placed critical reliance on democracy. Seeking to change

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the subject by turning from formalism to instrumentalism, they claim that delegation should be constitutional because it does not undercut democracy. [FN117]

Overall, Kahan's essay does not explore the question of whether delegation undercuts democratic accountability. Instead, he too attempts to change the subject by inviting us to speculate on whether there is a correct way to design a government that is democratic (as he uses the word). I decline to accept his invitation because it is a diversion. It diverts us into thinking that our government is shaped by professors theorizing rather than politicians entrenching themselves in office. These politicians are the ones with the power to redesign the ground rules of government for their convenience, unless we force them to remember that the basic purpose of a written constitution is to stop them from doing so.

Professor Kahan's critique by misdefinition and misdirection fails to oust opponents of delegation from the high ground. We can still rightly protest, without qualification, that delegation undercuts ***760** democracy.

IV. Professor Schuck and Delegation as a Policy Issue

Professor Peter Schuck has a quiver full of criticisms in his Article, but the ones that do not reiterate those of Mashaw and Kahan boil down to this: "[Schoenbrod] does not see that the level and type of delegation are themselves fundamental policy choices, and that these issues . . . are almost always--and quite explicitly--at the core of political debates in Congress over the shape and content of particular pieces of legislation." [FN118] Because, for Schuck, delegation is a policy issue for the political branches to handle, the courts should stay away from what is not fit business for them. In his opinion, delegation is a "political question," [FN119] although he does not explicitly invoke that doctrine. After talking of plunging "a long, sharp knife deep into the [delegation] doctrine's heart," [FN120] he makes this final thrust: "Professor Schoenbrod, usually so sensible about such things, would surely deplore it." [FN121]

Not all advice from good friends is good, especially when one misunderstands the other, as Schuck does me. Schuck misunderstands me when he says that I do not see that delegation has important policy ramifications. Of course I do; in fact, my book has two chapters on those ramifications. [FN122] What Schuck does not see is that delegation is one of those policy choices that is controlled by the Constitution. Were all issues with policy implications off limits to the courts, they would largely be out of the business of constitutional review. The Constitution is a series of policy choices, often about how government should make policy. [FN123] The Constitution is written precisely so that politicians cannot change these meta-policy choices.

Schuck does not argue that the Constitution allows delegation but rather marshals arguments that he might use, were he writing a constitution, to explain why his draft would leave the choice on delegation to the legislature. He argues delegation is necessary for national welfare partly because "social complexity has made it far more difficult for legislators (not to mention voters) to accurately predict the consequences of their choices so that they can reason ***761** their way to a conclusion as to the best policy choice." [FN124] For him, the agency is the best place to make the law "not only because the details of the regulatory impacts are hammered out there. It is also because the agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address." [FN125] Furthermore, "[i]n short, it is only at the agency level that the citizen can know precisely what the statute means to her; how, when, and to what extent it will affect her interests; whether she supports, opposes, or wants changes in what the agency is proposing . . . ." [FN126]

Delegation is the reason, however, that it is only at the agency level that legislators or anyone else have any understanding of what is at stake. With delegation, legislation is mainly concerned with promising the best of everything to everyone, yet it is only when laws are passed that rights are actually linked to duties. Were Congress to make the law, the stakes would become apparent to legislators (and their constituents) at the legislative level, which is precisely why legislators avoid accountability and delegate.

To get a clearer picture of what those stakes are, Congress could make a number of policy choices other than delegation. It could ask the agency to recommend a draft with an accompanying analysis of the consequences. It

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could target whatever law it enacts at the specific problems that sparked congressional attention (e.g., lead in gasoline, emissions from new cars) rather than, as it often does with delegation, launch a regulatory program designed to address a far larger set of problems (e.g., air pollution from every source from big factories to the corner dry-cleaner) in order to obscure the fact that it has not resolved the issues that most concern its constituents. Congress could also leave more issues to state and local government and private action.

Delegation skews Congress's political incentives toward granting federal agencies comprehensive jurisdiction over large areas of policy, much of which could be left to state and local government. For example, air pollution was being reduced at a relatively steady rate from at least the beginning of the twentieth century. [FN127] The data do not show any uptick in the rate of improvement ***762** when the federal government took over in 1970. [FN128]

Schuck seems to think that Congress acts in the public interest when it decides to delegate. As he sees the legislative process, the "legislative staffs, the White House, regulated firms, 'public interest' groups, state and local governments, and others [fight over the scope and terms of the delegation.]" [FN129] He implies that the balance struck in the legislative fight produces something like the right result.

Schuck distrusts legislators to make laws but trusts them in deciding whether to delegate. I distrust them when they make laws and distrust them more when they delegate. Legislators have selfish interests in deciding whether to delegate and so have a conflict of interest. Through delegation, they can claim credit, shift blame, and increase the demand for casework as a means for them to exact campaign contributions and other favors. The stakeholders from the private sector, in contrast, aim to get the law they want, wherever it is made. For them, delegation is only a possible means to that end. The balance on delegation that might be produced by the tugging and hauling between the competing private stakeholders is knocked out of wack by the heavy hands of those with the biggest stakes in delegation and the power to do it, the legislators.

Not only does Schuck blink at the selfish interests of the legislators, he also puts too much faith in the idea that all the relevant interests are represented. Just because many well organized interest groups are active in the contest does not guarantee a good outcome as the well organized interests are only a part of the overall public interest. The unorganized interests are the ones most prone to be harmed by delegation.

Schuck also suggests that agencies use their delegated powers well. He does so by taking me to task for writing in the initial draft of my paper that agencies are free "to do as they please." [FN130] I did write in discussing those occasions where Congress might "trim the agency's power . . . [that] so long as the agency does not profoundly anger large numbers of voters--and instead only slightly irritates large numbers of voters or really screws much smaller numbers--it is free to do as it pleases." [FN131] I was rebutting the argument ***763** that the power of Congress to repeal the agency rule or cut back its delegated powers works to reconcile delegation with democracy. Schuck has taken my unfortunately hyperbolic language, literally and out of context, to be a claim that agencies are unrestrained. This I do not believe, as is clear from my book where I discuss multiple constraints on agency action and the problem of agency paralysis. [FN132]

That the agencies are constrained does not necessarily make what they produce good. None of the sources of constraint that Schuck invokes can rightly be claimed to filter out bad laws and force imposition of good ones. Congress and the White House are at their least accountable in the many open, and not so open, ways that they lean on agencies engaged in making laws. The courts cannot demand that agencies produce good laws, they can only require superficially plausible reasons for the laws that agencies do produce.

Public participation is also not much of a solace. According to Schuck, "[t] oday, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective." [FN133] But the average member of the public lacks the lawyers and experts needed for meaningful participation. The most average citizens can do is write a letter, whether to an agency or a representative. The letter will probably result in little in either case but is more likely to count when the law is being made by the representative

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who wants our vote, than the agency official who wants a bigger office. What Schuck really means by public participation is participation by the leadership of various interest groups, be they unions, corporations, and cause-based groups. Interest group leaders do monitor agencies, but usually only on issues of the most direct interest to the leadership. The broadest and most important public interests have little if any representation. To show just how delegation hurts unorganized interests-- in fact and not just in theory--was the point of the extended case studies in my book. [FN134]

Schuck argues that delegation could not be that much of a problem because our country is prosperous and our government functions reasonably well compared to governments elsewhere. This is despite delegation, not because of it. The credit for our ***764** success belongs much more, I think, to other factors such as a free press and checks and balances, both of which are vitiated by delegation. Delegation removes lawmaking from the center stage of politics, that most worthy of press attention. It frees lawmaking from the requirement that both houses of Congress and the President take affirmative responsibility.

While the constraints on delegation may avoid the very worst laws that might otherwise come from agencies, to rest content with that and to say there is no problem, as Schuck does, is to miss the bigger picture. Inherent in delegation is a bias towards more regulation, more centralized and complicated regulation, because lawmakers escape most of the blame for launching sweeping regulations that promise more than can be delivered and impose costs for which legislators would not take responsibility if they had to make the hard choice. In other words, society is deprived of the most direct means to decide how much it wants to be controlled by government. Rather, that decision is ceded, in substantial measure, to a government run by legislators who want to entrench themselves in office, agency officials who want to enlarge their budgets, and interest group leaders whose livelihoods and power grow in our thriving administrative state.

The genius of our Constitution was that the people would get to decide how much government they want. If, as Schuck believes, the people's welfare would be advanced by giving up some of that decisional power, let the people so decide through the constitutional amendment process. Instead, the insiders have done that for them.

Schuck argues that courts should abstain from tackling the delegation issue because "it would greatly strengthen the power of the federal courts relative to that of Congress and the agencies." [FN135] For Schuck, such a shift of power "is particularly obnoxious when, as in this case, it is not essential to the vindication of enumerated constitutional rights." [FN136] Schuck does not explain why it is not also obnoxious for courts to make what he would have to label "policy choices" on what parts of the Constitution are worthy of enforcement.

Schuck goes on to argue that the courts lack a judicially manageable test of unconstitutional delegation. The test that I propose in my book rides on the difference between lawmaking and law interpretation. I devote a chapter to explaining that, despite the ***765** slippery nature of these concepts, the test is no worse than other constitutional tests. [FN137] Schuck does not take issue with my argument but rather misunderstands it. He writes: "How general is too general, how specific is specific enough--these are, contrary to Professor Schoenbrod's claim, questions of degree, not kind. They are preeminently questions of politics and of policy that courts are poorly equipped to answer . . . ." [FN138] My test does not ride on the concepts of generality or specificity, but rather on the distinction between lawmaking and law interpretation.

In any event, if Congress concluded that the courts were intruding too deeply in policy by enforcing the nondelegation doctrine, Congress has an available remedy. It could adopt the idea floated by Justice Breyer to enact a statute under which agency rules would not go into effect without being enacted by Congress. [FN139] Then there could never be any delegation, and thus courts would have nothing to rule upon. As a result, Schuck can get most of the advantages that he thinks come from the agency process.

Schuck also predicts that the Supreme Court will never put teeth into the delegation doctrine. [FN140] I am not a prophet, but I do believe that a vibrant democracy is a possibility, not a certainty or an impossibility. The outcome is a choice, not a certainty. I wish that Schuck, who puts so much value on being able to make his own

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choices, would urge his fellow citizens, including the justices of the Supreme Court, to insist on a form of government in which voters would have a more effective choice on the scope of government.

Conclusion

The comments on my book made at this symposium and from other sources have pushed me toward realizing that I need to broaden my focus beyond a scholarly analysis of delegation and the power to regulate. Reviews by Judge Douglas Ginsburg and Professor Harold Krent made me realize that the battle against delegation had to be fought in the court of politics as well as the ***766** courts of law. [FN141] Phillip Howard's comments at the symposium that a lack of responsibility is pervasive in Washington and is not limited to Congress underscored my desire to show that shirking by Congress is part of that broader picture. [FN142] William Niskanen's comment at the symposium that delegation cannot end without returning much power to the states underscored my desire to link the argument against delegation with an argument for federalism. [FN143] Peter Schuck's claim that ending delegation would rock a prosperous ship of state underscored my desire to explain in popularly understandable terms the real harm done to society by an overlarge, irresponsible national government. In other words, delegation of regulatory lawmaking power is only one aspect of a more profound disease in our body politic. The challenge I recognize is to explain that disease to people who do not deem themselves experts.

I am working on a new book that attempts to paint this broader picture. With that work in progress, this symposium's focused on delegation forced me to paint on a canvas narrower than the picture in my mind. Yet, the symposium has energized me because the contributions from all sides have been so good and because it was with delegation that I first saw, from personal experience--how politicians' subversions of the Constitution undercut democracy and hurt real people.

[FNa1]. Professor, New York Law School. My thanks to Harry Wellington and the conference participants, especially Marci Hamilton and Peter Schuck, for their helpful comments on an earlier draft. My thanks also to Phillip Caal and Floyd Englehardt, New York Law School class of 1998, for their excellent research assistance.

[FN1]. See The Harwood Group, The Kettering Fund, Citizens and Politics: A View from Main Street iii (1991).

[FN2]. See U.S. Const. art. I, § 8, cl. 1.

[FN3]. See id. art. I, § 5, cl. 3.

[FN4]. The President must accept personal responsibility either by introducing a declaration of war or approving a statute. Should the President not approve a statute, then it is enacted only if two-thirds of the lawmakers in both houses override his veto. See id. art. I, § 7, cl. 2.

[FN5]. See The Federalist No. 73 (Alexander Hamilton); see also Marci Hamilton, Representation and Delegation, 20 Cardozo L. Rev. 807 (1999).

[FN6]. See David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993).

[FN7]. See Jerry L. Mashaw, Greed, Chaos, & Governance: Using Public Choice to Improve Public Law 139-40 (1997).

[FN8]. See Dan M. Kahan, Democracy Schmemocracy, 20 Cardozo L. Rev. 795 (1999).

[FN9]. See Peter Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 Cardozo L. Rev. 775 (1999).

[FN10]. See Schoenbrod, supra note 6, at 131.

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[FN11]. See Robert H. Wiebe, Self Rule: A Cultural History of American Democracy (1995).

[FN12]. See id. at 65, 85.

[FN13]. Id. at 141.

[FN14]. See id. at 142-44.

[FN15]. See id. at 135.

[FN16]. See id. at 134-37, 164-65.

[FN17]. See id. at 136-37.

[FN18]. See id. at 173-80, 206-07, 217-22.

[FN19]. Id. at 207.

[FN20]. Arthur M. Schlesinger, Jr., The Imperial Presidency ix (1973).

[FN21]. As Congress was drafting competing resolutions to authorize President Bush to send troops to Saudi Arabia, Bush told reporters, "I don't think I need [congressional authority].... I have the authority to fully implement the United States resolutions .... Many attorneys have so advised me." William Scally, Congress Heads Toward Fateful Vote on Persian Gulf War, Reuters N. Am. Wire, Jan. 9, 1991, available in LEXIS, News Library, Arcnws File.

[FN22]. John Hart Ely, War and Responsibility (1993).

[FN23]. 2 U.S.C. §§ 691-692 (Supp. II. 1996). The Supreme Court held LIVA unconstitutional in Clinton v. City of New York, 118 S. Ct. 2091 (1998).

[FN24]. See Walter Shapiro, The Loneliest Job in the World, Except for All the Lawyers, USA Today, Feb. 13, 1998, at 6A.

[FN25]. Id.

[FN26]. See Clinton v. City of New York, 118 S. Ct. 2091 (1998).

[FN27]. See Clean Air Act, 42 U.S.C. § 7661(a)(b)(3) (1994); Telecommunications Act of 1996, 47 U.S.C. § 609 (Supp. II. 1997); see also David Schoenbrod & Marci Hamilton, Congress Passes the Buck: Your Tax Buck, Wall St. J., June 12, 1998, at A10.

[FN28]. See Schoenbrod, supra note 6, at 30-31, 155-56.

[FN29]. See id. at 31-35.

[FN30]. See generally Field v. Clark, 143 U.S. 649, 690-91 (1892) (upholding a statute that delegated power to the President to suspend the free importation of certain goods when those exporting countries laid tariffs on U.S. goods because Congress had the authority "to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations").

[FN31]. See Schoenbrod, supra note 6, at 31-36.

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[FN32]. See, e.g., Mashaw, supra note 7, at 133.

[FN33]. See, e.g., Washington v. W.C. Dawson, 264 U.S. 219 (1924) (affirming the decision of Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), which held that Congress could not delegate to states the application of state worker compensation laws in admiralty cases); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) (striking down a statute that made it a crime to charge "unjust or unreasonable" prices for "any necessaries" as unconstitutional because it delegated legislative power to courts and juries); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (striking down a statute that instructed federal courts to apply state worker compensation law in resolving admiralty cases).

[FN34]. See, e.g., Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 634 (1980) (striking down a health standard promulgated by OSHA, which limited occupational exposure to benzene from ten parts benzene per million parts of air to one part benzene per million parts of air because OSHA's arrival at this figure was not premised on concrete findings, but rather on the "assumptions" that "leukemia might result from exposure to 10 ppm and that the number of cases [of leukemia] might be reduced by lowering the exposure level to 1 ppm"); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) (affirming that Congress can delegate powers to agencies "setting standards to guide their determination" but not reaching the question of whether the regulation before it met the intelligible principle requirement).

[FN35]. See, e.g., INS v. Chadha, 462 U.S. 919 (1983) (holding unconstitutional a provision of an INS regulation that allowed a one-house veto of an executive decision to allow an alien to remain in the United States because such an action was legislation thatrequired passage by a majority of both houses of Congress and presentation to the President); Hampton v. Mow Sun Wong, 426 U.S. 88, 105 (1976) (holding unconstitutional a U.S. Civil Service Commission ("CSC") regulation denying non-U.S. citizens employment in federal service despite the argument by the CSC that the regulation was mandated by Congress, the President, or both, because the Court was "not willing to presume that... defendants [were] deliberately fostering an interest [of Congress, the President or both which was] so far removed from [[[its] normal responsibilities"); Smith v. Goguen, 415 U.S. 566, 568-69, 572 (1974) (holding unconstitutional a Massachusetts statute that made it a crime to "publicly... treat[ ] contemptuously the flag of the United States" because the statute was vague).

[FN36]. 276 U.S. 394 (1928).

[FN37]. Id. at 409.

[FN38]. NBC v. United States, 319 U.S. 190 (1943) (discussing the Hampton decision).

[FN39]. J.S. Cotton, Letter, Flexible Tariffs, 13 Const. Rev. 100-01 (1929) (quoting President-elect Hoover's speech of Oct. 15, 1928).

[FN40]. 293 U.S. 388 (1935).

[FN41]. 295 U.S. 495 (1935).

[FN42]. A.L.A. Schechter Poultry, 295 U.S. at 537-38; Panama Refining, 293 U.S. at 430.

[FN43]. See, e.g., Fahey v. Mallonee, 332 U.S. 245, 249-53 (1947) (holding constitutional the Homeowners' Loan Act of 1933 despite the claim that it unconstitutionally delegated congressional power to the Federal Home Loan Bank Board because there were adequate standards to guide the policy of the board); Yakus v. United States, 321 U.S. 414, 426 (1944) (holding constitutional the Emergency Price Control Act of 1942, promulgated by the Office of Price Administration, because the necessary standards to gauge whether the will of Congress had been obeyed were present); United States v. Rock Royal Coop., 307 U.S. 533, 574-78 (1939) (holding constitutional the Agricultural Marketing Agreement Act of 1937, promulgated by the Secretary of Agriculture,

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because it contained the necessary standards for determining the intent of Congress).

[FN44]. Mr. Smith Goes to Washington (Columbia Pictures 1939).

[FN45]. See Schoenbrod, supra note 6, at 181-83.

[FN46]. See U.S. Const. art. I, § 7, cl. 2.

[FN47]. See, e.g., Zuber v. Allen, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route.").

[FN48]. 462 U.S. 919 (1983).

[FN49]. Id. at 958 n.23.

[FN50]. 5 U.S.C. §§ 801-808 (Supp. II 1996).

[FN51]. See id.

[FN52]. See The Role of Congress in Monitoring Administrative Rulemaking: Hearings on H.R. 1704 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong. 1 (1997) (testimony of Rep. Kelley).

[FN53]. Professor Schuck points out that agencies may have changed the regulations they proposed to avoid defeat in Congress. See Schuck, supra note 9, at 787-88. But he misunderstands my point. The agencies still promulgated regulations that drew substantial criticism in Congress, yet the legislators contrived to avoid voting on them.

[FN54]. See Schoenbrod, supra note 6, at 89-90.

[FN55]. See id. at 101-02.

[FN56]. Morris P. Fiorina, Congress: Keystones of the Washington Estab- lishment 36-37 (1977) (quoting Randall Ripley, Congress: Process and Policy (1975)).

[FN57]. See Schoenbrod, supra note 6, at 104-05.

[FN58]. See, e.g., Richard B. Stewart, Beyond Delegation Doctrine, 36 Am. U. L. Rev. 323 (1987); Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391 (1987). Professors Pierce and Stewart argue that delegation is necessary or enhances welfare. I deal with those arguments in Schoenbrod, supra note 6, at 107-52.

[FN59]. Mashaw, supra note 7.

[FN60]. Id. at 139-40.

[FN61]. Id. at 146-47.

[FN62]. My book draws this distinction early and often. See Schoenbrod, supra note 6, at 9-10, 43, 135-36, 142-44, 181-84.

[FN63]. See Clean Air Act Amendment of 1970 § 202(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as

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amended at 42 U.S.C. § 7521(b)(1) (1994)).

[FN64]. In a related passage, Mashaw states:

Nor does specificity help voters police for inconsistency in legislators' ideological positions. Indeed, it would seem to me much easier for a voter to detect the inconsistency in a legislator's statement that he or she intended "to protect the public health through strict air quality regulation while avoiding any serious economic dislocation" than by attempting to figure out that the specific provisions of a bill were indeed trading off these values and in precisely what ways.

Mashaw, supra note 7, at 147. I wonder how Mashaw would tell voters to evaluate President Clinton's statement in the 1998 State of the Union Address that:

[t]he vast majority of scientists have concluded unequivocally that if we don't reduce the emission of greenhouse gases, at some point in the next century we'll disrupt our climate and put our children and grandchildren at risk. This past December, America led the world to reach a historic agreement committing our nation to reduce greenhouse gas emissions through market forces, new technologies, energy efficiency. We have it in our power to act right here, right now. I propose $6 billion in tax cuts and research and development to encourage innovation, renewable energy, fuel-efficient cars, energy-efficient homes. Every time we have acted to heal our environment, pessimists have told us it would hurt the economy. Well, today our economy is the strongest in a generation, and our environment is the cleanest in a generation. We have always found a way to clean the environment and grow the economy at the same time. And when it comes to global warming, we'll do it again.

President Bill Clinton, Address Before a Joint Session of the Congress of the State of the Union (Jan. 27, 1998), in 34 Weekly Comp. Pres. Doc. 129, 137 (Feb. 2, 1998).

[FN65]. See Schoenbrod, supra note 7, at 19-20, 54-57 (discussing the navel orange market order); id. at 61-67 (discussing the Clean Air Act).

[FN66]. See Mashaw, supra note 6, at 147.

[FN67]. See Schoenbrod, supra note 6, at 63 & n.19.

[FN68]. See id. at 73.

[FN69]. See Citizens' Commission on Public Services and Compensation, Pub. L. No. 90-206, 81 Stat. 642 (1967) (codified as amended at 2 U.S.C. § 351 (1994)).

[FN70]. Mashaw, supra note 7, at 147.

[FN71]. The opinion by Justice Scalia, concurring in part and dissenting in part, relied upon history to argue that Congress could allow the President discretion not to spend appropriated monies. See Clinton v. City of New York, 118 S. Ct. 2091, 2115-18 (1998). In my book, I argued that such discretion is not a delegation of legislative power. See Schoenbrod, supra note 6, at 180, 186-88, 190-91. However, the Line Item Veto Act not only gave the President discretion not to spend, but also to take away the power from future Presidents to spend that money. See Clinton, 118 S. Ct. at 403-20. For that reason, I believe that the majority was correct to conclude that the act delegated an Article I legislative power.

[FN72]. See Office of Management & Budget, Historical Tables: Budget of the United States Government, Fiscal Year 1998, at 15 (1997):

[E]xcept for periods of war (when spending for defense increased sharply), depressions or other economic downturns (when receipts fell precipitously), the Federal budget was generally in surplus throughout most of the Nation's first 200 years. For our first sixty years as a Nation (through 1849), cumulative budget surpluses and deficits yielded a net surplus of $70 million. The Civil War, along with the Spanish-American War and the depression of the 1890s, resulted in a cumulative deficit totaling just under $1 billion during the 1850-1900 period. Between 1901 and 1916, the budget hovered very close to balance every year.

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....
... The traditional pattern of running large deficits only in times of war or economic downturns was broken during the rest of the 1980s.

[FN73]. See Schoenbrod, supra note 6, at 27-28 (referring to The Federalist Nos. 10, 51 (James Madison)).

[FN74]. See Schoenbrod, supra note 6, at 145-46.

[FN75]. See David Schoenbrod, Remarks to the National Resource Defense Council, 20 Cardozo L. Rev. 767 (1999).

[FN76]. See Schoenbrod, supra note 6, at 38 & n.45.

[FN77]. Mashaw, supra note 7, at 139.

[FN78]. See Editorial, Once Again, Regulatory Reform, Wash. Post, Aug. 26, 1997, at A14.

[FN79]. See Clean Air Act Amendment of 1970 § 202(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7521(b)(1) (1994)).

[FN80]. See S. 433, 105th Cong. (1997) (sponsored by Sen. Brownback and 12 cosponsors); H.R. 1036, 105th Cong. (1997) (sponsored by Rep. Hayworth and 67 cosponsors).

[FN81]. See Schoenbrod, supra note 6, at 160-62.

[FN82]. See Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L.J. 453, 457-61, 510-15. (1989).

[FN83]. See U.S. Const. art. V.

[FN84]. My Fair Lady (Warner Bros. 1964).

[FN85]. Mashaw, supra note 7, at 153. Part of what Mashaw is talking about in this passage is that true legislative specificity would require a great deal of detail in the administrative lawmaking process. That argument is wide off the mark because, as I have already pointed out, Mashaw confuses the issue of specificity-vagueness with the issue of whether Congress has delegated the power to make the laws. Thus, I focus instead on his main point that the voters get what they want because the administration is responsive.

[FN86]. Cf. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysberg (Nov. 19, 1863), in 7 The Collected Works of Abraham Lincoln 17 (Ray P. Bassler ed., 1953).

[FN87]. See The Federalist No. 73, supra note 5, at 494-96.

[FN88]. The Supreme Court does rely on the accountability of the President to justify courts deferring to agencies on matters of statutory interpretation. See Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). The Court's point is that presidential appointees are more accountable than judges, not that the accountability of presidential appointees is a sufficient replacement for the accountability of legislators. See id. at 856-66.

[FN89]. See Schoenbrod, supra note 6, at 67-72.

[FN90]. See id. at 180-82.

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[FN91]. Dan Kahan would like to see Congress be able to delegate to the Department of Justice the power to make the criminal laws in the hope that it will be more responsive than Congress. See Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469 (1996). I would need to know a lot more about criminal law than I do to comment on Kahan's various examples, but I have two comments. First, as to one of Kahan's most troubling examples, RICO, it seems likely that a delegation doctrine with teeth would have been killed at birth. Second, many of the other problems that Kahan raises might be cured through the Department of Justice issuing rules of interpretation.

[FN92]. See generally David Schoenbrod, Center for the Study of American Business, Time for the Federal Environmental Aristocracy to Give Up Power (1998).

[FN93]. See id.

[FN94]. Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 902 (1987).

[FN95]. Id. at 902 n.172.

[FN96]. Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 98 (1985).

[FN97]. The research on absence of cycling in Congress is collected and discussed in Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 48-49 (1991). For policy changes by agencies, see William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 1986 Duke L.J. 948, 961-62. For discussion of Arrow's assumptions, see, for example, Robert A. Dahl, Democracy and Its Critics 153-54 (1989); Herbert Hovenkamp, Legislation, Well-Being, and Public Choice, 57 U. Chi. L. Rev. 63, 89-94 (1990). See also Mayton, supra at 953-58.

[FN98]. See Andrew Caplin & Barry Nalebuff, On 64%-Majority Rule, 56 Econometrica 787 (1988). Mashaw and others have raised a number of second order objections to how Article I avoids voting cycles. I deal with these arguments in Schoenbrod, supra note 6, at 132-34.

[FN99]. See Peter H. Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 36-37 (1982).

[FN100]. Mashaw, supra note 7, at 143.

[FN101]. See Schoenbrod, supra note 6, at 5, 7-12.

[FN102]. Kahan, supra note 8.

[FN103]. Id. at 796.

[FN104]. Id. at 797.

[FN105]. American Heritage Dictionary 380 (2d ed. 1991).

[FN106]. Cf. Lincoln, supra note 86.

[FN107]. See Marci Hamilton, supra note 5, at 812.

[FN108]. See id. at 813.

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[FN109]. See Kahan, supra note 8, at 795.

[FN110]. See Schoenbrod, supra note 6, at 47-48, 155-64, 174-79.

[FN111]. See id. at 84-96, 99-106.

[FN112]. See Kahan, supra note 8, at 800.

[FN113]. See id. at 805.

[FN114]. See U.S. Const. art. I, § 7, cl. 2.

[FN115]. See Kahan, supra note 8, at 795.

[FN116]. See Schoenbrod, supra note 6, at 47-48, 155-64, 174-79.

[FN117]. See id. at 99-104.

[FN118]. Schuck, supra note 9, at 781.

[FN119]. Cf. Baker v. Carr, 369 U.S. 186, 209 (1962).

[FN120]. Schuck, supra note 9, at 776.

[FN121]. Id. at 775.

[FN122]. See Schoenbrod, supra note 6, at 119-52.

[FN123]. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 88-101 (1980).

[FN124]. Schuck, supra note 9, at 778.

[FN125]. Id. at 782.

[FN126]. Id.

[FN127]. See Schoenbrod, supra note 92, at 8.

[FN128]. In another context, Schuck kindly provided me with citations of other comprehensive federal programs that have not produced better results than their state, local, and private antecedents.

[FN129]. Id. at 781.

[FN130]. Id. at 777.

[FN131]. See David Schoenbrod, Delegation and Democracy: A Reply to My Critics, 20 Cardozo L. Rev. 731 (1999) (draft of Sept. 1, 1998, on file with Cardozo Law Review).

[FN132]. See Schoenbrod, supra note 6, at 82-84, 111-18, 121-26.

[FN133]. Schuck, supra note 9, at 781.

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[FN134]. See Schoenbrod, supra note 6, at 56-57, 63-67.

[FN135]. Schuck, supra note 9, at 790.

[FN136]. Id. at 790-91.

[FN137]. See Schoenbrod, supra note 6, at 180-91.

[FN138]. Schuck, supra note 9, at 791. He also writes, "[r]esolution of these questions, moreover, depends entirely on context--or, as Professor Schoenbrod recognizes, on a 'slew of other factors."' Id. at 791. The "slew of other factors" quote is taken out of context. My point was not that courts should look at the context in deciding whether the text of a statute made the law.

[FN139]. See Stephen Breyer, The Legislative Veto After Chadha, 72 Geo. L.J. 785, 793-94 (1984).

[FN140]. See Schuck, supra note 9, at 791.

[FN141]. See Douglas Ginsburg, Delegation Running Riot, 18 Reg. 83 (reviewing Schoenbrod, supra note 6); Harold Krent, Delegation and Its Discontents, 94 Colum. L. Rev. 710 (1994) (same).

[FN142]. See Phillip Howard, Comments at the Cardozo Law Review symposium "The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives" (Mar. 19, 1998) (transcript on file with the Cardozo Law Review).

[FN143]. See William A. Niskanen, Legislative Implications of Reasserting Congressional Authority over Regulations, 20 Cardozo L. Rev. 939 (1999).

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Section A

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The Court Vetoes Line Item

In a sound and much-needed decision, the Supreme Court has rejected the line item veto as a departure from the basic constitutional requirement that Presidents accept or reject bills in their entirety. The 6-to-3 decision, written by Justice John Paul Stevens, firmly cast aside Government arguments that in canceling specific lines of the budget the President was merely exercising authority delegated to him by Congress. Instead the Court found that the line item veto violates the "'presentment clause" of Article I. That clause establishes the process by which a bill becomes law.

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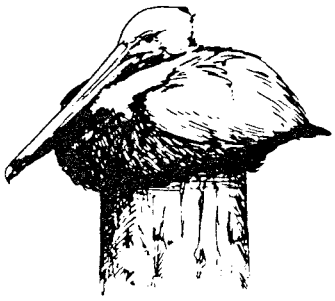

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THE CLEAN AIR ACT UNDER REGULATORY REFORM

C. BOYDEN GRAY

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The Clean Air Act under Regulatory Reform

C. Boyden Gray*

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I. INTRODUCTION

For years, one of the most vigorously debated issues in regulatory reform is whether the Clean Air Act[1] (CAA) should be amended to require the Environmental Protection Agency (EPA or the Agency) to consider costs and benefits in setting ambient air quality standards. To date, the proponents of cost-benefit analysis have lost the debate, as environmentalists and EPA officials have prevailed on the argument that a change would constitute a "rollback" of environmental protection and that the EPA's failure consists of not too much pollution reduction, but not enough. The EPA should be concerned solely with protecting the public's health, its supporters say, not with the health of polluting industry, which always overstates its costs, as well as the harm to an obviously booming economy.

Because the arguments have been framed as pitting industry against the public, they have largely obscured the real issue, which is not whether the EPA should consider costs and benefits, but how, and with what accountability. The plain fact is that the EPA has for a long time considered costs and benefits in setting ambient standards—only it has done so behind closed doors in a manner that should never be tolerated in an open and democratic society and that has perversely impeded some of the clean air objectives the Agency is supposed to promote. Moreover, the 1990 CAA Amendments made cost consideration an explicit

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1. Clean Air Act §§ 101-618, 42 U.S.C. §§ 7401-7671*q* (1994).

component of implementing the air quality standards,[2] a responsibility the EPA and the states have not yet fully embraced. Because early pollution reductions are the easiest and cheapest, the EPA's rejection of accountability for its cost-benefit calculus has, to date, done relatively little harm to the economy. But continuation of business as usual in the future poses serious risks to the economy, to continued improvement in U.S. air quality—which is now among the best in the world—and to the constitutional separation of powers and the rule of law in our democratic society.

The recently promulgated fine particulate matter (PM)/ozone rules provide a useful case study of how the EPA currently looks at costs and benefits in fashioning ambient air standards in order to maximize its regulatory reach without maximizing air quality or minimizing economic benefits. After reviewing what the Agency has so far done in the context of the PM/ozone rules, this Article will show how this violates the Administrative Procedure Act[3] (APA), the CAA, and the constitutional nondelegation doctrine that the Supreme Court has applied against the Occupational Health & Safety Administration (OSHA) but not against the EPA (because it has never had the opportunity to do so) in analogous circumstances. Finally, this Article will attempt to demonstrate that open and reviewable application of cost-benefit concepts currently used by the EPA in secret will not only cure its violation of the CAA and the nondelegation doctrine, but will also provide, over the long run, higher air quality benefits at lower cost.

II. THE STATUTORY FRAMEWORK

The starting point for addressing the use of cost-benefit analysis at the EPA generally, and in the PM/ozone rule particularly, is to recognize that the CAA already explicitly requires the EPA to consider benefits by requiring the EPA to protect the public health with an adequate margin of safety. The statute provides that the standards issued by the EPA must be those that are "requisite to protect the public health" and that allow "an adequate margin of safety."[4] The D.C. Circuit in *Lead Industries Association v. EPA* has construed this language as requiring the standard to be set at a level at which "there is 'an absence of adverse effects'" on sensitive individuals.[5] So far, so good. But what exactly does this mean,

2. CAA § 221(k)(1), 42 U.S.C. § 7545(k)(1).

3. Administrative Procedure Act of 1946, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended in scattered sections of 5 U.S.C.).

4. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1).

5. Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1153 (D.C. Cir. 1980) (quoting S. REP. No. 91-1196, at 416 (1970)).

given the fact that for most air pollutants there is no threshold of health effects below which there is no clear harm? Most pollutants cause harm at some level all the way down to zero.[6]

The answer has been to let the EPA decide where to set the standards, partly because there are no "clear thresholds above which there are adverse effects and below which there are none."[7] The court rejected the idea that the EPA was constrained either by considerations of economic or technological feasibility, or by any requirement that Congress intended protection only against pollution that is "clearly harmful to health."[8]

The EPA is therefore on its own, with virtually no guidance at all except for legislative history and judicial language suggesting that the EPA should "err on the side of caution in making the necessary decisions" by not waiting for or requiring evidence that an air pollutant is clearly harmful to health.[9] On the other hand, the EPA does not, in fact, have to go to zero even if there are health effects just above that level:

> [T]he standards do not fully protect in accordance with the statutory language which gives the Administrator authority to provide for additional protection. He has had to make a pragmatic judgment in the face of the fact that there is no threshold on health effects, which makes it very difficult to apply absolute health protection, and he has not been able to do that.[10]

Underscoring this absence of any mandate to go to zero is the margin of safety requirement, which assumes that there is still room for further reductions after the EPA has set the level and then added a margin of safety on top.[11] Yet, even this assumption was shaky, the court noting that "Congress has recently acknowledged that more often than not the margins of safety that are incorporated into air quality standards turn out to be very modest or nonexistent, as new information reveals adverse health effects at pollution levels once thought to be harmless."[12]

Contrast the blank check Congress gave to the EPA to regulate the quality of the air we breath ten to twenty percent of our time with the tight leash put on the OSHA that regulates the air in the workplace where we spend most of our time. In *Industrial Union Department v. American*

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6. *See id.* at 1153 n.43 (citing H.R. REP. No. 95-294, at 110 (1977); 123 CONG. REP. No. 18,463-64 (1977) (statement of Sen. Muskie)).

7. *Id.* at 1152.

8. *Id.* at 1153.

9. *Id.*

10. 123 CONG. REC. 18,463 (1977) (statement of Sen. Muskie), *cited in Lead Indus.*, 647 F.2d at 1153 n.43.

11. *Lead Indus.*, 647 F.2d at 1154.

12. *Id.* at 1154.

Petroleum Institute[13] (*Benzene*), the Supreme Court addressed a very similar statutory standard of health protection, namely, a requirement that defined a health and safety standard as one "that is 'reasonably necessary and appropriate to provide safe or healthful employment.'"[14] While not accepting an argument similar to the one rejected in *Lead Industries* that this required evidence of effects known to be "clearly harmful to health,"[15] the Supreme Court did rewrite the statute to require evidence of "a significant risk of material health impairment."[16] The reason the Court imposed this constraint on the OSHA was precisely for the same consideration that the D.C. Circuit refused to impose a similar constraint on the EPA—namely, the absence of a no-effect threshold that, when combined with the absence of other requirements to provide zero risk, equaled an open-ended grant of authority that, without a requirement of significant risk, "would make such a 'sweeping delegation of executive power' that it might be unconstitutional under the Court's reasoning in *A.L.A. Schecter Poultry Corp. v. United States*."[17]

It is difficult, if not impossible, to reconcile these two cases that came to diametrically opposite conclusions about the same condition—namely, the absence of a no-effect threshold combined with statutory permission, if not direction, not to require zero risk. On June 27, 1980, the D.C. Circuit addressed this condition and concluded that the EPA must necessarily have a blank check to do virtually anything it chooses, unrestrained by any requirement to show clear harm before acting.[18] Five days later, the Supreme Court took the same condition and said that the OSHA had to show something like clear harm (i.e., "significant risk") lest it be acting under an overly-broad and unconstitutional grant of legislative power.[19]

It is possible to attribute the difference to historical timing. The Supreme Court decision came down five days after the D.C. Circuit's and thus too late to guide it. But, the more important point may be that *Lead Industries* represented the EPA's first crack at lead amidst the early days of the EPA's implementation of the 1977 CAA Amendments, whereas the Supreme Court was dealing with a much more mature OSHA that had already regulated benzene once and, having cleaned out the "low hanging fruit," was back for a second or third helping. It is understandable that the

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13. 448 U.S. 607 (1980).
14. *Id.* at 608 (quoting Occupational Safety and Health Act, 29 U.S.C. § 652(8) (1970)).
15. *Lead Indus.*, 647 F.2d at 1153.
16. *Benzene*, 448 U.S. at 639.
17. *Id.* at 646 (quoting A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935); citing Panama Refining Co. v. Ryan, 393 U.S. 388, 390-97 (1935)).
18. *Lead Indus.*, 647 F.2d at 1153.
19. *Id.*

EPA reviewing court might be reluctant to require it to start all over again, leaving the public unprotected from lead exposure in the interim, while there was substantial protection for workers in place for the period of the *Benzene* remand.

III. THE PM/OZONE CASE STUDY

The circumstances of the current PM/ozone rule, by contrast, are well beyond the early, pioneer rulemaking of *Lead Industries* and are much more akin to the situation facing the Court in *Benzene*. More than two decades of rulemaking have passed since the 1977 Amendments, and, not to put too fine a point on it, the EPA has regulated the hell out of all of the pollutants that contribute to PM and ozone. In addition to standards for ozone, total suspended particulates (TSP) (very coarse particles) and PM_{10}, which have taken years and billions of dollars to implement, the EPA has issued separate standards for NOx, SO_2, and VOCs (in the form of air toxic rules). It has, in the last three years, decided that there were no grounds to tighten the NOx and SO_2 standards,[20] possibly because Congress itself launched the acid rain program in Title IV of the 1990 CAA Amendments to reduce SO_2 and NOx, in the biggest single pollution cleanup program ever legislated.[21] Finally, Congress also revolutionized the way gasoline is made to reduce PM and ozone components in a separate part of the 1990 CAA Amendments that is still not yet fully implemented.[22]

The result has been what can only be described as an extraordinary improvement in air quality in the face of dramatic economic growth, improvement that will continue to play itself out well into the next decade as the 1990 CAA Amendments come fully into effect.

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20. *But see* the D.C. Circuit's recent remand of the SO_2 decision in *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998).

21. *See* CAA § 401, 42 U.S.C. § 7651 (1994).

22. *See* CAA § 210(k), 42 U.S.C. § 7544(k).

Table 1[23]

	Air Quality Concentration % Change 1977-1996	Emissions % Change 1970-1996
Carbon Monoxide	-61%	-31%
Lead	-97%	-98%
Nitrogen Dioxide	-27%	+8% (NOx)
Ozone	-30%	-38% (VOC)
PM_{10}	-25% (from 1987)	-73%
Sulfur Dioxide	-58%	-39%

That improvement makes *Benzene* factually far more relevant to the EPA today than in 1980. The basic parallel is striking: the *Benzene* Court said dozens of studies of harm at highly regulated benzene exposure levels of 10 parts-per-million (ppm) could not supply grounds for regulating benzene at 1 ppm, even conceding the absence of a no-effect threshold, because without any scientific evidence of harm at 1 ppm (of which there was none in the case), OSHA's intervention at that level would constitute the exercise of a standardless delegation.[24] So, it should also be with the PM rule: All of the studies in the world about harms from TSP and PM_{10}, which are highly regulated, should not be able to justify regulation of $PM_{2.5}$, in the absence of any evidence of harm from $PM_{2.5}$.

The absence of any evidence of harm from $PM_{2.5}$, whether epidemiological or otherwise, is the single most defining characteristic of the PM rulemaking. The Statement of Basis and Purpose of the rule describes paragraph after paragraph of studies on TSP and PM_{10}, but nothing on $PM_{2.5}$, except for three studies, known as D.W. Dockery *et al.*, 1993 (Dockery), C.A. Pope, III *et al.*, 1995 (Pope), and J. Schwartz *et al.*, 1996 (Schwartz). These three studies deserve special attention.[25]

The problem with the first two studies is that the EPA itself never reviewed the data underlying the studies nor procured the data from the authors for review by anybody else, notwithstanding the general

23. EPA NATIONAL AIR QUALITY AND EMISSIONS REPORT, ch. 1, at 3 (1996).
24. *See Benzene*, 448 U.S. 607, 631-38 (1980).
25. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,690, 38,660 n.11 (1997) (to be codified at 40 C.F.R. pt. 51).

requirements of the APA[26] and specific requirements of Section 307(d) of the CAA[27] that supporting data and material for studies that are essential to a rule be made available for public comment.[28] This continued unavailability of the key data emerged as a key factor in the rulemaking, since Pope and Dockery were the only long-term studies showing any link—solely epidemiological—between $PM_{2.5}$ and mortality and, thus, constituted the only evidence to support the annual standard proposed by the EPA. To be sure, the EPA still had Schwartz 1996, but it was a short-term study that at best could support only the daily standard that was the less binding of the two requirements.

The reasons for this state of affairs are complex and could constitute the subject of an entire article by themselves. Suffice it to say here that the issue lead to congressional hearings and an enormous amount of pressure on the EPA itself and the custodians of the data. In the case of Dockery, the custodian of the data was Harvard University, which was thereby forced to enter the rulemaking on the side of the EPA—a difficult position for an academic institution to find itself in. Before the rulemaking was over, the EPA and the custodians agreed to make the data available to a "neutral" research organization (the Health Effects Institute that has substantial ties to Harvard), but, of course, the results of that review were not available for inclusion in the rulemaking docket and will not be available for several years.[29]

Once the EPA had been forced to make this concession, it was perhaps inevitable that it would have to take the next step and take the two controversial studies out of the basis for the rule itself, a remarkable event that occurred in obscure "Footnote 90"[30] that appears to have escaped the attention of the press, both general and trade, altogether. There, the EPA said that the studies in question "do not provide the sole (or even primary) basis for EPA's decision regarding $PM_{2.5}$," which the EPA said was instead "based on a consideration of a large body of epidemiological studies, a clear majority of which suggest PM is strongly linked to mortality and other serious health effects at concentrations permitted under the current standards."[31] The EPA went on to say that the specific $PM_{2.5}$ standard levels were based "on a more limited number of studies that actually measured fine particles and/or components of fine

26. *See* 5 U.S.C. §§ 553, 556, 557 (1994).
27. CAA § 307(d), 42 U.S.C. § 7607(d) (1994).
28. *See id.*
29. Fuels and Fuel Additives Registration Regulations, 59 Fed. Reg. 33,042, 33,046 (1994) (to be codified at 40 C.F.R. pt. 79).
30. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,689 n.90 (1997) (to be codified at 40 C.F.R. pt. 50).
31. *Id.*

particles," but these studies, identified by reference to "Koman, 1996, 1997," did not include Dockery and Pope when the 2.5 standard level was initially selected.[32] The Dockery and Pope studies were only used to "help corroborate this result," i.e., the result reached by Koman, and "neither study alone (or together) provided sufficient evidence to support more stringent levels below those identified" by Koman, and, therefore, "removal of these two studies from consideration would not have changed the selected standard level."[33]

The basis for the rule, in other words, was what was in Koman, not Dockery or Pope. An examination of Koman, however, reveals no long-term studies at all, and the EPA acknowledges in Footnote 90 that the 2.5 standard level was "principally based on other *daily* mortality and respiratory effects studies" identified in Koman.[34] The EPA thus explicitly acknowledges that, while it has short-term study support for the daily average, it has no long-term study support for the annual average.[35]

It is important to put this extraordinary gap in context. Even if the EPA had relied on the Dockery and Pope studies (after having made their underlying data available for public comment), it is not clear that the EPA would be in a stronger position. At best, these studies prove little because they deal only with weak statistical associations uncorroborated by any clinical analysis that provides a plausible biological mechanism for the faintly observed association. Although there are no formal rules on the use of epidemiology, there is a consensus that epidemiology should not support government intervention, beyond committing to intensive research, unless it reveals a risk ratio (RR) of two-, or preferably three-to-one, backed by an understandable biological explanation, or a higher RR in the absence of one.[36] In the case of smoking, for example, a compelling single causal explanation has never been developed, but a RR of better than twenty-to-one has easily sufficed to make up the difference.[37] Here, by contrast, the Dockery and Pope studies produced barely detectable RRs of about 1.2-to-1, with no plausible biological mechanism, and with many questions about whether the authors had adequately taken account of confounding factors, such as smoking, humidity, and weather.[38]

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32. *Id.*
33. *Id.*
34. *Id.* (emphasis added).
35. *See id.*
36. *See* Gary Taubes, *Epidemiology Faces Its Limits*, 269 SCIENCE 164, 168 (1995).
37. *See id.*
38. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,690 n.11.

The absence of a plausible mechanism may itself be explained by nothing more complicated than the EPA's failure at the outset to theorize, let alone prove, what $PM_{2.5}$ is supposed to do to people. For an agency that is supposed to be dealing with observable adverse health effects, albeit those that may only show up in sensitive populations, this is not a trivial problem. Given that a RR of 1.2-to-1 is barely statistically significant, regulating $PM_{2.5}$ could result in unintended consequences that do more harm than good.

The most likely confounder not accounted for in most short-term PM studies is humidity, which was found to knock out PM_{10} as having any statistically significant association with mortality in connection with Schwartz's Birmingham study.[39] But none of the studies of PM_{10} or $PM_{2.5}$, other than the Birmingham reanalysis, address the question of humidity or air conditioning that not only lowers humidity indoors but screens out some fine particles, including sulfates, a phenomenon understood and recognized by Schwartz himself in his 1996 short-term study.[40]

Humidity and air conditioning raise further the thorny question about the contrast between indoor air, which people breathe about eighty to ninety percent of the time, and outdoor air, where people spend very little time. We know very little about indoor air's relationship to outdoor air either in the context of PM or ozone. The EPA's publicly-stated reason for tightening the ozone standard is asthma,[41] but incidents of asthma increased in recent years just as ozone decreased, and there are many more explanations for the asthma epidemic to be found in indoor air (such as mites, dust, molds, cockroach droppings, etc.) than in outdoor air.[42] Moreover, according to Schwartz, urban populations are not likely to be significantly exposed to sulfates due to the filtering from air conditioning.[43]

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39. *See* Jerry M. Davis et al., *Airborne Particulate Matter and Daily Mortality in Birmingham, Alabama*, NAT'L INST. OF STATISTICAL SCIENCES (Technical Report No. 55, 1996).

40. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,662.

41. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50).

42. *See* Thomas A.E. Platts-Mills & Melody C. Carter, *Asthma and Indoor Exposure to Allergens*, 336 N. ENG. J. MED. 1382, 1383 (1997). Dr. David Rosenstreich, one of the inaugural researches in the field, and the author of one of the articles published along with Drs. Platts-Mills and Carter's article in Volume 336 of the *New England Journal of Medicine*, says that "to blame air pollution [for asthma] is political, not medical." *A Second Look at the Asthma Epidemic*, WASH. TIMES, Apr. 16, 1998, at A18.

43. Joel Schwartz et al., *Is Daily Mortality Associated Specifically with Fine Particles?*, 46 J. AIR & WASTE MGMT. 927, 935 (1996).

In short, the EPA cannot identify any benefits from its PM standard. While there is data on ozone showing health effects below the previous standard, these same data also show effects below the new standard[44] that the EPA's Clean Air Science Advisory Committee (CASAC) said was not "significantly more protective of public health" than the previous standard.[45] The EPA openly admits that its choice of level is a pure policy call.[46] If this approach to air pollution is allowed to stand, there is no constraint whatsoever on the EPA's untrammeled policy discretion to do anything it wants with essentially all pollution sources, including forcing them all down to background levels.

This blank check might have been appropriate when the EPA was in the early stages of its heretofore hugely successful campaign for air quality improvement. However, it raises quite different questions after all the "low hanging fruit" has been picked and achieving big air quality advances is more akin to pulling teeth than picking fruit. Indeed, the benefits are so elusive that the White House had to ask for tens of millions of dollars in research funds to reduce the "great uncertainty" about the effects of $PM_{2.5}$;[47] and the EPA acknowledges that it will have to spend much of the funds abroad because the ambient levels of fine particles are so low in this country that it is virtually impossible to plot a dose-response curve based on the residual PM pollution that remains in the air here.[48]

In an effort to address the uncertainties, Congress has directed the EPA to arrange for an independent study by the National Research Council (NRC) to "identify the most important research priorities relevant to setting NAAQS for particulate matter. . . ."[49] Finding that the EPA's current research plans are "crucially inadequate,"[50] the NRC stated that

> [t]here is a great deal of uncertainty about the implications of the findings for risk management, due to the limited scientific information about the

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44. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,862-63 (1997) (to be codified at 40 C.F.R. pt. 50).

45. Letter from George Wolf, Chairman, CASAC, to Carol Browner, EPA Administrator (Nov. 30, 1995) [hereinafter CASAC Letter] (on file with author) (regarding CASAC closure on the primary standard portion of the staff paper for ozone 3).

46. *See id.*

47. *See* BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1998, at 81.

48. EPA, DRAFT, PARTICULATE MATTER SEARCH NEEDS FOR HUMAN HEALTH RISK ASSESSMENT 2 (Aug. 8, 1996).

49. NATIONAL RESEARCH COUNCIL, BOARD ON ENVIRONMENTAL STUDIES AND TOXICOLOGY, RESEARCH PRIORITIES FOR AIRBORNE PARTICULATE MATTER 1-2 (1998) [hereinafter NRC REPORT]; *see also* CONFERENCE REPORT, Report 105-297, 105TH CONG., 1ST SESS., MAKING APPROPRIATIONS FOR THE DEPARTMENT OF VETERANS AFFAIRS AND HOUSING AND URBAN DEVELOPMENT, AND FOR SUNDRY INDEPENDENT AGENCIES, COMMISSIONS, CORPORATIONS, AND OFFICES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1998, AND FOR OTHER PURPOSES 112-15 (1997).

50. NRC REPORT, *supra* note 49, at 8.

> specific types of particulates that might cause adverse health effects, the contributions of particles of outdoor origin to actual human exposures, the toxicological mechanisms by which the particles might cause adverse health effects, and other important questions. These questions are not presented here as a rationale for abandoning efforts to control public exposures to fine particulate matter and the other pollutants, but they do indicate the critical need for better scientific knowledge to guide such efforts.[51]

In other words, in the absence of any statutory or scientific guidance, the EPA has "shot first," and only now is being forced by Congress to figure out where to aim.

Nowhere is the uncertainty more apparent than in connection with the utility industry. In its filing before the Federal Energy Regulatory Commission (FERC) in the open-access Notice of Proposed Rulemaking (NOPR),[52] for example, the EPA said that "[e]lectricity production represents the single greatest cause of fine particle pollution, when secondary formation of nitrates and sulfates from SO_2 and NOx emissions are taken into account."[53] Two years later, the EPA was much less certain about this, stating in its Statement of Basis and Purpose for the $PM_{2.5}$ rule, as noted above, that SO_2 may not be a factor in $PM_{2.5}$ formation, especially indoors where most people spend most of their time.[54]

The ultimate confirmation of this aimlessness comes with the EPA's unwillingness or inability to provide for implementation of the PM rule (and perhaps the ozone rule as well) on a level playing field pursuant to the kind of market incentives that made possible the three most successful pollution reductions in history: the lead phase down of the early 1980s, the phaseout of CFCs, and the ongoing acid rain program under Title IV of the CAA.[55] The EPA supported the FERC's open access rule because a more efficient electricity industry is a less polluting one, noting that "[w]e believe that, as a nation, we will not meet our health-based National Ambient Air Quality Standards until there is an open, competitive

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51. *Id.* at 2.

52. Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Request for Comments on Alternative Pricing Methods, 60 Fed. Reg. 8356 (1995), FERC Docket No. RM 95-6-000.

53. Comments of the Environmental Protection Agency, *in* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, FERC Docket No. RM 95-8-00; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, FERC Docket No. RM 94-7-001, at 16 (Aug. 7, 1995) [hereinafter EPA's Open Access Comments].

54. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,662 (1997) (to be codified at 40 C.F.R. pt. 50).

55. CAA §§ 401-416; 42 U.S.C. §§ 7651-7651*o* (1994).

electrical industry."[56] The EPA went on to say that it "is committed to flexible, market-based air quality regulations to encourage innovation and achieve clean air in the most cost-effective manner"[57] and that it "believes that open transmission access could enhance both economic efficiency and encourage market-based environmental protection."[58] The message was clear: the better the market for electricity, the better the market for pollution control.

In reality, however, the EPA cannot now say whether or not it will allow the establishment of an acid rain-like cap and trade system for reducing $PM_{2.5}$ precursors, because it does not yet understand the relationship between those precursors well enough to allow trading between them. The best the EPA can say now is that as detailed data on the chemical composition of $PM_{2.5}$ in different areas becomes available, it "will encourage states to work together to use a cap-and trade approach" if the future research suggests that regional reduction strategies will help compliance.[59] But, it seems fairly obvious that if the EPA does not understand how potential PM precursors relate to each other, it cannot understand how or even whether to regulate them at the outset.

One cannot escape the suspicion that there is another reason the EPA is now reluctant to embrace market based incentives—namely, that a transparent and level playing field reduces, if not eliminates, the EPA's ability to pick and choose regulatory targets depending upon the political necessities of fending off a congressional override of the rule. Thus, as Congressman John D. Dingell (D-16th MI) has observed,[60] the EPA made numerous political deals, including promising Congress that it would not regulate politically powerful farmers, notwithstanding the EPA's own acknowledgment in the rule that implementation of a standard is up to the states in their SIP programs and that "there is nothing EPA can do in setting the NAAQS to tailor those programs as they apply to small entities."[61] And despite the EPA's supposed lack of power in this area, it announced with the rule a $10,000 per ton technology cost limit for compliance expenses on the grounds that "[i]t was agreed that $10,000

56. EPA's Open Access Comments, *supra* note 53, at 2.

57. *Id.* at 3.

58. *Id.* at 6.

59. Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, 62 Fed. Reg. 38,421, 38,428 (1997).

60. Representative John Dingell (D-MI), Remarks at National Press Club Newsmaker Luncheon (regarding the new EPA Clean Air Standards) (July 20, 1997), *reprinted in EPA Clouding the Clean Air Debate*, WASH. TIMES, Sept. 7, 1997, at B1.

61. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,705 (1997) (to be codified at 40 C.F.R. pt. 50).

per ton of emission reduction is the high end of the range of reasonable cost to impose on sources."[62]

It is, of course, impossible to have a market for pollution control like the one set up for acid rain, which the EPA admits "delivered environmental benefits at a greatly reduced cost,"[63] if the government sets the price and determines who can buy and sell. This technique is not what the authors of the CAA had in mind. Section 110(a)(2)(A) provides that state SIPs "shall" include emission limitations and "other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights) . . . as may be necessary or appropriate to meet the applicable requirements of [the CAA]."[64] Thus, the EPA finds itself ignoring a cost-saving provision of the CAA, because it does not know enough about either the harms or the benefits of the targeted pollution to use economic incentives and because using such transparent even-handed incentives would preclude use of the command and control gerrymandering necessary to make the standard politically palatable.

So, here we have truly come full circle. The EPA refuses to entertain cost-benefit considerations, at least for purposes of judicial or congressional accountability, because *Lead Industries* states that the CAA says the only thing that counts is the EPA's official view of the adverse effect of the particular pollutant under scrutiny. Then, the EPA goes ahead and engages in the most exquisite cost-benefit manipulation, including exempting farmers, targeting utilities, foregoing the benefits of cost-saving economic incentives required by the statute, proceeding in the face of "crucially inadequate" science, setting a compliance cost ceiling in violation of the statute, exploiting the curious asthma epidemic for political purposes at the expense of medical truth,[65] and biasing the benefit considerations by excluding consideration of side-effects or "dis-benefits"—all in a manner designed to shield its actions from any accountability by the other two branches of government (and the White House as well, it might be added).

IV. THE NONDELEGATION DOCTRINE

If this is not the standardless exercise of legislative power—or "delegation running riot" to use Cardozo's famous phrase[66]—it is difficult

62. Implementation Plan for Revised Air Quality Standards, 62 Fed. Reg. at 38,429.
63. *Id.* at 38,428.
64. CAA § 110(2)(2)(A), 42 U.S.C. § 7410(a)(2)(A) (1994).
65. *See* WASH. TIMES, *supra* note 43, at A18.
66. A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

to imagine what could be. Perhaps the most revealing insight is the use of the passive voice in the compliance memorandum accompanying the President's decision on PM/ozone to describe the $10,000 per ton compliance cost cap: "It was agreed that $10,000 per ton of emission reduction is the high end of reasonable cost to impose on sources."[67] "It was agreed?"[68] By whom and according to what criteria and subject to what standard of judicial review? Of course, there is no standard and there is no judicial review, because *Lead Industries* makes clear that Congress meant for costs to be totally irrelevant, citing as a representative view the harsh conclusion made by the Senate Committee Report on the 1970 CAA in order to force technology: "Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be shut down."[69] Nor is the EPA permitted to consider economic or technical feasibility in reviewing SIPs.[70]

So in Alice-in-Wonderland style, the EPA's successful assertion in court that it cannot consider costs has freed it to consider costs in a way that no one can shape or review. A $10,000 per ton cap is no doubt better than no cap at all, because five-figure tons are very expensive tons indeed, difficult to justify in the absence of a closed, captive market on to which to pass the costs without triggering plant relocations abroad. One could argue in favor of a $5,000 per ton figure as the best market clearing price at which costs can be imposed without sending production abroad or shutting it down altogether. But, this decision is not for the EPA to make, at least not without some guidance and review. As Chief Justice Rehnquist observed in *Benzene*, "[t]he decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy."[71]

Compounding the "black box" nature of the EPA's arrogation of authority is its refusal, noted above, to permit open and transparent trading of marketable permits as required by the CAA, and its decision to establish instead a "Clean Air Investment Fund" to trade undisclosed reductions of other pollutants for $10,000 per ton payment made by sources in lieu of installation of its own controls.[72] This would allow the EPA to micro-manage and maintain control over who wins and who loses

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67. Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, 62 Fed. Reg. 38,421, 38,429 (1997).

68. *Id.*

69. Lead Indus. Ass'n, Inc. v. EPA, 647 F.3d 1130, 1149 (D.C. Cir. 1980) (quoting S. REP. No. 91-1196, at 3 (1970)).

70. *See id.*

71. *Benzene*, 448 U.S. 607, 686 (1980).

72. Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, 62 Fed. Reg. 38,421, 38,429 (1997).

from the allocation of the regulatory burden that the CAA commits, in the first instance, to the states and then to the market through economic incentives but in no instance to the EPA itself. The EPA is forced into this position because, as noted above, it does not know enough about the relationship of PM precursors to allow trading between them. If that is not known, then the EPA has no business regulating the precursors at the outset, let alone playing industry price fixer and broker, especially when there is no hint of statutory authority for the EPA's "Fund."

The use of a $10,000 figure looks deceptively neutral, but, in fact, it can have a dramatically different impact depending on the size of a source, its market power, and its vulnerability to foreign competition. As the D.C. Circuit said in another OSHA nondelegation case decided under *Benzene*,

> even the use of general standards leaves opportunities for dangerous favoritism. The cost of compliance with a standard will vary among firms within an industry, so the power to vary the stringency of the standard is the power to decide which firms will live and which will die. At the simplest level, for example, compliance may involve economies of scale, so that a tough standard will erase small, marginal firms and leave the field to a small group of larger ones.[73]

This situation is especially troubling where there are no opportunities for trading below $10,000 a ton.

The fact is that the entire PM/ozone effort is a massive exercise of unguided industrial policy based on a Rube Goldberg-like, gerrymandered set of regulatory indulgences designed to reward or punish political friends or enemies for the purpose of enhancing adoption of the rules, not advancing the environment. The EPA thus decided to protect the farmers and small business, taking immediate action only against the utility industry that has been distracted and politically weakened by the restructuring and deregulation of the industry and that, as a result, has had to husband its political capital for other purposes. The most delicious indulgence is the one the EPA gave to the West in the form of relaxation of the existing PM_{10} standard (by changing the one-hour to an eight-hour standard),[74] notwithstanding the fact that most of the evidence of harm cited in support of the $PM_{2.5}$ rule is in fact data on PM_{10}. The point was to placate the western congressional delegations rightly concerned about ordinary dust.

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73. International Union, United Auto, Aerospace & Agric. Implement Workers of Am., UAW v. OSHA, 938 F.2d 1310, 1318 (D.C. Cir. 1991).

74. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) (to be codified at 40 C.F.R. pt. 50).

The EPA's unguided policy making is not simply occurring on a blank slate of delegated authority; it is in fact indirectly erasing much of the CAA and ousting Congress of its jurisdiction over the Act. Thus, as noted above, it is illegally preempting the states' authority over implementation by walling off certain sources from state regulation; it is ignoring the CAA's direction to the states to use economic incentives[75] and instead operating the market itself through an unauthorized "Clean Air Fund;" it is setting itself the price for emission reductions, notwithstanding its own successful judicial arguments that it is precluded from considering costs; and it is completely rewriting the carefully worked out implementation schedule for ozone attainment known as subpart D.[76] Most importantly, it has asserted jurisdiction over a surrogate for all pollution ($PM_{2.5}$) without any understanding either of what exactly the surrogate consists of—other than anything and everything—or of what exactly it does to harm the public health, so that it is now free, unless checked by the courts, to regulate any and all pollutants down to background levels whenever the spirit moves it to do so.

There is, in these circumstances, no need for any CAA at all, or for any of the kind of periodic reviews and revisions that have occurred over the last three decades to bring the CAA up to date. There is no need or room for any further congressional direction, fine tuning, or even oversight, because there is no pollutant for which the EPA will not be able to prescribe background-level standards some time in the future. This open-ended authority derives from the fact that there are virtually no threshold pollutants given today's measuring techniques and from the power asserted by the EPA in the $PM_{2.5}$ rule, but rejected for the OSHA by *Benzene*[77]—to generalize from epidemiological data linking a pollutant to premature death at one level of that pollutant to adverse health effects at any level and from there to reduce that pollutant to zero. This conflict on nondelegation grounds with the Supreme Court in *Benzene* ought to be enough to merit reversal. *Lead Industries* also conflicts with a D.C. Circuit offspring of *Benzene* known as the "lockout-tagout case" that forbade the OSHA to do what *Lead Industries* said the EPA could do, namely, "choose freely among levels of stringency, from adopting no standard at all to adopting the most stringent standard feasible."[78]

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75. CAA § 110, 42 U.S.C. § 7410.

76. *See, e.g.*, Subpart D, 40 C.F.R. §§ 60.40-60.48(c) (1997).

77. *Benzene*, 448 U.S. at 654.

78. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. UAW v. OSHA, 37 F.3d 665, 668 (D.C. Cir. 1994). Actually, *Lead Industries* ruled that the EPA

Is there enough life in the nondelegation doctrine to deal with this state of affairs? There are, of course, numerous legal challenges to the PM/ozone rules that could and should succeed, such as the lack of scientific support for $PM_{2.5}$ after Footnote 90 and the absence of significant improvement for the ozone rule, the total conflict with Subpart D of the ozone rule, and both rules' defiance of the statutory commitment to state SIPs and the use of economic incentives. But, the nondelegation doctrine—if alive—puts all of these arguments in better understood context and in bolder relief.

The case law seems strong enough not to have the CAA declared unconstitutional, but to have it construed as narrowly as OSHA's statute was in the *Benzene*, *Cotton Dust*,[79] and the lockout-tagout cases. There is, of course, evidence of nondelegation life beyond just the OSHA.[80] Although Judge Silberman once described the nondelegation argument as "only a shadowy limitation on congressional power,"[81] more recently in a speech in Washington, D.C., before the Federalist Society, he cited the need for courts to test agency claims of expansible legislative authority against the nondelegation doctrine.[82] Finally, there is Judge Hogan's opinion in the line item veto decision, where he discusses the nondelegation doctrine as grounds for holding the line item veto unconstitutional.[83]

As indicated above, the nondelegation doctrine should be applicable in the PM/ozone cases not to have the CAA declared unconstitutional, but rather to have it implemented pursuant to criteria that lend accountability to the process. As noted above, a court could remand the rules for lack of sufficient evidence or for inconsistency with subpart D's or Section 110's requirements for use of economic incentives,[84] but that course would provide little future guidance either for these rules on remand or for future rules where the EPA may be equally emboldened to legislate unless clearly tied down to accountable standards now. Indeed, the EPA's sorry win-loss record in the courts over the last six years strongly suggests that case-by-case reversals have not provided adequate systematic guidance and that something more comprehensive may be required.

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was not even constrained by feasibility. Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1149 (D.C. Cir. 1980).

79. American Fed'n of Labor and Congress of Indus. Orgs. v. OSHA, 965 F.2d 962 (11th Cir. 1991).

80. *See, e.g.*, South Dakota v. Department of Interior, 69 F.3d 878, 886-89 (8th Cir. 1996).

81. Chamber of Congress v. Reich, 74 F.3d 1322, 1326 (D.C. Cir. 1996).

82. The Honorable Laurence H. Silberman, Circuit Judge, U.S. Court of Appeals, D.C. Circuit, Speech before the Federalist Society (Oct. 18, 1997).

83. *See* City of New York v. Clinton, 985 F. Supp. 168, 177-81 (D.D.C. 1998).

84. CAA § 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A) (1994).

V. THE EXISTING LEGISLATIVE ANSWER

What is necessary here: Legislation embodying some form of cost-benefit balancing or use of economic incentives to reduce costs, maximize benefits, and eliminate regulatory gerrymandering? Given the EPA's refusal to comply with the existing statutory scheme (behavior not unique to the EPA by any means), it does not make much sense to enact another statute it can also ignore. The best option is for the courts to enforce the existing framework as informed by the nondelegation doctrine, as the courts did earlier with *Benzene* and its progeny.

More precisely, what the courts should do here is apply the analysis of *Benzene et al.* to the CAA and the EPA, along with (a) a publicly-accountable and judicially reviewable application of the cost-benefit approach used by the EPA itself and (b) enforcement of the 1990 CAA Amendments that, as noted above, introduced cost considerations for the EPA and the states to take into account. This combination would satisfy both the statute and the nondelegation doctrine for the PM/ozone rules and all future standards and rules as well. It is important to indicate that the following discussion does not suggest applying formally to the EPA any analysis materially different from the approach that the EPA has been following internally for years and, with the modifications introduced by the 1990 CAA Amendments, used in these particular rulemakings.

VI. BENEFITS

The starting point, as always, is to look at the benefit side of the equation, that is, what adverse health effect is being targeted for elimination. This is not as easy at it might seem on the surface. There are at least two confining qualifications on the identification of benefit, or avoided harm, that the EPA has rejected and that would substantially guide the exercise of the EPA's discretion. The first is how clear the harm or benefit must be before the EPA can act. In *Benzene*, without any statutory language to point to and relying almost solely on the nondelegation doctrine, the Supreme Court determined that the protection to worker health at issue had to involve a "significant risk," the necessary showing for which, at a proposed level of 1 ppm, could *not* be supplied by evidence of risk at 10 ppm (as supplemented by a theoretical linear dose-response curve).[85] In *Lead Industries*, by contrast, the D.C. Circuit rejected an argument that the CAA required evidence of "clear harm" to satisfy the CAA, although the court did say that there had to be

85. *Benzene*, 448 U.S. 607, 636-37 (1980).

supporting evidence for the particular level the EPA decided to pick.[86] It is quite possible, of course, that a reviewing court today could say there is no need here to reconcile the potential conflict between significant risk and "unclear" harm, because even under *Lead Industries*, the EPA's Footnote 90 in the $PM_{2.5}$ rule means the EPA failed to meet that case's evidentiary requirement. However, for future guidance, the better course for a court to follow would be to say that where, as here and as in *Benzene*, but not *Lead Industries*, there has been substantial regulation of the pollutant already—in this case that regulation could be described as massive—the EPA cannot propose massive *future* regulation of the pollutant without showing that there is a continuing significant health risk at ever diminishing levels of pollution. This is the holding of *Benzene*, and it ought to apply to the outdoors, where the overall risk is far less than it is indoors where people spend most of their time. As will be shown below, this deference to the law of diminishing returns is surprisingly consistent with the approach followed by the EPA in practice.

The second qualification concerns the issue of "dis-benefits" or substitution risks, also known as "adverse side effects" in the world of new drug applications at the Food and Drug Administration. That is, are there any collateral consequences of eliminating some pollutant, just as some new drug may solve one problem but contribute to another? An example was the EPA's phaseout of lead—the subject of the *Lead Industries* case itself. The elimination of lead, which supplied octane to gasoline, triggered the need for the oil companies to find another source of octane enhancement. The new octane source, which no one focused on at the time, was, ironically, the same substance under review in the *Benzene* case, namely, benzene and its cousins toluene and xylene.[87] The problem with benzene was that, as a carcinogen, it is possibly more toxic than lead; it is especially photochemically reactive for ozone purposes; and it hinders the operation of the catalytic converter (though not as badly as lead). As a result, it had to be forced out by the 1990 CAA Amendments at the cost of billions that could probably have been avoided had anyone thought about it at the time the lead decision was made.[88]

There are several potential dis-benefits or substitution risks here. For ozone, there is substantial scientific evidence that further reduction of ozone will so increase exposure to ultraviolet radiation as to cause more

86. Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1160 (D.C. Cir. 1980).

87. *See generally Benzene*, 448 U.S. at 607.

88. *See* CAA § 211(k), 42 U.S.C. § 7545(k) (1994) (reformulated gasoline provisions, setting limits on benzene, aromatics, and air toxics).

cancer than the ozone rule might otherwise produce.[89] For PM, there is some question that further removal of sulfates will aggravate the heating of the atmosphere for global warming purposes because there will be fewer particles to reflect sunlight back into space. For both rules, there is ample literature demonstrating that higher electrical prices, which these rules will surely trigger if they do nothing else, will quite literally kill low-income people during heat waves either because they cannot afford air-conditioning or they turn it off (remember that air conditioning also screens out at least a substantial portion of $PM_{2.5}$).[90]

The EPA has taken the position that the CAA, by focussing solely on the public health effect of "each air pollutant" individually in Section 108[91] precludes the EPA from considering secondary or tertiary consequences that may involve another pollutant or other health effect. These other effects, the EPA says, should be considered during the implementation stage, not earlier.[92]

History suggests, however, that, as in the case of lead, later may be too late. It takes a lot of time to regulate a new risk, and there is the potential for much harm in the interim. More importantly, the CAA, perhaps for this reason, does not impose such tunnel vision on the EPA. Once a criteria pollutant is identified under Section 108,[93] Section 109 requires the EPA to promulgate the standard itself that must be "requisite to protect the public health,"[94] a concept far broader than just the regulation of each air pollutant. If a particular standard, for whatever reason, causes more public health harm than good, it is difficult to see how that standard satisfies Section 109 to "protect the public health."[95]

Although many experts may differ, to this author the biggest substitution risk is the risk of heat prostration and related problems resulting from curtailed air conditioning use. Numerous studies by the government of past heat waves have shown that the lack of adequate air conditioning in residences during summer heat waves can increase mortality. Since nearly seventy percent of American households had air

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89. *See generally* Randall Lutter & Christopher Wolz, *UV-B Screening of Tropospheric Ozone: Implications for the National Ambient Air Quality Standard*, 31 ENVTL. SCI. & TECH. 142A (1997).

90. *See* Platts-Mills & Carter, *supra* note 42, at 1383.

91. *See* CAA § 108, 42 U.S.C. § 7408 (sets forth the framework for the EPA to list ambient air pollutants for standard setting).

92. *See* EPA, RESPONSE TO SIGNIFICANT COMMENTS ON THE 1996 PROPOSED RULE ON THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE 128-33 (1997) [hereinafter RESPONSE TO COMMENT].

93. CAA § 108, 42 U.S.C. § 7408 (1994).

94. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1).

95. *Id.*

conditioning according to the 1990 census,[96] raising the cost of operating these units will certainly have an effect on the quality of many American lives through increased stress due to heat and humidity and, potentially, even loss of life. The *New England Journal of Medicine* suggests that air conditioning was responsible for saving many lives in the heat wave of 1995 in Chicago.[97] This study looked at the causes of at least 700 excess deaths to determine who was at greatest risk for heat-related death.[98] People most at risk were those with medical illness, those socially isolated, and those who did not have access to air conditioning.[99] In fact, the study found that the risk of death was reduced for people with working air conditioners by eighty percent, as well as reducing the mortality due to cardiovascular disease by sixty-six percent.[100] In closing, the study stated: "Access to air-conditioned environments is the factor with the greatest protective effect with respect to heat-related mortality. We found that people who lived in apartments without air conditioning had a lower risk if they had access to an air-conditioned lobby."[101]

One EPA and National Oceanic and Atmospheric Administration (NOAA) study of deaths in a New York City heat wave in 1966 claimed the death rate more than doubled a day after the maximum temperature of 103 degrees was reached.[102] According to this same study, in one three-day period, for example, the cancer death toll rose from forty-three to ninety-eight per day while heart failures jumped from eighty-eight to 230 a day.[103] Carl A. Posey, a spokesperson for NOAA, maintained that high energy costs were killing people:

> The cost of cool air moves steadily higher, adding what appears to be a cruel economic side to heat wave fatalities preliminary indications from the 1978 Texas heat wave suggest that some elderly people on fixed incomes, many of them in buildings that cannot be ventilated without air conditioning, found the cost too high, turned off their units, and ultimately succumbed to the stress of heat syndrome. When a human's heat limits are exceeded, he does not doze reptile-fashion, he dies.[104]

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96. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 739 (1995); *see also* 1991 DEPT. OF COMM. & DEP'T OF HUD, AMERICAN HOUSING SURVEY FOR THE UNITED STATES IN 1991 5.

97. Jan C. Semenza et al., *Heat-Related Deaths During the July 1995 Heat Wave in Chicago*, 335 N. ENG. J. MED. 84 (1996).

98. *See id.* at 86.

99. *See id.* at 84.

100. *See id.* at 86-87.

101. *Id.* at 90.

102. Randolph E. Schmid, ASSOC. PRESS, Aug. 6, 1979 (on file with author).

103. *See id.*

104. *Id.*

Apparently, the EPA itself has done significant research on the topic of air conditioning's life-saving capability.[105] Another EPA study showed air conditioning saved lives during a heat wave.[106] According to the Chicago Tribune, "[r]esearchers for the U.S. Environmental Protection Agency estimated that in New York more than 3,500 deaths were avoided between 1964 and 1988 because of air conditioning. That number is equal to 21 percent of all heat-related deaths in that period."[107]

Other federal agencies have shown concern about the dangers of heat waves and the lack of air conditioning. In 1982, the Federal Centers for Disease Control and Prevention published a study of the deaths associated with the July 1980 heat wave in Kansas City and St. Louis, Missouri.[108] Not surprisingly, lack of air conditioning was the most critical factor in the fatalities; those without it had a fifty percent greater risk of dying.[109]

These studies are also supported by the many reports in the press about the benefits of air conditioning. According to one article by *The New York Times* news service, the inability to afford air conditioning was a factor in the many deaths in 1995 in Chicago:

> The one factor common to heat victims was a lack of air conditioning. Dr. Zun and others point out that while there were hundreds of deaths in Chicago in the hot spell, only 80 people died of heat in the same period in more affluent Cook County suburbs. "Folks in the suburbs, with a lot of air conditioners," Dr. Zun said, "didn't have the same kind or amount of problems we had in the city."[110]

There is, in short, a great deal more evidence linking death to higher electricity costs than to $PM_{2.5}$.

The problem is compounded because the EPA simply has no clue about how much $PM_{2.5}$ penetrates indoor air conditioning or how much humidity, which is eliminated by air conditioning, may be a confounding factor in the $PM_{2.5}$ epidemiology studies that the EPA no longer relies upon; there is simply no data relating air conditioning use to the deaths involved in the studies. But, we do know that the PM_{10} study by

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105. Stevenson Swanson, *Is Being Cool Our Right or just a Privilege?*, CHI. TRIB., Aug. 6, 1995, at 1C.

106. *See id.*

107. *Id.*

108. Joseph J. Ramm & Christine A. Ervin, *How Energy Policies Affect Public Health*, 111 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH REPORTS 390 (Sept. 19, 1996).

109. *Id.*

110. Don Terry, *Killer Heat Teaches City Grim Lessons: Experts Warn that Others Could Suffer Like Chicago*, DALLAS MORN. NEWS, Oct. 8, 1995 (quoting Dr. Leslie Zun of Mt. Sinai Hospital).

Schwartz was reanalyzed and its PM effect found statistically insignificant when humidity was included.[111] As a result, the EPA has absolutely no idea whether implementation of the $PM_{2.5}$ rule might not actually kill more people than it saves, if in fact it would save anybody.

The EPA also contends that Congress made the dis-benefit preclusion clear in amending the CAA in 1977 in Section 109 to direct CASAC to offer the EPA advice "in several areas, including any 'adverse public health . . . effects which may result from various strategies for attainment and maintenance'" of the standards.[112] But, this amendment would seem to reinforce the obvious point that the EPA is *required* to take dis-benefits into account, not prohibited from doing so. The EPA tries to turn this upside down by saying that the legislative history shows the advice was not for the EPA but for the benefit of the states for SIP implementation or Congress for future legislation.[113] This proposition is absurd on its face, because the statute directs CASAC to advise the EPA, not the states or Congress.[114] It is not irrelevant here that when it comes to advantageous rather than adverse side effects, or what might be called "co-benefits" rather than dis-benefits, the EPA rarely ever hesitates to take them into account.

VII. COSTS

What about the cost side of the equation? As any EPA employee or practitioner knows, the EPA has for a long time taken costs into account in its decision-making. The beauty of saying that it is officially precluded from doing so means that it can do so unofficially without any review by the courts or Congress. But it does so nonetheless. In its regulatory impact analysis (RIA) for the PM/ozone rules, the EPA makes the Yogi Bera-like statement that "this prohibition against consideration of cost does not mean that cost or other economic considerations are not important or can be ignored. In fact, the Agency believes that consideration of costs is an essential decision-making tool."[115] The Agency goes on to say:

> The consideration of cost and, to be more specific, the use of cost-benefit analyses, provides a structured means of evaluating and comparing various

111. Davis et al., *supra* note 39.

112. RESPONSE TO COMMENTS, *supra* note 93, at 128-33 (quoting CAA § 109(d)(2)(C), 42 U.S.C. § 7409(d)(2)(C)).

113. *See id.*; *see also* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,685 n.65 (1997) (to be codified at 40 C.F.R. pt. 50).

114. CAA § 109(d)(2)(C); 42 U.S.C. § 7409(d)(2)(C).

115. EPA, REGULATORY IMPACT ANALYSIS FOR PROPOSED PARTICULATE MATTER NATIONAL AMBIENT AIR QUALITY STANDARD, ES-1 (Dec. 1996) [hereinafter RIA].

> implementation policies, as well as a means of comparing the variety of tools and technologies available for air pollution control efforts. The Agency has found the use of such analyses to be of significant value in developing regulatory options over the years.[116]

The EPA seems to be trying to say that either it or the states can take costs into account for implementation purposes but not for standard-setting purposes. But, apart from the fact that, as the PM/ozone rules make clear, standard-setting cannot easily be separated from implementation, there is no statutory or judicial basis for the EPA or the states to compartmentalize standard-setting and implementation as unrelated issues or to use cost-benefit in implementation but not standard-setting. The EPA acknowledges as much by summarizing the Supreme Court's and D.C. Circuit's views as follows: "[S]tates may consider economic and technological feasibility . . . only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards."[117] The EPA may not consider such factors at all in deciding whether to approve state SIPs.[118] Since deadlines have never been met, consideration of costs has never been permissible. As noted above, one of the purposes of the original CAA was to force technology; if a source could not meet the standard, it would have to be shut down. Since implementation was exclusively up to the states in any event, the EPA was never supposed to have any implementation strategy and, as we have seen, was not even supposed to tell the states what sources they could or could not control.

Again, in practice, as everybody knows, the EPA runs almost everything from Washington and, therefore, must have the best cost information it can get. In doing the RIA, for example, the EPA calculated the total cost figure for compliance only after settling upon $1 billion/μg/m3 as the cut-off point for making the calculations.[119] That is, the EPA said that no further controls will be required when the costs exceed the $1 billion cut-off; the purpose is "to eliminate extreme measures that are unrealistically cost-ineffective."[120] How does the EPA know? The reason is the result of an analysis of two cities (Philadelphia and Denver) that "indicated that higher cut-offs achieve minimal air

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116. *Id.* at ES-2.

117. *See* Lead Indus. Ass'n v. EPA, 647 F.2d 1149 n.37 (D.C. Cir. 1980) (citing Union Elec. Co. v. EPA, 427 U.S. 246, 257-58, 266 (1976)); *see also* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,684 (1997) (to be codified at 40 C.F.R. pt. 50).

118. *See Lead Industries*, 647 F.2d at 1149 n.37.

119. RIA, *supra* note 115, at ES-6 to 7.

120. *Id.*

quality improvements at unreasonably high cost."[121] Presumably, this data is the basis for capping control costs at $10,000 a ton in the rule. So much for the prohibition against considering costs. The fact is that the EPA has been observing the law of diminishing returns for a long time, and it would be absolutely idiotic not to do so. The problem, however, as Chief Justice Rehnquist said in 1980, is that this is quintessentially a job for Congress to spell out, and not for an agency, namely the EPA, to conduct behind closed doors.[122]

How can one square what the EPA has been doing, and should continue to do, albeit on the record and subject to judicial review, with *Lead Industries*? Maybe, as suggested above, the D.C. Circuit or the Supreme Court has to overrule *Lead Industries* in favor of the lockout-tagout decision,[123] or *Benzene*. If necessary, that should be done, because the conflict should not be allowed to persist any longer. But a strong case can be made that the 1990 CAA Amendments effectively "overruled" *Lead Industries* with a far-reaching provision that the EPA has acknowledged but misconstrued. The particular provision at issue is the change made in 1990 in Section 110 to require SIPs to incorporate economic incentives.[124] This, in turn, requires the agency and the states to have a full understanding of costs and all compliance alternatives, because it is impossible to structure incentives without that understanding.

During the hearings on the 1990 CAA Amendments, EPA Administrator Reilly explained that "[w]e do want to be careful . . . that the control measures imposed by the federal government are as cost-effective as possible. The President's bill reflects this effort."[125] He went on to say that

> [t]his bill incorporates more economic incentives than any environmental law ever passed in this country. . . . In this bill [the President] brings the force of the marketplace to bear in our national effort to protect air quality. In doing so he is not only proposing a fundamental change in the way we approach air pollution control in this country, he is also giving momentum to an idea that is shared by many people on Capital Hill today . . . . This bill gives industry a great deal of flexibility in meeting clean air goals, and it gives it economic flexibility to take advantage of that flexibility.[126]

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121. *Id.*

122. *Benzene*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring).

123. International Union, United Auto, Aerospace & Agric. Implement Workers of Am., UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991).

124. CAA § 110, 42 U.S.C. § 7410.

125. *Clean Air Amendments of 1989: Hearing on S. 816 and S. 196 Before the Subcomm. On Environmental Protection of the Senate Comm. on Environmental and Public Works*, 101st Cong. 78 (1989) (statement of William Reilly, EPA Administrator).

126. *Id.* at 78-79.

As detailed above, the EPA acknowledges the role of economic incentives, but it makes only the weakest promise to allow them in the ozone rule, and it defies the statute in the PM rule by setting up a Clean Air Fund that substitutes the EPA for the marketplace envisioned by Reilly as the mechanism for setting price and allocating burden. Thus, the EPA is in denial about the fundamental change made by the CAA Amendments of 1990. Ironically, the White House seems to understand the importance of these incentives on the global stage, having made them a centerpiece of its Global Warming initiative.[127] The EPA should give this fundamental change in Section 110 the same scope domestically. There are probably two explanations for why the EPA has not done so. The most obvious is that full compliance with the change would acknowledge the CAA's adoption of cost consideration, subject to judicial review. The second is that compliance would preclude establishment of a PM rule until the EPA understands what it is trying to regulate well enough to make the use of transparent economic incentives possible. Both explanations, of course, underscore the importance of complying with Section 110.

VIII. CONCLUSION

Making open and accountable use of economic incentives and the law of diminishing returns, as well as demanding that there be benefits to the public from a rule net of any offsetting side-effects or dis-benefits, would save the CAA and the EPA from vulnerability under the nondelegation doctrine. It would also produce more expansive air quality benefits, because costs saved in implementation can be redirected to providing benefits. That, indeed, is the basic lesson of the fundamental change made to the CAA in 1990 to require use of economic incentives: as illustrated by the success of the Title IV Acid Rain allowance trading program[128] that has produced more than 135% of the targeted benefits at less than one-fifth the cost, use of economic incentives in enforcement produces huge air quality dividends.[129] There is, in short, no need for a cost-benefit statute. The EPA already has one, even if it may need the assistance of the *Benzene* nondelegation decision to comply with it.

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127. *See* President's Remarks at the White House Conference on Climate Change, 29 WEEKLY COMP. PRES. DOC. 2108, 2109 (Oct. 19, 1993); President William J. Clinton and Vice President Albert Gore, Jr., The Climate Change Action Plan (visited May 22, 1998) <http://gcrio.cgrio.org/USCCAP/>.

128. CAA §§ 401-416, 42 U.S.C. §§ 7651, 7651*a*-7651*o* (1994).

129. *See* EPA, OFFICE OF AIR AND RADIATION, 1995; 1996 COMPLIANCE RESULTS AND RAIN PROGRAM (1997).

REPRESENTATION AND NONDELEGATION: BACK TO BASICS

*Marci A. Hamilton**

There are those who view the nondelegation doctrine as a dead letter.[1] Some even go so far as to celebrate its passing.[2] Methinks they doth protest too much. The nondelegation doctrine is rooted in the structure of the Constitution, which distinguishes between legislative and executive power. Lawmaking power is given to Congress and enforcement power to the President.[3] In its simplest terms, it is a rule that prohibits Congress from "forsaking its [lawmaking] duties" by handing them off to the executive branch.[4] Rather, Congress must embrace its particular responsibilities, while the Executive does the same. In Justice Kennedy's memorable words, "[a]bdication of responsibility is not part of the constitutional design."[5]

The language of the Constitution would seem to prescribe a bright-line doctrinal approach. For its application, all it would seem to require is a set of definitions—"lawmaking" and "enforcement"—that can be applied to each legislative or executive action, respectively, to determine constitutionality.[6] The United States Supreme Court has not held true to this bifurcation of responsibilities. Rather, avoiding its own constitutional obligation to keep the branches within the Constitution's prescribed parameters, the Court has declined to enforce the Constitution's rule requiring the legislature to make the laws. Indeed, its refusal to enforce with any vigor the Constitution's demarcation of legislative

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1 *See, e.g.*, Peter Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999); Peter Strauss, Comments at the *Cardozo Law Review* symposium "The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives" (Mar. 19, 1998) (transcript on file with the *Cardozo Law Review*).

2 *See id.*

3 *See* U.S. CONST. arts. I, II.

4 Loving v. United States, 517 U.S. 748, 758 (1996).

5 Clinton v. City of New York, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring).

6 *Cf.* HANS LINDE & GEORGE BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 1-7 (1976).

and executive roles is now enshrined in the Court's jurisprudence.[7]

The Court has intoned pragmatic reasons for its refusal to draw such a line, saying that delegation of the details is a practical necessity.[8] In fact, the Court has given Congress considerably more latitude than practical realities require. Under the Constitution's lax rendering of Article I, Congress has had wide latitude to delegate its obligations and need only provide an "intelligible principle" to guide the executive branch's lawmaking.[9] Having started down this path in the 1930s, the cases have slid down the proverbial slippery slope. We have reached the point where Congress regularly delegates its lawmaking responsibilities to the executive branch, whether it be to the President or to an executive agency.[10]

Courts and commentators alike, however, have bypassed the threshold questions necessary to determine whether the doctrine ought to have been diminished. The validity of the nondelegation doctrine turns on an underexamined, crucial constitutional issue—the constitutionally designated roles of the representatives in Congress and the representative in the White House, the President. While both the legislative and executive branches are representative, they are situated in the constitutional scheme quite differently. Examination of those differences recaptures why the nondelegation rule is crucial to liberty and why it deserves to be reinvigorated.

Historical developments have complicated the issues. No longer do we have in the executive branch the one-man show envisioned by the Framers. Rather, we have appended a massive administrative bureaucracy to it. The justification for applying the nondelegation doctrine to the former is not necessarily the same as that for the latter.

Some have presumed that, even if delegation to the President is a constitutional evil, delegation to the executive agencies may

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[7] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989);*see also Loving*, 517 U.S. at 758 (stating that it had "long ago [established] that Congress must be permitted to delegate to others at least some authority that it could exercise itself").

[8] *See Mistretta*, 488 U.S. at 372 ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

[9] *Loving*, 517 U.S. at 771; *Mistretta*, 488 U.S. at 372; J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928);*see* Yakus v. United States, 321 U.S. 414, 424-25 (1944); United States v. Rock Royal Coop., Inc., 307 U.S. 533, 574 (1939); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

[10] *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

not be.[11] There is a meaningful constitutional difference between the President and the administrative bureaucracy. That difference calls for a more nuanced approach to explaining and justifying the nondelegation doctrine than the courts typically have applied.

This Article concludes that the nondelegation doctrine is consistent with the Constitution's intended structure and that it serves important constitutional ends. The Supreme Court's recent warming to its fundamental principles is a salutary development, whether applied to the President or to administrative agencies.

First, I will describe the structure of representation in the Constitution generally. I will then compare legislative representation with the Executive. In the latter case, I will dissect the difference between the President and the administrative bureaucracy. Finally, using the insights gleaned from analyzing the representative structure, I will explain the ramifications for the nondelegation doctrine and, in particular, why it deserves to be revived.

I. REPRESENTATION IN THE CONSTITUTION

The most useful measuring rod for representation under a constitution is direct democracy, or rule by the people. The United States Constitution nowhere provides for direct democracy. While the people enjoy power in the voting booth and through the press, they enjoy no direct power over lawmaking.[12] Only representatives are capable of making legislative decisions. The Framers assumed that every individual exercising power would be tempted to misuse that power either by underutilizing it or by using it overly aggressively.[13] At the same time, they expressed hope that their project of effecting a system of government would preserve liberty. This is what I have called elsewhere the Calvinist paradox of distrust and hope.[14]

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[11] *See, e.g.*, Byrd v. Raines, 956 F. Supp. 25 (D.D.C. 1997), *overruled on other grounds by* Raines v. Byrd, 117 S. Ct. 2312 (1997).

[12] *See* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 535-36 (1994) [hereinafter Hamilton, *Discussion and Decisions*]; Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 15 (1997) [hereinafter Hamilton, *The People*].

[13] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 56-59 (1992) (discussing the "endlessly propulsive tendency [of power] to expand itself beyond legitimate boundaries"); Hamilton, *The People*, *supra* note 12, at 6 ("[P]ower by its very nature is propulsive."); *see also* Hamilton, *Discussion and Decisions*, *supra* note 12, at 540.

[14] *See* Marci A. Hamilton, *The Paradox of Calvinist Distrust and Hope at the Constitutional Convention*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Angela Carmella

Much, or even most, of what was said at the Constitutional Convention was couched in terms of distrust—distrust of the legislature, of the Executive, of the people, of power in general, of religion, of the states, of the large states, and of the small states.[15] It was a *feast of distrust.* Frankly, one can point to precious little in the intervening centuries that would prove their assumptions wrong.

Despite their abiding distrust, many of the Framers were optimistic that a form of government that could serve the national interest without being tyrannical might be crafted. Gouverneur Morris sketched their hope-filled mission in the following terms:

> He came here as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention. He wished gentlemen to extend their views beyond the present moment of time; beyond the narrow limits of place from which they derive their political origin. If he were to believe some things which he had heard, he should suppose that we were assembled to truck and bargain for our particular States. He can-not descend to think that any gentlemen are really actuated by these views. We must look forward to the effects of what we do. These alone ought to guide us.[16]

Given that they trusted nobody and no particular social institution but still believed that they might craft a government geared toward liberty, the Framers' debates focused on finding the appropriate balance of power.[17] The right exercise of power fell between two extremes. The one holding power could exercise it ineffectually *or* tyrannically. Either extreme was unacceptable.[18] The Arti-

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et al. eds., forthcoming 1999) [hereinafter Hamilton,*Paradox of Calvinist Distrust*].

15 *See id.* Distrust of those exercising power was not new to the Convention. It was a staple in the American mindset at least from the Revolutionary War. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 135, 141, 143 (1998).

16 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 240 (Adrienne Koch ed., Ohio Univ. Press 1966) (statement of Gouverneur Morris).

17 James Madison stated that, like the check between the two branches of the national government, the general government would "controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order and harmony of the political System." *Id.* at 89; *see also id.* at 84-85 (statement of John Dickinson); *id.* at 85 (statement of James Wilson); Hamilton,*The People*, *supra* note 12, at 3-4.

18 *Compare* MADISON, *supra* note 16, at 296 (statement of James Wilson) ("The great fault of the existing confederacy is its inactivity."),*with id.* at 288 (statement of Elbridge Gerry) (stating that "all men. . . abuse" the power given them).

cles of Confederation illustrated the former, while King George III typified the latter.

The Framers believed that a balance of power was effected by pitting one social entity against another and by assigning different jobs to different branches. Their theory was that you could not trust either one alone but you might be able to trust both if they were working toward the common good in different and potentially conflicting ways.[19]

The Framers had come to fear the "excesses of democracy"[20] and therefore brought a jaundiced view of the people's ability to rule to the Constitutional Convention.[21] Their distrust was not the result of idealistic devotion to a particular political paradigm. Rather, they shared with their fellow citizens the pragmatic, negative reaction to the state legislatures' abuses of power during the post-Revolutionary era.

In response to the British monarchy, many of the states had stripped the Executive of any real power and placed all of the government's political power in the branch closest to the people, the legislative branch.[22] Without a significant check on their exercise of power, the state legislatures had degenerated into cabals rather than deliberative lawmaking bodies.

At the Convention, James Madison summarized the states' experience under a system dominated by the legislature:

> Experience had proved a tendency in our governments to throw all power into the legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable.[23]

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19 According to Montesquieu:

> Political liberty is to be found only in moderate governments. . . It is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits. Who would think it! Even virtue has need of limits. So that one cannot abuse power, power must check power by the arrangement of things.

MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. 4, at 155 (Anne M. Cohler et al. trans., Cambridge Univ. Press 1989);*id.* ch. 6, at 157 ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty. . . . Nor is there liberty if the power of judging is not separated from legislative power and from executive power.");*see also* WOOD, *supra* note 15, at 152; Hamilton, *The People*, *supra* note 12, at 5.

20 MADISON, *supra* note 16, at 39 (statement of Elbridge Gerry).

21 *See* Hamilton, *Paradox of Calvinist Distrust*, *supra* note 14.

22 *See* WOOD, *supra* note 15, at 409.

23 MADISON, *supra* note 16, at 312 (statement of James Madison);*see also id.* at 34-35

The state constitutions had swung the pendulum too far toward the legislature. The post-Revolutionary state constitutions had set in place governmental schemes that proved legislatures were difficult to control.[24] "The legislature will continually seek to aggrandize & perpetuate themselves; and will sieze [sic] those critical moments produced by war, invasion or convulsion for that purpose."[25] The legislature was characterized as home to "intrigues" and "corruption & cabal."[26] In sum, the legislature—unchecked by other institutions—was likely to become mired in petty politics and the pursuit of power at the expense of the polity.

Thus, the Framers felt obligated to construct a system that generated a better balance of power between branches than the states had achieved.[27] The legislature, as the branch closest to the people, would remain the seat of lawmaking, but the Executive would be vested with significant powers.[28] The two branches might then check each other and thus render the balance necessary to forestall tyranny.

Democracy had its golden moment immediately following the Revolution.[29] If direct democracy ever had a chance of being enshrined in the United States Constitution, that chance was lost when the post-Revolution state legislatures abused their powers and sank into a morass of politics. In the glow of the Revolution's defiance to monarchical authority, the only justification for turning to the legislature, rather than the people themselves, was that direct democracy was impracticable.[30] Had the legislatures proved reliable, the next logical step could have been endorsement of direct democracy.

(statement of Pierce Butler) (opposing to granting Congress significant power until Randolph Plan suggested dividing power between two houses).

24 *See* WOOD, *supra* note 15, at 403-13.

25 MADISON, *supra* note 16, at 322 (statement of Gouverneur Morris); *see id.* at 324 (statement of Gouverneur Morris) (expressing fear that the Executive would be "the tool of a faction, of some leading demagogue in the Legislature").

26 *Id.* at 308 (statement of Gouverneur Morris); *see id.* (statement of James Wilson).

27 *See* Hamilton, *The People*, *supra* note 12, at 4-6 (discussing principle of balance in the Constitution).

28 *See* U.S. CONST. arts. I, II.

29 The *Declaration of Independence* states:

> Governments are instituted among Men, deriving their just Powers from the Consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

30 *See* MADISON, *supra* note 16, at 41 (statement of Pierce Butler).

Yet, the Framers came to the Convention persuaded that direct democracy could not work. Indeed, they brought to the Convention utter disrespect for the people, whom they characterized as "blind," uninformed, and ignorant.[31] For obvious reasons, the *Federalist Papers*, which were propaganda aimed at persuading the people to ratify the Constitution, did not repeat the vitriol heaped on the people at the Convention.[32] Despite the *Federalist Papers*' relative silence on the point, the debates at the Convention and the Constitution's terms strongly suggest that the Constitution rests on the presupposition that the people are not fit to rule by themselves.

Thus, the Framers assailed democracy as the ruination of the Confederation.[33] Far from being persuaded by the post-Revolutionary experience that democracy was a viable political structure, they came armed with the understanding that democracy must be mediated, not only by a legislature but also by an Executive with true power.

The Constitution employs hard-learned political insights and a republican form of government to construct the representation schemes found in Congress and the President. The people have no right to instruct[34] and no right to veto their rulers' decisions, but they are present on a daily basis through the press,[35] and they have the power to check future abuses of power each time they enter the voting booth.[36]

The legislative and executive schemes of representation share certain features. First, each branch is independent of the people. On James Madison's terms, the independence requirement exists for the purpose of making both Congress and the President anti-majoritarian institutions, in the sense that they both bear responsibility to do what is in the nation's interest, even if contrary to the people's views. Thus, both branches operate as a check on popular

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31 *Id.* at 368 (statement of Elbridge Gerry).

32 *See* THE FEDERALIST.

33 *See* MADISON, *supra* note 16, at 74 (statement of James Wilson) ("Representation is made necessary only because it is impossible for the people to act collectively.")*id.* at 75-77 (statement of James Madison); *id.* at 83-84 (statement of James Madison) (discussing the evils of direct democracy).

34 The Constitutional Convention definitively defeated a proposal that legislators should be subject to the right to instruct. *See* ANNALS OF CONGRESS 757-78 (Joseph Gales ed., 1789) (recording congressional debate over the right of the people "to instruct their representatives").

35 *See* U.S. CONST. amend. I ("Congress shall make no law... abridging the freedom of speech, or of the press....").

36 *See* MADISON, *supra* note 16, at 75 (statement of James Madison).

rule for the purpose of serving the common good.[37] Second, each branch is required to report on its activities. Members of Congress are required to communicate to the people by publishing a "Journal of [Congress's] proceedings."[38] The President is required to report on the state of the union to Congress from time to time.[39]

The First Amendment's Speech, Press, and Petition Clauses also institute mechanisms for an exchange of views between citizens and either branch.[40] Thus, both branches operate independently though within sight of the people, who always hold the final trump card—the vote. The roles of these two branches in the polity, however, are very different. Because of the way it is structured, each branch serves the end of balancing power in different ways.

A. *The Structure of Representation in the Legislative Branch*

The Congress is a well-populated and even unwieldy group of individuals. In Article I, the Constitution places many in positions of power for the purpose of representing all.[41] The legislative branch serves the people by filtering the factions in the society and distilling those laws that will best serve the nation.[42] The process of distillation is messy. Like all committees, Congress is incapable of hasty action on most issues. Rather, positions must be funneled through a large number of ports before becoming governing law.

Congress, thus, filters the multitude of interests in the society. Because of its numbers, Congress is capable of mediating a great variety of interests. As a result, it is capable of reaching more nuanced compromises on national issues. To state the matter differently, Congress's sheer size forces representatives to engage in complicated horse-trading to reach the public good. The necessity of horse-trading slows the process, thereby preventing a rush to

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[37] *See id.* at 311-12 (statement of James Madison); THE FEDERALIST No. 47 (James Madison); Hamilton, *The People*, *supra* note 12, at 5-6.

[38] U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy."); *id.* amend. I ("Congress shall make no law... abridging the freedom of speech, or of the press...."); *see also* Hamilton, *Discussion and Decisions*, *supra* note 12, at 540-41 (discussing legislative structure of representation).

[39] *See* U.S. CONST. art. II, § 3.

[40] *See id.* amend. I ("Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peacefully... to petition the Government for a redress of grievances."); *see also* Hamilton, *Discussion and Decisions*, *supra* note 12, at 541-42, 555-58.

[41] *See* U.S. CONST. art. I.

[42] *See* MADISON, *supra* note 16, at 83-84.

judgment. Thus, its size is an advantage in reaching the common good.

Its size is also a detriment. The legislature is presumed to be inherently corruptible because of the "cabals" that form and the "intrigues" that ensue.[43] Because it is a community, it can be tempted to turn its attention inward, away from the needs of the polity, toward the machinations of its own interior politics.[44] There is much to distract the member of Congress from the national good. The longer a member remains in the community, the more enmeshed he becomes.

Absorbed by the war of interests it is supposed to filter, Congress can tend to generate legislation that serves its own ends, rather than those of the country.[45] This was, precisely, the calumny that fell on the post-Revolution state legislatures unchecked by other governmental forces.[46]

B. *The Structure of Representation in the Executive Branch*

The executive branch was included in the Federal Constitution partly to ensure that the legislative power would be checked:

> One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves; and will sieze [sic] those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people . . . against legislative tyranny . . . .[47]

Yet, they feared giving the Executive too much power as well.

From the beginning, the Framers viewed the executive branch as a much less populated branch than Congress. They debated

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[43] *Id.* at 308 (statement of Gouverneur Morris).

[44] *See* WOOD, *supra* note 15, at 162-73 (discussing experience of post-Revolutionary state legislatures).

[45] This is the legislative potential that public choice theorists mistakenly have concluded as the *necessary* nature of the legislative process—a war of interests. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 17 (1984) (arguing that it is appropriate for courts to "treat [a] statute as a contract" where it has been enacted under influence of competing interest groups); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (arguing that economic legislation should be regarded as a "bargain" or a "deal" between the legislature and interest groups); *id.* at 879 (referring to legislation as a "'contract' between the enacting legislature and the group that procured the legislation"); *id.* at 894 ("In our view the courts do not enforce the moral law or ideals of neutrality, justice, or fairness; they enforce the 'deals' made by effective interest groups with earlier legislatures.").

[46] *See* WOOD, *supra* note 15, at 403-09.

[47] MADISON, *supra* note 16, at 322-23 (statement of Gouverneur Morris).

how many might serve as the Executive, but they always envisioned less than a handful of men in the position.[48] While the legislature provided many outlets for the many factions in the society, the Executive was to be the representative of the Zeitgeist, the spirit of the times. A small number, presumably, would not generate cabals and intrigues but could, rather, exercise the sort of decisive leadership missing under the Articles of Confederation.[49]

The Framers presumed that the executive branch would be insufficiently populated to become consumed with the internal politics of the branch.[50] Rather, the very structure of the branch would make such a turn unlikely. The Framers' jaundiced attitude toward the legislature did not mean that they were prepared to embrace an all-powerful Executive. The experience with a monarchy in Britain led many of the Framers to distrust the Executive on principle. Some feared that a single Executive could be transformed into a "hereditary Monarchy."[51] In Randolph's memorable words, a one-man Executive was "the foetus of monarchy."[52] Butler, in turn, feared the Executive's veto power, observing that "in all countries the Executive power is in a constant course of increase . . . . [W]hy might not a Cataline or a Cromwell arise in this Country as well as in others."[53] Legislatures might be feared for their self-absorption and intrigue, but the President might act like a monarch—unilaterally and capriciously. Because the President could operate arbitrarily, he was a dangerous holder of power.

Much of the debate at the Convention over the Executive centered around the fear of a one-man show and the potential for tyranny latent in such a concentration of power.[54] This led the Framers to construct a new role for a national leader, one that would permit the Executive to lead but that would not elevate him above other citizens. The President was to be a unifying force but would hold only limited power. The President was to be a citizen leader subject to the law, not a divinely appointed ruler above the law. "[A]lthough the President 'is placed [on] high,' not a single

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48 *See id.* at 45-47, 59-67.

49 *See* WOOD, *supra* note 15, at 407.

50 *See* MADISON, *supra* note 16, at 59-67; THE FEDERALIST No. 70 (Alexander Hamilton).

51 MADISON, *supra* note 16, at 312 (statement of George Mason) (arguing against motion that the executive should be able to keep his position "during good behavior" because it would lead to life tenure and a "hereditary Monarchy").

52 *Id.* at 46 (statement of Edmund Randolph).

53 *Id.* at 63 (statement of Pierce Butler).

54 *See id.* at 45-47.

privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen."[55]

This conception of the President as a figure that must have the power to rule but must be limited in the exercise of that power led the Framers to assign specific and limited duties to the President.[56] It also led to giving the President no more lawmaking power than the power to veto.[57] The President is given the duties that a single individual, with the right cabinet, can perform—that of commanding armies,[58] negotiating treaties,[59] nominating public officials,[60] and assessing the state of the union[61]—a role that was missing under the Articles of Confederation.

The representative model I began with—an independent decisionmaking authority grounded in a two-way communication process made possible by the First Amendment—describes the Executive just as it describes the legislature. In the case of the Executive, though, its duties are purposefully tailored to make it possible for the President to lead the country in a way not available to the legislative branch. Unlike the ungainly Congress, the President will be tempted to abuse his power because he can act unilaterally. Because of the President's capacity for capricious action, there is reason to be fearful whenever the Executive takes upon itself duties not enumerated in Article II. In particular, domestic national policy determinations are not the bailiwick of this unilateral decisionmaker.[62] These decisions are better left in Congress's tied hands.

C. *The Constitutional Distinction Between the President*

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[55] Clinton v. Jones, 117 S. Ct. 1636, 1645 (1997) (quoting 2J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863)) (alteration in original);*see also id.* at 1646 n.24 ("[T]he common-law fiction that '[t]he king... is not only incapable of *doing* wrong, but even of *thinking* wrong,' was rejected at the birth of the Republic." (citation omitted and alteration in original)).

[56] *See* U.S. CONST. art. II.

[57] *See id.* art. I, § 7, cls. 2-3.

[58] *See id.* art. II, § 2, cl. 1.

[59] *See id.* cl. 2.

[60] *See id.*

[61] *See id.* § 3.

[62] *See* Clinton v. City of New York, 118 S. Ct. 2091, 2105 (1998) (criticizing the Line Item Veto Act for failing to "qualify [the President's] discretion to cancel or not to cancel"); *id.* at 2106 (criticizing the Act for giving President authority to "reject[] the policy judgment made by Congress and rely[] on his own policy judgment");*id.* at 2106 n.35 (criticizing the Act for permitting the President to "reject[]... the policy choice made by Congress"); *id.* at 2106 (criticizing the Act for authorizing the President to cancel piecemeal legislation "for his own policy reasons").

and the Administrative Bureaucracy

In this era, the executive branch contains many more people than the President and his council of ministers. The Framers focused on the Executive as a small branch—one person with a cabinet of department heads confirmed by the Senate.[63] Today, we have administrative agencies appointed by the President. The executive *branch* is no one-man show. It is more populated than even the legislature and more capable of being distracted from the polity's interest by its own internal and self-perpetuating rhythms. In effect, we have a new structure built atop the one envisioned by the Framers—the President plus an administrative bureaucracy. The President remains capable of acting unilaterally while administrative agencies diffuse executive power. The question then becomes what are the qualities of this new structure and how must it be checked.

Returning to the Framers' calculus, the question to be asked is whether each branch is checking the others in ways that are constructive for effective government and for liberty.[64] When the executive branch generates a well-populated administrative bureaucracy, that branch becomes less capable of exercising decisive leadership and therefore loses the ability to check the legislature's tendency to cabal. That branch is no longer capable of reflecting or interpreting the Zeitgeist of the people in the unified way a single leader can.

Bureaucrats are accountable to the people neither through the voting booth nor the reporting requirements under which the President and the Congress labor.[65] Instead of checking the legislature's tendency to ignore the people for the sake of intrigue, the administrative bureaucracy replicates the legislature's likely faults by multiplying itself.

The President was feared because of his capacity for unilateral action as a unitary entity. The administrative bureaucracy presents a different potential for arbitrariness: it is a decisionmaker without accountability.[66] On this account, the bureaucratic state may be real, and the republic may not have fallen, but, in the con-

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[63] *See* MADISON, *supra* note 16, at 622-24 (stating the text of Article II of the draft constitution).

[64] *See Clinton*, 118 S. Ct. at 2109 (Kennedy, J., concurring) (stating liberty as the goal of separation of powers doctrine).

[65] *See supra* text accompanying note 36.

[66] *See* SCHOENBROD, *supra* note 10.

text of the structure laid out by the Framers, the administrative state is utterly wrongheaded.

In sum, the system has not eliminated the one-man show. The dangers attendant to it remain. Thus, it remains, but it is amended to a large and unwieldy administration. The question remaining in this Article is why the nondelegation doctrine would be appropriate with respect to either or both.

II. THE NONDELEGATION DOCTRINE

For different reasons, the nondelegation doctrine serves crucial constitutional ends when applied against delegations to the President and against delegation to administrative agencies.

A. *Delegation to the President*

When lawmaking is delegated to the President, the deliberative possibilities and the many ports of entry available through the legislature are quelled.[67] The President can take unilateral action, which is less likely to be filtered through the society's various interests that affect the law under consideration.[68] The principle of nondelegation meets the Framers' concern that the presidency would be the "fetus of a monarchy" by prohibiting the President from taking over decisions structurally more appropriate to the legislature.[69] It is a critical check on the Executive's likely abuses of power forecast by the Framers.

A good example of the President overstepping his bounds by accepting delegated power that undermines the structural advantages of the Congress is the now-invalidated Line Item Veto Act[70] ("LIVA"). LIVA was enacted to redress a structural failure in the Congress: Congress could not bring itself to reduce the amount of "pork-barrel" spending it included in its appropriations bills.[71] Instead of controlling itself, it delegated the decision to prioritize national interests to the President, who, consistent with the Framers' expectations, gladly took the proffered handover of power. He would now be the governmental entity that would choose which

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[67] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

[68] *See Clinton*, 118 S. Ct. at 2107 (criticizing Line Item Veto Act for "giv[ing] the President the unilateral power to change the text of duly enacted statutes").

[69] MADISON, *supra* note 16, at 47 (statement of James Wilson).

[70] 2 U.S.C. §§ 691-692 (Supp. II. 1996). The Supreme Court held LIVA unconstitutional in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

[71] *Pork barrel spending* means federal expenditures that serve only particular local interests and which are made by federal representatives to purchase local support.

pork was appropriate and which was not. The Court rejected the law on the ground that it violated the Presentment Clause,[72] but it explained the constitutional violation through reliance on the most important nondelegation principle: The legislature holds primary responsibility to make the national policy choices, and the President may not take on those choices.[73] LIVA was a striking example of the way in which power can be transferred and embraced by the federal branches. Congress shrugged off its constitutional duty to reach independent policy choices by exploiting the Executive's capacity for arbitrariness.[74]

The Court did not wish away the problem Congress has created and was careful to say that it would not pass judgment on Congress's policy judgment that something must be done about pork-barrel spending.[75] However, the "[f]ailure of political will does not justify [an] unconstitutional remed[y]."[76] Even when Congress faces such a credible threat to its legitimacy, the Court held that some solutions, including even plainly *voluntary* abdications of power, can be unconstitutional.[77] The President may not unilaterally take on Congress's responsibilities, even with Congress's consent.

B. *The Nondelegation Doctrine and Administrative Agencies*

A different, though equally compelling justification for application of the nondelegation doctrine can be found when Congress delegates its lawmaking power to administrative agencies. The dangers posed by the administrative state are not only that it may act arbitrarily and capriciously, but also that such officials are less accountable to the voters.[78] The President is checked to some degree by the voting booth and public opinion, but the administrative agency suffers little deterrence from either. There is no constitutional structure that ensures deliberation or accountability, and the agencies are not constitutionally required to report their activities.

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72 U.S. CONST. art. I, § 7, cl. 2.

73 *See Clinton*, 118 S. Ct. at 2105-07.

74 *See* Brief Amici Curiae of Marci Hamilton and David Schoenbrod in Support of the Appellees, Clinton v. City of New York, 118 S. Ct. 2091 (1998) (No. 97-1374).

75 *See Clinton*, 118 S. Ct. at 2107 ("[W]e express no opinion about the wisdom of the procedures authorized by the Line Item Veto Act.").

76 *Id.* at 2108 (Kennedy, J., concurring).

77 *See id.* at 2106-07 ("The fact that Congress intended such a result is of no moment."); *id.* at 2109 (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand . . . .").

78 *See* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999).

These agencies comprise a bureaucracy, which makes them less likely to take decisive action—the advantage offered by the President on certain issues. Yet, they are so removed from accountability that the branch's size does not generate the deliberative advantages provided by the structure of the legislature. Agencies are prone to be arbitrary and unaccountable as they spin in their self-executed bureaucratic orbits. The nondelegation doctrine in this scenario is crucial to liberty, because it prohibits general lawmaking from occurring in a structure both capable of arbitrary action and removed from the national scrutiny to which both Congress and the President are exposed by the constitutional structure. From a constitutional, structural perspective, delegation to agencies is even worse than delegation to the President.[79]

The Court has addressed delegation to administrative agencies with little rigor,[80] leaving a gaping hole in the Constitution's balanced structure of checks and balances. Indeed, one lower court thought it posed no constitutional problem while finding that delegation to the President did pose constitutional problems.[81] With the administrative state, the power that was supposed to be cabined by the people, interests, and the states through the Congress is left to expand in the unlimited universe posed by the executive agencies. The costs are high. Arbitrariness, corruption,[82]

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[79] *See also* SCHOENBROD, *supra* note 10, at 58-81.

[80] In its most recent delegation case, *Mistretta v. United States*, the Court remained committed to the nondelegation principle but left broad leeway for Congress to delegate the details of lawmaking given that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. 361, 372 (1989); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) (upholding congressional delegation to administrative officers to proscribe food labeling regulations); Washington v. W.C. Dawson & Co., 264 U.S. 219, 227-28 (1924) (striking down federal statute permitting application of state workmen's compensation laws within admiralty and maritime jurisdictions as unconstitutional); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920) (holding state workmen's compensation law unconstitutional as applied to maritime employment). *But see* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 639 (1980) (plurality opinion) (upholding congressional delegation to the Secretary of Labor to promulgate standards to ensure safe and healthy working conditions for the Nation's workers); Yakus v. United States, 321 U.S. 414, 426 (1944) (upholding congressional authorization of the Price Administrator to control commodity prices in time of war).

[81] *See* Byrd v. Raines, 956 F. Supp. 25 (D.D.C. 1997), *overruled on other grounds by* Raines v. Byrd, 117 S. Ct. 2312 (1997).

[82] *See* Independent Counsel Reauthorization Act of 1994, 28 U.S.C. § 594; *see also* S. REP. NO. 103-101, at 6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 748, 750 ("The profound

citizen apathy, dereliction of the constitutional principles of federalism, and disrespect for state sovereignty are the high constitutional costs charged for the Court's failure to hold the line on delegation to administrative agencies.[83]

CONCLUSION

The Constitution sets into play a competing set of institutions intended to share and check national and state power. It rests on the presupposition that no entity can be trusted with too much power, because any "concentration of power in the hands of a single branch is a threat to liberty."[84]

The plasticity of power makes it necessary to craft mechanisms to meet the inevitable abuses of power that arise despite the constitutional structure. The line item veto was one attempt, but misguided. Such mechanisms must be monitored to ensure the constitutional structure is not doubly offended by abuses of power cured by unconstitutional means. The principles underlying the nondelegation doctrine, which keep congressional, presidential, and bureaucratic power cabined and are drawn from each structure's peculiar characteristics, are valuable weapons in the courts' separation of powers arsenal.

The nondelegation doctrine could move the constitutional balance of power back toward the balance envisioned by the Framers by forcing legislators to make the law and by rendering it more difficult for the executive branch to enlarge its sphere of power. By threatening laws that are made by the executive branch, rather than the legislative, the nondelegation doctrine encourages the executive branch to move closer to the one-man show envisioned by the Framers. If properly functioning, the nondelegation doctrine leads to representation of factions, the people, *and* the Zeitgeist.

Instead of interring the doctrine, it is time to get back to basics.

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disruption to the country and public trust [after Watergate] led Congress to conclude that the federal government needed to establish a new process for investigating and prosecuting top executive branch officials suspected of criminal conduct.");*id.* at 7, *reprinted in* 1994 U.S.C.C.A.N. at 751 (statement of President Reagan) ("I fully endorse the goal manifested in the Independent Counsel Act of ensuring public confidence in the impartiality and integrity of criminal law investigations of high-level Executive branch officials."); *id.* at 10, *reprinted in* 1994 U.S.C.C.A.N. at 754 (statement of Attorney General Janet Reno) ("It is my firm conviction that the law has been a good one, helping to restore public confidence in our system's ability to investigate wrongdoing by high-level Executive Branch officials.").

[83] *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995) (advocating rigorous judicial enforcement of separation of powers).

[84] Clinton v. City of New York, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring).

Essay

Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State

Lisa Schultz Bressman†

Last term, the Supreme Court issued an opinion that may alter the longstanding debate on congressional delegation of lawmaking power to administrative agencies. The case primarily concerned a federalism issue. In *AT&T Corp. v. Iowa Utilities Board*,[1] the Court determined that the Federal Communications Commission (FCC), and not the states, possesses authority to implement the provisions of the Telecommunications Act of 1996 that pertain to local telephone competition.[2] Although this part of the Court's decision is likely to generate significant commentary, a less prominent part may have far greater significance.

In that part, the Court for the first time invalidated an agency interpretation under the second step of the *Chevron* test.[3] Under *Chevron*, courts evaluating agency interpretations of statutory provisions must determine whether a provision is ambiguous, and, if so, defer to any

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1. 119 S. Ct. 721 (1999).

2. *See id.* at 730. Justice Scalia, writing for the Court, reasoned that the Commission's authority flows from a provision of the Communications Act of 1934 granting the Commission power to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." *Id.* at 729 (quoting Communications Act of 1934, 47 U.S.C. § 201(b) (1994)). That provision was amended to incorporate the 1996 Act. *See id.* (noting that § 201(b) of the 1934 Act was amended by the 1996 Act to include the provisions of the 1996 Act); *see also id.* at 729 n.5 (same).

3. *See id.* at 734-36 (invalidating the FCC's rule under *Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984)).

reasonable agency construction.[4] In all prior cases reaching the second step of *Chevron*, the Supreme Court had deferred to the agency interpretation.[5] In this case, the Court invalidated one of the FCC's interpretations as unreasonable.[6] Moreover, it did so not simply for typical process failures such as lack of sufficient evidence or explanation supporting the interpretation, as lower courts had done in the past.[7] Instead, the Court invalidated the FCC's interpretation for more precise and provocative reasons: The interpretation failed to contain "limiting standard[s]" and allowed private parties to fix the content of the regulation.[8]

If this reasoning sounds familiar, it should. Almost sixty-five years ago, the Court struck down provisions of a central piece of New Deal legislation on analogous grounds under the nondelegation doctrine. The National Industrial Recovery Act (NIRA) delegated to the President substantial authority to promulgate regulations stabilizing the economy. In *Panama Refining Co. v. Ryan*,[9] the Court invalidated a provision of NIRA because "Congress ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule" to guide the President's discretion in issuing regulations under the statute.[10] In *A.L.A. Schechter Poultry Corp. v. United States*,[11] the Court invalidated another provision of NIRA for the same reason.[12] As

4. *See Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *id.* at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (citations omitted).

5. *See* Ronald L. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997) (noting that the Supreme Court has never invoked the second step of *Chevron* to invalidate an agency interpretation); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1034-41 (1992) (collecting and analyzing Supreme Court cases from 1981 to 1990); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 355, 359-60, 367, 376-77 (1994) [hereinafter Merrill, *Textualism*] (collecting and analyzing Supreme Court cases from 1981 to 1991). Levin and Merrill each note a possible exception, *IRS v. Federal Labor Relations Authority*, 494 U.S. 922 (1990) (Scalia, J.), which held that the agency interpretation was "not reasonable" because it was contrary to the plain meaning of the statute. However, both conclude that the Court actually resolved the case as a matter of statutory construction under the first step of *Chevron*. *See* Levin, *supra*, at 1261 n.38; Merrill, *Textualism*, *supra*, at 377.

6. *See Iowa Utils. Bd.*, 119 S. Ct. at 736.

7. *See, e.g.*, Kidney Ctr. v. Shalala, 133 F.3d 78, 87-88 (D.C. Cir. 1998) (finding insufficient or incoherent agency justifications).

8. *Iowa Utils. Bd.*, 119 S. Ct. at 734-35.

9. 293 U.S. 388 (1935).

10. *Id.* at 430.

11. 295 U.S. 495 (1935).

12. The Court stated:

> In view of the scope of [the] broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes [of fair competition under the statute] and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.

Justice Cardozo commented, "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . ."[13] Furthermore, the delegated power was so unbounded that it enabled the President to exercise his discretion by rubber-stamping regulations proposed by private parties.[14] The Court declared such private lawmaking "utterly inconsistent with the constitutional prerogatives . . . of Congress."[15] The Court never again expressly applied the nondelegation doctrine to invalidate a statute.

Iowa Utilities Board may be understood to revive the dormant nondelegation doctrine. It did not cite *Panama Refining* or *Schechter Poultry*. Nor did it mention the word "delegation." Nevertheless, it undeniably invoked the principles that underlie those cases and are traditionally captured by the concept of delegation: the requirement of limiting standards and the prohibition on private lawmaking. But it did so in a new way. Instead of striking down the statutory delegation, as it had done in *Panama Refining* and *Schechter Poultry*, the Court *upheld* the "promiscuous" delegation to the FCC.[16] It then invalidated the FCC's rule for failing to supply the very limiting standards that had once been Congress's responsibility. The Court effectively required the agency to pick up where Congress had left off and to carry forward the lessons of the old nondelegation cases.

By requiring the agency to limit its own discretion, *Iowa Utilities Board* may be understood to endorse a persistent undercurrent in administrative law[17] and, strangely, to presage a subsequent D.C. Circuit decision that is drawing considerable scholarly attention.[18] Although that case differs from *Iowa Utilities Board* in many respects, it shares an essential feature. In *American Trucking Ass'ns v. EPA*,[19] the D.C. Circuit also invalidated agency regulations for failure to contain administrative limiting standards.[20] The court invalidated the regulations under the nondelegation doctrine itself. However, it applied a modified version of the doctrine that, as in *Iowa Utilities Board*, required the agency to supply the standards that Congress had failed to produce.

Id. at 541-42.

13. *Id.* at 551 (Cardozo, J., concurring).

14. *See id.* at 538-39.

15. *Id.* at 537.

16. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 733 (1999).

17. *See generally* International Union v. OSHA, 37 F.3d 665 (D.C. Cir. 1994); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (Leventhal, J., for a three-judge panel); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 208-12 (2d ed. 1978) (recommending administrative rather than statutory safeguards and standards to check agency discretion).

18. *See, e.g.*, Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 302 (1999).

19. 175 F.3d 1027, *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999).

20. *See id.* at 1037-38.

This Essay argues that *American Trucking* and *Iowa Utilities Board* confirm the emergence of a new delegation doctrine that has the potential to shift the terms of the current debate on delegation and democracy.[21] The new doctrine does not ask *who* ought to make law, which has been a central theme of scholarly interest in the delegation area. Rather, it asks *how* (or how well) the law is being made. Thus, it fundamentally alters the traditional scope of delegation review by refocusing the inquiry on the exercise of delegated lawmaking authority. In so doing, it reinforces a certain conception of democracy. By requiring agencies to articulate limiting standards, it ensures that agencies exercise their delegated authority in a manner that promotes the rule of law, accountability, public responsiveness, and individual liberty. Furthermore, it advances these values without having either to prohibit delegation or to approve delegation wholesale.

The new delegation doctrine also acknowledges and addresses an inherent limitation in the prevailing judicial strategy for constraining broad delegations—interpretive norms. Since the effective demise of the original nondelegation doctrine in 1935, the Court has searched for ways to assuage its abiding worry about broad delegations. It has turned, with apparent success, both to clear-statement principles and to ordinary tools of statutory construction under the first step of *Chevron*. However, such interpretive norms are unhelpful in many cases. In particular, they are of little value when Congress writes statutes to grant agencies policymaking authority to the fullest extent. The new delegation doctrine offers courts a meaningful tool for monitoring these types of delegations. Furthermore, it offers a tool that is more respectful of administrative discretion than either interpretive norms or the original nondelegation doctrine are.

Part I of the Essay sets forth the two views that dominate the current scholarly debate on the relationship between delegation and democracy. Part II discusses the use of interpretive norms to constrain broad delegations and identifies an inherent limitation of interpretive norms with respect to some delegations. Part III proposes a new doctrine that attempts at once to fill the gap created by interpretive norms, to mediate between the extremes of the scholarly debate, and to retain democratic values in the administrative age. Part III then illustrates this new doctrine with *Iowa Utilities Board* and *American Trucking*.

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21. The label "nondelegation doctrine" does not quite fit the approach described in this Essay. The term "*non*delegation" connotes a prohibition on transfer of congressional lawmaking authority to administrative agencies. The approach in this Essay permits the transfer of authority but imposes constraints on the exercise of that authority. Interestingly, the Supreme Court has not applied the nondelegation doctrine itself to prohibit the transfer of congressional authority except in the two 1935 cases mentioned earlier, *Panama Refining* and *Schechter Poultry*.

I. DELEGATION AND DEMOCRACY

Although the current scholarly debate on the relationship between delegation and democracy has many complexities, it is composed at bottom of two opposing views. One side of the debate argues that delegation of legislative power disserves democracy and ought to be prohibited. The other side contends that delegation furthers democracy and generally ought to be respected. This Part explores the jurisprudential roots of the debate and then turns to the competing claims.

A. *The Judicial Framework*

Concerns about the transfer of lawmaking authority to administrative agencies originally found expression in the nondelegation doctrine. The evolution of the nondelegation doctrine has been well-charted.[22] It began with Article I, Section 1 of the United States Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[23] For almost two centuries, the Supreme Court has understood these words to limit the extent to which, or the conditions under which, Congress may delegate its lawmaking powers to executive or administrative officials.

In the early cases, the Court articulated a factfinding or "contingency" theory of delegation. Specifically, it held that Congress could condition implementation of statutes on a factual contingency, and could delegate to an executive official the authority to determine whether that contingency had occurred.[24] During this early period, the Court also upheld a number of

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22. *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 132-36 (1997); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478-88 (1989).

23. U.S. CONST. art. I, § 1.

24. The Court applied its "contingency" theory of delegation in *The Brig Aurora*, which concerned the Embargo Act of 1809. *See* Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813). The Embargo Act delegated to the President the authority to suspend an embargo on trade with France and Britain if he determined that those nations "cease[d] to violate the neutral commerce of the United States." *Id.* at 384 (quoting Embargo Act of 1809, § 4, 2 Stat. 604). The Court upheld the Embargo Act on the theory that Congress could condition implementation on a factual determination—whether the European countries had terminated their unfair trade practices—and could delegate this determination to the President.

In *Field v. Clark*, 143 U.S. 649 (1892), the Court upheld a provision of the Tariff Act of 1890 on a similar theory. The Tariff Act authorized the President to suspend favorable tariff treatment for nations that imposed on American products any "exactions and duties . . . which he found to be . . . unequal and unreasonable." *Id.* at 692. As in *The Brig Aurora*, the Court found that Congress could delegate the authority to determine whether a factual "contingency" had occurred—that is, whether the duties imposed by foreign nations were "unequal or unreasonable." *Id.* at 692-93. Such administrative factfinding power differed in kind from legislative power to make law or set policy.

statutory delegations on a "detail-filling" rationale. Specifically, the Court found that Congress could delegate to an administrative official the power to "fill up the details" of a statutory scheme.[25] Article I was satisfied as long as Congress retained for itself the responsibility for setting basic policy. Interestingly, many of the statutes upheld under this theory contained only vague legislative standards and allowed administrators significant latitude to make policy.

The most familiar judicial formulation of the nondelegation doctrine first appeared in *J.W. Hampton, Jr. & Co. v. United States*,[26] which involved the Tariff Act of 1922.[27] The Act delegated to the President authority to adjust tariffs when the rates failed to "equalize . . . differences in costs of production."[28] The Court acknowledged that the Act authorized the President to go beyond factfinding and make discretionary economic judgments.[29] However, the Court upheld the delegation because it found that Congress had set forth "an intelligible principle" to guide the President's discretion.[30]

In two cases decided in 1935, the Supreme Court applied *Hampton*'s "intelligible principle" for the first time to invalidate provisions of a statute for impermissibly delegating lawmaking authority to an administrative agency. That statute was the National Industrial Recovery Act, which gave the President broad authority to revitalize the economy in the wake of the Depression. In *Panama Refining Co. v. Ryan*,[31] the Court invalidated section 9(c) of NIRA.[32] Section 9(c) authorized the President to restrict interstate transportation of oil produced in violation of state law.[33] In *A.L.A. Schechter Poultry Corp. v. United States*,[34] the Court invalidated section 3 of NIRA, which authorized the President to approve "codes of fair competition" proposed by private industry groups.[35] As stated above, neither section contained standards to guide the President's discretion.[36]

25. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). For example, in *Wayman*, the Court sustained a legislative grant of authority to the federal courts to adopt their own rules of process. Similarly, in *Buttfield v. Stranahan*, 192 U.S. 470 (1904), the Court upheld a delegation to an administrator to "establish uniform standards" for importing tea. In *United States v. Grimaud*, 220 U.S. 506 (1911), the Court upheld a delegation to the Secretary of Agriculture to promulgate regulations protecting public forests and establishing criminal penalties for violations.

26. 276 U.S. 394 (1928).

27. 19 U.S.C. §§ 154, 156 (1994).

28. *Hampton*, 276 U.S. at 401.

29. *See id.* at 405.

30. *Id.* at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

31. 293 U.S. 388 (1935).

32. *See id.* at 433.

33. *See id.* at 406.

34. 295 U.S. 495 (1935).

35. *Id.* at 535, 551.

36. *See id.* at 538-39; *Panama Refining Co.*, 293 U.S. at 418, 430.

Furthermore, section 3 was so open-ended that it permitted the President to exercise his discretion by rubber-stamping codes written by industry groups, rather than considering whether those codes comported with the broad public interest underlying the statute.[37] Thus, it effectively delegated lawmaking authority to private parties.

Panama Refining and *Schechter Poultry* have come to represent the high-water mark for the nondelegation doctrine. Although the Court has not overruled them, it has not since applied them or the nondelegation doctrine to invalidate a piece of legislation. It has entertained delegation challenges, however.[38] In each case, the Court has upheld the delegation on the basis of vague statutory standards.[39] These cases plainly demonstrate the Court's unwillingness to enforce the nondelegation doctrine.

Justice Scalia has offered an explanation for the Court's reluctance in this area. Although the Court has not renounced the importance of the nondelegation principle in "our constitutional system," it has acknowledged the centrality of delegation in our modern government.[40] Moreover, the Court has recognized that once some delegation is permitted, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."[41] Furthermore, "the limits of delegation must be fixed according to common sense and the inherent necessities of [government]."[42] Because this determination requires consideration of factors "both multifarious and (in the nonpartisan sense) highly political," the Court has "almost never felt qualified to second-guess

37. *See Schechter Poultry*, 295 U.S. at 521-22. Participating industry groups had to be "truly representative" of the industry, and "impose no inequitable restrictions on admissions to membership." The codes were to be approved only if they were not designed "to promote monopolies or to eliminate or oppress small enterprises and [would] not operate to discriminate against them." *Id.* at 522-23.

38. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944). In *Yakus*, the Court considered the validity of the Emergency Price Control Act, which delegated to the Office of Price Administration the authority to fix prices during World War II. The statute contained few standards constraining the administrator's discretion. It directed the administrator to promulgate regulations that would effectuate the general statutory purposes, including the establishment of "fair and equitable" prices and "the prevention of inflation and its enumerated consequences." *Id.* at 420-23. Although these standards were no less vague than those condemned in *Schechter Poultry*, they sufficed to sustain the delegation.

39. *See, e.g.*, Loving v. United States, 517 U.S. 748, 768-69 (1996) (upholding a delegation to the President to define the "aggravating factors" that permit imposition of the death penalty in a court martial); Touby v. United States, 500 U.S. 160 (1991) (upholding a delegation to the Attorney General to add certain drugs to those listed in the statute, the possession or sale of which would constitute a crime, on the basis of standards that require the Attorney General to consider the levels of use of a particular drug and its impact on public health); Mistretta v. United States, 488 U.S. 361, 371-72 (1989) (upholding a delegation to the Sentencing Commission to "promulgate sentencing guidelines for every federal criminal offense").

40. *Mistretta*, 488 U.S. at 415-16 (Scalia, J., dissenting).

41. *Id.* at 415.

42. *Id.* at 416 (citation omitted).

Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[43]

B. *The Scholarly Debate*

The Court's reluctance to enforce the nondelegation doctrine has drawn considerable criticism over the years from the likes of Chief Justice Rehnquist,[44] Theodore Lowi,[45] and John Hart Ely.[46] Each for his own reasons maintains that Congress must make the hard policy choices underlying law rather than delegate such responsibility to administrators. More recent scholarship builds on this criticism, incorporating insights from public choice theory. Most notably, David Schoenbrod claims that Congress uses delegation precisely for the purpose of avoiding responsibility for hard choices. According to Schoenbrod, delegation "allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those benefits."[47] Thus, Schoenbrod contends, Congress deliberately enacts delegations to shift blame for the burdens that regulation inevitably imposes on the public.[48] Moreover, he claims that Congress delegates to avoid responsibility for administrative action that favors organized interests.[49] Worse still, Congress intentionally structures its delegations to ensure that any administrative action (or inaction) *will* benefit organized interests. It either delegates broadly and pressures the agency to accommodate powerful interests,[50] or it delegates narrowly, burdening the agency with specific—and often contradictory—goals and procedures, in order to delay or inhibit regulation that burdens industry.[51]

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43. *Id.*

44. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment).

45. *See* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 125-26 (1969).

46. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133-34 (1980); *see also* MASHAW, *supra* note 22, at 136-40 (discussing the Rehnquist-Lowi-Ely attack).

47. DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993); *see also* Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 821 (1999) (noting that delegation to agencies avoids the national scrutiny that Congress receives); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 740 (1999) (same).

48. *See* SCHOENBROD, *supra* note 47, at 10.

49. *See id.* at 9-12, 49-57.

50. *See id.* at 55-56 (offering the Agricultural Adjustment Act as an example).

51. *See id.* at 58-81 (offering the Clean Air Act as an example).

In Schoenbrod's view, delegation violates principles of democratic governance.[52] He claims that democracy, in its most basic sense, requires lawmaking "by the people"—that is, lawmaking by elected officials rather than by unaccountable bureaucrats.[53] Of course, forcing Congress to make the hard choices (that is, nondelegation) also tends to generate good public policy—or lawmaking "for the people"—to the extent that it makes members focus on the public interest when writing laws rather than on maximizing their reelection chances.[54] In addition, requiring congressional responsibility tends to reinforce liberty to the extent that it prevents legislators from enacting laws that interfere with individual rights absent an important public purpose.[55] In other words, legislators may be deterred from enacting laws that interfere with individual rights in the absence of an important public purpose, if they will be held accountable for such decisions. Nonetheless, whatever function congressional responsibility may serve in producing lawmaking "for the people," Schoenbrod remains convinced that lawmaking "by the people" is the essential feature of a democratic government.[56]

The other side of the debate, represented by Jerry Mashaw and Peter Schuck, argues that delegation reinforces democracy.[57] Mashaw maintains that agency lawmaking promotes accountability because, among other things, it is subject to presidential oversight.[58] According to Mashaw, the President is more responsive to public preferences than Congress. The President deals with issues that are national in scope and has no particular constituency demanding benefits in exchange for votes.[59] Schuck claims that agency decisionmaking is more responsive to the public interest than is congressional legislation.[60] Agencies, he states, often are the most "accessible site[s]" for public participation because the costs of participating in the rulemaking process are likely to be lower than the costs of lobbying Congress.[61] Furthermore, agencies often are "more meaningful

52. *See* Schoenbrod, *supra* note 47, at 732.

53. *Id.* at 756.

54. *Id.* at 740; *see also* SCHOENBROD, *supra* note 47, at 14-15.

55. *See* SCHOENBROD, *supra* note 47, at 14-16.

56. Schoenbrod, *supra* note 47, at 756-57.

57. *See generally* MASHAW, *supra* note 22; Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999). To a certain extent, this characterization oversimplifies the work of Mashaw and Schuck in this area. Their work contains many nuances. Their main focus, however, has been to defend broad delegation and administrative decisionmaking against attacks from the nondelegation school. This Essay is not intended to criticize Schuck or Mashaw. Much of their work has been in response to Schoenbrod, who has set the terms of the current debate.

58. *See* MASHAW, *supra* note 22, at 152-56.

59. *See id.* at 152.

60. *See* Schuck, *supra* note 57, at 782.

61. *Id.* at 781.

site[s]" for public input because it is there that the real policy stakes emerge and crystallize.[62] Congress, by its nature, tends to deal in generalities when writing legislation.[63] Finally, agencies are often the "most effective" sites for public participation because parties not only define the issues there but actually educate the government on the nature of the problem.[64] Thus, Mashaw and Schuck, taken together, argue that broad delegation promotes accountability and public responsiveness. As a result, broad delegation generally ought to be respected.

II. INTERPRETIVE NORMS

The Court, for its part, has taken a moderate position. Since 1935, it has never overtly embraced delegation review. But it has not entirely repudiated such review either. To the contrary, it has continued to identify and address delegation concerns through means other than the nondelegation doctrine. In the recent case of *Clinton v. City of New York*,[65] for example, a plurality of the Court invalidated the Line Item Veto Act as a violation of the constitutional requirements of bicameralism and presentment.[66] The Line Item Veto Act enabled the President to "cancel" certain provisions of bills after signing them into law.[67] Although the plurality said that the Line Item Veto Act permitted the President to amend or to repeal law, in violation of the dual constitutional requirements for legislative action,[68] it identified what looked more like a delegation problem: The Line Item Veto Act delegated to the President broad authority to determine the ultimate content of law.[69]

Only certain types of delegations permit the Court to invoke the requirements of bicameralism and presentment as an alternative method of enforcing the nondelegation doctrine. For the majority of troublesome delegations, the Court has resorted to a more modest approach.[70] In particular, it has used canons of construction to constrain a variety of broad

62. *Id.*
63. *See id.*
64. *Id.*
65. 524 U.S. 417 (1998) (plurality opinion).
66. *See id.* at 436-47.
67. *See id.* at 436-38.
68. *See id.* at 438.
69. *See generally* Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 877-91 (1999) (explaining the delegation concerns underlying the plurality's decision invalidating the Line Item Veto Act). *But see Clinton*, 524 U.S. at 463-66 (Scalia, J., concurring in part and dissenting in part) (stating that the Line Item Veto Act does not violate nondelegation principles); *id.* at 484-86 (Breyer, J., dissenting) (same).
70. The use of interpretive norms to constrain broad delegation is a more modest or minimal approach because it does not require judicial invalidation of statutes. *See* CASS SUNSTEIN, ONE CASE AT A TIME (1999) (discussing judicial minimalism).

delegations in cases raising constitutional questions, and it has used ordinary tools of statutory construction to restrict a number of broad delegations in routine *Chevron* cases.

A. *Canons of Construction*

The Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine.[71] These principles direct courts to construe delegations in such a manner as to avoid raising constitutional questions, absent an explicit congressional statement to that effect.[72] They are closely tied to the nondelegation doctrine to the extent that they ensure that Congress, and not just the agency, has considered and spoken clearly to the constitutional issue.

Kent v. Dulles[73] is an example. In *Kent*, the Court refused to construe a broadly worded statute to permit the Secretary of State to restrict the right to travel.[74] The statute authorized the Secretary to issue passports according to rules prescribed by the President.[75] The President, in turn, granted the Secretary the power to deny passports in his discretion.[76] The Secretary exercised that discretion to issue a regulation denying passports to members of the Communist Party.[77] The Court declined to interpret the statute as delegating the power to pass the regulation, because such power would raise "important constitutional questions."[78] Citing *Panama Refining*, the Court indicated that it would "construe narrowly all delegated powers that curtail or dilute [liberty interests] . . . [where] Congress has made no such

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71. For a discussion of clear-statement principles as surrogates for the nondelegation doctrine, see Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2110-15 (1990) [hereinafter Sunstein, *Law and Administration*]; and Cass R. Sunstein, *Nondelegation Canons* (John M. Olin Law & Econ. Working Paper No. 82, 1999) [hereinafter Sunstein, *Nondelegation Canons*].

72. The canon of avoidance may differ slightly from clear-statement rules. It instructs courts to avoid interpretations close to the constitutional line on the theory that Congress would not have intended such interpretations. *See* Rust v. Sullivan, 500 U.S. 173, 191 (1991) (noting that the "canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations"). Thus, courts applying the canon of avoidance frequently dispense with the requirement of a clear statement and simply presume that Congress considered the issue and resolved it against the agency.

73. 357 U.S. 116 (1958).

74. *See id.* at 130.

75. *See id.* at 123.

76. *See id.* at 124.

77. *See id.* at 117-18.

78. *Id.* at 130. The Court expressly noted that

> [w]e would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Id.

provision in explicit terms."[79] Thus, the Court used the constitutional clear-statement canon to avoid a delegation that would impinge on the individual rights of certain passport applicants.[80]

The Court applied a similar canon in *National Cable Television Ass'n v. United States*[81] to avoid an unconstitutional delegation of Article I taxing power.[82] The Independent Offices Appropriations Act grants agencies authority to assess fees against regulated parties to cover their operating costs.[83] The statute directs agencies to set fee levels in consideration of the "direct and indirect cost[s] to the Government, value to the recipient, [and] public policy."[84] In the Court's view, this language, "*if read literally*, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House."[85] The Court did not ask for a clear statement concerning the scope of the language.[86] Relying on *Schechter Poultry*, it simply declined to read the statute as raising a constitutional question. It declared that the statute merely conveyed the limited power to impose administrative fees.[87]

In *Industrial Union Department v. American Petroleum Institute* (the *Benzene* case),[88] the Court used the avoidance canon to escape a violation of the nondelegation doctrine itself.[89] The Secretary of Labor interpreted the Occupational Safety and Health Act to require regulation of airborne carcinogen exposure in the workplace at the lowest level feasible.[90] Accordingly, the Secretary set exposure limits for benzene at one part per million of air,[91] even though the Secretary failed to demonstrate that benzene exposure at all levels above that limit posed a significant health risk.[92] The Court rejected the Secretary's interpretation and required a showing of significant risk prior to regulation:

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79. *Id.* at 129-30.

80. The Court did not decide whether Congress could have authorized such a delegation. *See id.* at 127 ("Freedom to travel is, indeed, an important aspect of the citizen's 'liberty.' We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.").

81. 415 U.S. 336 (1974).

82. *See id.* at 340-41.

83. *See id.* at 337-38.

84. *Id.* at 337.

85. *Id.* at 341.

86. *See id.*

87. *See id.* at 340-41.

88. 448 U.S. 607 (1980).

89. *See id.* at 662.

90. *See id.* at 613 ("Wherever the toxic material to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that § 6(b)(5) requires him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated.").

91. *See id.*

92. *See id.* at 653-54.

> If the Government were correct in arguing that [nothing in the statute] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in [*Schechter Poultry* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.[93]

B. *Ordinary Tools of Statutory Construction:* Chevron

The Court has used statutory construction in a yet more subtle way to preserve the nondelegation doctrine. Congress frequently delegates significant policymaking authority to agencies by allowing them to interpret or "fill gaps" in the statutes they administer. In *Chevron, U.S.A. v. NRDC*,[94] the Court instructed federal courts to defer to reasonable agency interpretations of ambiguous statutory terms.[95] The Court devised a two-step process for determining when deference is appropriate.[96] The first inquiry (Step I) is whether the statutory provision at issue is ambiguous—that is, whether Congress has spoken to the precise issue or has left a gap for the agency to fill.[97] If the meaning of a statutory command is clear, then that meaning controls.[98] If, however, the command is ambiguous, the second question (Step II) is whether the agency's interpretation is permissible or reasonable.[99] *Chevron* purports to give agencies great discretion in interpreting ambiguous statutory provisions.[100]

However, the Court frequently finds clarity in ambiguity in order to deprive an agency of discretion.[101] The Court's efforts to find clarity where

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93. *Id.* at 646 (citations omitted).

94. 467 U.S. 837 (1984).

95. The Court said:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44.

96. *See id.* at 842.

97. *See id.* at 842-43.

98. *See id.*

99. *See id.* at 843.

100. *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994) ("The deferential courts' strong reading of *Chevron* essentially transfers the primary responsibility for interpreting regulatory statutes from the courts to the agency authorized to administer the statute.").

101. *See* Schuck, *supra* note 57, at 788 ("Although it is true that the *Chevron* doctrine in principle increases the deference to agency interpretations of their governing statutes, many commentators have observed that the courts can, and often do, manipulate this doctrine in order to

none exists, while perhaps not faithful applications of *Chevron*, are nonetheless understandable as a form of nondelegation review. By denying agencies the discretion to interpret ambiguous terms as they see fit, the Court effectively may block the delegation of policymaking authority.

Textualists, like Justice Scalia, have proven notoriously successful at extracting clear legislative intent from seemingly murky language when they dislike a particular agency interpretation or the delegation of interpretive power itself:

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.[102]

Thus, Justice Scalia has admitted to successfully avoiding *Chevron* deference in a variety of cases.[103]

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preserve much of their influence over agency decisions . . . ."); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 496 ("Justice Scalia accepts broad delegations only because he cannot imagine a judicially manageable standard for telling the good from the bad, a handicap he does not face if he can plausibly construe an agency's authority in a narrow way.").

102. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

103. *See, e.g.*, Babbitt v. Sweet Home Chapter, 515 U.S. 687, 736 (1995) (Scalia, J., dissenting) ("There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains."); Maislin Indus. v. Primary Steel, 497 U.S. 116, 136-38 (1990) (Scalia, J., concurring) (refusing to accord deference to the Interstate Commerce Commission's interpretation of "reasonable" as used in the Interstate Commerce Act, stating that "under no sensible construction of that term could it consist of failing to do what the statute explicitly *prohibits* doing—viz., charging or receiving a rate different from the rate specified in a tariff." (citation omitted)); INS v. Cardoza-Fonseca, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring) ("Since the Court quite rightly concludes that the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act . . . there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference.").

Textualism may not always produce a determinate interpretation. It provides little help in cases where the text evinces no congressional intent with respect to a particular ambiguity except the intent to delegate interpretive authority to an administrative official. It also has limitations when the language permits more than one plausible meaning. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 856 (1992) (remarking that more than one plausible meaning entails potentially inconsistent results, thus defeating the

Justice Stevens, though no textualist, also has failed to find "agency-liberating ambiguity" when displeased with an agency interpretation. For example, in *INS v. Cardoza-Fonseca*,[104] Justice Stevens, writing for the majority, rejected the INS's statutory interpretation of the words "well-founded fear of persecution" as flatly wrong.[105] The interpretation concerned the showing that an alien must make under the Immigration and Nationality Act to qualify for a discretionary grant of asylum from the Attorney General.[106] The INS interpreted the phrase to have the same meaning as the mandatory-asylum provision of the statute, which prohibited deportation of any alien who showed a "clear probability of persecution."[107] Acknowledging that "[t]here is obviously some ambiguity in a term like 'well-founded fear,'"[108] Justice Stevens nevertheless refused to defer to the INS's construction.[109] According to him, text and legislative history made it plain that the term, whatever its meaning, was not identical to its mandatory counterpart.[110]

Justice Scalia concurred, finding the meaning of the term clear and contrary to the INS's interpretation on the basis of text alone.[111] But he chided the majority for its inconsistent application of *Chevron*. Courts, he said, may not "substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the

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reasonable expectations of those originally involved in enacting the statute). In such cases, resort to other tools such as legislative history may prove necessary. *See id.* at 856-61 (observing that using legislative history prevents incompatible and, therefore, undesirable results); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 457-58 (1988) (arguing that "legislative intent deserves a place in the interpretive effort"); Patricia M. Wald, *The Sizzling Sleeper: The Use of the Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301 (1990) ("When a statute comes before me to be interpreted, I want first and foremost to get the interpretation right. By that, I mean simply this: *I want to advance rather than impede or frustrate the will of Congress*. To that extent, at least, I am a conservative judge—Congress makes the laws, I try to enforce them as Congress meant them to be enforced. To do this, however, I very often find it not only helpful but *necessary* to consult the legislative history of statutes."). Furthermore, Thomas Merrill has found that most *Chevron* cases decided by the Supreme Court involve textual ambiguities. *See* Merrill, *Textualism*, *supra* note 5, at 369-70 (concluding on the basis of empirical study that legislative history does not necessarily expand possible interpretive meanings of statutory terms). Thus, Merrill has questioned whether Justice Scalia is correct in assuming that textualism will yield firm answers more often than legislative history or reduce the occurrence of *Chevron* deference. *See id.* at 370.

104. 480 U.S. at 421.

105. *Id.* at 430.

106. *See id.* at 427-28 (noting that § 208(a) of the Immigration Act authorizes the Attorney General, in his discretion, to grant asylum to an alien who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

107. *Id.* at 430.

108. *Id.* at 448.

109. *See id.* at 448-50.

110. *See id.* at 448.

111. *See id.* at 452-75 (Scalia, J., concurring in the judgment).

statute."[112] This approach, he remarked, "would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue."[113] Once courts concede ambiguity, Justice Scalia commented, they are obligated to defer.[114]

Justice Stevens refused, however, to construe the ambiguity to give the INS power to adopt its interpretation. For Justice Stevens, "[t]he question whether Congress intended the two standards to be identical [was] a pure question of statutory construction for the courts to decide."[115] In other words, Justice Stevens refused to find that Congress had granted the INS authority to resolve the question. Rather, Congress had left the task of defining the standards to the courts. Any ambiguity the text contained merely empowered the INS to apply the standards "to a particular set of facts."[116] Thus Justice Stevens parsed the delegation implicit in the ambiguous language. This parsing worked as surely as textualism to constrain the agency's authority.

As the above cases illustrate, interpretive norms have allowed the Court to address its persistent concern about broad delegations without requiring it to invalidate statutes.[117] Cass Sunstein recently has encouraged courts to continue this practice rather than attempt to revive the original

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112. *Id.* at 454 (alteration in original).

113. *Id.*

114. *See id.* at 453-54. Interestingly, this is not what Justice Scalia did upon conceding ambiguity in *Iowa Utilities Board*. Rather, Justice Scalia invalidated the FCC's interpretation of the ambiguous words "necessary" and "impair" for failure to contain limiting standards and for effectively permitting one set of regulated parties to make law. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 734-36 (1999).

115. *Cardoza-Fonseca*, 480 U.S. at 446.

116. *Id.* at 448; *see also* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 262-64 (1988) (proposing that courts defer to agency interpretations that apply statutory terms to a particular set of facts but not necessarily to those that simply define statutory terms).

117. Another case worth considering in this regard is *MCI v. AT&T*, 512 U.S. 218 (1994). In that case, Justice Scalia, writing for the Court, invalidated the FCC's interpretation of the word "modify" at the *Chevron* Step I level. *See id.* at 225-28. Section 203(a) of the Communications Act of 1934 requires communications carriers to file tariffs with the FCC, and "§ 203(b) permits the FCC to 'modify' any requirement of § 203." *Id.* at 220. The FCC had interpreted the word "modify" to allow it effectively to eliminate the tariff-filing requirements for MCI. *See id.* at 221, 224-27. Thus, it had interpreted the word "modify" to encompass basic and fundamental changes to § 203. *See id.* at 224-27. The FCC argued that such an interpretation was supported by *Webster's Third New International Dictionary*. *See id.* at 225-26. All other well-accepted dictionaries suggested a less aggressive meaning. *See id.* Justice Scalia refused to find an ambiguity based on the existence of one renegade dictionary definition, and rejected the interpretation as contrary to the plain meaning of the statute. *See id.* at 228-29. Peter Strauss has commented that Justice Scalia was motivated by delegation concerns. According to Strauss, the difficulty with the FCC's interpretation was not simply "the largeness of the change being effected." Strauss, *supra* note 101, at 495. Other parts of the Communications Act grant the FCC admittedly broad authority to make the most significant policy changes. The real difficulty in accepting the interpretation was that it would have "entail[ed] accepting that an agency can be empowered to change its mandate." *Id.* Justice Scalia construed the word "modify" narrowly to avoid such a delegation of legislative authority. *See id.* at 496.

nondelegation doctrine.[118] The difficulty is that interpretive norms cannot constrain all problematic delegations. Interpretive norms are useful in addressing the nondelegation issue only when Congress's language fairly allows such readings. Frequently, Congress chooses particularly broad language to convey its intent to delegate lawmaking authority to the fullest extent. This includes the power to determine all matters of subsidiary policy, including appropriate limits on administrative discretion. In such cases, interpretive norms (fairly applied) provide no mechanism to narrow the delegation. They simply run out. Indeed, to apply interpretive norms in such cases would frustrate Congress's intent. Clear-statement rules would ask Congress to rethink a delegation that it plainly intended to make. The other interpretive norms would allow courts to rewrite the delegation by supplying the very limitations that Congress intended the agency to furnish. Thus, interpretive norms are least helpful when arguably most necessary: in the face of the broadest sort of delegations. The question is whether some other doctrine might furnish a mechanism for counteracting or mitigating wholesale delegations without striking them down in the now-disfavored *Schechter Poultry* mode.

III. A NEW DELEGATION DOCTRINE

There is an approach that fills the gap created by the inherent limitation of interpretive norms, giving courts a tool to police broad delegations that Congress intended to make.[119] The approach, which has lurked beneath the surface of administrative law,[120] has come to light in recent cases.[121] The newly emerging delegation doctrine requires administrative agencies to issue rules containing reasonable limits on their discretion in exchange for broad grants of regulatory authority. Thus, the new delegation doctrine upholds the congressional transfer of lawmaking authority to administrative agencies, but imposes restraints on the exercise of that authority. Instead of demanding intelligible principles from Congress, it permits agencies to select their own standards, consistent with the broad purposes of the statutory scheme. (Administrative limiting standards are distinct from congressional intelligible principles because the former are not discernible from the statute itself, but rather are chosen by the agency in accordance

118. *See* Sunstein, *Nondelegation Canons*, *supra* note 71, at 2-3, 22-27.

119. This approach might even supplant interpretive norms by allowing courts finally to acknowledge that such norms, as often applied, are inconsistent with general principles of deference to administrative agencies.

120. *See, e.g.*, International Union v. OSHA, 37 F.3d 665, 372 (D.C. Cir. 1994); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (Leventhal, J., for a three-judge panel); 1 DAVIS, *supra* note 17, at 208-12 (discussing the development of this practice by state courts).

121. *See infra* Section III.B.

with the broad purposes of the statute. Both serve, however, to define the parameters of permissible administrative action.) These administrative limiting standards, once promulgated, function no differently than if Congress had written them into the original statute—that is, they bind agencies in implementing the statutory provision to which they apply.[122] In this way, the standards serve to limit administrative discretion and prevent arbitrary administrative decisionmaking.

Although easy to state, the administrative-limiting-standards requirement, or more broadly, the new delegation doctrine, raises difficult questions. The first question concerns the source of authority for the new doctrine—that is, from where courts derive authority to invoke the new doctrine and mandate administrative limiting standards. The second concerns the reasons for preferring the new doctrine to the old doctrine—or, more particularly, the extent to which the new delegation doctrine reduces the substantial transaction costs imposed on the legal process by the nondelegation doctrine. The final and most important question concerns the relationship between the new delegation doctrine and democracy, or whether the new doctrine can be justified from a democractic perspective in a way that addresses both sides of the current scholarly debate.

A. *The Source of Authority for the New Delegation Doctrine*

The Court traditionally has understood the nondelegation doctrine to flow primarily from Article I or the separation-of-powers principle.[123] The nondelegation doctrine promotes separation of powers by forcing Congress to make the hard choices rather than allowing it to delegate such responsibility to the executive branch.[124] The new delegation doctrine does not bear an obvious relationship to separation of powers. By tolerating broad transfers of congressional authority to administrative agencies, the new doctrine seems to concede any separation-of-powers objection. It might be said that the new doctrine has an indirect connection to the separation of powers to the extent that administrative standards serve in

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122. *See* Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370 (1932) (holding that agencies generally must follow their own rules until they are properly changed). Of course, agencies may redefine the limits of their power or the regulatory theory under which they operate as long as they sufficiently justify the change.

123. *See* AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 672-74 (1980) (Rehnquist, J., concurring in the judgment); *see also* Farina, *supra* note 22, at 479 n.105 (noting that the Supreme Court and commentators most frequently attribute the nondelegation doctrine to separation of powers and citing SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 24 (1975)); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237 (1994) (connecting the nondelegation doctrine with separation of powers).

124. *See American Petroleum Inst.*, 448 U.S. at 671 (Rehnquist, J., concurring in the judgment).

place of congressional standards to cure an otherwise unconstitutional transfer of authority. However, it is fair to respond that, in the main, such standards only replace congressional standards as a source of administrative guidance. They cannot remedy Congress's failure to make the hard choices. At most, they compensate for that failure.

The question then arises of where the new delegation doctrine finds a basis in law. One possibility is the Due Process Clause. Concerns for administrative discretion and arbitrary decisionmaking often sound in due process.[125] Indeed, lower courts have identified the Due Process Clause as the source of authority for requiring administrative standards to cabin administrative discretion.[126] Those cases involved delegations by state and local governments to their own administrative agencies and therefore did not present federal separation-of-powers issues. Nonetheless, the courts found that the Due Process Clause supplied the requisite check on arbitrary administrative decisionmaking. It may compel a similar result with respect to federal agencies—at least those that receive power without congressional limitations.[127]

But courts need not rely on constitutional law to impose administrative standards in such cases. Courts reviewing federal agency regulations have the power to mandate administrative standards under the statute authorizing those regulations or under the Administrative Procedure Act (APA). For example, a court reviewing an agency interpretation of an ambiguous statutory provision might declare that interpretation unreasonable under *Chevron* Step II unless accompanied by administrative standards defining the boundaries of permissible interpretation.[128] In this way, the

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125. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553 (1991) (linking the nondelegation doctrine to due process); Farina, *supra* note 22, at 479 n.105 (noting that commentators have linked the nondelegation doctrine to due process and citing BARBER, *supra* note 123, at 11-13, 30-36).

126. For example, in *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), the Fifth Circuit held that the Due Process Clause required a city liquor-licensing board to issue a list of "objective standards which had to be met to obtain a license." *Id.* at 610. In *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968), the Second Circuit held that the Due Process Clause required the New York City Housing Authority to issue "ascertainable standards" for awarding low-rent apartments. *Id.* at 265 ("It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse."); *see also* Morton v. Ruiz, 415 U.S. 199, 230-36 (1974) (holding that the Bureau of Indian Affairs must publish its policy on denying benefits through notice and comment rulemaking "so as to assure that [the agency's policy] is being applied consistently and so as to avoid both the reality and appearance of arbitrary denial of benefits to potential beneficiaries").

127. *But see* Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 792-93 (1975) (arguing that the Due Process Clause, as applied in *Holmes* and *Hornsby*, only requires agencies to issue standards when allocating scarce governmental benefits).

128. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 734-36 (1999). This application of *Chevron* Step II differs from the application to traditional process failures, such as lack of adequate explanation or evidence supporting the interpretation. A mere explanation will not

administrative-standards requirement might be said to be implicit in the agency's organic statute.[129] The requirement also might be understood to flow from the APA, which establishes its own standard of judicial review for agency interpretations and policy determinations.[130] Thus, a court reviewing an agency policy determination might find that determination arbitrary and capricious under the APA in the absence of administrative standards.[131]

In any case, the basic idea is the same. The agency rule is unreasonable or arbitrary because it lacks a connection to some determinate theory of the statutory provision it implements. Not only is there no assurance that the rule is rationally related to such a theory, there is no guarantee that the agency even has developed such a theory. Put differently, there is no guarantee—or at least no outward indication—that the agency has assumed responsibility for the hard choices underlying the statutory provision and has limited its authority accordingly. This characterization reveals the dual nature of the administrative-standards requirement. It seeks to confine administrative action within reasonable and finite boundaries (so as to prevent ad hoc decisionmaking), and it seeks to generate regulatory policy that is both visible and consistent with the broad statutory purposes (so as to produce accountable and responsive decisionmaking).

Whether constitutional or statutory in nature, the administrative-standards requirement and the new delegation doctrine it supports compel agencies to limit their own discretion in the absence of congressional limits. But why resort to administrative standards to constrain arbitrary decisionmaking rather than reverting to the original nondelegation doctrine?

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suffice to sustain an interpretation issued in the absence of standards. Rather, the agency must produce appropriate standards and demonstrate that the prior interpretation accords with those standards. This requirement may prove more difficult to satisfy than the ordinary requirement of reason-giving.

129. *See id.*; *see also* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (Leventhal, J., for a three-judge panel) (finding the administrative-standards requirement implicit in the agency's organic statute and inherent in the rule of law).

130. *See* 5 U.S.C. § 706(2)(A) (1994) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); *id.* § 551(13) (defining "agency action" to include "the whole or a part of an agency rule"); *id.* § 551(4) (defining a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"). Lower courts have displayed some confusion over the relationship between *Chevron* Step II and the APA. The D.C. Circuit generally has found that the arbitrary-and-capricious test of the APA and the reasonableness inquiry of *Chevron* Step II establish equivalent standards of review. *See* Levin, *supra* note 5, at 1263-66 (collecting and analyzing D.C. Circuit cases). Commentators have also urged a similar understanding. *See* Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1378-79 (1997); Levin, *supra* note 5, at 1266-67; Seidenfeld, *supra* note 100; Sunstein, *Law and Administration*, *supra* note 71, at 2104-05.

131. *See* Checkosky v. SEC, 139 F.3d 221, 225-26 (D.C. Cir. 1998) (holding that the agency's failure to provide an intelligible principle governing enforcement proceedings violated the arbitrary-and-capricious test of the APA).

From a practical standpoint, the answer is obvious. As the next Section demonstrates, the administrative-standards requirement imposes fewer transaction costs on the legal process.

B. *The Relative Costs of the New Delegation Doctrine*

It is first necessary to consider the costs exacted by traditional nondelegation review.[132] Not surprisingly, the nondelegation doctrine imposes significant costs on the legal process because it requires courts to invalidate regulatory statutes or provisions. Thus, it embroils courts in direct confrontation with Congress—a situation that the Supreme Court has taken pains to avoid.[133] It also has destabilizing effects on the government, the regulated parties, and the public. At a minimum, the uncertain future of the regulatory program post-invalidation disrupts public and private planning.[134] Even the threat of judicial invalidation may have similar effects.[135] Moreover, statutory invalidation calls for statutory reenactment. Many commentators have highlighted the significant costs associated with enacting and reenacting legislation.[136] A new bill (even one that revives a prior law) first must compete with a slew of others for legislative attention, and then must survive the constitutional requirements of bicameralism and presentment. These obstacles reduce the likelihood that an invalidated statute will be reenacted or reenacted promptly.

These obstacles appear with a vengeance with respect to invalidated statutory delegations. According to public choice theory, legislators routinely enact broad delegations to dispense with the need to reach

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132. This Section primarily explores the costs imposed by the nondelegation doctrine from an ex post perspective—that is, the costs imposed by judicial review of laws containing broad delegations. For an explanation of the costs from an ex ante perspective—that is, the costs imposed on the initial legislative enactment process—see MASHAW, *supra* note 22, at 138, 148-49; and Schuck, *supra* note 57, at 792.

133. Although the evolution of the nondelegation doctrine suggests that the Court seeks to avoid such confrontation, the Court has not hesitated to confront Congress in other contexts. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 442-49 (1998) (invalidating the Line Item Veto Act as a violation of the constitutional requirements of bicameralism and presentment); City of Boerne v. Flores, 521 U.S. 507 (1997) (restricting the scope of Congress's power under Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (restricting the scope of Congress's power under the Commerce Clause).

134. For example, when lower courts invalidate regulatory programs, the uniformity of nationwide regulations is disrupted. *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117-22 (1987). When the Supreme Court invalidates a regulatory program, it leaves the affected agency, regulated parties, and the public in a state of uncertainty as to whether, when, and how the program will resume.

135. *See* Schuck, *supra* note 57, at 792.

136. *See* MASHAW, *supra* note 22, at 148-49; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 722-23 (1997); Schuck, *supra* note 57, at 792; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1305 n.41 (1990).

consensus on contentious issues.[137] In other words, they use delegation precisely to reduce decision costs. When a statute or provision that relied for its passage on a broad delegation is struck down, it is even less likely than other statutes to be reenacted quickly.[138] In the interim, the status of the regulatory program or part thereof remains uncertain. In some cases, the regulatory program may not be reenacted at all.[139] Those who oppose delegation (or big government) as a general matter might applaud this result.[140] Those who take a more moderate approach to the issue of delegation might regret it. Included in this group are members of the pro-delegation school as well as individuals who generally disfavor legislation that avoids the hard choices but who might prefer such legislation to the status quo in certain circumstances.[141]

The new delegation doctrine reduces decision costs simply by avoiding statutory invalidation and subsequent reenactment. However, it does increase the costs of administrative decisionmaking by requiring the adoption of administrative standards. Agencies traditionally have possessed discretion in formulating standards.[142] Before the new doctrine, the absence of standards (congressional or administrative) might have cost Congress its delegation. After it, the absence of standards may cost agencies their final rule and require diversion of scarce resources to reconsidering the same issue. To prevent such a result, agencies may have to promulgate standards whenever they perceive a potential lack of congressional standards.[143]

Furthermore, the new delegation doctrine anticipates that agencies will issue standards through notice-and-comment rulemaking rather than through less formal procedures or case-by-case proceedings. To prevent effectively arbitrary decisionmaking in the dual sense described above, administrative standards must be generally applicable, visible, and binding.

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137. *See* MASHAW, *supra* note 22, at 142; SCHOENBROD, *supra* note 47, at 8-10.

138. *See* Schuck, *supra* note 57, at 792 (arguing that there are many obstacles to congressional reenactment of a statute).

139. *See id.*

140. *See id.* ("Professor Schoenbrod might reply that . . . if Congress could not enact the more specific version of the statute, it should not be permitted to enact the less specific one.").

141. *See* MASHAW, *supra* note 22, at 142.

142. Agencies previously have been required to issue standards guiding their discretion under certain circumstances. *See* Morton v. Ruiz, 415 U.S. 199, 232-36 (1974) (requiring the agency to issue standards governing the denial of governmental benefits through notice-and-comment rulemaking); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (requiring the agency to issue standards governing the denial of governmental benefits); Hornsby v. Allen, 326 F.2d 605, 608-09 (5th Cir. 1964) (same).

143. On the positive side, parties who devote resources to seeking administrative standards (when those standards are genuinely absent) have some assurance that they will succeed. Administrative standards are a necessary part of rulemaking pursuant to a broad delegation of authority. Legislative standards, by contrast, are required only to the extent that lobbyists and legislators persuade Congress to rehabilitate an otherwise invalid statutory delegation.

Thus, they must take the form of notice-and-comment rules.[144] This requirement not only consumes public and private resources but reduces administrative flexibility—an important component in minimizing error costs, among other things. There is considerable value in permitting agencies to adapt their policies over time to informational advances, technological innovation, and particular factual circumstances.[145] But there is always a tension between the need for individualized or incremental decisionmaking and the need for clear rules.[146] Perhaps the best that can be said in defense of the new delegation doctrine on this point is that Congress strikes the balance in favor of clear rules by writing unbounded delegations and creating heightened potential for arbitrary decisionmaking. Of course, the alternative is to request further specification from Congress and to leave agencies alone. But this remedy actually imposes greater costs on administrative flexibility. At least agencies may alter their standards when no longer appropriate in light of changed circumstances, provided that they adequately explain the change. Statutory standards do not permit such direct administrative revision.

On a more general level, the new delegation doctrine minimizes error costs relative to the nondelegation doctrine by maintaining agency involvement in policymaking. The Court and commentators have questioned Congress's ability to specify competently the particulars of complex regulatory schemes.[147] Congress, by its nature, legislates in generalities because it cannot predict the ways in which its laws will apply in concrete settings.[148] As many have noted, the administrative process offers a forum for crystallizing issues and gathering the input of interested

144. This may represent a significant departure from settled administrative law. The Court has long held that agencies possess discretion to choose among statutorily authorized procedures for decisionmaking. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947). The Court also has held that reviewing courts may not impose additional procedures on agencies. *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

145. In this regard, it is important to note that agencies need not adopt standards in a one-size-fits-all manner. For example, the FCC might rationally determine that different standards ought to guide its discretion under the same general statutory standard as applied to relevantly different communications technologies.

146. *See* MASHAW, *supra* note 22, at 139.

147. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

148. *See* MASHAW, *supra* note 22, at 150-51 (observing that the Court's decision in *Chevron* recognized "the uncertainties inherent in dealing with specific contingencies at the legislative level"); Manning, *supra* note 136, at 725-26 ("No legislator, however prescient, can predict all the twists and turns that lie ahead for his or her handiwork. The path of a law depends on diverse and unknowable factors, and no one seriously argues the regulation of social problems can be reduced to a pellucid and all-encompassing code."); Seidenfeld, *supra* note 100, at 118 (noting that "members of Congress cannot possibly envision the myriad of real-world situations to which the statute might apply").

parties.[149] In Schuck's words, the agency is "often the site where public participation in lawmaking is most accessible, most meaningful and most effective"[150]—accessible because the costs of participation in notice and comment rulemaking are lower than those of congressional lobbying; meaningful because the parties have the opportunity to define the precise nature of the problem that the statute broadly addresses; and effective because parties have the opportunity to educate the government about that problem.[151] In this respect, the new delegation doctrine has important advantages over the nondelegation doctrine, which prefers congressional specification to agency adaptation. It also has advantages over interpretive norms (aggressively applied) to the extent that they substitute court construction for agency elaboration.

The critical question raised by the new delegation doctrine, however, does not concern its practical advantages. Rather, it concerns the relationship between the new doctrine and democracy. More particularly, the pressing question raised by the new delegation doctrine is whether an administrative-standards requirement furthers democratic governance in any meaningful way.

C. *The New Delegation Doctrine and Democracy*

The current scholarly debate might have difficulty making sense of the new delegation doctrine in terms of democracy. Schoenbrod's side of the debate might find that the administrative-standards requirement perpetuates the general abdication of democratic values in this area because it fails to ensure that Congress makes the hard choices. On the other side, Mashaw and Schuck might conclude that the administrative-standards requirement arbitrarily intrudes on democratic values because it interferes with the legitimate exercise of administrative lawmaking authority.[152] Put simply, one side might claim that the administrative-standards requirement does too little, and the other side might contend that it does too much.

Whatever the merits of each side's argument, the entire debate falls short of addressing the particular conception of democracy reinforced by the new delegation doctrine and its administrative-standards requirement.

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149. *See* Schuck, *supra* note 57, at 781.

150. *Id.*

151. *See id.* at 781-82.

152. Mashaw and Schuck do emphasize the role that judicial review and other forms of oversight generally may play in constraining agencies. *See id.* at 783 ("[W]e should seek to assure that bureaucratic power is checked and effectively bent to the legislative purpose, that the agency, in Professor Schoenbrod's words, is not 'free to do as it pleases.'" (citation omitted)); *see also* MASHAW, *supra* note 22, at 158-65. *See generally* Schuck, *supra* note 57, at 783-90 (discussing agency constraints). However, neither has addressed the possibility of a delegation doctrine of the sort proposed in this Essay. *See id.* at 776 ("[I]f [the nondelegation doctrine] is not robust, there is no point talking about it.").

The new delegation doctrine does not focus on the proper locus of lawmaking authority, which is the issue that has seemed to dominate at least one side of the current scholarly debate. Rather, it accepts Congress's assignment of power and consequent relinquishment of policy control. But it does not thereby abdicate responsibility for promoting and protecting democracy. Nor does it arbitrarily interfere with legitimate delegations. Instead, it restrains the exercise of delegated authority by invoking a principle—an obligation to provide limiting standards—that reflects classic democratic values in precisely those cases that raise familiar concerns about democracy.

This principle can be understood to advance democracy in several ways. For example, it may increase congressional accountability by improving congressional oversight of agency action.[153] Administrative limiting standards may enhance congressional oversight by providing an additional piece of information for Congress to consider in evaluating a controversial agency proposal.[154] Moreover, that piece of information is particularly useful to Congress in formulating a legislative response because it provides insight not only into the agency's rationale but also into its overarching regulatory theory.[155]

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153. *See* Schuck, *supra* note 57, at 785 ("Congressional oversight of administration is one of the central pillars of the constitutional scheme of checks and balances . . . .").

154. Administrative limiting standards also enhance presidential control of agency action, an important (and, some say, superior) source of accountability. *See* MASHAW, *supra* note 22, at 152-56.

155. In this way, the new delegation doctrine may respond to arguments against delegation posed by positive political theory and Article I, Section 7 of the Constitution. William Eskridge and John Ferejohn have demonstrated that delegation disrupts the strong status quo bias built into the Article I lawmaking scheme. *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-33 (1992). Their models, based on positive political theory, illustrate the difficulty of achieving consensus among the House, the Senate, and the President on any given piece of legislation. *See id.* Because the House, the Senate, and the President have diverse preferences and priorities, they encounter considerable difficulty reaching agreement on the proper movement away from the status quo. As a result, numerous bills fail to receive either bicameral approval or presidential signing. Thus, they fail to alter the status quo. Moreover, "[t]he Framers expected that such a legislative stalemate would not be uncommon, and the requirement of bicameral approval [plus presentment] reflects the constitutional presumption in favor of the status quo." *Id.* at 530. In other words, the Framers anticipated that the Article I legislative process would promote stability and incremental change rather than sudden and significant departures from the status quo. *See id.* at 532 (citing THE FEDERALIST NO. 63, at 384-85 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 78, *supra*, at 468-69 (Alexander Hamilton)).

According to Eskridge and Ferejohn, delegation dramatically alters this balance. *See id.* at 535-36. Statutes that delegate encounter fewer obstacles to passage. They do not require Congress to make all the hard choices and thus evade the need for agreement by the two houses. They confer considerable authority on the executive branch, and this transfer of authority increases the likelihood of presidential approval. Moreover, they allow the President (or administrative agencies) to exercise delegated authority in a manner that moves the status quo significantly toward executive-branch preferences. *See id.* at 536-38. In most cases, the President or agency can move the status quo to a point just short of the level at which Congress would detect the change, propose a bill responding to the change, and have sufficient votes to override any presidential veto of that bill. *See id.* at 538-39.

Administrative limiting standards also may spur calls for oversight hearings. Traditionally, Congress has used such hearings sparingly and for matters of some prominence.[156] Interest groups may increase the pressure for congressional review of agency standards they dislike, either before or after those standards are promulgated.[157] Or interest groups, fearing unfavorable administrative standards, may push for more precise and protective standards in the initial statute. To the extent that this occurs, the new delegation doctrine may force Congress to make more basic choices up front—the result that Schoenbrod seeks to achieve through use of the original nondelegation doctrine.

1. *Rule of Law*

Perhaps more significantly and intuitively, the new delegation doctrine promotes the rule of law. As Jerry Mashaw succinctly explains,

> A consistent strain of our constitutional politics asserts that legitimacy flows from "the rule of law." By that is meant a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority. By reducing discretion, and thereby the possibility for the exercise of the individual preferences of officials, specific rules reinforce the rule of law.[158]

The rule-of-law rationale for delegation review is hardly new. It has always been present in the Court's intelligible-principle requirement. Although the Court has primarily understood this requirement to preserve separation of powers,[159] it has made it clear that the requirement also serves an important role in controlling administrative discretion.[160] Thus, the rule

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By forcing agencies to adopt self-limiting standards, the new delegation doctrine increases the possibility and quality of legislative oversight and hence legislative correction. Agencies (or the President) may no longer enact aggressive policies in reliance on the high search and other transaction costs that generally impede a legislative response. *Cf. id.* at 539-40 (arguing that ordinary congressional oversight is insufficient to prevent an agency's preferences from reflecting those of the President). Rather, they will have to select decisions closer to the House or Senate preference points in order to avoid provoking a legislative response. This, in turn, will lead to more stable and incremental change. Thus, the new delegation doctrine will, to some extent, restore the Article I, Section 7 balance.

156. For example, in 1997 Congress held hearings on the EPA's controversial clean-air standards. *See* John H. Cushman, Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern over Costs*, N.Y. TIMES, June 26, 1997, at A1.

157. *See* Schuck, *supra* note 57, at 789.

158. MASHAW, *supra* note 22, at 138-39; *see also* Schuck, *supra* note 57, at 780, 783 (discussing the rule of law).

159. *See supra* note 123.

160. *See* American Power & Light Co. v. SEC, 329 U.S. 90, 104-06 (1946); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406, 409 (1928); *see also* Yakus v. United States, 321

of law has always supplied a partial doctrinal basis for the nondelegation principle.[161]

Moreover, the rule of law has furnished a major theoretical underpinning of delegation review for some time. In his 1978 treatise, Kenneth Culp Davis stated:

> The purpose [of a nondelegation doctrine] should be to do what can be done through such a doctrine *to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power.*
>
> Instead of saying that delegations are unlawful or that delegations are unlawful unless accompanied by meaningful standards, the courts should affirmatively assert that delegations are lawful and desirable, as long as the broad legislative purpose is discernible and as long as protections against arbitrary power are provided. . . .
>
> The change in the basic purpose is essential because the underlying problem is broader than control of delegation; the problem is to provide effective protection against administrative arbitrariness. . . .
>
> . . . The courts should continue their requirement of meaningful standards, except that when the legislative body fails to prescribe the required standards for discretionary action in particular cases, the administrators should be allowed to satisfy the requirement by prescribing them within a reasonable time.[162]

Thus, Davis understood the purpose of delegation review as advancing rule-of-law values and further recognized that administrative, as well as congressional, standards could serve those values. Davis certainly was not alone on this point. As Judge Leventhal recognized in the important case of

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U.S. 414, 426 (1944) ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . ."); Farina, *supra* note 22, at 486 (noting that, after *Yakus*, the nondelegation inquiry shifted to the question of whether Congress had supplied enough policy structure to control administrative discretion).

Even the Schoenbrod-type insistence on congressional control and accountability contains strands of this rule of law analysis: The greater Congress's own role in making policy, the greater the assurance that structural limits on discretion will be observed. *See* SCHOENBROD, *supra* note 47, at 101 (noting that agencies often leave rules unspecified, which decreases congressional accountability); Schuck, *supra* note 57, at 783 ("If the rule of law is a central goal (as Professor Schoenbrod clearly thinks, although usually calling it 'responsibility'), then our *desideratum* should not be statutes of a certain specificity with that level of specificity enforced by courts as a matter of constitutional law.").

161. Of course, it is fair to argue that the separation-of-powers norm has always been present to some extent in the Court's delegation cases. Furthermore, it is fair to question whether the new delegation doctrine bears any relationship to that norm. *See supra* Section III.A.

162. 1 DAVIS, *supra* note 17, at 208, 211.

Amalgamated Meat Cutters v. Connally,[163] an administrative-standards requirement "means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action."[164]

Neither side of the current delegation debate has considered this precise relationship between the rule of law and administrative standards. Because of his focus on congressional responsibility, Schoenbrod has not even considered the rule of law.[165] The rule of law accomplishes much of what he seeks to achieve, however. Like accountability, the rule of law (as enforced through administrative standards) tends to produce rational and responsive lawmaking. Of course, it does so through different means and at a different level of government. Rather than relying on congressional self-interest to produce regulatory policy in the public interest, the rule of law—or, more specifically, the new delegation doctrine that it supports—looks to administrative self-discipline to generate regulation consistent with the broad public interest underlying the statute at issue. But, as explained above, this difference does not diminish the quality of the resulting regulatory program. To the contrary, it enhances the quality of the program by maintaining agency involvement in policymaking.

Schoenbrod might respond that the new delegation doctrine falls short of attaining his central objective: to force Congress to make the basic policy choices in order to prevent bad politics. He might oppose the new delegation doctrine because it does not stop Congress from using delegation to claim credit for superficial legislative responses while shifting blame for unpopular results. The difficulty is that Schoenbrod's proffered solution, the nondelegation doctrine, does not promise better results. As Mashaw has noted, a Congress prohibited from delegating may use nondelegating legislation to fool the public.[166] The only sure way for courts to prevent bad politics is to reform the entire legislative process by subjecting all legislation to more stringent review. This proposition seems at once radical and yet not so far-fetched in the wake of some recent Supreme Court cases.[167] In any event, it goes well beyond the delegation debate. As between the two comparatively modest approaches to the problem of delegation, both admittedly leave room for Congress to mislead the public.

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163. 337 F. Supp. 737 (D.D.C. 1971) (three-judge panel).

164. *Id.* at 758. Of course, Mashaw and Schuck also highlight the importance of the rule of law in agency decisionmaking. *See* MASHAW, *supra* note 22, at 138-39; Schuck, *supra* note 57, at 783. However, neither considers the relationship between the rule of law and administrative standards.

165. *See* SCHOENBROD, *supra* note 47, at 100-01 (noting that agencies impair the principle of congressional accountability when they leave their rules unspecified).

166. *See* MASHAW, *supra* note 22, at 146.

167. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (restricting scope of Congress's power under section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (restricting scope of Congress's power under the Commerce Clause).

But only the new delegation doctrine reduces the potential for arbitrary decisionmaking—and thereby promotes democracy, broadly understood—without disabling modern government.

Unlike Schoenbrod, Mashaw and Schuck acknowledge the importance of the rule of law in evaluating broad delegations and accompanying agency decisionmaking.[168] They decline to elevate that value above the others contained in the concept of democracy, however.[169] As a result, they might object to the new delegation doctrine because it gives precedence to the rule of law over values like individualized justice and administrative flexibility.[170] Admittedly, the new delegation doctrine imposes costs on such values. However, as noted above, there is always a tension between the need for clear rules and case-by-case decisionmaking.[171] In the case of broad delegations, it might be said that Congress tips the balance in favor of clear rules. When Congress delegates authority without supplying standards, it increases the risk of arbitrary administrative action. Administrative standards are necessary to promote the rule of law, even if they must come at some expense to other democratic values.

Mashaw and Schuck also might find the new delegation doctrine problematic because of its potential for abuse by overzealous courts. The argument is that courts will use the new delegation doctrine in an antidemocratic fashion to target administrative regulations (or statutes) that they dislike on policy grounds. Although this potential undoubtedly exists, it cannot be judged in isolation or even in relation to an unenforced nondelegation doctrine. It must be evaluated with respect to interpretive norms, which reflect the modern judicial method for restricting broad delegations. Interpretive norms grant courts significant latitude to displace administrative regulations that they disfavor. As between interpretive norms and the new delegation doctrine, Mashaw and Schuck have reason to prefer the latter. Interpretive norms permit courts to substitute their own limiting standards for administrative ones. To the extent that interpretive norms are invoked in cases where the statutory language does not fairly permit (and, arguably, even in cases in which the statutory language does), they represent a far greater intrusion on administrative prerogatives than the new delegation doctrine.

2. *Private Lawmaking*

Apart from enforcing the rule of law, the new delegation doctrine serves another democratic function. It prevents private parties from

168. *See* MASHAW, *supra* note 22, at 138-39; Schuck, *supra* note 57, at 780, 783.
169. *See* Schuck, *supra* note 57, at 780, 783.
170. *See* MASHAW, *supra* note 22, at 139.
171. *See id.*

effectively assuming lawmaking authority. Private lawmaking might be said to result when administrators use open-ended delegations to rubber-stamp regulations proposed by private parties. Broad delegations thus facilitate private lawmaking because they contain nothing to constrain agencies from adopting a wide range of options, including those developed by one regulated party. A similar phenomenon was evident in *Schechter Poultry*.[172] There, the Court noted that delegations to private parties—whether directly by Congress or through standardless delegations to administrators—violate the basic constitutional structure, which requires that government officials, and not private parties, make law.[173]

In addition to violating the constitutional design, private lawmaking impinges on democracy by prioritizing private gains over individual rights and public purposes. Private parties have an incentive to select regulation that provides them with maximum benefits without considering the effect on the other regulated parties or the public.[174] Thus, private lawmaking has a tendency to produce regulation that both interferes with individual liberty for suspect public purposes and inadequately reflects a broad public purpose to justify such interference. In this regard, private lawmaking is undemocratic even if it can be said to be efficient or rational on some other grounds.

Private lawmaking, however, is often the product of insidious reasons that, some argue, ought themselves to be prevented. It frequently is said that interest groups pressure agencies to administer broad delegations on their behalf.[175] Schoenbrod claims that private lawmaking actually originates in the strategic use of delegation by legislators. According to Schoenbrod, legislators deliberately enact broad delegations to help private interests

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172. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

173. The Court stated,

> [W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I [of NIRA]? The answer is obvious. Such a delegation of legislative power is unknown to our law and utterly inconsistent with the constitutional prerogatives and duties of Congress.

Id. In the statute in *Schechter Poultry*, Congress granted private parties an express role in lawmaking on the face of the statute. The statute permitted industry groups to propose codes for the President's approval. *See id.* at 535, 551. Moreover, the statute was so open-ended that it allowed the President to exercise his approval authority in a perfunctory fashion, thereby giving industry groups the power to make law. *See id.* This Essay does not restrict itself to statutes that grant parties an express role in lawmaking. It also encompasses statutes that facilitate an effective delegation of lawmaking authority to private parties by containing open-ended statutory language.

174. *See* AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 735 (1999).

175. It is debatable whether such pressure is problematic. *See generally* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35 (1991).

capture the regulatory process.[176] Furthermore, they do so solely to improve their reelection chances. Through delegation, legislators may satisfy the interest groups that finance their campaigns. And they may satisfy the voting public with superficial legislative responses to public problems while shifting blame to the agency for any bad regulations.[177]

To demonstrate his point, Schoenbrod offers the example of marketing orders for navel oranges under the Agricultural Adjustment Act.[178] The Act was a New Deal effort to restore "order" to wildly fluctuating agricultural prices.[179] In Schoenbrod's view, the statute actually was an attempt by Sunkist, the largest orange producer, to stem the deleterious effect of competition on its profits.[180] Congress sought to avoid the appearance of capture by delegating broad authority to the Secretary of Agriculture to issue marketing orders in the public interest.[181] However, it took calculated steps to ensure that Sunkist controlled the administrative process.[182] Among other things, it continuously pressured the Secretary to allow Sunkist to dominate the growers' committee drafting the orange marketing orders[183] and granted bloc voting rights that enabled Sunkist to defeat referenda amending or terminating favorable orders.[184] Thus, Congress guaranteed that the Act effectively delegated to Sunkist the power to set sales quotas. Meanwhile, consumers paid inflated prices and minority growers watched as oranges produced in excess of the quotas rotted on the ground.[185]

In Schoenbrod's view, the orange experience demonstrates the pitfalls of broad delegation. Broad delegation promotes capture by creating space for political pressure at the administrative level.[186] Furthermore, he claims, there is no good reason for it. New Deal idealists believed that delegation would insulate public-interest determinations from politics, facilitate reliance on agency expertise, and increase focus on the public interest.[187] In practice, Schoenbrod maintains, delegation enables legislators (and the

176. *See* SCHOENBROD, *supra* note 47, at 56-57 (pointing to the Agricultural Adjustment Act, in which the delegation benefited a concentrated interest but ignored the public interest).

177. *See id.* at 9-10.

178. *See id.* at 49-57.

179. *See id.* at 49-50.

180. *See id.* at 4-6, 50-54.

181. *See id.* at 50.

182. Members of Congress and the White House staff also acted to prevent threats to Sunkist's position from outside the administrative process. *See id.* at 51-52.

183. From the inception of the growers' committee, Sunkist held five of the 11 seats. In 1984, the Secretary sought to reduce Sunkist's seats to four. After threats of political retaliation by Sunkist, members of Congress and the White House pressured the Secretary to reverse himself. *See id.* at 50-53.

184. For example, in 1991, Sunkist exercised its bloc voting right to continue a marketing order, despite bylaws that guaranteed members the right to cast their own votes. Without bloc voting, the order would have been defeated. *See id.* at 54.

185. *See id.* at 4.

186. *See id.* at 54-55.

187. *See id.* at 12-13.

President) to influence the agency in private—which is more effective because it is less visible.[188] Thus, delegation actually shields political determinations from public scrutiny. And because delegation does not achieve distance from politics, it does not take advantage of agency expertise.[189] For these reasons and others, Schoenbrod argues that delegation should be prohibited.[190]

Schoenbrod has not considered, however, the possibility of the new delegation doctrine, which goes a considerable distance toward addressing his concerns. Many of the failures that Schoenbrod identifies do not arise directly from the transfer of lawmaking authority from Congress to the agency; they arise from the potential for private lawmaking that the transfer creates. For example, Schoenbrod's main complaint about the orange-marketing-order statute is that it permitted Sunkist to dominate the regulatory process. Sunkist used the open-ended grant of legislative authority as an opportunity to pressure the Secretary of Agriculture to issue and maintain orders that favored its narrow interests.[191] The new delegation doctrine prevents private parties from assuming regulatory authority. By forcing agencies to promulgate limiting standards, the new delegation doctrine bars private parties from dictating their own standards or substantive regulations—assuming that those standards or regulations are inconsistent with the broad public interest underlying the statute. Thus, the new delegation doctrine frustrates attempts by private parties to capture the regulatory process, but it does so at the administrative level.

Of course, Schoenbrod might respond that the new delegation doctrine provides a less effective or certain mechanism for preventing capture than does the nondelegation doctrine. For one thing, it may be difficult to determine what rises to the level of private lawmaking. In this regard, it is important to remember that it has been no simple exercise for the Court to determine what constitutes impermissible delegation.[192] Schoenbrod also might argue that the new delegation doctrine does not prohibit Congress from pressuring agencies to favor organized interests in less visible ways than those exhibited in the Sunkist case. For example, the new delegation doctrine does nothing to prevent Congress from pressuring an agency not to regulate or not to enforce aggressively its regulations. In addition, it does nothing to prevent Congress from constructing delegations to delay the pace of regulation. Schoenbrod notes that Congress frequently writes delegations containing complex and contradictory statutory "instructions" to the

188. *See id.* at 54-55; *see also* Hamilton, *supra* note 47, at 821 (stating that delegation shields lawmaking from national scrutiny).

189. *See* SCHOENBROD, *supra* note 47, at 56.

190. *See id.* at 179.

191. *See id.* at 50-57.

192. *See* Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting).

agency.[193] According to Schoenbrod, Congress intends these instructions to hamper the regulatory process and retard the issuance of burdensome regulations.[194]

The new delegation doctrine may offer no remedy for covert interest-group pressure or delegations so narrow as to amount to no delegation at all. However, this is not a reason to prefer the nondelegation doctrine. Although Schoenbrod claims that the nondelegation doctrine may provide some relief in this regard, Mashaw has noted that Congress may use non-delegating legislation to enact interest-group deals or achieve regulatory delay.[195] Thus, the nondelegation doctrine also has weaknesses in terms of coverage. And, with respect to the cases it does cover, it lacks the significant advantages of the new delegation doctrine. Only that doctrine prevents agency capture—and thereby promotes democracy, broadly understood—without imposing huge transaction costs on the legal process.

D. *The New Delegation Doctrine Applied*

This Essay began with a brief description of two recent cases. The first was *AT&T Corp. v. Iowa Utilities Board*,[196] in which the Supreme Court invalidated an FCC interpretation under *Chevron* Step II for failure to contain administrative limiting standards and for permitting private parties to fix the content of law.[197] The second was *American Trucking Ass'ns v. EPA*,[198] in which the D.C. Circuit invalidated EPA regulations under a modified version of the nondelegation doctrine for failure to contain administrative limiting standards.[199] It is now possible to consider these cases more fully as two applications of the new delegation doctrine.

1. Iowa Utilities Board

To understand *Iowa Utilities Board* in relation to the new delegation doctrine, a fair bit of technical background is unavoidable. The case involves the Telecommunications Act of 1996, which "fundamentally restructures local telephone markets" by introducing competition among providers of local telephone service.[200] To facilitate competition, the 1996

193. *See* SCHOENBROD, *supra* note 47, at 58-81.
194. *See id.* at 68-71.
195. *See* MASHAW, *supra* note 22, at 146.
196. 119 S. Ct. 721 (1999).
197. *See id.*
198. 175 F.3d 1027 (D.C. Cir.), *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999).
199. *See* at 1033.
200. *Iowa Utils. Bd.*, 119 S. Ct. at 726; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 101, 110 Stat. 56 (codified as amended at 47 U.S.C.A. § 251 (West Supp. 1999)) (introducing competition to local telephone markets). As the Court stated,

Act prohibits states from perpetuating local-service monopolies and subjects incumbent Local Exchange Carriers (LECs) to a variety of duties, including the duty to share their network facilities with new entrants.[201] The Act establishes three methods for new telecommunications carriers to enter markets for local telephone service. One method—"unbundled access"—permits new telecommunications carriers to lease certain parts of the incumbents' existing telephone networks in order to provide their own telephone service to consumers.[202] The Act directs the Federal Communications Commission to determine which network elements the incumbents must share with new entrants on an unbundled basis. The Act further provides certain factors for the Commission to consider in making this determination:

> In determining what network elements should be made available for purposes of [the unbundled access provision], the Commission shall consider, at a minimum, whether—
> (A) access to such network elements as are proprietary in nature is *necessary*; and
> (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[203]

The Commission promulgated a list of seven proprietary and nonproprietary network elements that incumbent LECs must share with new entrants.[204] The incumbents challenged the list, arguing that the FCC

> Until the 1990s, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. Technological advances, however, have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies.

Iowa Utils. Bd., 119 S. Ct. at 726.

201. *See* 47 U.S.C.A. § 251(c)(3), *quoted in Iowa Utils. Bd.*, 119 S. Ct. at 726.

202. The Act requires the incumbents to allow requesting carriers to "purchase local telephone services at wholesale rates for resale to end users; . . . [to] lease elements of the incumbent's network 'on an unbundled basis'; and . . . [to] interconnect its own facilities with the incumbent's network." 47 U.S.C.A. § 251(c). The Act on its face does not favor one method over another; instead, it allows the requesting carrier to choose among the three options. Furthermore, it imposes on the incumbents a duty to negotiate terms of access with new entrants and permits these parties to arrive at mutually agreeable arrangements without regard to the obligations of § 251. But, if negotiation fails, either party may seek arbitration before the state commission under the provisions of § 251 and related rules. *See id.* §§ 251, 252; *Iowa Utils. Bd.*, 119 S. Ct. at 726-27. With respect to the second "unbundled access" requirement, § 251(c) directs the incumbents to provide such access "at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Id.* § 251(c).

203. 47 U.S.C.A. § 251(d)(2) (emphasis added).

204. Those elements include the local loop, the network interface device, switching capability, interoffice transmission facilities, signaling networks and call-related databases,

generated it without properly considering whether access to the proprietary elements was "necessary" and whether lack of access to the nonproprietary elements would "impair" the new entrant's ability to provide service, as required by the 1996 Act.[205]

The Commission stated in the First Report and Order implementing the local competition provisions that

> it would regard the "necessary" standard as having been met regardless of whether "requesting carriers can obtain the requested proprietary element from a source other than the incumbent," since "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act."[206]

Thus, it restricted the definition of "necessary" to consideration of elements within the incumbent's network.[207] It did the same with respect to the term "impair."[208] The Commission determined that lack of access to a particular element would "impair" service if it would "'decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network,'—which means that comparison with self-provision, or with purchasing from another provider, is excluded."[209] Taken together, the FCC's interpretation of the "necessary" and "impair" standards basically required incumbents to share with requesting new entrants those elements that had the greatest effect on cost and quality of service—that is, the most efficient and effective elements—as determined by the new entrants. The incumbents argued that the standards established "something akin to the 'essential facilities' doctrine of antitrust theory," requiring access "only to those 'bottleneck' elements unavailable elsewhere in the marketplace."[210]

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operations support systems functions, and operator services and directory assistance. *See* 47 C.F.R. § 51.319(a)-(g) (1999). Requesting carriers may petition state commissions for additional elements on a case-by-case basis. *See id.* § 51.317. On remand from *Iowa Utilities Board*, the Commission revised the original list to exclude operator services and directory assistance and to limit where and under what conditions the switching capability element must be made available. *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-238, (released Nov. 5, 1999), *available in* 1999 WL 1008985 [hereinafter Order].

205. *See Iowa Utils. Bd.*, 119 S. Ct. at 727-28. The incumbents also argued that the list included features that did not constitute "network elements" as defined by the Act. *See id.* at 728.

206. *Id.* at 735 (quoting ¶ 283 of the FCC's First Report and Order).

207. *See id.*

208. *See id.*

209. *Id.* (alteration in original omitted).

210. *Id.* at 734.

Justice Scalia, writing for the Court, found the terms "necessary" and "impair" susceptible of more than one interpretation: "We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply [the incumbents'] standard; it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind."[211] Thus, Justice Scalia found the terms ambiguous. In fact, he declared the entire Act "a model of ambiguity or indeed even self-contradiction" that "can be read to grant (borrowing a phrase from incumbent GTE) 'most promiscuous rights' to the FCC."[212] Congress, he suggested, had made this a *Chevron* Step II case: "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency, see *Chevron v. NRDC* . . . ."[213]

Justice Scalia did not defer to the Commission under *Chevron*, however. Rather, he struck down the FCC's interpretation as unreasonable.[214] In his view, the interpretation was fatally flawed because the FCC had failed to supply any "limiting standard, rationally related to the goals of the Act."[215] The FCC had interpreted the words "necessary" and "impair" to require incumbents to share those elements in their networks that would provide new entrants the best competitive advantage, in terms of either cost or quality of service.[216] The Commission never considered whether new entrants could obtain comparable elements or comparable pricing from other carriers or supply comparable elements (at comparable pricing) themselves. According to Justice Scalia, the Commission's exclusive focus on the incumbents' networks deprived its interpretation of any meaningful limit: "Since any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment' under this standard."[217]

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211. *Id.*; *see also id.* at 753 (Breyer, J., concurring in part and dissenting in part) ("The Act expresses this last-mentioned sharing requirement in general terms, reflecting congressional uncertainty about the extent to which compelled use of an incumbent's facilities will prove necessary to avoid waste.").

212. *Id.* at 738.

213. *Id.* (citation omitted). Justice Scalia did not expressly state that he was reviewing the FCC's interpretation of the unbundled access provision under Step II. The citation to *Chevron* came in a later part of the opinion. He applied Step II terminology and principles, however, calling the FCC's interpretation not "reasonable" and describing the provision to which it related as susceptible of more than one interpretation. *See id.* at 734, 736. Furthermore, Justice Souter understood Justice Scalia to rest his unbundled access ruling on *Chevron* Step II. *See id.* at 739-40 (Souter, J., concurring in part and dissenting in part).

214. *See id.* at 736 ("Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we must vacate [the interpretation].").

215. *Id.* at 734.

216. *See id.* at 734-35.

217. *Id.* at 735.

The Commission attempted to justify its focus by arguing that "no rational entrant would seek access to network elements from an incumbent if it could get better service or prices elsewhere."[218] In other words, the new entrants had already considered and rejected the possibility of obtaining network elements from outside sources and of providing such elements themselves. Because the new entrants already had determined that access to the incumbent's network elements offered them the best competitive advantage, it made little sense for the Commission to consider the availability of outside elements.[219]

Justice Scalia conceded the point but said that this kind of reasoning could not support an interpretation that "allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services."[220] Such an interpretation, he suggested, impermissibly delegates to new entrants the power to determine which elements the incumbents must provide under the statute.[221] He concluded that the Commission "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network."[222]

As noted above, the Court identified two fatal flaws in the FCC's rule. First, the rule lacked limiting standards. Second, it permitted private parties, rather than the FCC, to exercise lawmaking authority.[223] The difficulties identified in *Iowa Utilities Board* track those in *Panama Refining* and *Schechter Poultry*. Justice Scalia even seemed to invoke Justice Cardozo's

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218. *Id.*

219. *See id.*

220. *Id.*

221. *See id.*

222. *Id.* Furthermore, Justice Scalia stated, "[t]hat failing alone would require the Commission's rule to be set aside." *Id.* Justice Scalia went on to find an additional reason to invalidate the FCC's interpretation. In particular, he found that the FCC's interpretation, by permitting the new entrants to select the most advantageous elements available, allowed them to extract their desired profit from the market. *See id.* In other words, the FCC's interpretation permitted new entrants to select whichever elements would guarantee them the highest profit, even though some other element might enable them to compete effectively for the provision of telephone service to consumers. *See id.* at 735 n.11 ("We similarly disagree . . . that a business can be impaired in its *ability* to provide services . . . when the business receives a handsome profit but is denied an even handsomer one."). According to Justice Scalia, such an interpretation was "simply not in accord with the ordinary and fair meaning" of the terms "necessary" and "impair." *Id.* at 735. Justice Souter took issue with Justice Scalia's analysis. *See id.* at 739-40 (Souter, J., concurring in part and dissenting in part). In Justice Souter's view, *Chevron* permitted the FCC to choose even an admittedly weak interpretation of the statutory terms. *See id.* at 740. Justice Scalia responded by saying that the Commission's interpretation was more than weak. *See id.* at 735 n.11. It was unreasonable. *See id.* at 735 ("In a world of perfect competition, in which all carriers are providing their service at marginal cost, the Commission's total equating of increased cost (or decreased quality) with 'necessity' and 'impairment' might be reasonable; but it has not established the existence of such an ideal world.").

223. *See id.* at 736-38.

imagery from the latter case,[224] calling the FCC's power "promiscuous."[225] Thus, *Iowa Utilities Board* can be understood in the context of the original nondelegation doctrine and its case law.

More significantly, the case can be understood as an application of the new delegation doctrine. The principal problem plaguing the rule was that the Commission had failed to articulate a theory of the statute before promulgating its list of elements.[226] In the absence of such a theory, the list was fatally ad hoc or incomplete.[227] The list also amounted to private lawmaking—that is, lawmaking by the new entrants.[228] Assume for a moment, however, that the Commission had determined, without relying on the new entrants, that access to each element on the list was necessary because denial would increase costs or decrease quality too much. The list still would have left key policy questions unanswered—for example, how much is too much under the statute? It was these unanswered questions that created the potential for arbitrary decisionmaking and violated the rule of law. Some governmental entity must make, articulate, and stick to the hard choices underlying the statute.

But the case also raised the further problem of private lawmaking. Recall that the FCC's rule "allow[ed] entrants, rather than the Commission, to determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services."[229] The FCC had permitted regulated parties to define the terms of competition. In theory, this was more than simply enabling the new entrants to secure access to particular network elements. It was giving them the power to define the criteria that the statute (or the APA or the Due Process Clause) required for all affected parties. Of course, the new entrants effectively declined to produce such criteria and instead generated a wish list of network elements. The FCC then rubber-

224. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) ("The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . .").

225. *See Iowa Utils. Bd.*, 119 S. Ct. at 738. Justice Scalia did not cite either *Panama Refining* or *Schechter Poultry*, however. Nor did he mention the word delegation in reference to the FCC's interpretation. In light of the Court's history in the delegation area, neither omission is particularly surprising. The Court rarely mentions the nondelegation doctrine or the associated case law in what are understood as modern delegation cases. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998); *supra* Section II.B (discussing the use of *Chevron* Step I as a delegation doctrine).

226. *See Iowa Utils. Bd.*, 119 S. Ct. at 734-36.

227. *See id.* In this regard, the Commission did not simply fail to explain or justify its interpretation. It failed to issue criteria guiding the interpretation of the statutory terms.

228. *See id.* at 735 (noting that the Commission's decision to "deliberately limit[ ] its inquiry to the incumbent's own network . . . allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary").

229. *Id.*

stamped that list.[230] Interestingly, there was no indication that the FCC was somehow pressured to do so. It had adopted the list for what it believed were perfectly rational reasons.[231]

Nonetheless, the Court rejected this type of lawmaking. Such lawmaking not only failed to supply the requisite standards, but it also gave regulatory power to those least likely to consider the interests of the incumbents and the public.[232] The new entrants had incentives to extract the most advantageous terms for themselves, even though other terms might suffice and better serve the broader statutory goals.[233] For example, free-riding on the incumbents' networks or demanding excessive profits may hurt service and prices in the long run, even though it would serve the new entrants' own immediate interests. Justice Breyer's concurrence reflected this concern.[234]

The Court determined that the Commission was not permitted to side with the new entrants, because the agency was required to advance the broad public purpose underlying the statute and to justify any interference with individual rights by reference to such a purpose.[235] In Justice Breyer's words, "Regulatory rules that go too far, expanding the definition of what must be shared . . . to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle."[236] The Commission was not obligated, however, to accept the incumbents' position either: "[I]t may be that some

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230. The new entrants' involvement differed in certain respects from the private lawmaking in *Schechter Poultry*. In *Schechter Poultry*, private parties received a role in lawmaking from Congress on the face of the statute and received enhanced power from the President as a result of an open-ended statutory delegation. *See* A.L.A. Schechter Poultry v. United States, 295 U.S. 495, 535, 551 (1935). In *Iowa Utilities Board*, new entrants received their lawmaking authority from the FCC, facilitated of course by an open-ended statutory delegation. *See Iowa Utils. Bd.*, 119 S. Ct. at 735.

231. *See Iowa Utils. Bd.*, 119 S. Ct. at 735.

232. *See id.* at 735-36.

233. *See id.*

234. Justice Breyer stated,

> [A] sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. And as one moves beyond the sharing of readily separable and administrable physical facilities, say, to the sharing of research facilities, firm management, or technical capacities, these problems can become more severe. One would not ordinarily believe it practical, for example, to require a railroad to share its locomotives, fuel, or workforce. Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious. And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide.

Id. at 753-54 (Breyer, J., concurring in part and dissenting in part) (citation omitted).

235. *See id.* at 735.

236. *Id.* at 754 (Breyer, J., concurring in part and dissenting in part).

other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind."[237] The Commission was required merely to select some determinate criteria that made good policy sense of the statute.[238]

2. American Trucking Ass'ns

Iowa Utilities Board can be understood to illustrate the application of the new delegation doctrine through *Chevron* Step II. The Court declined to find the FCC's interpretation reasonable under Step II in the absence of administrative limiting standards. *American Trucking Ass'ns* can be understood to illustrate another possible application of the new delegation doctrine—this time under the Constitution. Although the case purports to apply the original nondelegation doctrine, it explicitly converts that doctrine to one with the same procedural requirements, practical benefits, and theoretical underpinnings as the new delegation doctrine. Thus, the label "nondelegation" seems to be a bit of an artifact. However, it does serve to indicate the constitutional dimension of the doctrine fashioned in the case.

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237. *Id.* at 734; *see also id.* at 753 (Breyer, J., concurring in part and dissenting in part) ("The Act expresses . . . congressional uncertainty about the extent to which compelled use of an incumbent's facilities will prove necessary to avoid waste.").

238. Of course, this requirement will not necessarily prevent the FCC or any other agency from issuing substantive regulations that favor narrow interests. It may, however, impose a more significant obstacle than the traditional requirement of reason-giving under cases like *State Farm*. *See* Motor Vehicle Mfg. Ass'ns v. State Farm Mut. Ins. Co., 462 U.S. 29, 42-43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made . . . ."). Indeed, upon remand from *Iowa Utilities Board*, the FCC articulated standards that required it to revise its unbundled-access rule. *See* Order, *supra* note 204, at 9-10. The Commission determined that

> [a] proprietary network element is "necessary" . . . if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative form from a third party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.

Id. Moreover,

> [t]he incumbent LECs' failure to provide access to a non-proprietary network element "impairs" a requesting carrier . . . if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer.

Id. at 10. The Commission further provided that

> [i]n order to evaluate whether there are alternatives actually available to the requesting carrier as a practical, economic, and operational matter, we look at the totality of the circumstances associated with using an alternative. In particular, our "impair" analysis considers the cost, timeliness, quality, ubiquity, and operational issues associated with the use of an alternative.

Id. The Commission also set forth a number of additional factors that, consistent with the broad purposes of the Act, it would consider in evaluating which elements to make available on an unbundled basis. *See id.* Applying these standards and factors, the Commission struck several network elements from its original list and added certain others. *See id.* at 11-14.

American Trucking Ass'ns concerns a vaguely worded provision of the Clean Air Act that directs the Environmental Protection Agency (EPA) to promulgate and periodically to revise the National Ambient Air Quality Standards (NAAQS).[239] The EPA issued final rules revising the NAAQS for particulate matter and ozone.[240] For example, it reduced the ozone NAAQS from a 0.09 parts per million (ppm) level to a 0.08 ppm level.[241] In making that reduction, the agency considered a variety of factors, including the number of people exposed to serious health effects and the certainty of those effects.[242]

Judge Williams, writing per curiam,[243] invalidated the revised NAAQS.[244] He took no issue with the factors that the EPA had employed; he simply found them incomplete.[245] According to Judge Williams, the EPA was also required to articulate a theory for determining the point below which the risks were too trivial or uncertain to justify regulation.[246] In other words, the agency was required to provide a limiting standard or "intelligible principle" guiding its discretion:

> [T]he only concentration for ozone and PM [particulate matter] that is utterly risk-free, in the sense of direct health impacts, is zero. Section 109(b)(1) [of the Clean Air Act] says that EPA must set each standard at the level "requisite to protect the public health" with an "adequate margin of safety." These are also the criteria by which EPA must determine whether a revision to existing NAAQS is appropriate. For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.[247]

Judge Williams remarked that it was as if Congress had asked the agency "to select 'big guys,' and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point."[248]

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239. *See* American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033, *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999); *see also* Clean Air Act §§ 108-109, 42 U.S.C. §§ 7408-7409 (1994).

240. *See American Trucking Ass'ns*, 175 F.3d at 1033.

241. *See id.* at 1035.

242. *See id.* at 1036.

243. The per curiam opinion identified Judge Williams as author of this part. Judge Ginsburg joined, with Judge Tatel dissenting.

244. *See id.* at 1034-38.

245. *See id.* at 1036-37.

246. *See id.*

247. *Id.* at 1034 (citations omitted).

248. *Id.*

The EPA was obligated to determine "How tall? How heavy?"[249] Its failure to do so violated the nondelegation doctrine. Judge Williams remanded the rules to the EPA for further specification consistent with the broad statutory purpose of the Clean Air Act.[250] He acknowledged that the nondelegation doctrine ordinarily requires congressional remand—that is, statutory invalidation.[251] However, he stated,

> [w]here (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.[252]

Judge Williams justified this approach by pointing to the practical advantages of remanding for administrative standards. According to Judge Williams, remanding to the agency "ensure[s] that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage."[253] There are two parts to Judge Williams's observation: preventing courts from unnecessarily invalidating statutes, particularly on constitutional grounds, and preserving a role for agency expertise in saving them. The former reflects a concern to avoid the transaction costs associated with statutory invalidation, and the latter reflects a concern to capture the benefits of agency rulemaking.

The more important issue was whether the remand for administrative standards would serve the purposes of the nondelegation doctrine. Judge Williams conceded that his approach would not promote congressional responsibility, because the agency would still get to make the policy choices.[254] But, he said, the Supreme Court no longer insists upon this "strong form" of nondelegation review.[255] Furthermore, he noted, his approach would serve the remaining purposes of the nondelegation doctrine: preventing arbitrary administrative decisionmaking and

249. *Id.*
250. *See id.* at 1038.
251. *See id.*
252. *Id.* In this regard, Judge Williams clearly determined that administrative standards were constitutionally required in the absence of congressional standards. However, he did not clarify the constitutional provision from which such standards emanated. As discussed above and as Judge Williams acknowledged, *see id.*, administrative standards do not bear an obvious connection to the separation-of-powers rationale underlying the nondelegation doctrine. Perhaps Judge Williams determined that they nonetheless flow from the separation-of-powers principle because they serve in place of congressional standards to guide administrative discretion. Or perhaps Judge Williams found that they stem from the Due Process Clause.
253. *Id.*
254. *See id.*
255. *Id.*

facilitating judicial review. "If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily."[256] With those words, Judge Williams made explicit what was only implicit in *Iowa Utilities Board*: that the administrative-standards requirement furthers democracy broadly understood to encompass rational, responsible, and responsive lawmaking.

Writing in support of the denial for rehearing on this issue, Judge Williams also confirmed another point implicit in *Iowa Utilities Board*: the inherent limitation of interpretive norms as an alternative strategy for restraining broad delegations.[257] Judge Williams defended his decision to ask the agency for limiting standards by invoking the principle of *Chevron* deference.[258] Just as *Chevron* grants agencies authority to choose among reasonable interpretations of ambiguous statutory terms, so it also grants agencies authority to select among reasonable interpretations "of statute[s] containing only an ambiguous principle by which to guide its exercise of delegated authority."[259] Thus, courts should respect an agency's choice of limiting standards and, conversely, should look to the agency rather than Congress for such standards when absent. Furthermore, courts should not impose their own standards under a clear-statement or *Benzene*-type approach.[260] To do so would frustrate Congress's intent and contradict *Chevron*. In short, courts should address delegation issues *to the agency* under a modified form of nondelegation review—or, more aptly described, under a new form of delegation review created expressly for the administrative state.

IV. CONCLUSION

The new delegation doctrine might seem perplexing to both sides of the current delegation debate. Either it is too intrusive on administrative prerogatives or it is not nearly intrusive enough. The new delegation doctrine is difficult to comprehend only because it evinces a different focus. While the debate concentrates primarily on the legitimacy of lawmaking by administrative agencies, the new doctrine speaks more to the goal of promoting the legitimacy of law made by administrative agencies. It might even be fair to say that, in this regard, the new doctrine moves beyond the academic debate. Moreover, the new doctrine neither abandons democracy

256. *Id.*

257. *See* American Trucking Ass'ns v. EPA, 195 F.3d 4 (D.C. Cir. 1999). Unlike the original per curiam opinion, the rehearing opinion does not identify Judge Williams as its author. It was joined by Judge Williams and Judge Ginsburg, with Judge Tatel dissenting.

258. *See id.* at 8.

259. *Id.*

260. *See id.*

nor interferes with it in an arbitrary fashion. It attempts to reinforce a certain conception of democracy in precisely those cases that suggest a classic democracy problem. And it does so at the administrative level, preserving the significant advantages of agency policymaking. Thus, it offers a mechanism that mediates between the extremes of the delegation debate and that fits comfortably within the administrative state.

The new delegation doctrine also recognizes and remedies the inherent limitation of interpretive norms as an alternative tool for constraining broad delegations. Interpretive norms are helpful only where Congress's language permits their application. With increasing frequency, Congress writes statutes in language intended to convey maximum policymaking authority to administrative agencies. In such cases, interpretive norms simply run out. To apply them would allow courts to substitute their judgment of what Congress should have written for what Congress did write—a broad delegation that leaves to the agency the choice among reasonable limiting standards. The new delegation doctrine respects Congress's delegation but also ensures that agencies implement their delegated authority in an appropriate manner, by supplying the standards necessary for democratic lawmaking.

E.L. WIEGAND PRACTICE GROUPS OF THE FEDERALIST SOCIETY

ENVIRONMENTAL LAW & PROPERTY RIGHTS NEWS

EDITOR'S NOTE:

We hope you enjoy the 1999 National Lawyers Convention and that you are picking up this issue of the newletter there. If you were unable to join us for the Convention, never fear -- the next issue of the newsletter will summarize the proceedings hosted by our practice group.

And this issue will be of interest whether you are attending the Convention or not. It contains an analysis by the Pacific Legal Foundation of the most recent takings case by the Supreme Court, Del Monte Dunes. It also considers the D.C. Circuit's recent decision, American Trucking, applying the nondelegation doctrine to strike down EPA's national ambient air quality standards for ozone and particulate matter. The Competitive Enterprise Institute's Jonathan Adler then explains why wetlands can be protected without federal intervention. Finally, we wrap up this issue with a book review of a new law and economics monograph on toxic torts and environmental regulation by the Cato Institute's Peter VanDoren, and a case summary of an important new RCRA decision from the Eighth Circuit.

The Editor

The (In)signifcance Of Del Monte Dunes

Eric Grant [1]

The only takings case of the Supreme Court's 1998 Term, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[2] was highly anticipated on both sides of the property-rights fault line. When it was argued back in October of last year, the case seemed to portend a major reappraisal of the so-called "first prong" of the regulatory takings standard set forth in *Agins v. City of Tiburon*, namely, that a land use regulation effects a compensable taking if it "does not substantially advance legitimate state interests."[3] The Court had granted *certiorari* to consider, among other things, whether "liability for a regulatory taking can be based upon a standard that allows a jury or court to reweigh evidence concerning the reasonableness of [a] public agency's land use decision."[4] The City of Monterey and its *amici curiae* had argued strenuously in the negative, propounding a vision of regulatory takings law in which "courts employ deferential standards of review and require only that there be *some basis* to support the local government's [land use] decision."[5] Indeed, at oral argument, the representative of the Solicitor General had gone so far as to urge the Court explicitly to discard the first prong of *Agins* altogether, in favor of a much more relaxed standard derived from due process jurisprudence.[6]

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The Recent Controversy Over The Nondelegation Doctrine

Jeffrey Bossert Clark[1]

On May 14, 1999, in *American Trucking Association v. EPA*[2] the United States Court of Appeals for the District of Columbia Circuit applied the nondelegation doctrine to overturn and remand what was probably the Clinton Administration's most important environmental policy initiative -- its promulgation of new National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter, commonly known as smog and soot. Estimates of the costs of compliance with the revised NAAQS ranged into the hundreds of billions of dollars, but at the very least would have been in the neighborhood of $45 billion. Thus, EPA's proposed changes to the NAAQS constituted one of the most expensive regulatory mandates ever imposed.[3]

Reaction to the decision striking down these rules from Carol Browner, Administrator of the EPA, was swift and less-than restrained. In Browner's words, the decision was "one of the most bizarre and extreme decisions ever rendered in the annals of environmental jurisprudence."[4] That is extraordinarily harsh criticism for a court that has the exclusive power to review any nationally applicable environmental regulations EPA issues to combat air pollution.[5] It is hard to imagine an EPA Administrator being so strident if her term of office were not coming to a close and the court's cooperation was required to secure the continued validity of future EPA programs.

Putting aside the political wisdom of Browner's remarks, they reflect a profound misunderstanding or mischaracterization of the *American Trucking* decision. The D.C. Circuit's use of the nondelegation doctrine in that case is in line with that court's own precedent, as well as with Supreme Court case law. Indeed, one wrinkle in the way the court applied the doctrine that has come under fire from Browner and the environmental left was originally suggested by Kenneth Culp Davis, a towering figure in the liberal approach to administrative law and the principal author of the leading treatise on the subject.[6]

Moreover, perhaps the leading modern scholar of the administrative state, Cass Sunstein (hardly an arch conservative), acknowledges the serious policy concerns that the court was seeking to address in *American Trucking*. Thus, while Sunstein argues in a forthcoming law review article that it was inappropriate for the court in *American Trucking* to invoke the nondelegation doctrine, his academic criticism is quite restrained, and indeed he suggests an alternative framework that would have yielded the same result reached by the D.C. Circuit -- invalidating and remanding the NAAQS set by EPA.[7] (Admittedly, however, Professor Sunstein's approach would likely allow EPA to easily justify its current rules simply by offering a different explanation for them. The problems actually identified in the D.C. Circuit's decision will not be as easy for EPA to resolve.)

The nondelegation doctrine is based on constitutional text. The very first sentence of the substantive provisions of the Constitution, Article I, § 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." As every modern lawyer knows, however, there is a fundamental disconnect between that plain statement and the fact that much of the day-to-day law under which individuals and businesses operate is made not by Congress, but by unelected bureaucrats in administrative agencies issuing regulations pursuant to delegations of authority from Congress. The theory behind these delegations, however, has always been that the agencies are simply filling in the details after Congress has enacted the basic standards.[8] Thus, although there have been relatively few Supreme Court cases invoking the doctrine against Congress (or the Executive -- *see below*), there is a vital line between valid delegations and abdication by Congress of all real

responsibility in making the laws. For instance, a completely standardless delegation to industry representatives to create codes of competition was held to be so broad as to violate the nondelegation doctrine.[9]

While Professor Sunstein is fond of pointing out that the nondelegation doctrine has had only one good year -- 1935 -- because that was the only year in which the Supreme Court has ever invalidated any statutes under the doctrine, it is simply not true that the doctrine has been entirely dormant ever since the 1937 "switch in time that saved nine."[10] In the so-called *Benzene Case*,[11] a plurality of Justices led by that latter-day fellow traveler of the Four Horsemen,[12] Justice Stevens, construed the Occupational Safety and Health Act of 1970 to avoid nondelegation problems. Then-Justice Rehnquist, in a concurrence, would have gone farther and simply declared the statute unconstitutional, rather than attempting to save it. The simple point, however, is that given *Benzene*, it is just not true that the nondelegation doctrine is dead, or that it is the product of a fringe on the new judicial right.[13]

After *Benzene*, in a careful and scholarly opinion, Judge Williams of the D.C. Circuit, applied the nondelegation doctrine to the so-called *Lockout/Tagout* case, invalidating and remanding certain rules issued by the Occupational Safety & Health Administration ("OSHA").[14] And it was in this opinion that Judge Williams first put into action Professor Davis' suggestion for how to implement the nondelegation doctrine. Instead of applying the strong version of the nondelegation doctrine (*Schechter*), or the semi-strong version of the doctrine (*Benzene*), Judge Williams asked OSHA itself to suggest standards to constrain its own discretion. That decision to apply a weak form of the doctrine is fully consistent with the deference afforded administrative agencies under *Chevron, U.S.A., Inc v. NRDC*,[15] and represents an attempt by the judiciary to minimize any intrusive effects of the nondelegation doctrine. Indeed, Judge Williams couples this approach with what seems his general preference not to vacate rules that have been inadequately explained by agencies.[16] By doing so, Judge Williams allows an agency operating in the context of a nondelegation problem to attempt to supply a limiting principle for the troubling statute without having to repromulgate the rules at issue.[17]

American Trucking is nothing but a case in the line of *Lockout/Tagout* and *Benzene*. The D.C. Circuit's decision is therefore not radical. If anything, the range of discretion claimed by EPA is even more disturbing than the more narrow bounds of discretion available to OSHA in both *Lockout/Tagout* and *Benzene*. Comparing *American Trucking* to *Lockout/Tagout*, Judge Williams wrote: "EPA's freedom of movement between the poles is equally unconstrained, but the poles are even farther apart — the maximum stringency would send industry not just to the brink of ruin but hurtling over it, while the minimum stringency may be close to doing nothing at all."[18] In a tongue-in-cheek, but accurate footnote, Judge Williams also noted that the range of discretion EPA claimed was not only capable of deindustrializing the entire nation, but also of requiring radical reductions in the soot generated by nature herself![19] Power that enormous is more to be feared than the power of federal judges like those on the D.C. Circuit, who in this context, are largely limited to reacting to the political branches' affirmative use of government coercion by preventing agency action from going into effect. More importantly, wanting to place limits on such agency power is perfectly consistent with, and even necessary to, democracy.

Judge Tatel dissented from the nondelegation aspects of *American Trucking* (Judge Ginsburg joined Judge Williams to form the majority on this issue). Judge Tatel emphasized two points in opposition to the majority. *First*, Judge Tatel claimed that the majority threatened to strike down part of the Clean Air Act, which in his view was more definite a delegation than was present in various other statutes upheld by the Supreme Court against similar challenges. *Second*, Judge Tatel argued that it was unnecessary to invoke

the nondelegation doctrine to reach the result settled on by the majority.[20]

Contrary to Judge Tatel's first point, the majority did not threaten to strike down a portion of the Clean Air Act. Rather, it held only that *as interpreted by EPA*, the portion of the Clean Air that delegated the authority on which the Agency was relying in setting the NAAQS *would have been unconstitutional* if the statute were interpreted to hand over as much power to EPA as the Agency was claiming. Having made that determination, the majority would have been well within its rights under *Benzene* to provide a limiting principle itself for the Clean Air Act provision in question (and may yet do so if EPA fails on remand to identify a limiting principle). Instead, in a highly deferential nod to EPA's *Chevron* power to interpret the Clean Air Act, the majority gave EPA the first opportunity to solve the nondelegation problem presented by the Agency's interpretation of the statute. It is hard to see how this decision is so radically intrusive of agency power. Thus, it is difficult to reach a conclusion other than that Judge Tatel (and Administrator Browner) are exaggerating in saying that this decision "ignores the last half-century of Supreme Court nondelegation jurisprudence."[21] If anything, it is Judge Tatel who is ignoring precedent on point. His decision never so much as cites *Benzene*.

Judge Tatel's second point, that it was unnecessary to invoke the nondelegation doctrine, because the same result could have been based on Administrative Procedure Act "arbitrary and capricious" review alone,[22] seems to create a special rule for constitutional difficulties stemming from that doctrine. In the context of reviewing Federal Communications Commission ("FCC") decisions, for instance, the D.C. Circuit routinely identifies First Amendment problems with FCC action and remands for that agency to fix those problems.[23] What the *American Trucking* court did in terms of the nondelegation doctrine is no different. It is undoubtedly true that in both types of cases, where FCC action creates First Amendment difficulties and EPA action creates nondelegation doctrine difficulties, a court could often invalidate the agency action at issue on the grounds of arbitrariness and capriciousness and remand for further proceedings without mentioning constitutional problems. But there is no reason not to mention these constitutional difficulties, especially when they are intertwined with the arbitrariness of the agency action under review. Furthermore, agency action that might not be arbitrary if no constitutional concerns are present can become arbitrary in light of such concerns. If the D.C. Circuit does not impose a constitutional "gag rule" on itself when it invalidates and remands FCC action in light of First Amendment problems, there is no reason for it to operate under a special "gag rule" in the nondelegation context.

Finally, it should be noted that the EPA rules in question were invalidated on statutory grounds as well as in light of the nondelegation doctrine. An important point often ignored or underestimated in much of the media hype about *American Trucking* is that the panel's *statutory* rulings were *unanimous*.[24] In this regard, it is worth highlighting how the court dealt with EPA's smog (ozone) standard, because it was particularly problematic. When present at ground level, ozone, the same substance that high up in the sky forms the "ozone layer" which blocks the sun's harmful ultraviolet radiation ("UV"), has been associated with various respiratory illnesses. Those harmful ground-level effects are EPA's mandate for regulating ozone. But what EPA refused to consider in its NAAQS rulemaking was the scientific evidence establishing that ozone at ground level has the same UV-blocking effects that it has in the stratospheric ozone layer. And it is not trivial to ignore these benefits because excess UV radiation has been strongly linked to skin cancer, cataracts, and immune-system dysfunction. Thus, ozone at ground level has both harmful and helpful effects on human health. The D.C. Circuit invalidated EPA's decision to consider only one half of the "equation" by focusing in its regulations on the harmful effects of ground-level ozone, while ignoring its positive

effects.

The *American Trucking* decision is not radical. Rather, it represents a modest form of the nondelegation doctrine even less stringent than the one used by the Supreme Court relatively recently in the *Benzene Case*. Indeed, its use in this fashion was advocated by a liberal academic long ago, and had been similarly used by the D.C. Circuit before *American Trucking* was ever handed down. Finally, *American Trucking* is about more than just the nondelegation doctrine -- important statutory questions posed by the case were resolved by a diverse panel both in favor of and against EPA. What *American Trucking* is really about is saving the public from having to live under one of the most expensive regulatory mandates ever issued by an agency where the agency's choices were arbitrary and based on slipshod legal analysis.

Shortly after the decision was issued, EPA petitioned for en banc review of *American Trucking*. That petition is still pending. If a vital principle protecting our democracy is to be preserved, that en banc petition should be rejected, or if it is granted, should lead to a decision reaching the same result as the panel by acknowledging the nondelegation-doctrine concerns present in the case. Supreme Court review should prove unnecessary, but if it occurs, the High Court should strengthen and not weaken its approach in the *Benzene Case*.

[1] *Mr. Clark is an associate at Kirkland & Ellis. He participated in briefing the American Trucking decision in proceedings before the United States Court of Appeals for the District of Columbia Circuit en banc. The views expressed here are solely Mr. Clark's and do not represent those of the American Trucking Association, any of the other parties to the American Trucking case, or any of Kirkland & Ellis's other clients.*

[2] 175 F.3d 1027 (D.C. Cir. 1999).

[3] *Court Asked to Rehear Soot and Smog Rule That Two Judges Ruled Unconstitutional*, 27 The Energy Report, Issue 27 (July 5, 1999).

[4] *Justice Appeals Air Standards Decision*, Chemical Week (July 7, 1999).

[5] *See* Clean Air Act ("CAA") § 307(b)(1), 42 U.S.C. § 7607(b)(1).

[6] *See* 1 Kenneth C. Davis, *Administrative Law Treatise* 207-08 (2d ed. 1978) (suggesting that the nondelegation doctrine should be implemented not by courts striking down congressional enactments with overly broad delegations, or by courts narrowing otherwise overbroad statutes to avoid constitutional problems, but by "requir[ing] the administrators . . . as rapidly as feasible [to] supply the [missing] standards").

[7] Professor Sunstein has released a preliminary version of his law review article through the AEI-Brookings Joint Center for Regulatory Studies, entitled "Is the Clean Air Act Unconstitutional?" It may be found on the Internet at <http://www.aei.brookings.org/publications/working/working_99_07.pdf>. It should be noted, however, that while Professor Sunstein's academic criticism of *American Trucking* is muted, his criticism in the popular press approaches Carol Browner's in tone. *See* Cass R. Sunstein, *The Courts' Perilous Right Turn*, New York Times at A25 (June 2, 1999). In that article , Sunstein used *American Trucking* as evidence to support his thesis that "some conservative judges are fighting democracy, not working with it." Given that later briefing filed on EPA's behalf by the Justice Department had a more measured tone, in line with Sunstein's draft law review article, it is likely that both Professor Sunstein and Administrator Browner are simply making their voices shrill in the popular press to attract the public's attention to a decision they disagree with on policy grounds. It is unfortunate that a prominent law professor and a high-ranking government official present such different faces to the general public than to a specialized legal audience.

[8] *See United States v. Grimaud*, 220 U.S. 506 (1911).

[9] *See Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (commonly called the "sick chicken" case because the challenge at issue was brought by a poultry dealer unhappy with the code created under this delegation of authority, which prevented him from selling chickens of below-average quality).

[10] The reference is to the famous switch by Justice Roberts that gave President Roosevelt his way in pushing forward with the New Deal, even after the defeat of his Supreme Court packing plan, ostensibly designed to ease the workload of Justices who were growing old. *See West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (where Justice Roberts first began to switch sides).

[11] *Industrial Union Dep't, AFL-CIO v. American Petroleum Instit.*, 448 U.S. 607 (1980).

[12] In a comparison to the Book of Revelation 6:12, the four Justices who most strongly opposed the New Deal were called the "Four Horsemen" after the biblical four horsemen of the Apocalypse. The Justices in question were: Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter. The comparison of Justice Stevens to these much-maligned Justices is intended to be sarcastic.

[13] It is true that the Supreme Court has upheld certain other delegations, such as the Federal Sentencing Guidelines, but those delegations were hardly as extreme as those in the sick chicken case or in *Benzene*. *See Mistretta v. United States*, 488 U.S. 361 (1989). Justice Scalia dissented from *Mistretta*, but not on nondelegation grounds.

[14] *International Union, UAW v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir.1991).

[15] 467 U.S. 837 (1984).

[16] *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993); *but see Illinois Public Telecommunications Ass'n v. FCC*, 123 F.3d 693, 694 (D.C. Cir. 1997) ("a reviewing court should normally strike the balance in favor of vacating the agency's action, unless special circumstances exist."), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 118 S. Ct. 1361 (1998); *see also Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1992) (opinion of Randolph, J.) (arguing that courts reviewing agency action under the Administrative Procedure Act lack the authority to allow invalid agency regulations to continue in effect pending a remand).

[17] *See International Union, UAW v. OSHA*, No. 89-1559, 1991 WL 223770 (Sept. 16, 1991) (refusing to vacate suspect OSHA rules pending a remand to OSHA). The panel in *American Trucking* acted in similar fashion. Thus, the invalidated NAAQS are still on the books at EPA, and will spring back into life if the D.C. Circuit panel in *American Trucking* becomes satisfied that EPA has addressed the nondelegation problems at issue there, or if the panel's decision is ever vacated or reversed.

[18] *American Trucking*, 175 F.3d at 1037.

[19] *See id.* at 1038 n.4.

[20] *See id.* at 1057-62 (Tatel, J., dissenting).

[21] *Id.* at 1057.

[22] *Id.* at 1061.

[23] *See, e.g., Sangre De Christo Communications, Inc. v. FCC*, 139 F.3d 953, 957-58 (D.C. Cir. 1998); *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996); *cf. Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (Thomas, J.) (vacating order that violated Equal Protection Clause).

[24] Given that Judge Tatel, a Clinton appointee, joined in these rulings, it should be hard for Carol Browner to claim that the decision was extreme, or for Professor Sunstein to claim that the decision is the product of activist conservative judges. Judging from what they have said already, however, this has not proven true.

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CONTROLLING *CHEVRON*-BASED DELEGATIONS

Ernest Gellhorn and Paul Verkuil***

INTRODUCTION

The central operational standards of our written Constitution—that executive, legislative, and judicial powers shall be separated and that each shall be controlled by one (or more) of the three branches of government—are based on two precepts: first, that governmental powers are limited to those granted by the Constitution or approved by Congress and the President; and second, that discretion in any agency or official is constrained by the Constitution as well as by laws duly enacted pursuant to constitutional requirements. The first restraint on government lies with Congress, under its authority to "make all laws"[1] and thus to make them specific and limited. It has full authority to ensure that an agency stays within its designated jurisdiction by clear drafting and specific assignments. To this end, a revived delegation doctrine, which requires legislation to include "intelligible principle[s]"[2] for measuring the scope and not just the goals of legislation,[3] could play a critical role in confining agency discretion and ensuring agency accountability. In this way, limits on vague and standardless delegations should be a first principle of constitutional government.[4] Strong policy grounds continue to support wider application of the doctrine prohibiting standardless delegations.[5]

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1 U.S. CONST. art. 1, § 8.

2 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

3 *See generally* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249-74 (1985); David Schoenbrod, *Goal Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 803-26 (1983).

4 *See* Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 352 (1987) (urging that the delegation doctrine be revived on a limited basis to prohibit "excessive delegations that are clearly used to create private goods").

5 *See* RICHARD PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 54 (2d ed. 1992); *see also* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 5 (1982) (analyzing "certain causes and consequences of the congressional delegation of legislative authority to executive-branch agencies and independent commissions").

Properly pursued, the delegation doctrine would ensure that major policy decisions are made by an elected Congress and President, and not an appointive bureaucracy.[6] It also would give agencies and courts greater guidance in understanding the scope (and limits) of an agency's mandate.

Despite the attractiveness of a revived delegation doctrine in constitutional law, it also must be acknowledged that the United States Supreme Court continues to show "no interest in reviving the delegation doctrine as a check on administrative discretion."[7] In upholding wide discretion to the United States Sentencing Commission to craft mandatory sentencing guidelines in *Mistretta v. United States*,[8] Justice Blackmun went so far as to say that the Court's "approval of . . . broad delegations"[9] without objection "has been driven by a practical understanding that in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives."[10] Even Justice Scalia's dissent in *Mistretta* agreed with this assessment, although he derisively characterized the Commission's authority as a "junior-varsity Congress."[11] He reasoned that the Court has not "felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[12]

However, the problems of unconfined agency discretion and, more particularly, of excessive delegations of authority to agencies are not limited to the scope of congressional delegations or to the standards applied to test the necessary precision of regulatory laws. Indeed, the larger question, at least in terms of practical impact and unregulated agency overreaching, is how to control overly expansive readings by agencies of their mandates. Justices Blackmun and Scalia may be right that Congress cannot be ex-

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6 *See* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, at 955-56 nn.24-26 (1999); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871 (1999); Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999).

7 PIERCE ET AL., *supra* note 5, at 54.

8 488 U.S. 361 (1989).

9 *Id.* at 374.

10 *Id.* at 372.

11 *Id.* at 427 (Scalia, J., dissenting).

12 *Id.* at 416.

pected to do a better job of drafting legislation that sets primary policies, although we will never really know unless it is expected or commanded by the courts to do so. However, it is surely the case that, even if the Court required Congress to adopt more precise and clearer statutes when assigning agencies responsibility for clean air, a safe and sound banking system, reasonable rules for election campaigns, or fair competition, difficult, unanticipated issues not answered directly by the terms of the statutes or their legislative histories would continue. Arguments over the scope of an agency's authority cannot be eliminated and the standards applied to decide such issues are critical in limiting the discretion of administrative officials.

Designing more effective controls on agency interpretations of their authority involves two questions: (1) how agencies should read their mandates, and (2) how courts should review such agency interpretations. Consistent with separation of powers principles, we believe that agencies should read their enabling authority restrictively. Assertion of new-found powers should occur only after receiving a clear statement of intent from Congress.[13] Such a self-imposed standard would help ensure the legitimacy of agency action outside the traditional scope of its authority.[14]

But the tendency has been to favor a more expansive approach. Regulators are expected to be proactive. The media interprets this to mean that regulators should continually press for an expansion of their authority. Perhaps this is inevitable, although the more careful analysis today holds that regulatory programs should be confined to market failures, should be limited to solutions that match specific needs, and should apply market-based standards where possible.[15] The argument for agency restraint in interpreting its legislative authority reflects a more basic principle of legitimacy and authority. Until Congress delegates specific powers to an agency with a reasonable degree of clarity, there is no basis in law for an agency to claim such power. The

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[13] *See* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) (reading the FCC's authority to collect fees narrowly by applying a "clear statement" standard). For the effects of a judicial command that an agency does not construe an act so broadly as to raise a delegation doctrine problem, see International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991).

[14] *See, e.g.*, JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 93-94 (1978). *But see* JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAWS 151-53 (1997) (suggesting that "vague delegations" may be a superior means of accountability and legitimacy).

[15] *See generally* STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

checks and balances central to our constitutional scheme instruct that laws are passed only after compliance with both the bicameralism and presentment requirements, not agency preferences or interests.[16]

Such a rule of interpretation is more consistent with constitutional and prudential norms, and we urge that agencies should adopt it. But we are skeptical that this recommendation will carry the day. History clearly shows that, except in highly unusual circumstances,[17] agencies read their authority expansively and often pursue agendas far beyond that envisioned when the agencies were created.[18] These many causes include: pressure from the President or congressional committees; bureaucratic imperatives; and public (i.e., interest group) demands.[19] Neither the President nor Congress is likely to narrow agency discretion to limit such tendencies when it is in their self-interest not to do so.[20] In addition, we do not believe that courts are likely to expand the clear statement doctrine beyond its current limited scope where an agency interpretation raises serious constitutional questions.

The second approach for constraining agency assertions of authority, and the one we develop more fully in this Article, would restore the independent judicial determination of jurisdictional issues outside the agency's primary mandate or subject matter, even

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16 *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983).

17 The most celebrated exception is airline deregulation which was led by the Civil Aeronautics Board ("CAB") and approved by Congress. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. §§ 40,101-40,120 (1994)). Airline deregulation was surely not the product of regulatory inertia or restrictiveness. Yet neither was it a function of jurisdictional aggrandizement. Alfred Kahn, the CAB's chairman during its deregulatory phase, focused the agency on its central mission—that of preserving a healthy airline industry—by *narrowing* rather than expanding the agency's rulemaking powers. *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION 261-99 (1984) (outlining CAB chairman Alfred Kahn's role in implementing deregulatory policies). Thus, while in many respects Chairman Kahn was no less ambitious in setting the CAB's agenda than Dr. Kessler was in setting the FDA's agenda, *see infra* text accompanying notes 48-51, Kahn clearly acted "within jurisdiction" as that term is interpreted under section 558(b) of the APA. *See infra* note 28.

18 *See, e.g.*, E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (refusing to enforce an FTC order); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980) (same); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980) (same); *see also* Jeffrey H. Liebling, Comment, *Judicial Usurpation of the F.T.C.'s Authority: A Return to the Rule of Reason*, 30 J. MARSHALL L. REV. 283 (1996) (discussing the narrowing of the FTC's authority by the federal courts).

19 *See* Aranson et al., *supra* note 5.

20 *See* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992); Kenneth Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistence: A Comment on Macey* 8 J.L. ECON. & ORG. 111 (1992).

if contrary to an agency's plausible interpretation (and some readings of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[21]). This approach is not without its problems, of course, but we view it as far more promising than the alternatives. Admittedly, the United States Supreme Court cases have limited the application of *Chevron* more often than they have applied it and the cases often are difficult to reconcile.[22] But we believe that some members of the present Court may be receptive to limiting *Chevron* deference to narrower questions of legislative ambiguity where it is more likely that Congress both expected agencies to fill in the gaps and courts to defer to such agency determinations.[23] In any event, the application of *Chevron* deference to peripheral jurisdictional questions has been and remains unsettled.[24]

Adoption of a rule denying deference to expansive agency readings of their jurisdictional claims would not require overruling any precedent. Moreover, a requirement of independent judicial evaluation of peripheral jurisdictional issues is consistent with the terms and rationale of *Chevron*. The prudential rule of *Chevron* (and *Skidmore v. Swift & Co.*[25]), requiring judicial deference to reasonable agency interpretations of their enabling acts, was first applied in limited contexts where the specific scope of the agency's authority to apply well-recognized regulatory programs was in doubt. Its purpose was to take advantage of agency experience and expertise in areas where Congress had delegated general authority to the agency, but the precise contours of that power were not clear or its applications to recent developments were uncertain.

This Article presents the case for restricting the application of *Chevron* deference to filling in the interstices of its core legislation, thereby leaving peripheral jurisdictional issues for independent judicial determination. This is not to say that agencies cannot argue

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21 467 U.S. 837 (1984).

22 *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6 (2d ed. Supp. 1996).

23 *See, e.g.*, St. Luke's Hosp. v. Secretary of Health and Human Servs., 810 F.2d 325, 331 (1st Cir. 1987) (Breyer, J.).

24 *See* Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 377-91 (1988). In *Mississippi Power*, Justices Brennan, Marshall, and Blackmun joined in a dissenting opinion that argued, inter alia, that *Chevron* had no application to jurisdictional disputes, whether core or peripheral. In a concurring opinion, Justice Scalia argued that it did. In this Article, the term "peripheral" is intended to represent those jurisdictional questions that reflect territory outside the ambit of the agencies' traditional or "core" exercises of authority.

25 323 U.S. 134 (1944).

the case for greater jurisdiction, including an explanation of why their interpretation should be given special attention because of the impact of the decision on their regulatory programs. Nor does it depend upon either support of or hostility to *Chevron*.[26] Taking the agency's experience and special insights into account because of the merit of its analysis is one thing; but taking agency interpretations of basic statutory authority outside traditional areas of agency regulation as controlling is another.

When agency self-interest is directly implicated, such as when it must decide whether an area previously unregulated by the agency should now come within its jurisdiction, the justifications for deference fade. Its experience and expertise in the new subject matter is limited; it is at most a fiction that Congress intended that the agency would exercise jurisdiction if it had addressed the question. It is here that concern about agency aggrandizement is at its highest. Of course, peripheral jurisdictional issues are not always readily distinguishable from other more traditional questions, and this is a major criticism of our approach. But we are satisfied that even in those circumstances, courts should be cautious in applying *Chevron* where there is significant distance between the agency's traditional regulation and that being asserted. The need to ensure accountability and limit agency discretion weighs heavily on the side of not expanding *Chevron* beyond its original and limited scope. For our purposes, it is *Chevron* deference that is the problem, not *Chevron* itself. Moreover, if our jurisdictional concerns can be resolved in step one of *Chevron*, where both the agency and court are bound by Congress' legislative judgment, then we have reached our goal without adjusting the deference standard.

I. THE PROBLEM OF *DYNAMIC INTERPRETATION*

The Constitution[27] and the Administrative Procedure Act[28]

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[26] In fact, we count ourselves among the supporters of the *Chevron* rule as a necessary accommodation to the impracticality of applying the delegation doctrine. Non-deferential judicial review, after all, has almost as much potential to disrupt congressional delegations as does a revived nondelegation doctrine. But for *Chevron* to become a workable alternative to nondelegation, it must also have limits.

[27] U.S. CONST. art. I, § 8, cl. 18.

[28] 5 U.S.C. §§ 551-559 (1994). Note especially section 558(b) which provides that "[a] sanction may not be imposed or a substantive order issued except *within jurisdiction delegated to the agency* and as authorized by law." *Id.* § 558(b) (emphasis added). This often overlooked provision articulates an independent APA ground for scrutinizing jurisdictional decisions. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998). And it should be remembered that an agency is entitled to no *Chevron* deference in its interpretation of the APA. *See infra* note 81.

("APA") require that agency action be based on authority granted to the agency by Congress. Unlike common law courts with a recognized power to create their own authority, as well as to fill in and apply the law, it is contrary to the constitutional scheme for agencies to regulate areas beyond those which Congress authorized. These propositions are not unchallenged: They have been questioned by those who see agencies as recipients of regulatory power subject to "dynamic statutory interpretation."[29] Indeed Professor Sunstein also postulates that "[i]n the modern era, administrative agencies have become America's common law courts."[30] While this argument has appeal, we necessarily reject it in this Article.[31]

Determining whether an agency's asserted authority is within a specifically delegated assignment is subject to numerous rules and principles. Most prominent among them is, of course, step two of the *Chevron* doctrine that agency interpretations which are reasonable shall be upheld where Congress has not spoken on the precise question.[32] While agencies often interpret their regulatory authority expansively, such assertions generally are limited to situations where the agency clearly has jurisdiction over the practices involved. For example, when the Federal Trade Commission ("FTC") pushed its substantive and procedural authority to the boundaries in cases such as *FTC v. Sperry & Hutchinson Co.*[33] and *National Petroleum Refiners Ass'n v. FTC*,[34] serious challenges were not raised about the FTC's authority to prohibit antitrust and "unfair trade practice" violations. That is, the trading stamp practices at issue in *Sperry & Hutchinson* raised tying issues closely related to traditional antitrust prohibitions, and the use of substantive rule authority in *National Petroleum* involved an interpretation of the FTC's rulemaking authority under the FTC

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29 *See* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies As Common Law Courts*, 47 DUKE L.J. 1013, 1020 (1998) [hereinafter Sunstein, *Is Tobacco a Drug?*].

30 *Id.* at 1059.

31 *See also* Richard A. Merrill, *The FDA May Not Regulate Tobacco Products As "Drugs" or as "Medical Devices"* 47 DUKE L.J. 1071 (1998).

32 *See* Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

33 405 U.S. 233 (1972); *see also* FTC v. Brown Shoe Co., 384 U.S. 316, 320 (1966) (holding that the FTC had the "power to find... an anticompetitive practice unfair, subject of course to judicial review").

34 482 F.2d 672 (D.C. Cir. 1973) (upholding the FTC's authority to implement trade regulation rules). The court concluded that "the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent." *Id.* at 698.

Act. Thus, the primary question in cases such as *Sperry & Hutchinson* was whether, as in *Chevron* itself, the agency had the authority to attack the problem in the *manner* asserted. Did the FTC's rulemaking authority cover substantive rules? Did its assignment of prohibiting anticompetitive and unfair practices include the lock-in competitive advantage obtained by trading stamps.

On the other hand, when an agency asserts authority far beyond its legislative assignment, as occurred in *Leedom v. Kyne*,[35] the courts have reviewed agency assertions of jurisdiction even before a final order is issued and without deference to the agency's interpretation of its authority.[36] As Judge Friendly concluded in *PepsiCo v. FTC*,[37] *Leedom* allows a court to review without deference an agency complaint or other action "plainly beyond its jurisdiction as a matter of law," even though further proceedings were contemplated, because the "proceeding... must prove to be a nullity."[38] However, these are pre-*Chevron* cases. Whether *Chevron* modified the *Leedom* rule is a question that we will seek to answer.[39]

A. Examples of Agency Action Plainly Beyond Jurisdiction

Perhaps emboldened by the role of judicial deference outlined in *Chevron*, agencies have increasingly ignored the boundaries of their delegated authority and made broad claims of jurisdiction into areas long thought to be outside their jurisdiction. When challenged, agencies know they can rely on the safe harbor of step two of the *Chevron* test by arguing that their jurisdictional conclu-

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[35] 358 U.S. 184, 188 (1958) (reviewing agency assertions of jurisdiction in a suit brought "to strike down an order of the [NLRB] made in excess of its delegated powers and contrary to a specific prohibition in its Act").

[36] The NLRB had attempted to include in the "unit" for collective bargaining purposes "employees whom it found were not professional employees." *Id.* at 188-89. The Court held that the NLRB had "attempted [an] exercise of power that had been specifically withheld." *Id.* at 189; *see also* Rockford Redi-Mix Co. v. Zipp, 632 F.2d 30, 31-33 & n.6 (7th Cir. 1980) (holding that the NLRB's refusal to issue an unfair labor practice complaint may be reviewable by a court if the NLRB has exceeded its delegated powers); Associated Builders & Contractors, Inc. v. Irving, 610 F.2d 1221, 1226-28 (4th Cir. 1979) (same); Bova v. Pipefitters & Plumbers Local 60, 554 F.2d 226, 228-29 (5th Cir. 1977) (same).

[37] 472 F.2d 179, 187 (2d Cir. 1972); *see also* Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655 (D.C. Cir. 1994) (en banc).

[38] 472 F.2d at 187.

[39] *See infra* text accompanying notes 104-07 (discussing Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988)).

The FDA, relying on "new evidence" that nicotine is addictive and has significant pharmacological effects and that nicotine addiction is a pediatric disease, asserted jurisdiction over the distribution, marketing, and sale of cigarettes and smokeless tobacco.[48] It emphasized the health effects of tobacco products and the dangers that marketing and advertising practices presented in enticing children to begin smoking. This need was then used to justify a broad reading of the FDCA to encompass tobacco products as combination products under the drug and device segments of the Act.[49] A federal district court accepted the FDA's argument that the FDA had jurisdiction over tobacco products (but not their advertising and promotion) under *Chevron* on two grounds. First, it found that although Congress did not specifically address the issue of FDA jurisdiction over tobacco products in the FDCA, it also did not express a "clear intent to *withhold* from [the] FDA jurisdiction to regulate tobacco products in some place other than the text of the FDCA."[50] Second, the court found the agency's interpretation "reasonable"[51] and thus entitled to *Chevron* deference.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed in a two-to-one opinion authored by Judge Widener.[52] First, the court reversed the district court's presumption of statutory authority, calling it a "fundamental misconception."[53] Once it took this step, it was relatively easy to retrace and reverse the jurisdictional assumptions contained in the district court's opinion. From the *Chevron* perspective advocated here, the Fourth Circuit's approach is preferable. When expanded areas of jurisdiction are under scrutiny, *Chevron* "deference" must itself be viewed skeptically. In this connection, the court stated: "We also note that ascertaining congressional intent is of particular im-

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Pub. L. No. 91-222, § 4, 84 Stat. 87, 87-90 (1970) (amending 15 U.S.C. §§ 1331-1338 (1994)) (warning label requirement).

48 *See* Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374, 1384 (M.D.N.C. 1997)*,rev'd,* Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998)*petition for cert. filed,* 67 U.S.L.W. 3484 (U.S. Jan. 19, 1999) (No. 98-1152).

49 *See id.* at 1393-97.

50 *Id.* at 1380 (emphasis added).

51 *Id.* at 1384.

52 *See Brown & Williamson Tobacco Corp. v. FDA,* 153 F.3d at 161. In particular, the court reviewed the FDCA as a whole rather than through the prism of the definitional sections alone as the district court had done. *See id.* at 163 & n.11 (citing Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990); Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) (warning against "bootstrap" jurisdiction)).

53 *Id.* at 161.

portance where, as here, an agency is attempting to expand the scope of its jurisdiction."[54]

2. Application of Civil Rights Law to Environmental Decision-Making

Decisions made by agencies such as the Environmental Protection Agency ("EPA") and the Nuclear Regulatory Commission ("NRC") regarding the permitting of industrial plants and the siting of nuclear facilities are required to be made in accordance with statutory criteria related to environmental pollution, safety, and efficacy. For example, the NRC, created in 1974[55] and responsible for the "[p]rincipal licensing and regulation" of nuclear facilities,[56] must consider several factors when evaluating nuclear facility sites.[57] Among the considerations previously applied to siting applications are the "intended use of the reactor,"[58] the safety features of the facility,[59] and both the "[p]opulation density and use characteristics of the site environs."[60] The NRC reworked the criteria for siting applications submitted after January 1, 1997.[61] These factors include "the population distribution, and site-related characteristics,"[62] as well as the "[p]hysical characteristics of the site."[63] Thus, until recently, the EPA and NRC read their mandates as not authorizing them to include civil rights criteria under Title VI of the Civil Rights Act[64] when deciding permit and site issues.[65]

However, in 1994 both the EPA and NRC had to confront Executive Order 12,898,[66] which they read as mandating a different approach. The order directed that all federal agencies identify and address "environmental justice" concerns—e.g., that minority communities not host a disproportionate number of high-emission chemical or other hazardous facilities—pursuant to Title VI of the

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54 *Id.* at 162.
55 *See* 10 C.F.R. § 1.1 (1998).
56 42 U.S.C. § 5843(b)(1) (1994).
57 *See* 10 C.F.R. § 110.00 (1998) (setting forth the factors).
58 *Id.* § 110.00(a)(1).
59 *See id.* § 110.00(a)(4).
60 *Id.* § 110.00(b).
61 *See id.* § 110.20.
62 *Id.* § 100.20(a).
63 *Id.* § 100.20(c).
64 42 U.S.C. § 2000(d) (1994).
65 *See* James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964* 13 STAN. ENVTL. L.J. 125, 181 & n.176 (1994) (referencing EPA statements denying that it had civil rights obligations).
66 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994).

1964 Civil Rights Act.[67] The presidential directive specified that it was designed to sensitize regulatory officials to possible disproportionate effects of their decisions on minority communities. But, it was "intended only to improve the internal management of the executive branch" and did not "create any [enforceable] right, . . . substantive or procedural," or provide that agency compliance was judicially reviewable.[68]

A recent decision by the NRC's Atomic Safety and Licensing Board ("Board") illustrates how the Board has relied upon Executive Order 12,898 to expand its authority and reach results inconsistent with the NRC's enabling statute. The case, *In re Louisiana Energy Services, L.P.*,[69] involved the siting of a nuclear facility, which according to NRC regulations generally requires that a nuclear plant be located away from sensitive "receptors," such as hospitals, schools, and nursing homes.[70] Even though the Board found these criteria satisfied, it ruled that the site selected was invalid because minority communities generally are underserved by such "amenities."[71] In particular, the Board severely criticized the staff's unwillingness to consider siting the nuclear facility near a popular fishing lake.[72] Reliance on "quality of life considerations" was held to be improper because it favored the middle class at the expense of the poor.[73] In reaching this conclusion, the Board relied upon Executive Order 12,898 as modifying its siting criteria even though the President's order expressly did not—because it could not—expand the NRC's statutory authority.[74]

Another example concerns an experimental program in California whereby oil companies obtain extra emissions credits for each old, heavy-emission car that they buy and scrap.[75] By ac-

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67 *See id.*

68 *Id.* at 863.

69 45 N.R.C. 367 (1997).

70 *See id.* at 388, 396.

71 *See id.* at 408.

72 *See id.* at 394-97.

73 *See id.* at 387.

74 *See* Chrysler Corp. v. Brown, 441 U.S. 281, 308-13 (1979) (ruling that executive orders must be authorized by statute to have legal effect); Meyer v. Bush, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) (holding that the executive order lacks "legal significance"); New River Valley Greens v. United States Dep't of Transp., 1996 U.S. Dist. LEXIS 16547, at *16-20 (W.D. Va. Oct. 1, 1996) (holding that executive orders do not create enforceable rights or obligations).

75 *See* Branford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization* 25 ECOLOGY L.Q. 1, 26-31 (1998) (describing a lawsuit challenging the validity of the emissions-trading initiatives).

quiring extra emissions credits, these oil companies are able to concentrate statewide emission sources at refineries located near minority communities, resulting in an alleged violation of Title VI and the EPA's siting requirements.[76] These effects have led several community groups to file a complaint with the EPA, alleging that the "'Old-Vehicle Scrapping Program' results in an adverse disparate impact on regional communities of color."[77]

Several opinions issued by the EPA further demonstrate the interplay between industrial plant permitting and Executive Order 12,898. In *In re Chemical Waste Management of Indiana, Inc.*,[78] *In re Envotech, L.P.*,[79] and *In re EcoElectrica, L.P.*,[80] the EPA's Environmental Appeals Board stated that the EPA could consider "environmental justice" issues, as set forth in Executive Order 12,898, in its criteria for reviewing permit applications. Despite concluding in these cases that Executive Order 12,898 did not add any substantive requirements to its permitting criteria, the EPA in effect now considers environmental justice concerns in its permitting decisionmaking. Thus, like the NRC, the EPA arguably has exceeded its statutory authority by incorporating Executive Order 12,898 into its permitting criteria.

These cases are similar to the FDA's assertion of authority to regulate tobacco products where no health claims are made. In the environmental cases, the agencies' statutory authority for identifying the criteria to be applied in permitting and siting decisions is explicit. None of these criteria, however, includes application of the civil rights laws. All have been interpreted as limiting the decisional criteria to factors directly related to the two agencies' regulatory programs. Moreover, as with FDA's tobacco rules, the NRC and EPA cases involve the agency's application of an executive order that is not directly part of its regulatory authority, and thus generally not within *Chevron* deference.[81] Both agencies' con-

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[76] *See* John Chambers, *The Supreme Court Has Agreed to Take up an Issue That Has Stymied Regulators and Judges: Waste Disposal Facilities Planned for Construction in Minority Areas*, NAT'L L.J., June 22, 1998, at B6.

[77] *Id.* The complaint filed with the EPA is captioned as *Communities for a Better Environment v. South Coast Air Quality Management District*, EPA File No. 10R-97-R9 (filed June 23, 1997). *See id.* at B7 n.23.

[78] 1995 EPA App. LEXIS 25 (June 29, 1995).

[79] 1996 EPA App. LEXIS 4 (Feb. 15, 1996).

[80] 1997 EPA App. LEXIS 5 (Apr. 8, 1997).

[81] *See* United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 236 n.6 (1973) (holding that the ICC does not have primary responsibility for administering the APA and its interpretations "do[ ] not carry the weight, in ascertaining the intent of Congress, that an interpretation by an agency 'charged with the responsibility' of administering a particular

trary interpretation of their authority has resulted in a substantial expansion of that authority in a manner not considered or probably even imagined by Congress. As appealing as these assertions of jurisdiction may be as social policy matters, there is no reason to defer to the agencies' broad reading of their authority.

3. Federal Reserve Board's Interpretation of the Glass-Steagall Act

To ensure their safety and soundness, the Bank Holding Company Act of 1956[82] and the Glass-Steagall Act[83] have long prohibited commercial banks from engaging in nonbanking activities or from owning voting shares in any company that is not a bank.[84] This insulation of commercial banks from investment banking and dealing in securities was thought necessary to avoid conflicts of interest that had resulted in breaches of fiduciary duties by banks in the collapse of the early 1930s and to restore confidence in the integrity of the commercial banking system.

However, changing times have led to calls for the elimination of the Glass-Steagall firewall to make U.S. banks more competitive. Commercial banks have long argued that they must be allowed to enter many markets, including the securities and insurance business, if they are to remain viable.[85] For example, Citicorp, a bank holding company, and Travelers Group Inc., a holding company for securities, insurance, and other financial services firms, recently sought to merge under the Bank Holding Company Act.[86] Commenters, however, argued that approval of the merger would violate the Glass-Steagall Act by allowing for the combination of a member bank with one of the largest U.S. securities firms.[87] Despite these concerns, the Federal Reserve Board ("FRB") approved the merger finding that "Travelers has committed to conform the activities of [its domestic subsidiaries that cannot be affiliated with a bank under section 20 of the Glass-

statute does"); Air N. Am. v. Department of Transp., 937 F.2d 1427, 1436-37 (9th Cir. 1991) (same) (post-*Chevron*).

82 Bank Holding Company Act of 1956, 12 U.S.C. § 1841.

83 Banking Act of 1933, 12 U.S.C. § 227, 48 Stat. 162.

84 *See* 12 U.S.C § 1843 (1994);*see also* 12 U.S.C §§ 24, 78, 221, 335, 377, 378(a).

85 *See* Richard W. Steveson, *Financial Services Heavyweights Try Do-It-Yourself Deregulation*, N.Y. TIMES, Apr. 7, 1998, at A4 (discussing the "gambl[e]" of Citicorp (a bank) and Travelers (an insurance company) in merging, despite a ban existing on such combinations).

86 *See* Order Approving Formation of a Bank Holding Company and Notice to Engage in Nonbanking Activities, 84 Fed. Res. Bull. 985, 985 (1998).

87 *Id.* at 1004.

Steagall Act] to the requirements of the Glass-Steagall Act and the [FRB's] orders and interpretations thereunder."[88]

Traditional lending has become a much smaller market for banks because large companies can raise capital independently at a lower cost by selling bonds, commercial paper, and stocks in the capital market. In addition, U.S. banks have fallen behind large German and Japanese banks that have, among other things, acquired investment banks and engaged in the insurance business. But proposals for reform have stalled because insurance groups and smaller commercial banks (who are allowed to sell insurance under an exception to the prohibition of commercial banks from engaging in nonbanking activities[89]) fear that they would be squeezed by larger banks if the Glass-Steagall prohibitions were eliminated. As a result, proposals in Congress to increase the power of banks to deal in securities and insurance have failed because the political power of small banks and insurance agents, who reside in every congressional district, has neutralized the influence of large banks.

To overcome this legislative impasse, the FRB unilaterally "amended" section 20 of Glass-Steagall by a change in Regulation Y[90] which implements the statutory provisions separating commercial banking from nonbanking activities.[91] Regulation Y had long interpreted section 20 as prohibiting bank holding companies from acquiring a subsidiary unless it was "engaged principally" in permissible activities.[92] But under the revised regulation, the FRB has broadly expanded the range of permissible activities and allowed bank holding companies to purchase investment banks if seventy-five percent, of the new subsidiary's activities were permissible.[93] Formerly the threshold was ninety percent, and the permissible activities category was interpreted narrowly.[94]

By allowing banks to shift permissible functions, such as underwriting of government bonds or dealing in securities for a customer to a subsidiary, the new limitations have the effect of al-

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88 *Id.* at 985.

89 *See* Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995).

90 Bank Holding Companies and Change in Bank Control (Regulation Y), 12 C.F.R. pt. 225 (1998).

91 *See* 12 U.S.C. § 377 (1994).

92 *Id.*

93 *See* Revenue Limit on Bank-Ineligible Activities of Subsidiaries of Bank Holding Companies Engaged in Underwriting and Dealing in Securities, 61 Fed. Reg. 68,750, 68,752 (1996) (effective Mar. 6, 1997).

94 *See id.* at 68,751.

lowing commercial banks to acquire investment banks and, perhaps, other commercial entities, without restriction. For example, the FRB has approved the purchase by Bankers Trust Co. (a commercial bank) of Alex. Brown & Sons (an investment bank) even though Alex. Brown ranked sixth in underwriting initial public offerings of stock in 1996 and was a leading underwriter of high technology stocks.[95] The practical effect of the FRB's aggressive reading of its powers is the collapse of the statutory firewall without the benefit of legislation.

Again, the result in these cases may well be good policy. Only a few years ago, dire predictions were made that commercial banks would soon suffer the fate of the dinosaur. Investment banks, mutual funds, and other financial services were actively making loans and deposits, a business that had long been the protected preserve of commercial banks. Under amended Regulation Y, banks are repositioning themselves to respond to such competition, although newly-approved subsidiary enterprises may make it more difficult for bank auditors and regulators to measure the safety and soundness of U.S. banks. On another level, however, this dynamic interpretive response by the FRB to modernize its authority without congressional authorization seems clearly contrary to its legislative mandate and separation of powers principles. Whether the policy is wise is not at issue. Our only point is that adoption in the face of a long-standing contrary understanding by the FRB and Congress should, if challenged, eliminate any *Chevron*-inspired claim for judicial deference.

4. Redefining the Definition of the Term *State*

Most interpretations of agency authority that disregard express or implied jurisdictional limits involve narrow issues that seldom create public controversy. Thus, they are unlikely to cause recognized policy mischief. Nonetheless, the attitude that an agency may do whatever is necessary even though it is not directly authorized to do so is lawless, not merely creative. One recent example of such "creeping" assertions of jurisdiction without statutory support is the rule proposed by the Federal Housing Finance Board ("Finance Board") to redefine the term *State* in its membership regulations by adding American Samoa and the Northern

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[95] *See* Applications Approved Under Bank Holding Company Act, 84 Fed. Res. Bull. 507, 511 (1998); Orders Issued Under the Bank Holding Company Act, 83 Fed. Res. Bull. 780, 780-84 (1997) (order approving notice to engage in nonbanking activities).

Mariana Islands to its list.[96] The revised definition would allow the financial institutions of both entities to be eligible for membership in the Federal Home Loan Bank. As a result, member banks in the Samoan territory and Mariana commonwealth would now be eligible for fund advances and other financial services from the Finance Board.

On the surface, this inclusion of American Samoa and Northern Mariana Islands within the scope of the Federal Home Loan Bank seems unobjectionable. It may be consistent with the broad coverage Congress intended for savings and loan institutions that are already insured entities under other regulatory programs. In contrast to the FRB's reinterpretation of the Glass-Steagall Act, there would appear to be no opposition to including Samoan and Mariana thrifts as members of the Finance Board. Nonetheless, the route chosen by the Finance Board to expand its membership in light of a more limited statutory directive raises serious questions.

The difficulty is that the Federal Home Loan Bank Act[97] ("FHLBA") clearly defines the "term 'State' [to] include[] the District of Columbia, Guam, Puerto Rico, and the Virgin Islands of the United States."[98] The FHLBA does not include either American Somoa or the Northern Mariana Islands in this list. In addition, the defined term is specifically relied upon elsewhere in the FHLBA, and in particular, in defining the criteria for membership eligibility.[99] Thus, under traditional rules of statutory construction, including *expressio unis*, the omission of American Samoan and the North Mariana Islands from the statute appears to be intentional and exclusive. Nor is this omission contradicted by evidence of a strong contrary legislative intent.

The case for including the North Mariana Islands is arguably stronger because specific provisions of the Covenant Agreement[100] executed by the United States and the North Mariana Islands at the time they became a commonwealth already made the FHLBA applicable to them.[101] No such justification can be offered for

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96 Membership Eligibility, 62 Fed. Reg. 49,943, 49,943 (1997).

97 12 U.S.C. §§ 1421-1449 (1994).

98 *Id.* § 1422(3).

99 *Id.* § 1424(a)(1)(A).

100 *See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America* §§ 502(a)(1), 502(a)(2) (1986) (*cited in* Membership Eligibility, 62 Fed. Reg. 49,943, 49,944 (1997)). Both the legislation approving the commonwealth and the related presidential proclamation make this clear.

101 *See id.*

American Samoa. Indeed, the Finance Board's proposed rule openly acknowledges that "bills currently are being considered in Congress that would achieve this same result legislatively."[102] Why administrative action was necessary or permissible under the circumstances is not explained. For our purposes, this becomes an admittedly small, but nonetheless instructive, example of why *Chevron* deference is not appropriate and should not be applied on judicial review, assuming of course that this becomes a step two case.

Each of these examples has appeal as substantive regulatory policy. None, however, appears to be grounded in statutory authority. All can, and probably should, be decided by a reviewing court without deference to the agency's views. Indeed, each assertion of authority warrants special skepticism because of the agency's obvious self-interest.[103] To the extent these decisions on review do not land in step one of *Chevron*, they should find no safe harbor in step two.

II. JUDICIAL LIMITATIONS ON *CHEVRON* DEFERENCE

In their debate over the application of *Chevron* deference to agency jurisdiction, Justices Brennan and Scalia sharply disagreed over whether it "applies to an agency's interpretation of a statute designed to confine its authority."[104] Both Justices relied upon the same authorities to support their contrary positions while neither admitted any doubts or limitations about his position.

Were the question so simple, it seems to us that Justice Scalia's position is clearly correct. Of course, *Chevron* allows an agency to interpret the scope of its jurisdictional authority; otherwise the rule is a nullity because there would be almost no statutory interpretations to which it could be applied. Filling statutory gaps, such as deciding how pollution is to be measured—smokestack by smokestack as the environmental-petitioners argued, or plant by plant as EPA urged and *Chevron* decided—ultimately is a question about the scope of the agency's authority.

On the other hand, Justice Scalia's further argument that it is both "necessary and appropriate" that such deference encompass

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[102] *Id.* at 49,944.

[103] *See* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) (unanimously applying *Chevron* step one to reverse an agency's interpretation of its jurisdictional authority over credit unions).

[104] Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 380 (1988); *see* Quincy M. Crawford, Chevron *Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1995).

all reasonable "administrative interpretation[s] of [an agency's] statutory jurisdiction or authority"[105] lumps jurisdictional issues into a single category as if all cases are alike. His argument assumes that all jurisdictional issues are identical and asserts, without further analysis, that there is no discernible line between an agency's authority and an agency's "authorized application" of its authority.[106] But as Justice Breyer has explained, "there are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula."[107]

We therefore explore a multi-faceted approach toward developing a peripheral jurisdictional limitation on the *Chevron* rule. It relies on several factors that we believe should be applied in deciding whether to defer to an agency's interpretation of its authority. Included among these factors are: whether Congress intended that courts defer to the agency under the circumstances; whether the jurisdictional claim is within the zone of interests regulated by the agency, or alternatively, whether it is clearly outside the agency's regular authority; and whether the statutory terms and structure are consistent with the expanded jurisdictional claim.

A. *Likely Congressional Intent*

By its own terms *Chevron* is more limited than Justice Scalia's argument assumes. Its rule of deference "comes into play . . . only as a consequence of statutory ambiguity, and then only if the reviewing court finds an implicit delegation of authority to the agency."[108] Thus, the first question to be decided by the reviewing

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105 *Mississippi Power & Light Co.*, 487 U.S. at 381.

106 This contention by Justice Scalia, that jurisdictional cases are indistinguishable, also is contradicted by his very next sentence conceding that there is, however, a discernable line where Congress has defined such authority in "plain terms" and its intention is obvious, "in which case the agency has no discretion" to decide otherwise. *Id.* at 382. This of course may reflect Justice Scalia's view that he is more comfortable deciding issues of agency authority in *Chevron* step one and if so we have no quarrel. *See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 220-21 (1992) (seeking to reconcile Justice Scalia's views by placing both substantive and jurisdictional issues in step one, rather than step two).

107 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986) [hereinafter Breyer, *Judicial Review*].

108 Sea-Land Serv., Inc. v. Department of Transp., 137 F.3d 640, 645 (D.C. Cir. 1998) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984)).

court, once it has determined that Congress did not address the issue itself, is whether "Congress has explicitly left a gap for the agency to fill [and whether] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[109] When that express delegation is made, the agency's regulation is upheld unless it is arbitrary and capricious.[110] Even where the "legislative delegation to an agency on a particular question is implicit rather than explicit,"[111] the court may find that Congress "implicitly decided" that agency experience and expertise were likely to be critical in determining whether the agency's authority encompasses the proposed action. In that circumstance, the "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency."[112]

Where, however, no implicit delegation of law-interpreting authority was granted to the agency, deference to the agency's judgment on jurisdictional issues cannot be traced to congressional intent. Without such support, *Chevron* teaches that basic coverage issues on the scope of the agency's regulatory authority are for Congress to decide because there is no basis for presuming that it intended otherwise. In other words, deference to an agency's interpretation of its primary jurisdictional coverage requires that a distinction be made between those interpretations that are within the agency's experience and expertise—and thus likely to have been intended by Congress for agency interpretation—and those that are outside this framework, and therefore subject to independent judicial review.

The more significant the question and the greater the impact that expansion of the agency's jurisdiction is likely to have, the greater the likelihood that Congress did not intend implicitly to delegate that determination to an agency. Nothing is more important to an agency than the scope of its regulatory authority. But agencies are established to implement regulatory programs authorized by Congress and not to decide whether those programs should be extended into new areas. In addition, the need for outside review and increased judicial scrutiny of agency-initiated ex-

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[109] *Chevron*, 467 U.S. at 843-44.

[110] Step two of *Chevron* requires the reviewing court to defer to the agency if the agency's interpretation is "reasonable." For an analysis that this standard should be merged with the "arbitrary and capricious" test under 5 U.S.C. § 706(2)(A) (1994), see Levin, *supra* note 40.

[111] *Chevron*, 467 U.S. at 844.

[112] *Id.*

pansion of its legislative authority outweighs any interest in agency sovereignty. Simply put, agencies are not common law courts. The underlying concern, as *Chevron*'s architecture recognizes when it requires courts to make the first determination of whether Congress answered the precise question at issue, is that agencies have no comparative advantage in reading statutes and that agency self-interest may cloud its judgment. The principle of deference under *Chevron*'s step two is limited to reasonable agency interpretations precisely because of a concern that "the decision to regulate may be motivated by designs for agency aggrandizement rather than by a disinterested assessment of statutory authority and appropriate policy."[113]

Justice Breyer's analysis of how *Chevron* should be applied has focused closely on assessing what a legislator supporting the statute at issue would have expected. He argues that the principal question in deciding whether step two should be invoked is whether the statute's legislative supporters would have expected questions of subject matter coverage to be decided by the agency or a reviewing court. Several factors are likely to decide this question. If the jurisdictional question at issue is an important one, likely to have a major impact on the regulatory program and those being regulated, it seems probable that members of Congress voting for the bill would not have wanted the courts to defer to the agency's views. For example, whether the FRB could breach the firewall between commercial and investment banking established by the Glass-Steagall Act is not something a legislator voting for the measure probably would have intended. Similarly, it seems unlikely that the Congress approving the FDCA expected it to cover a major segment of the economy not previously regulated by the FDA and not discussed in any legislative consideration.

On the other hand, if the question is interstitial involving an application of expected authority within the agency's primary mission—e.g., does the FRB's authority under Glass-Steagall empower it to define further what constitutes "banking" and "nonbanking" activities; or does the FDA's authority over food and drugs encompass requiring warning labels to protect consumers with specific allergies—it is more likely that the supporting Con-

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113 Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1024 (1992); *see also* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987) (referring to agency aggrandizement by stating that "foxes should not guard henhouses"). We much prefer this view of Professor Sunstein to his agencies as common law courts one. *See* Sunstein, *Is Tobacco a Drug?*, *supra* note 29.

gress would have wanted courts to defer to the agency's reasonable views. Even here, of course, Congress may have by other actions—e.g., by expressing serious concerns with any change in the separation between banking and nonbanking activities or by requiring warning labels on various alcoholic beverages posing dangers to public health[114]—given strong indication that the issue is reserved expressly for Congress to decide and therefore cannot be implied.

This examination of whether Congress meant to make an implicit delegation of jurisdiction to the agency is only the first measure for deciding whether the agency's interpretation of its authority warrants deference. Agency experience and expertise can be described in many ways to encompass almost any question. Similarly, the interpretation of a statute is invariably important, at least to the challenging parties (as was true of the plant versus smokestack issue in *Chevron* itself). Thus, a more structured framework identifying additional criteria to measure likely congressional intent is needed. One suggestion, implied in Justice Brennan's opinion in *Mississippi Power* where he stated that no deference should be given to an agency interpretation of "a statute designed to confine the scope of its jurisdiction,"[115] is that *Chevron* deference is not appropriate when an agency is asserting authority outside its core powers.

B. *Peripheral Jurisdictional Issues*

In *Leedom v. Kyne*,[116] the Supreme Court upheld a district court ruling that the lower court had jurisdiction to overturn an agency decision that clearly "exceeded its statutory power" and which was "contrary to a specific prohibition" in its enabling authority.[117] Although its holding only specified that the final order requirement did not prevent the trial court from reviewing interim agency findings otherwise not subject to judicial review, the Court's decision in *Leedom* has relevance for the application of *Chevron* deference to agency statutory interpretations. At bottom, *Leedom* is predicated on the theory that agency actions clearly outside its regular authority deserve immediate nondeferential judicial review. To ensure that self-serving agency interests do not influence the decision of the scope of agency authority, re-

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114 *See* 21 U.S.C. § 352(e)(1) (1994).

115 Mississippi Power & Light Co. v. Mississippi*ex rel.* Moore, 487 U.S. 354, 387 (1988).

116 358 U.S. 184 (1958).

117 *Id.* at 186, 188.

view is warranted, indeed necessary. *Leedom*'s significance is limited by the procedural posture of the case before the Court where, because of its jurisdictional argument, the agency did not dispute the plaintiff's claim that the agency had acted in excess of its jurisdiction. Nonetheless, the Court's rationale that there was a strong inference that Congress intended that the statutory provisions governing the general jurisdiction of the courts was controlling supports the view that jurisdictional issues outside an agency's core powers are different.

Under *Leedom* and other cases, reviewing courts independently have examined agency claims of regulatory authority to take action clearly beyond the scope of the agency's traditional area of responsibility. In *Leedom* itself, the Court found that where the agency had sought the claimed regulatory authority from Congress and been denied, and where the agency's exercise of the claimed regulatory power would raise serious constitutional questions, jurisdiction to review the agency's actions was warranted even though no final order had been issued.[118] This approach is similar to that followed under the clear statement doctrine which is relied upon by courts to read agency authority narrowly where constitutional rights would otherwise be implicated.[119] However, none of these cases directly examines the scope of review applicable to challenged agency jurisdictional claims.

1. The Agency's Primary Regulatory Assignment

The first criterion for determining whether *Chevron* deference should apply is whether the questioned jurisdiction is within the agency's core regulatory assignment. It is presumptively unlikely that Congress intended to allow an agency to decide for itself whether an area of regulation is within its regulatory jurisdiction where the enabling legislation is silent on that authority. An agency only has those powers delegated to it by Congress because any other presumption would mean that enabling legislation was always an open book to which the agency could add pages and change the plot line. Otherwise the enabling act would not significantly confine agency authority because finding "some rationale" to support expansion of agency authority would seldom be difficult. To defer to the agency interpretation in this circumstance,

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118 *See id.* at 188-91.

119 *See, e.g.*, National Cable Television Ass'n v. United States, 415 U.S. 336, 342-43 (1974); Kent v. Dulles, 357 U.S. 116, 129 (1958); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

even if that reading is reasonable, removes the independent check that courts exercise over agency actions.[120] Indeed such deference flies in the face of the APA itself, which in section 558(b) denies an agency the authority to impose sanctions on issues, rules, or orders "except within jurisdiction delegated to the agency."[121]

For example, the safety of foods, drugs, and devices is the FDA's primary authority; the truthfulness of advertising claims is the FTC's principal responsibility; and the safety of consumer products not involving foods, drugs, and devices is within the usual regulatory domain of the Consumer Product Safety Commission. If the asserted jurisdiction appears to fit within the role specifically assigned to the agency and the interpretive question is of the scope of its application—such as the most appropriate means for measuring effluent sources for applying pollution control requirements set forth in the Clean Air Act (as in *Chevron*)—the presumption of deference that *Chevron* commands is applicable unless Congress has clearly indicated otherwise.

On the other hand, if the agency has not previously regulated the product or service, or asserted the power to do so, then there seems to be little basis for assuming that Congress would have wanted courts to defer to agency interpretations. Indeed, to be consistent with the *Chevron* reliance on congressional intent, the presumption in that circumstance should be that interpretive deference is not appropriate unless Congress has expressly said so. For example, the FDA has long regulated foods, drugs and devices if unsafe (adulterated)[122] or if marketed in a misleading way (misbranded).[123] But it has not heretofore regulated or restricted the marketing of lawful products where the message is truthful and not targeted at unlawful sales. In this situation, *Chevron* deference is not appropriate because it is outside the area that the FDA has traditionally controlled. That is, without textual support in the statute to imply a delegation to the agency, there should be no presumption of deference.

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[120] *See* Breyer, *Judicial Review*, supra note 107, at 364-65 ("[C]urrent doctrine is anomalous. It urges courts to defer to administrative interpretations of regulatory statutes, while also urging them to review agency decisions of regulatory policy strictly.").

[121] 5 U.S.C. § 558(b) (1994). This section adds a statutory basis for the requirement that agencies act within their jurisdiction, and, since agencies are not entitled to *Chevron* deference in interpreting the APA, it also adds an independent basis for judicial review. *See supra* note 28.

[122] *See* 21 U.S.C. § 342 (1994) (adulterated food), *id.* § 351 (adulterated drugs and devices).

[123] *See id.* § 343 (misbranded food); *id.* § 352 (misbranded drugs and devices).

2. Statutory Structure, Operational Effect, and Legislative History

In deciding whether an agency's core jurisdiction includes activity not previously regulated, courts should independently review the same materials they would otherwise consider in deciding whether step one of *Chevron* (i.e., did Congress answer the jurisdictional question directly) applied. These include the structure of the statute,[124] the operational effect of expanding the agency's jurisdiction,[125] and the legislative history of that authority.[126] If the statutory structure, operational effect, and legislative history do not positively support the agency's claimed authority, then *Chevron* deference is not appropriate where the regulation would extend beyond the agency's primary areas of responsibility. The agency necessarily has no experience and probably no expertise in the new arena, further eliminating any justification for judicial deference to its jurisdictional conclusions. Here the courts are equally competent to figure out what Congress intended, and they do not have the inherent conflict of power aggrandizement.

Applied to nuclear facility siting issues, the statute, as well as clear precedent, have established the criteria by which such decisions are made. They do not include civil rights tests of Title VI or criteria as set forth in Executive Order 12,898. Here, of course, it is not even the agency (NRC) but the White House that suggests the expansion of jurisdiction. Similarly, the defining terms of the Federal Housing Finance Act as well as its legislative history give no indication that Congress intended for the Finance Board to expand the scope of the meaning of a *state* to include territories (American Samoa) or commonwealths (Northern Mariana Islands) without express authorization. The purpose of the Glass-Steagall Act, as well as the debates and reports issued when it was adopted, make clear that the wall between commercial banking and nonbanking activities was not to be breached, even in exceptional circumstances. Likewise, the FDA's exercise of authority over the truthful marketing of tobacco products is supported neither by the structure nor the legislative history of the FDCA as amended by the Medical Devices Act.[127] Similarly, the legislative history of the FDCA contains no mention of tobacco products nor does it indicate that the FDA was given regulatory power over to-

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124 *See* United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

125 *See* Dole v. United Steelworkers of Am., 494 U.S. 26, 35-41 (1990).

126 *See* Atherton v. FDIC, 519 U.S. 213, 228-31 (1997).

127 21 U.S.C. § 360 (1994).

bacco products as customarily marketed. Silence in this circumstance is especially telling because tobacco was a significant part of the economy, particularly in the states whose members were prominent supporters of the FDCA.[128]

The reliance on the structure and operational effect of the enabling legislation and on its legislative history to decide whether the assertion of jurisdiction warrants judicial deference is fully consistent with the rationale of *Chevron*. *Chevron* itself specifically relied upon the structure of the Clean Air Act, the effect of plant-wide effluents, and the Clean Air Act's legislative history in determining Congress's intent under step one.

Other traditional justifications for deference to agency interpretation—that the agency is better positioned to assess practical needs and regulatory requirements; that as the designers of the enabling legislation the agency knows more about what Congress intended and how it would have answered the question if put to it; and that deference ensures greater uniformity in interpreting the legislative authority—do not necessarily apply to agency interpretations of peripheral claims. Agencies have no comparative advantage in determining from the structure, terms, and legislative history of the enabling legislation whether it covers new or additional areas. Step one of *Chevron* expressly recognizes this as an area of special judicial competence. As an interested party, the agency's views should carry no special weight with a reviewing court whose judgment is likely to be independent and measured—and thus more acceptable.

C. *Additional Criteria*

Additional criteria for locating the boundaries between step one and step two of *Chevron* are designed to further identify when deference is inappropriate because Congress probably did not intend to pass this question to the agency for decision. Three are identified, but if this framework were to be adopted, further de-

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[128] *See* United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) ("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."); *see also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983):

> Nonaction by Congress is not often a useful guide, but the nonaction here is significant.... In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the [agency's] rulings....

Id. at 600-01. Sometimes a matter is so clear that no express provision is needed. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 283-84 (1974).

velopment would be desirable.

1. Distance of Asserted Jurisdiction

The distance between an agency's core jurisdiction and the proposed extension of its authority is obviously relevant. The closer the new regulatory program is to the agency's primary assignment, the more likely it is that Congress would have expected the agency to make that decision and thus included it, at least implicitly, within step two deference. Correlatively, the more distant the regulation is from the agency's primary program the less likely it is that Congress would have wanted the agency to expand its jurisdiction. In this circumstance, deference is inappropriate.

This criterion seems particularly relevant in addressing the authority of the EPA, NRC, and FDA to encompass civil rights or tobacco issues within their mandates. Neither the EPA nor NRC had previously applied civil rights criteria in making siting and permit decisions. Nor did existing criteria discriminate against any racial group. That facilities generally should not be located near recreational areas is common sense; that recreational facilities may be used less frequently by minority groups is likely to reflect imponderable issues of personal choice and resources. It is hard to see how such a decision is racially based. Here, the expansion of the agencies' authority demonstrates a difference of kind, not just of degree.

2. Importance of Issue

In applying *Chevron*, the kind of statutory construction question presented often should be dispositive of the issue of deference. Is it a matter of detail in a statute whose general application is undisputed (as in *Chevron*) or is it a fundamental issue of the limits of administrative jurisdiction. Judge, now Justice, Breyer captures this point in his opinion in *Mayburg v. Secretary of Health and Human Services*[129] as follows:

> The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or

[129] 740 F.2d 100 (1st Cir. 1984);*see* St. Luke's Hosp. v. Secretary of Health and Human Servs., 810 F.2d 325, 331 (1st Cir. 1987) (Breyer, J.).

stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.[130]

Applying this criterion to the FRB's revision of the Glass-Steagall firewall, it seems unlikely that Congress meant to leave "so important and delicate a legal question"[131] to the agency to decide. Not only was the statute carefully considered at the time the Glass-Steagall Act was adopted, but Congress's reconsideration in recent years has resulted in a stalemate because of intense lobbying pressure from warring industries. This is no *Bob Jones* situation. In these circumstances it is for Congress, not the agencies, to decide such significant "political, as well as policy, concerns."[132] On the other hand, the designation of small islands as states, making them eligible for membership in the Federal Home Loan Bank, is far less momentous either as a political issue or for its impact on the Federal Home Loan Bank, even though Congress was currently considering the same issue for American Somoa.

3. Related Regulatory Assignments Housed in Other Agencies

Where more than one statute is relevant, the usual rule of statutory construction is to look at all statutes "together, as if they were one law."[133] That is, a reviewing court must look at all relevant statutes on the same subject in determining Congress's intent.[134] In addition, *Chevron* is limited to agency interpretations of the statutes they administer;[135] no special weight is given to agency interpretations of other, nonorganic statutes.[136]

Applying these concepts to an agency's assertion of regulatory authority, a central question is whether another agency also has responsibility in the field, and if so, whether it is likely that Congress would have intended that more than one agency was to oversee the area. While duplicative regulatory authority is sometimes

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130 740 F.2d at 106 (citations omitted).

131 Breyer, *Judicial Review*, *supra* note 107, at 371.

132 *Id.*

133 United States v. Stewart, 311 U.S. 60,64 (1940) (citing United States v. Freeman, 44 U.S. (3 How.) 556, 564 (1845)).

134 *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-35 & n.3 (1989) (concluding that a later, more "comprehensive statutory scheme" prevails over earlier statute). Similarly, "when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." Farmer v. Employment Sec. Comm'n, 4 F.3d 1274, 1284 (4th Cir. 1993).

135 *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,467 U.S. 837, 843 (1984).

136 *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990).

authorized by Congress—e.g., both the Department of Justice ("DOJ") and FTC have authority to prohibit anticompetitive mergers and unreasonable restraints of trade[137]—that is the exception rather than the rule, and the usual presumption is that Congress does not intend to divide regulatory responsibility among two or more agencies.[138]

This issue of exclusive (or joint) authority is applicable to both the environmental siting/permitting cases as well as the FDA's tobacco rule. Title VI of the Civil Rights Act is enforced by the DOJ and the Equal Employment Opportunity Commission. Neither the EPA nor the NRC have specific enforcement responsibilities under the Civil Rights Act. And the criteria authorized by Congress for making siting and permitting decisions have not included civil rights tests.[139] Equally dubious is the FDA's attempt to regulate the marketing of tobacco products where specific legislation on warning labels and access grant enforcement authority to other agencies.[140]

CONCLUSION

The reading of *Chevron* proposed here—of not giving deference to agency assertions of authority beyond the core jurisdiction delegated by Congress—is consistent with the language and rationale of *Chevron*. Immediately after articulating a two-part test for determining when deference was appropriate, the Court explained that the power to administer a congressionally established program "necessarily requires the formulation of policy and the making of rules *to fill any gap* left, implicitly or explicitly, by Congress."[141] Express delegations are tested under the arbitrary or capricious test under section 706(2)(A) of the APA. But where "the

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137 *See* 15 U.S.C. § 18 (1994) (mergers); *id.* § 1 (DOJ authority regarding restraints of trade); *id.* § 45(a)(1) (FTC authority regarding restraints of trade).

138 *See, e.g.*, Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 151 (1991) ("Under most regulatory schemes rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority."); *see also* Martin v. Pav-Saver Manuf. Co., 933 F.2d 528, 530 (7th Cir. 1991) (citing *Martin*, 499 U.S. at 151).

139 The application of "civil rights" criteria in the *Bob Jones* case is distinguishable. There the Court upheld the agency's construction of the Internal Revenue Code as denying tax benefits under § 501(c)(3) to racially discriminatory private religious schools because they did not come within common law standards of charity, namely, they did not "serve a public purpose" and were "contrary to established public policy." Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

140 *See* discussion *supra* notes 42-51.

141 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)) (emphasis added).

legislative delegation to an agency on a particular question is implicit," the reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[142] In either case, section 558(b) of the APA admonishes the agency and the court to determine that its actions are "within [the] jurisdiction delegated to the agency."[143]

By its terms, *Chevron* does not apply to extension of an agency's jurisdiction beyond its core powers. In making such extraterritorial judgments, the agency is no longer filling gaps but annexing new territory.[144] If, after analyzing the statutory text and structure, and considering the pertinent legislative history, the court determines that the agency action is beyond its core jurisdiction, the court should decide for itself whether the action was authorized by Congress. This does not mean, of course, that such authority should not be found. But a court should not hesitate to strike agency action which is "effectively the introduction of a whole new regime of regulation . . . , which may well be a better regime but is not the one that Congress established."[145]

The absence of deference does not mean that a court will not find that the agency has jurisdiction. What it means, however, is that the court will not assume jurisdiction. Rather, the burden of proof is on the agency to demonstrate that Congress expressly or implicitly authorized it to act. If an agency's jurisdictional claim is denied, express authorization from Congress can always be sought. That, it seems to us, is the better balance under our scheme of separation of powers as it has been interpreted by the *Chevron* case. It also coincides with our modern nondelegation doctrine: Congress can delegate in vague or "implicit" terms and the courts under *Chevron* will defer, but if Congress does not even go that far, no *Chevron* deference should be forthcoming.

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142 *Id.* at 844.

143 5 U.S.C. § 558 (1994).

144 *See Chevron*, 467 U.S. at 844 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

145 MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 234 (1994) (striking down FCC policy).

No. 99-1426

IN THE

SUPREME COURT OF THE UNITED STATES

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Cross-Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, KENNETH J. ARROW, ELIZABETH E. BAILEY, WILLIAM J. BAUMOL, JAGDISH BHAGWATI, MICHAEL J. BOSKIN, DAVID F. BRADFORD, ROBERT W. CRANDALL, MAUREEN L. CROPPER, CHISTOPHER C. DEMUTH, GEORGE C. EADS, MILTON FRIEDMAN, JOHN D. GRAHAM, WENDY L. GRAMM, ROBERT W. HAHN, PAUL L. JOSKOW, ALFRED E. KAHN, PAUL R. KRUGMAN, LESTER B. LAVE, ROBERT E. LITAN, RANDALL W. LUTTER, PAUL W. MACAVOY, PAUL W. MCCRACKEN, JAMES C. MILLER III, WILLIAM A. NISKANEN, WILLIAM D. NORDHAUS, WALLACE E. OATES, PETER PASSELL, SAM PELTZMAN, PAUL R. PORTNEY, ALICE M. RIVLIN, MILTON RUSSELL, RICHARD L. SCHMALENSEE, CHARLES L. SCHULTZE, V. KERRY SMITH, ROBERT M. SOLOW, ROBERT N. STAVINS, JOSEPH E. STIGLITZ, LAURA D'ANDREA TYSON, W. KIP VISCUSI, MURRAY L. WEIDENBAUM, JANET L. YELLEN, AND RICHARD J. ZECKHAUSER IN SUPPORT OF CROSS-PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief is being submitted on behalf of a group of economists.[1] The purpose of the brief is not to attempt to guide the Court on legal issues but to inform it on economic ones. To put ourselves in the best possible position to offer the Court our expertise, we have tried to understand, in light of the legal task confronting the Court, where our own economic expertise might have a useful role to play.

To that end, we understand that the lawyers who brought this case framed the following question for the Court's consideration: "Whether the Clean Air Act requires that the Environmental Protection Agency ignore all factors 'other than health effects relating to pollutants in the air'" when setting National Ambient Air Quality Standards (NAAQS). We also understand that this question has arisen in part because the United States Court of Appeals in Washington, D.C., whose responsibility it is to review air quality standards issued by the Environmental Protection Agency (EPA), has interpreted the Clean Air Act as barring the EPA from even considering the potential costs of its air quality regulations.

The merits of this legal debate between the D.C. Circuit and the counsel who have contested the D.C. Circuit's views are beyond the scope of our economic expertise and hence of this brief. Nonetheless, we respectfully offer the following observations with hopes that they may ultimately prove useful.

The importance of this issue cannot be overstated. Both the direct benefits and costs of environmental, health, and safety regulations are substantial–estimated to be several hundred

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[1] No counsel for any party to this case authored this brief in whole or in part; and no person other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The signatories express their appreciation for the assistance of Jason K. Burnett and Erin M. Layburn, both of the AEI-Brookings Joint Center for Regulatory Studies, with the preparation of this brief.

billion dollars annually. If these resources were better allocated with the objective of reducing human health risk, scholars have predicted that tens of thousands more lives could be saved each year.[2] All presidents since Nixon–both Democratic and Republican–have attempted to make environmental, health, and safety regulations more efficient by requiring some form of oversight attempting to balance benefits and costs. President Reagan and President Clinton each crafted an executive order that required an explicit balancing of benefits and costs for major regulations to the extent permitted by law. A comprehensive regulatory impact analysis (RIA) prepared in conformance with President Clinton's Executive Order 12866 was done for the ozone and particulate matter rulemaking, but it played no official or overt part in the decision in this case because of the D.C. Circuit's view that costs must not be considered.

The issue presented in this case is of great significance to *amici curiae*. In 1998, the American Enterprise Institute (AEI) and the Brookings Institution established the AEI-Brookings Joint Center for Regulatory Studies (Joint Center) to help improve regulation and the regulatory process. A principal focus of the Joint Center is to analyze the economic benefits and costs of regulations, such as the ones being considered here, and to explore the implications of court decisions involving regulation. The Joint Center and the economists submitting this brief have a substantial interest in seeing that the Court

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[2] *See* Tammy O. Tengs and John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving, in* RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION (Robert W. Hahn ed. 1996). (The authors, from the Harvard School of Public Health, calculated that improved priority setting across federal agencies could provide either savings of $31.1 billion from current cost levels with no additional loss of life or savings of 60,200 lives at current cost levels.)

interprets the Clean Air Act in a manner that encourages sound decisions and in a way that is consistent with the law as established by Congress.

To that end the Joint Center asked the economists who are signatories to this brief to identify principles that are appropriate for setting National Ambient Air Quality Standards as well as for making other important regulatory decisions. The Joint Center and these economists are accordingly submitting this brief in the interest of improving regulatory decisionmaking as well as making it more transparent. All parties have consented to the filing of this brief.

BACKGROUND

A. Procedural History

In 1996, the EPA initiated rulemakings to revise the National Ambient Air Quality Standards for ozone and particulate matter (PM). The EPA prepared an RIA that suggested that the costs of the ozone standards would exceed the benefits while the benefits of the particulate matter standards would exceed the costs. The Joint Center strongly favors using such RIAs in decisionmaking and, without endorsing the quality of all aspects of the RIA here, believes that the ozone and PM RIA should have been considered in setting the standards. The D.C. Circuit ruled, however, that *Lead Industries* barred any consideration of costs and hence was unwilling to consider whether a balancing of benefits and costs might provide the requisite "intelligible principle" needed to resolve the constitutional problems that it found with EPA's interpretation of the statute.[3]

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[3] *See Lead Indus. Ass'n v. EPA*, 499 U.S. 1042 (D.C. Cir. 1980).

B. Nature and Importance of Benefit-Cost Analysis

The concern of the Joint Center along with that of the other signatories is how analytical methods, such as benefit-cost analysis, should be used in regulatory decisionmaking.[4] These methods can help promote the design of better regulations by providing a sensible framework for comparing the alternatives involved in any regulatory choice. Such analysis improves the chances that regulations will be designed to achieve a particular social goal specified by legislators at a lower cost.[5] In addition, they can make the regulatory process more transparent by providing an analytical basis for a decision. Greater transparency in the process, in turn, will help hold regulators and lawmakers more accountable for their decisions.

These analytical methods are neither anti- nor proregulation; they can suggest reasons why it would be desirable to have tighter or more lenient standards depending on the results of an analysis. For example, the benefit-cost analyses in the RIA on particulate matter and ozone could be interpreted as suggesting that the ozone standard should not be lowered while a new PM standard for fine particles should be introduced to protect public health.

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[4] *See* KENNETH J. ARROW, MAUREEN L. CROPPER, GEORGE C. EADS, ROBERT W. HAHN, LESTER B. LAVE, ROGER G. NOLL, PAUL R. PORTNEY, MILTON RUSSELL, RICHARD L. SCHMALENSEE, V. KERRY SMITH, AND ROBERT N. STAVINS, BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION: A STATEMENT OF PRINCIPLES (1996) ("Arrow *et al.*"); *see also* ROBERT W. CRANDALL, CHRISTOPHER DEMUTH, ROBERT W. HAHN, ROBERT E. LITAN, PIETRO S. NIVOLA, AND PAUL R. PORTNEY, AN AGENDA FOR FEDERAL REGULATORY REFORM (1997).

[5] *See* ARROW *et al.*

C. Evolution of the Use of Benefit-Cost Analysis in Regulatory Decisionmaking

Over the past two decades, support has been growing for the proposition that weighing of benefits and costs should play a more central role in regulatory decisionmaking. All three branches of government have recognized the importance of considering benefits and costs in designing regulation.[6]

To address the increase in regulatory activity over the past three decades, the past five presidents and President Clinton have introduced different analytical requirements and oversight mechanisms with varying degrees of success. A central component of later oversight mechanisms was formal economic analysis, which included benefit-cost analysis and cost-effectiveness analysis. Since 1981, presidents have required the preparation of RIAs for a predefined class of significant regulations.[7] President Reagan's Executive Order 12291 required an RIA for each significant regulation whose annual impact on the economy was estimated to exceed $100 million. President Bush used the same executive order. President Clinton's and President Reagan's executive orders require a benefit-cost analysis for significant regulations as well as an

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[6] *See, e.g.,* Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 8–11 (1995).

[7] While the definition of a "significant" regulation has changed somewhat over time, it is generally a regulation that is expected to have one or more of the following characteristics: an annual impact on the economy of $100 million or more; a major increase in costs or prices for consumers or business; or significant effects on competition, employment, investment, productivity, or innovation. President Reagan's Executive Order 12291 described such regulations as "major," while President Clinton's Executive Order 12866 described them as "significant." We will use the term *significant* because it is used by the most recent executive order.

assessment of reasonably feasible alternatives to the planned regulation.[8]

Congress has also shown increasing interest in emphasizing the balancing of benefits and costs in regulatory decisions. The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to submit final regulations to Congress for review.[9] The regulatory accountability provisions of 1996, 1997, and 1998 require the Office of Management and Budget to assess the benefits and costs of existing federal regulatory programs and to recommend programs or specific regulations to reform or eliminate. The Unfunded Mandates Reform Act of 1995 requires agencies, unless prohibited by law, to choose the most cost-effective regulatory approach or otherwise explain why they have not chosen this alternative.[10]

The courts have also been receptive to the use of benefit-cost analysis in decisionmaking. Indeed, the D.C. Circuit recently held in *State of Michigan v. EPA*, 2000 WL 180650, at *12 (D.C. Cir. 2000), that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." The court went on to cite various cases and legal authorities for the "general view

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[8] The language in those two executive orders is very similar, suggesting bipartisan presidential support for benefit-cost analysis. *See* Executive Order 12291, 46 FED. REG. 13,193 (Feb. 17, 1981). "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society. . . . Regulatory objectives shall be chosen to maximize the net benefits to society." *Id.* at § 2. *See also* Executive Order 12866, 58 FED. REG. 51,735 (Oct. 4, 1993). "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives. . . . Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits . . ., unless a statute requires another approach." *Id.* at § 1.

[9] 15 U. S. C. § 601 *et seq.*

[10] 2 U. S. C. § 1535.

that preclusion of cost consideration requires a rather specific congressional direction." *Id.* This case and others led Professors Robert H. Frank and Cass R. Sunstein to conclude that "[f]ederal law now reflects a kind of default principle: Agencies will consider costs, and thus undertake cost-benefit analysis, if Congress has not unambiguously said that they cannot."[11]

SUMMARY OF ARGUMENT

As we understand it, the D.C. Circuit did not allow the EPA to consider the costs of complying with ozone and PM NAAQS. As we further understand it, this legal ruling can be overturned only by this Court. As economists, we believe that the D.C. Circuit's ruling not allowing the EPA to consider important information relating to the consequences of its regulatory actions is economically unsound. Without delving into the legal aspects of the case, we present below why we think the Court should allow the EPA to consider costs in setting standards. In particular, we believe that, as a general principle, regulators should be allowed to consider explicitly the full consequences of their regulatory decisions. These consequences include the regulation's benefits, costs, and any other relevant factors.

ARGUMENT

We approach the question presented in this case from the perspective of the "default principle" summarized by Professors Frank and Sunstein.

Nothing in the following statutory text of section 109(b) of the Clean Air Act precludes consideration of costs:

> National primary ambient air quality standards . . . shall be ambient air quality standards the

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[11] ROBERT H. FRANK AND CASS R. SUNSTEIN, COST-BENEFIT ANALYSIS AND RELATIVE POSITION, (AEI-Brookings Joint Center for Regulatory Studies Working Paper 00-5, 2000), at 8.

> attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing a margin of safety, are requisite to protect the public health.[12]

Indeed, the plain aim of this provision is protecting the "public health," and that aim is unlikely to be achieved without, at least, an implicit balancing of benefits and costs.

Benefit-cost analysis is simply a tool that can aid in making decisions. Most people do a kind of informal benefit-cost analysis when considering the personal pros and cons of their actions in everyday life–more for big decisions, like choosing a college or job or house, than for little ones, like driving to the grocery store. Where decisions, such as federal environmental regulations, are by their nature public rather than private, the government, as a faithful agent of its citizens, should do something similar.

Carefully considering the social benefits and social costs of a course of action makes good sense. Economists and other students of government policy have developed ways of making those comparisons systematic. Those techniques fall under the label benefit-cost analysis. Benefit-cost analysis does not provide *the* policy answer, but rather defines a useful framework for debate, either by a legislature or, where the legislature has delegated to a specialized agency the responsibility of pursuing a general good, by that agency.

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[12] 42 U.S.C. § 7409(b)(1).

I. A GROUP OF ECONOMISTS DEVELOPS A CONSENSUS ON THE USE OF BENEFIT-COST ANALYSIS FOR ENVIRONMENTAL REGULATION.

Economists, other policy experts, and the regulatory agencies themselves have produced a large literature on the methods and applications of benefit-cost analysis. There are, and always will be, many uncertainties and disagreements about those methods and their application in particular cases. Nevertheless, a wide consensus exists on certain fundamental matters. In 1996, a group of distinguished economists, including Nobel laureate Kenneth Arrow, were assembled to develop principles for benefit-cost analysis in environmental, health, and safety regulation.[13] Here, we summarize and paraphrase for the Court a number of principles that we think could be helpful in this case, which involves the review of the EPA's NAAQS standard-setting decisions.

A benefit-cost analysis is a useful way of organizing a comparison of the favorable and unfavorable effects of proposed policies. Benefit-cost analysis can help the decisionmaker better understand the implications of a decision. It should be used to inform decisionmakers. Benefit-cost analysis can provide useful estimates of the overall benefits and costs of proposed policies. It can also assess the impacts of proposed policies on consumers, workers, and owners of firms and can identify potential winners and losers.

In many cases, benefit-cost analysis cannot be used to prove that the economic benefits of a decision will exceed or fall short of the costs. Yet benefit-cost analysis should play an important role in informing the decisionmaking process, even when the information on benefits, costs, or both is highly uncertain, as is often the case with regulations involving the

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[13] *See* ARROW *et al.*

environment, health, and safety.

Economic analysis can be useful in designing regulatory strategies that achieve a desired goal at the lowest possible cost. Too frequently, environmental, health, and safety regulation has used a one-size-fits-all or command-and-control approach. Economic analysis can highlight the extent to which cost savings can be achieved by using alternative, more flexible approaches that reward performance.

Benefit-cost analysis should be required for all major regulatory decisions. The scale of a benefit-cost analysis should depend on both the stakes involved and the likelihood that the resulting information will affect the ultimate decision.

Agencies should not be bound by a strict benefit-cost test, but should be required to consider available benefit-cost analyses. There may be factors other than economic benefits and costs that agencies will want to weigh in decisions, such as equity within and across generations.

Not all impacts of a decision can be quantified or expressed in dollar terms. Care should be taken to ensure that quantitative factors do not dominate important qualitative factors in decisionmaking. A common critique of benefit-cost analysis is that it does not emphasize factors that are not easily quantified or monetized. That critique has merit. There are two principal ways to address it: first, quantify as many factors as are reasonable and quantify or characterize the relevant uncertainties; and second, give due consideration to factors that defy quantification but are thought to be important.

II. IF AT ALL POSSIBLE GIVEN THE RELEVANT LEGAL AUTHORITIES, THE COURT SHOULD HOLD THAT SECTION 109(B) ALLOWS CONSIDERATION OF BOTH BENEFITS AND COSTS WHEN SETTING NAAQS.

We believe all of the available information should be considered in making any important decision. If costs or other types of data are deliberately left out, the quality of decisionmaking is likely to suffer. In particular, we make one recommendation, closely related to the Arrow *et al.* principles: The Court should allow the EPA to consider costs in setting NAAQS, so that these costs can then be assessed along with benefits and any other important information.

We believe that it would be imprudent for the EPA to ignore costs totally, particularly given their magnitude in this case. Together, the EPA estimates that those standards could cost on the order of $50 billion annually. Not considering costs makes it difficult to set a defensible standard, especially when there is no threshold level below which health risks disappear. The EPA acknowledges that exposure to ozone presents a "continuum" of risk, as opposed to a threshold below which adverse health effects cease to occur.[14] If the EPA is required to set a standard "to protect the public health" with an "adequate margin of safety," then ignoring costs could lead to a decision to set the standard at zero pollution.[15] That alternative, however, would be self-defeating–it would harm public health by threatening the very economic prosperity on which public health primarily depends.

Once the Court allows the EPA to consider costs, Executive Order 12866 will require the EPA to consider the full range of benefits and costs in setting NAAQS. We think that

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[14] 62 FED. REG. 38,856, 38,863 (July 18, 1997).

[15] Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1).

considering such information could improve both the regulatory decisionmaking process by making it more transparent and the regulatory decision by allowing all relevant information to be considered explicitly.

CONCLUSION

We believe that this Supreme Court case involving the setting of National Ambient Air Quality Standards could be a historic moment in the making of regulatory policy. This brief has argued that it would be imprudent not to consider costs in the setting of standards. In accordance with Executive Order 12866, we also believe that the full range of benefits and costs should be considered in decisionmaking. Accordingly, this Court should allow the Environmental Protection Agency to consider costs in setting nationwide air quality standards, so that this information can be considered along with benefits and any other relevant factors in setting a standard.

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In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1441 and consolidated cases
(Ozone NAAQS)

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For Review of
Ozone National Ambient Air Quality Standards ("NAAQS")
Promulgated by the EPA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae Congressman Tom Bliley certifies the following:

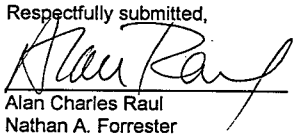
A. Parties and amici. Except for the amicus who is filing this brief, all parties, intervenors and amici appearing before this Court are listed in the various petitioners'

briefs. The amicus who is filing this brief is a member of the Congress of the United States.

B. Rulings under review. References to the rulings at issue appear in the various petitioners' briefs.

C. Related cases. References to any related cases also appear in the various petitioners' briefs.

Respectfully submitted,



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INTEREST OF AMICUS CURIAE

Amicus is a member of the Congress of the United States of America. He has a unique interest in ensuring that the statute in question not be construed so as to transfer legislative power to the executive branch, contrary to fundamental separation-of-power principles in the United States Constitution. Furthermore, amicus participated in the intense legislative debates and policy agreements that led to the passage of the Clean Air Act Amendments of 1990. He is thus keenly interested to see that the respondent agency faithfully executes the relevant provisions of the Clean Air Act.

This amicus brief is submitted under Fed. R. App. 29, and this Court's corresponding local rule, which allow governmental entities to file such briefs without permission of the parties and without leave of court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Clean Air Act, 42 U.S.C. §§ 7401 et seq., requires the Environmental Protection Agency ("EPA") to identify air pollutants that "may reasonably be expected to endanger public health or welfare," id. § 7408(a)(1)(A), and then to issue air quality standards for those pollutants that protect human health with "an adequate margin of safety." Id. § 7409(b)(1).

STATEMENT OF ISSUES

Whether EPA's new National Ambient Air Quality Standard ("NAAQS") for ozone constitutes a legislative judgment by EPA and thus violates the non-delegation doctrine of the Constitution of the United States.

STATEMENT OF JURISDICTION

Amicus incorporates by reference the statements of jurisdiction in the various petitioners' briefs.

STATEMENT OF FACTS

In the 1990 Amendments to the Clean Air Act, Congress set the national ambient air quality standard ("NAAQS") for ozone at 0.12 parts per million ("ppm"). 42 U.S.C. § 7511(a). In general, the Clean Air Act authorizes EPA to revise a NAAQS only in accordance with certain statutory criteria. 42 U.S.C. § 7409(b)(1). On July 18, 1997, EPA issued a final rule reducing the ozone NAAQS from 0.12 to 0.08 ppm. National Ambient Air Quality Standards for Ozone: Final Rule, 62 Fed. Reg. 38,855 (to be codified at 40 C.F.R. pt. 50) ("Final Rule").

If allowed to go into effect, this new ozone NAAQS will affect American society perhaps more broadly than any previous regulation in history. Ozone (O_3) is produced by a variety of sources that affect almost every facet of human activity, including not only cars, trucks, buses, and factories but also such consumer products as hair sprays, deodorants, nail polish, paints, and even gardens. Ozone is the primary ingredient of

urban smog, which affects respiratory functions and damages leafy vegetation. EPA's own regulatory impact analysis ("RIA"), published the same day as the final rule, estimates the overall cost of complying with the NAAQS to be $9.6 billion annually. Innovative Strategies and Economics Group, EPA, Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule ES-12 (1997). By contrast, EPA estimates total yearly benefits from compliance at between $1.5 and $8.5 billion. Id. at ES-17.

Science and technical expertise did not drive this hugely consequential regulatory decision. EPA made no finding, based on the data before it, that the new NAAQS of 0.08 ppm would mitigate a significant public health risk. After reviewing the available data and the proposed alternative NAAQS (including the current one of 0.12 ppm), the Clean Air Scientific Advisory Committee ("CASAC") advised EPA that "there is no 'bright line'" distinguishing any of the alternatives as "significantly more protective of public health." Letter from George Wolff, Chairman, CASAC, to Carol Browner, Administrator, EPA, regarding CASAC Closure on the Primary Standard Portion of the Staff Paper for Ozone 3 (Nov. 30, 1995) ("CASAC Closure Letter"). In fact, EPA itself conceded that "the selection of either [EPA's proposed NAAQS or a NAAQS equivalent to the existing one] could properly take into account the available scientific and technical information." National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,729 (to be codified at 40 C.F.R. pt. 50) (proposed Dec. 13, 1996) ("Proposed Rule").

Evidence of "economic costs or technical feasibility" did not drive EPA's decision, either. Final Rule, 62 Fed. Reg. at 38,878. EPA claims that it was forbidden even to consider such evidence by this Court's decision in Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), even though the pollutant at issue in that case (lead) was considered to be a "threshold" pollutant. The health risks associated with threshold pollutants practically disappear below a certain level of exposure. There was thus a purely scientific, non-cost-based rationale for setting the NAAQS for lead at a given level.

Ozone, however, is a "non-threshold" pollutant. It has health effects all the way down to background concentrations. CASAC Closure Letter at 2. Consequently, science alone cannot dictate where to draw the line of appropriate ozone exposure. Without referring to cost-effectiveness or considering societal burdens, EPA could provide no rational basis for choosing a NAAQS of 0.08 ppm, as opposed to 0.05 ppm, or 0.02, or even zero.

EPA thus had no choice but to admit that its decision to impose a NAAQS of 0.08 ppm was driven substantially by its own "policy judgments." Proposed Rule, 61 Fed. Reg. at 65727. The irony of this decision is that the existing ozone regime, established by Congress, was working quite well. According to published EPA data, between 1987 and 1996, ambient ozone concentrations in the United States decreased by 15 percent. During that same period, the number of exceedances of the NAAQS decreased by 73 percent. Between 1995 and 1996 alone, ambient ozone concentrations decreased by 6 percent, while the number of exceedances decreased

by 37 percent. Office of Air Quality Planning and Standards, EPA, National Air Quality and Emissions Trends Report, 1996, EPA Doc. No. 454/R-97-013 (last modified Jan. 23, 1998) <http://www.epa.gov/oar/aqtrnd96/trendsfs.html>.

Nevertheless, EPA decided to make a fundamental change.

SUMMARY OF ARGUMENT

The Clean Air Act represents the considered, detailed, publicly-debated judgment of Congress on how best to address the serious problem of air pollution in this country. In the 1990 Amendments to the Clean Air Act, Congress ratified a specific ozone NAAQS and imposed a complex program for ozone reduction. Though not yet fully implemented, Congress's program was still achieving ozone reductions throughout the country.

EPA saw fit, however, to impose a further reduction in the NAAQS for ozone, even though it acknowledged that the reduced NAAQS would not mitigate a significant public health risk and did not reflect considerations of cost-effectiveness or societal burden. In essence, EPA chose to determine for itself, without adhering to any Congressional policy, what level of public safety was appropriate.

This Court need not invent or revive any constitutional doctrine to hold that an assertion of policy-making power this broad violates the Constitution. The Supreme Court's 1980 ruling in the benzene case, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, and this Court's 1991 ruling in the lockout/tagout case, International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991), after remand, 37

F.3d 665 (D.C. Cir. 1994), require a finding of "significant risk," and confirm the non-delegation doctrine as an essential tool of statutory interpretation. The Constitution assigns fundamental policy-making responsibility to the elected representatives of the people. Art. I, § 1. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 (1892). It is not simply Congress's right, but its duty, to make the hard choices about environmental and economic impacts that are presented in the field of health and safety regulation.

The problem is not with the Clean Air Act itself, which does set forth the requisite "intelligible principles" of law to guide the EPA's discretion in implementing the Act. The problem is with EPA's decision to promulgate a new ozone NAAQS without adhering to any of those principles. EPA's arrogation of policy-making power subverts the constitutional scheme of divided powers and usurps law-making authority from the branch most immediately accountable to the people. Amicus therefore urges that this Court vacate EPA's proposed new NAAQS and remand for EPA to apply the correct constitutional and statutory principles.

ARGUMENT

I. EPA Has Taken Over Congress's Job And Failed to Do Its Own.

Given the broad national impacts of ozone pollution—it affects potentially anyone who breathes and is produced by almost anything that burns—it is incumbent upon Congress to set policy in this area. And Congress has done so. By enacting the Clean Air Act, the 1990 Amendments, and subsequent legislation, Congress provided EPA with substantial direction on how to regulate ozone.

Section 109(b)(1) of the Clean Air Act requires EPA to issue national ambient air quality standards (NAAQS) for pollutants, including ozone, if those standards are "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The word "adequate" indicates that EPA is not authorized to pursue zero risk. This is confirmed by the legislative history, which indicates that Congress intended for NAAQS to be set at "the maximum permissible ambient air level . . . which will protect the health of any group of the population." S. Rep. No. 91-1196, at 10 (1970) (emphasis added). EPA is to reserve its regulatory powers for the management of significant health risks. Section 109(d)(2) further provides that EPA should consider the following criteria in determining whether to revise a NAAQS: "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." 42 U.S.C. § 7409(d)(2)(C)(iv).

In addition, Congress pointedly addressed the problem of ozone pollution in the Clean Air Act Amendments of 1990. Pub. L. No. 101-549, 104 Stat. 2399 (codified at

42 U.S.C. §§ 7401 et seq.). Congress was greatly concerned about the lack of progress EPA had made in reducing the ambient air concentration of ozone. See, e.g., H.R. Rep. No. 101-490 at 146 (1990) ("After 10 years, many urban areas in the nation, and many rural areas, are currently in violation of the health-based NAAQS for ozone smog . . . includ[ing] 101 cities and towns, which are home to more than 112 million Americans . . . ."). Accordingly, Congress added a new subpart of the Clean Air Act (Title I, Part D, Subpart 2, codified at 42 U.S.C. § 7511), just for ozone.

The new Subpart effectively codified the existing NAAQS of 0.12 ppm, established five categories of non-attainment for ozone levels of 0.121 ppm and higher, and imposed attainment deadlines for each category. 42 U.S.C. § 7511(a). The new Subpart also imposed stringent ozone reduction measures and authorized EPA to take various regulatory actions to promote greater attainment of the NAAQS. EPA has yet to implement all of these measures.

Congress also established a number of other principles to guide EPA in the exercise of its regulatory authority. Congress directed EPA to analyze and report on the cost-effectiveness of the NAAQS program. Specifically, the 1990 Amendments obligated EPA to "conduct a comprehensive analysis of the impact of [the Clean Air Act] on the public health, economy, and environment of the United States," and to "consider the costs, benefits and other effects associated with compliance with each [NAAQS]." 42 U.S.C. § 7612(a).

Since the 1990 Amendments, Congress has also refined the regulatory process by enacting "generic" statutes that direct the manner in which administrative agencies,

including EPA, exercise their delegated authority. This legislation reinforces EPA's obligation to render a decision on NAAQS only after considering whether the results will be relatively more beneficial than costly. The Unfunded Mandates Reform Act ("UMRA") requires EPA, like all agencies, to prepare cost-benefit analyses in advance of major regulations and to select the most cost-effective regulatory alternative (or, alternatively, to explain why a cost-effective option was not chosen). Pub. L. No. 104-4, § 205, 109 Stat. 64, 66 (1995) (codified at 2 U.S.C. § 1535). The Small Business Regulatory Enforcement Fairness Act ("SBREFA") added new statutory language compelling agencies to consider and minimize the "significant economic impact" of regulations on "small entities." Contract With America Advancement Act of 1996, Pub. L. No. 104-121, § 241(b), 110 Stat. 847, 864 (1996) (codified at 5 U.S.C. § 604(b)).

UMRA and SBREFA are analogous in some respects to the National Environmental Policy Act of 1969 ("NEPA"), which requires the preparation of environmental impact statements prior to major federal actions. 42 U.S.C. § 4332(c). NEPA obligates agency decision-makers to take a "hard look" at the potential environmental impacts of their decisions, direct and indirect, before commiting to a particular course of action. 40 C.F.R. § 1508.25 (1997). Like NEPA, UMRA and SBREFA structure the procedural aspects of regulatory decision-making. Unlike NEPA, UMRA and SBREFA are not purely procedural. Both of the new regulatory reform statutes direct agencies to favor cost-effective regulatory decisions and to mitigate unwarranted regulatory burdens where possible. EPA essentially ignored these directives. See Final Rule, 62 Fed. Reg. at 38,887 (finding SBREFA not

applicable), 38,892 ("the provisions of sections 202 and 205 of the UMRA do not apply to this decision"),

In short, Congress tasked EPA to apply its technical expertise to the data at hand—scientific, economic, and otherwise—for the purpose of determining whether a change in the NAAQS was necessary to mitigate a significant public health risk. Congress also directed EPA at least to consider the societal burdens that such a change might cause and compare those burdens to the expected benefits. Congress did not authorize EPA to amend the NAAQS whenever it deemed fit, according to its own notions of public policy. But instead of observing these legislative constraints on its discretion, EPA decided to play the role of policy-maker itself.

First, EPA decided to impose a new, lower NAAQS, even though the available scientific data did not support a finding that the new NAAQS provided superior public health benefits to the one that had been codified by Congress. CASAC specifically advised EPA that there was no scientific "bright line" distinguishing the new NAAQS from the Congressionally-ratified NAAQS or from the other more or less stringent alternatives. CASAC Closure Letter at 3. It advised EPA that none of the new standards—including the one ultimately selected by EPA—appeared "significantly more protective of public health." Id. It even highlighted a particular study demonstrating only "small" health differences between "outdoor" children exposed to ozone at the Congressionally-ratified NAAQS level and those exposed to ozone at a level even more stringent than EPA's. Id. EPA acted anyway.

Next, EPA refused to consider "economic costs or technical feasibility" in imposing the NAAQS. Final Rule, 62 Fed. Reg. at 38878. EPA claimed that it was forbidden even to consider these factors by this Court's decision in Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), even though the pollutant at issue in that case (lead) was considered to be a "threshold" pollutant. The health risks associated with threshold pollutants practically disappear below a certain level of exposure. There was thus a purely scientific, non-cost-based rationale for setting the NAAQS for lead at a given level.

The same is not true for non-threshold pollutants such as ozone. It is unfortunate, but scientifically inescapable, that some sensitive individuals will suffer adverse health impacts at levels of ozone exposure below EPA's new NAAQS. CASAC Closure Letter at 2-3. Thus, unless EPA considered not only the significance of the relevant health risk, but also the cost-effectiveness of the new standard designed to combat it, there would be no rational, democratic, or moral basis for setting the NAAQS level at any point higher than zero.

Nevertheless, taking EPA at its word, EPA imposed the new NAAQS without evidence that the NAAQS would eliminate any significant health risk and without considering feasibility or the resulting societal burden. EPA made its own policy call. It is hard to call this decision anything other than the exercise of legislative judgment. During the notice-and-comment period, some parties suggested that assertion of a power this broad would violate the non-delegation doctrine, see American Automobile Manufacturers Association, Comments on the Environmental Protection Agency's

Proposed Changes to the National Ambient Air Quality Standard for Ozone Under the Clean Air Act, at 25-26 (Mar. 12, 1997), but EPA evidently ignored them. In essence, EPA decided to assume the role of Congress.

II. Under the Non-Delegation Doctrine, an Administrative Agency May Not Make Independent Policy Judgments, Except According to "Intelligible Principles" Gleaned from Authorizing Legislation.

EPA's arrogation of policy-making power not only contravenes the Clean Air Act itself, but also subverts the constitutionally-mandated separation of powers between the legislative and executive branches. Even had Congress intended for EPA to exercise such untrammeled discretion (which it did not), such a delegation of law-making authority would still have violated the bedrock constitutional principle that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. I, Art. I, § 1 (emphasis added); see also id., Art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .") (emphasis added). "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 (1892). The constitutional command is clear: Congress, and only Congress, makes the laws. The President and the courts apply them.

A. The non-delegation doctrine is a crucial separation-of-powers principle that is necessary to reconcile the administrative state with the Constitution.

The core purpose and necessity of the non-delegation doctrine in our Constitution cannot be refuted. First and foremost, it keeps government responsive to the will of people. It ensures that elected representatives, the members of government who are most immediately accountable to the people, are the ones who will make the laws. It is not just the right of amicus, as an elected representative of the people of this Nation, to confront this nation's problems of policy and governance. It is his sworn constitutional duty. It would be all too easy for Congress to leave the most difficult and controversial questions of policy to a relatively anonymous administrative agency. But the loss of political accountability resulting from such a scheme is plain. However tempting it might seem as a solution for short-term policy problems, a true constitutional democracy cannot long abide such an anti-democratic arrangement.

The rule against delegation protects liberty and promotes wise government as well. The constitutionally-mandated legislative process of bicameralism and presentment can be frustratingly cumbersome, but it is a vital component of our constitutional system of checks and balances. It walks the delicate line between the need for a strong national government and the right of the states (and local communities and individuals) to retain autonomy over their own affairs. It ensures that law will not be hastily enacted and that people's rights will not be encroached without careful deliberation and input from a variety of sources. At the same time, it ensures that law will take account of the national interest and will balance competing special

interests. Unfettered delegation of law-making power to another body who is not constrained to follow the Constitution's law-making procedures risks disruption of this important balance.

Contrary to popular perception, the non-delegation doctrine was not invented by activist judges bent on thwarting Presidential initiatives during the New Deal, nor did it recede into insignificance as the post-World War II administrative state came to be accepted as a necessary accommodation to the complexities of modern life. From the framing of the Constitution to the present day, the doctrine has been seen as a fundamental organizing principle of this Nation's system of ordered liberty and divided governmental powers. The Supreme Court declared, early on, that the Constitution placed law-making authority exclusively in the hands of Congress. "It is the peculiar province of the legislature," said Chief Justice Marshall in Fletcher v. Peck, "to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." 10 U.S. (6 Cranch) 87, 136 (1810). And in Wayman v. Southard, the Chief Justice stated again: "It will not be contended that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." 23 U.S. (10 Wheat.) 1, 42-43 (1825).

Nineteenth-century delegation cases wrestled primarily with the definitional question of which governmental functions were purely legislative (and thus could not be delegated by Congress), and which governmental functions might be shared with other branches. For example, the Supreme Court held that Congress could leave it to the

President to ascertain the existence of facts, so as to determine whether a certain statutory condition had been triggered. See Cargo of The Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 383 (1813) (upholding delegation to President to end retaliatory embargo against European trade when President determined that Europeans had "cease[d] to violate the neutral commerce of the United States"); Field v. Clark, 143 U.S. 649, 680 (1892) (upholding Tariff Act of 1890, which gave the President the power to impose retaliatory tariffs on imported sugar and other products, when the country importing those products had imposed "reciprocally unequal and unreasonable" tariffs on the same products being exported by the United States). Similarly, in Wayman v. Southard, the Court held that Congress could delegate to the federal courts the task of fashioning their own internal rules of procedure. 23 U.S. 1.

In a sense, these early cases did not have to face the hard delegation question, because they found that the branch to which Congress had assigned the particular task already possessed the authority to act in that area. The difficult question arises when Congress legislates in an area that clearly lies within its exclusive Article I jurisdiction, but leaves a certain amount of rule-making discretion to the agent charged with executing the law. Chief Justice Marshall seemed to anticipate this problem when he attempted, in Wayman v. Southard, to set forth a general formulation of the non-delegation test. "The line has not been exactly drawn," he acknowledged, "which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." 23

U.S. at 43 (emphasis added). That formulation prevailed for almost a century. See United States v. Grimaud, 220 U.S. 506 (1911) (upholding statute that authorized Secretary of Agriculture to regulate national forests, because Congress expressed its general purpose to preserve public forest lands and empowered Secretary only to "fill up the details").

By the turn of the Twentieth Century, however, the size and scope of the federal government was growing, and the hard delegation questions could no longer be avoided. The question was no longer as simple as which governmental functions were inherently legislative. Congress was clearly delegating rule-making power to administrative agencies in areas of Article I jurisdiction, such as interstate commerce, and the courts were acquiescing. See, e.g., Union Bridge Co. v. United States, 204 U.S. 364, 366 (1907) (upholding statute authorizing Secretary of War to remove any bridge that was an "unreasonable obstruction to the free navigation of . . . waters"); Interstate Commerce Comm'n v. Goodrich Transit Co., 224 U.S. 194 (1912) (upholding statute authorizing Interstate Commerce Commission to require common carriers to keep accounts of traffic and shipping). In an increasingly diverse, industrialized society, it began to be accepted that some areas of commerce were too complex for Congress to regulate unaided. The principle of necessity thus emerged in Supreme Court jurisprudence as a justification for broad delegations of rule-making authority.

In Buttfield v. Stranahan, 192 U.S. 470 (1904), for example, the Supreme Court upheld a statute that empowered the Secretary of the Treasury to "establish uniform standards of purity, quality and fitness for consumption" of imported tea. Id. at 494. By

expressing a general purpose "to exclude the lowest grades of tea," Congress had fixed a "primary standard," and had left for the Secretary "the mere executive duty to effectuate the legislative policy declared in the statute." Id. at 496. In the Court's view, Congress had legislated "as far as was reasonably practicable" Id. "To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." Id.; see also Grimaud, 220 U.S. at 516 ("In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management."); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.").

So long as Congress dictated a "primary standard" or "intelligible principle" to channel agency discretion, the courts would not invalidate the overall statutory scheme, out of deference to the principle of necessity. This became the test of non-delegation during the New Deal, and it remains the test today.

In J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928), the Supreme Court upheld a statute that gave the President the power to adjust tariff rates so as to "equalize" production costs between domestic and foreign manufacturers, because the goal of equalizing production costs provided an "intelligible principle" to direct the President's actions. Id. at 409. The Court admitted that, "in a sense," the President was exercising legislative power. But an inflexible constitutional doctrine requiring

Congress "to fix every rate" would have made it "impossible" for Congress to exercise its legislative powers at all. Id. at 407.

By contrast, the Supreme Court invalidated overbroad delegations in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Both cases involved provisions of the National Industrial Recovery Act. The provision struck down in Panama Refining authorized the President to prohibit interstate transportation of "hot oil" (petroleum products withdrawn from storage in a manner contrary to state law). The provision in Schechter Poultry authorized the President to approve codes of "fair competition" devised by private trade associations. Neither provision, in the view of the Court, gave sufficient guidance as to when the delegee should exercise the power in question.

In both cases, the Court acknowledged the need for "flexibility and practicality" in applying the non-delegation doctrine, but emphasized that even the principle of necessity had constitutional limits:

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits . . . . But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

Panama Refining, 293 U.S. at 421 (emphasis added); see also Schechter Poultry, 295 U.S. at 530 (quoting much of this language). In his concurring opinion in Schechter Poultry, Justice Cardozo uttered his famous characterization of the "fair competition" provision as an instance of "delegation running riot." 295 U.S. at 553. "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . . Here in effect is a roving commission to inquire into evils and upon discovery correct them." Id. at 551 (Cardozo, J., concurring).

While Panama Refining and Schechter Poultry are commonly thought to represent the high-water mark of the non-delegation doctrine, it would be a mistake to say that the doctrine lost vitality when the administrative state became a fixture of modern life. The doctrine survives, as a crucial canon of statutory construction and administrative restraint. It is no longer seriously disputed that, in areas of great technical complexity, Congress sometimes must be allowed to assign the making of certain judgments to a body of specialists that is insulated from immediate political pressures, so that these specialists can accumulate expertise and develop coherent policy over a period of time. But the legitimacy of this necessarily non-legislative scheme hinges on the premise that Congress will continue to set the governing legal standards, and the courts will continue to review agencies' actions to ensure regularity and compliance with those standards. Otherwise, all accountability to the people will be lost, and our constitutional system of separated powers will devolve into rule by administrative fiat.

B. Under the non-delegation doctrine, statutes must be construed, and agency actions judged, so as to prevent agencies from exercising unfettered rule-making power.

In a nutshell, the non-delegation doctrine guides all governmental parties—Congress, the agencies, and the courts—in fulfilling their concomitant responsibilities within the modern administrative state. Congress sets the standards; agencies "fill up the details"; and courts review the agencies' choices to ensure compliance with Congressional standards. The doctrine helps keep regulation within rational bounds and especially helps to ensure that the governmental process remains responsive to the will of the people.

In light of these important purposes, the modern non-delegation doctrine has taken on multiple dimensions. In extreme cases, of course, it may still be invoked as a basis for invalidating an act of Congress, should Congress fail to set forth any "primary standard" or "intelligible principle" to constrain agency discretion. See Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935, which allowed coal companies in predefined districts to elect district boards to set minimum coal prices within the district); South Dakota v. United States Dep't of Interior, 69 F.3d 878 (8th Cir. 1995) (striking down Indian Reorganization Act, which authorized the Secretary of the Interior to acquire lands in trust for Indian tribes, because the Act provided no "intelligible principles" to determine when the Secretary could exercise such authority), vacated in light of changed position by Government, 117 S. Ct. 286 (1996); City of New York v. Clinton, 985 F. Supp. 168 (D.D.C.), cert.

granted, 66 U.S.L.W. 3571 (Feb. 27, 1998) (No. 97-1374) (invalidating Line Item Veto Act because it impermissibly delegated legislative power to the President).

More commonly, the doctrine is deployed as a tool of statutory construction, to prevent an agency from interpreting an act so broadly as to give itself unrestrained law-making authority. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958) (invalidating decision of Secretary of State to withhold passport from member of Communist Party under the Passport Act, because a broader interpretation of the Act would render it an unconstitutional delegation); United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) (joining in Court's decision to invalidate provision of Subversive Activities Control Act of 1950, which prohibited employment in defense facilities of people who were members of a "Communist-action organization," id. at 278, because the Act was an impermissibly vague delegation to President in an area of fundamental liberties). Courts are justifiably reluctant to invalidate a statutory scheme altogether because some of its provisions may be broadly stated. Instead, they will labor to infer "intelligible principles" from the purposes that Congress has expressed in enacting the statute. In Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) ("Benzene"), for example, the Supreme Court interpreted the Occupational Safety and Health Act (the "OSH Act") to require a threshold finding of "significant risk" from exposure to benzene before the Occupational Safety and Health Administation ("OSHA") was permitted to regulate benzene levels in the workplace. In the absence of such a limiting principle, said the Court, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's

reasoning in [Schechter Poultry and Panama Refining]." Id. at 646 (Stevens, J., joined by Burger, C.J., and Stewart and Powell, JJ.). See also Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 465-66 (1989) (reciting the cardinal principle that statutes should be construed so as to avoid constitutional questions).

The concurrences in Benzene urged even sharper limiting interpretations of the OSH Act, thus forming a solid majority of the Court that favored strong application of the non-delegation doctrine. Then-Justice Rehnquist would have invalidated § 6(b)(5) of the OSH Act altogether, as effecting an unconstitutionally broad delegation à la Panama Refining and Schechter Poultry. Id. at 671-88. Justice Powell agreed with the plurality's decision to import a "significant risk" requirement into the OSH Act, but he believed that the purposes of the Act implied an additional, even stricter limitation on agency discretion: that OSHA was required to compare costs and benefits before promulgating any workplace safety standards. Id. at 668-71. See also International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) (remanding so that OSHA could bring its interpretation of the OSH Act within the limits of the non-delegation doctrine), after remand, 37 F.3d 665 (D.C. Cir. 1994) (approving of OSHA's subsequent limiting construction, which included requirements that the agency find significant risk and perform a cost-benefit analysis).

Finally, the non-delegation doctrine has an important procedural component as well: the "safeguarding of meaningful judicial review." Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (upholding Economic Stabilization Act of 1970, which authorized President to set wage

and price controls). "[T]he doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." Benzene, 448 U.S. at 686 (Rehnquist, J., concurring). Therefore, not only must Congress set forth "intelligible principles" in the authorizing legislation, but the agency must arrive at and explain its decision in such a manner as to facilitate the court's determination of whether the agency has complied with those principles. Yakus v. United States, 321 U.S. 414, 426 (1944); see also Fahey v. Mallonee, 332 U.S. 245, 250 (1947). An agency may not hide behind precatory statements of broad statutory goals to conceal the real reasons for its regulatory actions.

III. EPA Has Failed to Observe Any "Intelligible Principles" to Constrain the Exercise of its Delegated Authority.

The first facet of the non-delegation doctrine does not apply here. The Clean Air Act is plainly constitutional on its face. This is not a case in which Congress ducked the tough policy questions, as Justice Rehnquist believed Congress had done with the OSH Act in Benzene. See 448 U.S. at 687 (concurring) ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people."). In the 1990 amendments to the Clean Air Act, Congress confronted the problem of ozone pollution head-on. Members from both sides of the political aisle engaged over difficult questions about the environmental and economic ramifications of the Act. The result was a vigorously-debated compromise among various competing

positions and took the form of a precisely-detailed NAAQS compliance timetable and the various supplemental provisions directing EPA to regulate the emission of ozone.

Rather, this case implicates the second and third dimensions of the non-delegation doctrine: the assurance of regulatory discipline through rigorous statutory construction and judicial review. With the Clean Air Act and the 1990 Amendments, Congress did its job here. Instead of doing its job to "fill up the details," EPA attempted to do Congress one better. Evidently impatient with the pace of progress under the current clean air regime, EPA believed it necessary to overhaul the entire process. It proposed a new, more stringent NAAQS without even minimal findings that this new standard would eliminate a significant health risk or would be cost-effective. In so doing, EPA masked the policy judgments, default assumptions, and considerations of cost that must have influenced it to adopt a new NAAQS. This not only displaces Congress and diminishes public accountability, it also impedes this Court's review of whether EPA has been faithful to Congress's directives. See Wendy E. Wagner, The Science Charade in Toxic Risk Regulation, 95 Colum. L. Rev. 1613, 1617 (1995) ("camouflaging controversial policy decisions as science assists the agency in evading various political, legal, and institutitional forces").

The issue is not whether the EPA's policy decision was wise or even well-intended. The issue is one of appropriate roles and responsibilities. See Kelley v. EPA, 15 F.3d 1100, 1109 (D.C. Cir. 1994) (applauding "the clarity EPA's regulation would have provided," but ruling that EPA had no choice but to turn again to Congress to seek limitation on lender liability under CERCLA). EPA's arrogation of authority

threatens to disrupt the careful balance of policy-making responsibility among the governmental branches that was wrought by the Framers and refined by two centuries of constitutional experience. EPA's pretense that the new NAAQS was somehow dictated by "science" is only a disingenuous attempt to keep this Court from fulfilling its responsibility to correct the resulting imbalance. Amicus therefore urges that this Court strike down the regulation and remand for EPA to apply the correct constitutional and legislative standards.

A. The EPA has not demonstrated that the new ozone NAAQS addresses and mitigates a "significant risk" to public health.

The first intelligible principle that EPA ignored in departing from the Congressionally-ratified NAAQS was a threshold finding that the new NAAQS would eliminate a significant health risk. As noted above, a "significant risk" requirement is fairly implied by the language of the Clean Air Act, which authorizes EPA to promulgate NAAQS that protect human health with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1) (emphasis added). Furthermore, a "significant risk" requirement is minimally necessary to prevent EPA from asserting an unconstitutionally broad delegation of rule-making authority under the Clean Air Act.

The Supreme Court's Benzene decision, reviewing a statutory scheme (the OSH Act) that is similar to the Clean Air Act, recognized a "significant risk" requirement as an important constraint on agency discretion. 448 U.S. 607 (1980). In Benzene, the Occupational Safety and Health Administration ("OSHA") proposed to reduce the permissible level of exposure to benzene gas in the workplace from 10 ppm to 1 ppm,

despite weak evidence that such a reduction would eliminate any significant health risks. OSHA's decision-making process essentially went as follows: It cited data showing that exposure to benzene concentrations above 10 ppm sometimes led to cancer. It then presumed, in the absence of contrary evidence, that levels below 10 ppm would also lead to cancer. Id. at 623-25.

The Supreme Court invalidated the 1 ppm standard, on the grounds that OSHA's decision-making process contravened the OSH Act and the non-delegation doctrine. Four members of the Court—Justice Stevens, Chief Justice Burger, and Justices Stewart and Powell—held that OSHA was required at a minimum to cite evidence of "significant risk" before it issued any new workplace standard under the OSH Act. They cited the non-delegation doctrine as authority for limiting OSHA's discretion in this manner:

> If the Government was correct in arguing that neither § 3(8) nor § 6(b)(5) [of the OSH Act] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in [Schechter Poultry and Panama Refining]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

Id. at 646. The fifth member of the majority, then-Justice Rehnquist, would have invalidated the provision at issue altogether as an unconstitutionally broad delegation.

The more recent "lockout/tagout" decision by this Court confirms that the "significant risk" requirement is a necessary constraint on agency discretion under the

non-delegation doctrine. In International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991), OSHA issued a regulation requiring employers to install safety devices on industrial machines that might suddenly move and injure a worker. Employers were required either to place locks on an "energy isolating device" (e.g., a circuit breaker) to keep the machine from starting up, or else to post warning tags on the machine. Id. at 1312.

This Court carefully reviewed the limiting principles that OSHA had professed to follow in issuing the lockout/tagout regulation, to see whether they were sufficiently constraining to satisfy the non-delegation doctrine. The limiting principles included the "significant risk" requirement of Benzene. Not only did this Court find the threshold determination of "significant risk" to be a constitutionally necessary constraint on OSHA's discretion, it held that further limiting principles were also required. Ultimately, this Court upheld the lockout/tagout regulation, but only after OSHA came back to the Court after remand with a "Supplemental Statement of Reasons" for the regulation, which included significant risk, feasibility, and cost-effectiveness. International Union, UAW v. OSHA, 37 F.3d 665, 668 (D.C. Cir. 1994).

As in Benzene and International Union, this Court should interpret the Clean Air Act to require that any new NAAQS be targeted to the reduction of a significant health risk. Section 109(b)(1), with its use of the phrase "adequate margin of safety," and § 109(d)(2)(C)(iv), with its required focus on "adverse public health, welfare, social, economic, or energy effects," both demonstrate that EPA was not authorized to use its potentially vast rule-making authority to address health risks that were merely marginal

or speculative. Here, where EPA has found no "significant risk," EPA has effectively acted without any constraints on its delegated discretion. It would be free to impose a NAAQS for any reason whatsoever, regardless of its medical or scientific justification. In light of the non-delegation doctrine, any doubts about the scope of the Clean Air Act should be resolved against such an expansive interpretation.

B. EPA did not consider cost-effectiveness in adopting the new ozone NAAQS.

Even "significant risk" may not be sufficiently constraining. As noted above, in International Union, this Court reviewed all the limiting principles that OSHA had professed to follow in issuing the lockout/tagout regulation, to see whether they were sufficiently constraining to satisfy the non-delegation doctrine. These included the "significant risk" requirement of Benzene, as well as a requirement of technological and economic feasibility. The Court found that even these two principles were insufficient. OSHA was still asserting the unrestrained power, "once significant risk is found, to require precautions that take the industry to the verge of economic ruin . . . , or to do nothing at all." International Union, 938 F.2d at 1317. Between these two extremes, OSHA could set standards that effectively determined which firms within the industry would live, and which would die. Id. at 1318.

This Court then entertained the notion that § 3(8) of the OSH Act, defining a workplace standard as one "reasonably necessary or appropriate to provide safe or healthful environment," implicitly incorporated a requirement that any workplace standard produce benefits commensurate with costs. This would have been a sufficient

limiting principle, said the Court, if indeed OSHA accepted the principle in its construction of the Act. Id. at 1318-21. Because § 3(8) was ambiguous, admitting to alternative interpretations that might also satisfy the non-delegation doctrine, the Court remanded the lockout/tagout regulation to OSHA, so that it could apply appropriate limiting principles under the Act.

On remand, OSHA identified a new list of standards that governed its decision to impose the lockout/tagout regulation. International Union, UAW v. OSHA, 37 F.3d 665 (D.C. Cir. 1994). In addition to the "significant risk" and feasibility requirements it had already observed, OSHA said that it was obligated to issue a "cost-effective" standard and to pursue "a high degree of worker protection." Id. at 669-70. The Court found that these standards, taken as a whole, satisfied the non-delegation doctrine. It accordingly approved the lockout/tagout regulation.

Likewise here, without additional limiting principles, EPA would still have the power, "once significant risk is found, to require precautions that take the industry to the verge of economic ruin . . . , or to do nothing at all." It could raise the ozone NAAQS from its current level, or reduce it to zero. This Court should therefore recognize the additional requirement that any NAAQS imposed under the Clean Air Act be cost-effective.

As noted above, Congress was not oblivious to the costs of the Clean Air Act. In a number of places in the text of the statute, it directed EPA to assess cost impacts in connection with NAAQS. The EPA Administrator is required to issue reports to the states on "air pollution control techniques," including "data relating to the cost of

installation and operation." 42 U.S.C. § 7408(b)(1). More significantly, the 1990 Amendments included a provision requiring EPA, in consultation with other executive departments, to "conduct a comprehensive analysis of the impact of [the Clean Air] Act on the public health, economy, and environment of the United States." EPA was directed to "consider the costs, benefits and other effects associated with compliance" with the various provisions in the Act, specifically including the NAAQS. 42 U.S.C. § 7612(a).

In addition to the Clean Air Act itself, the text of UMRA requires EPA to prepare cost-benefit analyses in advance of major regulations and to select the most cost-effective regulatory alternative, with respect to state, local, and tribal governments and the private sector. 2 U.S.C. § 1535. By changing the ozone NAAQS without good cause, EPA not only imposes huge compliance costs on the private sector, it also compels states to rewrite their Clean Air Act implementation plans, generating considerable "unfunded" expense and social disruption.

SBREFA also requires, in its text, that agencies consider and minimize the "significant economic impact" of regulations on "small entities." 5 U.S.C. § 604(a)(5). UMRA and SBREFA together signify a Congressional policy that any regulation be cost-effective, absent some other compelling justification. Thus, EPA has acted at the nadir of its regulatory power, because its actions conflict with Congressional policy. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Chamber of Commerce v. Reich, 74 F.3d 1322, 1332-39 (D.C. Cir. 1996). At the very least, cost-effectiveness

is readily available as a limiting principle for EPA's or any other agency's actions, so as to bring that agency into compliance with the non-delegation doctrine.

EPA maintains, however, that it is forbidden to take account of costs. EPA relies upon Lead Industries Ass'n v. EPA, 647 F.2d 1120 (D.C. Cir. 1980), which held that "economic considerations play no part in the promulgation of ambient air quality standards under Section 109." Id. at 1148. EPA's reliance is misplaced. Lead Industries, which relied on Clean Air Act emanations rather than its text, predated the Supreme Court's decision in Benzene by five days. The Lead Industries court thus could not have taken account of Benzene's directive to consider the non-delegation doctrine in interpreting the scope of the agency's discretion to act. Since Lead Industries, Congress has amended the Clean Air Act, in the 1990 Amendments, to require the EPA Administrator to assess economic impacts. It has also enacted UMRA and SBREFA.

But even apart from these superseding expressions of Congressional intent, the ratio decidendi of Lead Industries simply does not carry over to the regulation of ozone. The pollutant at issue in Lead Industries was lead (Pb). The scientific data cited in Lead Industries made clear that, at least at the time, EPA considered lead to be a threshold pollutant. See, e.g., 647 F.2d at 1138-39 ("in children, a threshold level for anemia is about 40 μ[g] Pb/dl") (internal quotation omitted), 1139 ("the threshold for EP [erythrocyte protoporphyrin] elevation in children and women is at blood lead levels of 15-20 μg Pb/dl"), 1130 ("the blood lead threshold for these neurological effects of high level exposure is 80-100 μg Pb/dl in children, and 100-200 μg Pb/dl in adults"). EPA

thus had a valid scientific basis for setting the lead NAAQS at a given level of exposure, without taking account of costs.

EPA cannot do the same with non-threshold pollutants such as ozone. It could not rationally have decided to stop at a NAAQS of 0.08 ppm without some consideration of cost-effectiveness. If it had, its decision would have been inherently arbitrary—the epitome of the overbroad assertion of delegated rule-making authority.

This Court would not have approved the lockout/tagout regulation in International Union if OSHA had not come back with some limiting principle that required it to take account of costs. As in this case, "the scope of the regulatory program [wa]s immense, encompassing all American enterprise." 938 F.2d at 1317. "When the scope increases to immense proportions (as in Schechter) the standards must be correspondingly more precise." Id. (quoting Synar v. United States, 626 F. Supp. 1374, 1386 (D.D.C. 1986) (three-judge panel)). In its lockout/tagout regulation, OSHA had even applied a feasibility restriction, unlike EPA in this case. Nonetheless, the Court in International Union held OSHA to a stricter limiting principle.

Indeed, it is difficult to see how an agency could even determine initially that a given health risk was "significant," without some consideration of cost. See International Union, 37 F.3d at 669 n. 1 ("How can the significance of a risk be determined in isolation from the cost of eliminating the risk?") (quoting Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 350 (3d ed. 1992)). Both Justice Powell and Justice Rehnquist seemed to recognize this reality in Benzene. "Thousands of toxic substances present risks that fairly could be

characterized as 'significant,'" said Justice Powell in his concurrence. 448 U.S. at 670. But "[e]ven if OSHA succeeded in selecting the gravest risks for earliest regulation, a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost." Id. (emphasis added). "I would not attribute such an irrational intention to Congress." Id.; see also id. at 672 (Rehnquist, J., concurring).

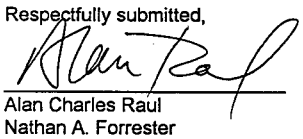
Amicus does not contend that EPA must adopt a rigid requirement that all new NAAQS yield benefits equalling costs. Neither the Clean Air Act nor the non-delegation doctrine are so intransigent. See International Union, 938 F.2d at 1321 ("We hold only that cost-benefit is a permissible interpretation of § 3(8). Given the ambiguity inherent in that section, there may be other interpretations that conform to nondelegation principles."). But to keep its delegated authority within discernible bounds, EPA must at least consider the burdens that its regulation imposes and render a transparent decision about the relationship of those burdens to the resulting benefits. There is significant evidence, for example, that the higher utility costs of complying with the new NAAQS could cause some people to die because they can no longer afford heat or air-conditioning. See Jan C. Semenza et al., Heat-Related Deaths During the July 1995 Heat Wave in Chicago, 335 New Eng. J. Med. 84 (1996) (study of 1995 Chicago heat wave showed that those at greatest risk of dying from heat were people with medical illnesses who were socially isolated and did not have access to air conditioning); Stevenson Swanson, Is Being Cool Our Right or Just Privilege?, Chic. Trib., Aug. 6,

1995, at C1 ("Researchers for the U.S. Environmental Protection Agency estimated that in New York more than 3,500 deaths were avoided between 1964 and 1988 because of air conditioning."). EPA's stilted claim that it does not and cannot consider such evidence of disbenefits defies logic and rationality, not to mention Congressional intent. 42 U.S.C. § 7409(d)(2)(C)(iv) (requiring EPA to consider "any adverse public health" impacts from NAAQS).

CONCLUSION

In issuing the new ozone NAAQS, EPA has failed to recognize any "intelligible principles" that adequately constrain its rule-making discretion under the non-delegation doctrine. EPA imposed its will on Congress, instead of faithfully executing Congress's directives. The NAAQS should be vacated and this case remanded to the agency for reconsideration in light of applicable constitutional and statutory principles.

Respectfully submitted,



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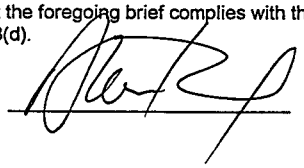
CERTIFICATE OF COMPLIANCE WITH WORD LIMITS IN RULE 28(d)

I, Alan Charles Raul, hereby certify that the foregoing brief complies with the word limits established by D.C. Circuit Rule 28(d).



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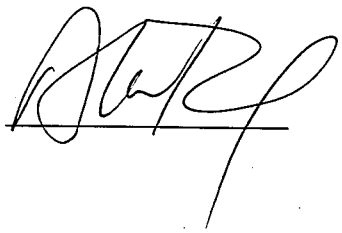

In the
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No. 97-1440 and consolidated cases
(PM NAAQS)

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For Review of
PM National Ambient Air Quality Standards ("NAAQS")
Promulgated by the EPA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae Senator Orrin Hatch certifies the following:

A. Parties and amici. Except for the amicus who is filing this brief, all parties, intervenors and amici appearing before this Court are listed in the various petitioners'

briefs. The amicus who is filing this brief is a Member of the Congress of the United States.

B. Rulings under review. References to the rulings at issue appear in the various petitioners' briefs.

C. Related cases. References to any related cases also appear in the various petitioners' briefs.

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May 7, 1998

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INTRODUCTION

This case poses a basic constitutional question: Should an executive agency be permitted to take this Nation in a major new regulatory direction, when the relevant science is radically uncertain and Congress has directed the agency to research the issue further? Amicus believes that, under the non-delegation doctrine, the clear answer to this question is no. When the available science does not provide the regulatory answers, setting a course for the country calls for fundamental legislative policy judgments, not administrative measures. The Constitution reserves these decisions for Congress.

Yet the Environmental Protection Agency ("EPA") seeks to make just such a judgment in its particulate matter (PM) regulation. EPA has decided to regulate fine airborne particles ($PM_{2.5}$), without relevant evidence of the health effects caused by these particles. Instead, EPA relies on tendentious assumptions and extrapolations from studies involving coarser PM fractions (PM_{10}), which are already regulated. The Agency's inferential leap violates the Supreme Court's ruling in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) ("Benzene"). Benzene requires an agency to heed intelligible principles in the exercise of its rule-making discretion. Without actual evidence that $PM_{2.5}$ poses a significant risk under the Clean Air Act, EPA's new $PM_{2.5}$ regulation represents such a sweeping assertion of policy-making authority as to violate the non-delegation doctrine.

INTEREST OF AMICUS CURIAE

Amicus is a Senator of the United States of America. He has a unique interest in ensuring that the statute in question not be construed so as to transfer legislative power to the executive branch, contrary to fundamental separation-of-power principles in the United States Constitution. Furthermore, amicus participated in the intense legislative debates and policy agreements that led to the passage of the Clean Air Act Amendments of 1990. He is thus keenly interested to see that the respondent agency faithfully executes the relevant provisions of the Clean Air Act.

This amicus brief is submitted under Fed. R. App. P. 29, and this Court's corresponding local rule, which allow governmental entities to file such briefs without permission of the parties and without leave of court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Clean Air Act, 42 U.S.C. §§ 7401 et seq., requires EPA to identify air pollutants that "may reasonably be anticipated to endanger public health or welfare," id. § 7408(a)(1)(A), and then to issue air quality standards for those pollutants that protect human health with "an adequate margin of safety." Id. § 7409(b)(1).

STATEMENT OF ISSUES

Whether EPA's new National Ambient Air Quality Standard ("NAAQS") for particulate matter ("PM") constitutes a legislative judgment by EPA and thus violates the non-delegation doctrine of the Constitution of the United States.

STATEMENT OF JURISDICTION

Amicus incorporates by reference the statements of jurisdiction in the various petitioners' briefs.

STATEMENT OF FACTS

EPA's $PM_{2.5}$ rule-making is a case study in the perils of hasty, ill-informed government action. Quite simply, no one knows whether and to what extent these fine airborne particles pose any kind of health hazard. When choosing what categories of PM to regulate, EPA has missed the mark before. As Senator Chafee has aptly put it,

> we must get it right this time. There are important gaps in our knowledge about the very small particulates and how they cause adverse health effects. As you may know, the particulate matter standard was revised in 1987 to address these same health effects. Based on a review of EPA's recent proposal, it appears that the 1987 standard may have missed the mark.

Letter from Sen. John Chafee to Ms. Molly Clark, American Lung Association 1 (Jan. 6, 1997).

EPA's effort at PM regulation can be summarized as follows: Everyone—the President, Congress, EPA—agrees that the science regarding $PM_{2.5}$ is highly uncertain.

In response, Congress has allocated large sums of money to $PM_{2.5}$ research. But EPA insists on regulating $PM_{2.5}$ without waiting for the research to yield answers.

I. The science regarding PM, especially $PM_{2.5}$, is highly uncertain.

Particulate matter ("PM") is the generic term for a broad class of substances—with varying chemical compositions and sizes—that exist in the atmosphere as discrete solid particles or liquid droplets. These substances originate from a wide range of natural and man-made sources, including industrial and utility boilers, combustion engines, forest fires, wind erosion, farming activity, and even backyard barbecue grills. PM may be produced directly from these sources, or by the atmospheric reactions of such precursor compounds as sulfur oxide (SO_x), nitrogen oxide (NO_x), and volatile organic compounds (VOCs).

The science regarding PM is not nearly as advanced as for other pollutants regulated by EPA under the Clean Air Act. Exposure to the coarser fractions of PM (samples that include both large and small particles) has generally been correlated with premature mortality and impaired respiratory functions, but scientists are still trying to determine what specific properties of particulate matter are causing these problems:

> Numerous scientists . . . have stated [that] the size, shape, or chemical composition of the PM that is causing the alleged adverse health effects is unknown. There are various theories—sulfates, acids, transmetals, ultrafines—regarding the potential bad actor.

143 Cong. Rec. S10,740-41 (daily ed. Oct. 9, 1997) (statement of Sen. Sessions). EPA's own staff has observed the "unusually large uncertainties associated with establishing standards for PM relative to other single component pollutants for which

NAAQS [national ambient air quality standards] have been set." Office of Air Quality Planning and Standards, Review of the National Ambient Air Quality Standards for Particulate Matter, Policy Assessment of Scientific and Technical Information VII-44 (emphasis added).

The facts are especially cloudy when it comes to the finer fractions of PM, such as EPA seeks to regulate in this case. All of the relevant studies upon which EPA bases its $PM_{2.5}$ NAAQS involve the coarser fractions of PM. Even EPA's Administrator could not avoid conceding the "uncertainty in the characterization of health effects attributable to exposure to ambient PM." National Ambient Air Quality Standards for Particulate Matter; Final Rule, 62 Fed. Reg. 38,652, 38,655 (1997) (to be codified at 40 C.F.R. pt. 50) (emphasis added) ("Final Rule"). This prompted the President, just last year, to request $26.4 million from Congress, for the express purpose of "reduc[ing] the great uncertainty about PM's health effects." Budget of the United States Government, Fiscal Year 1998, at 81 (1997) (emphasis added).

Notwithstanding all these questions about the health effects of PM, one fact is certain: PM pollution is decreasing. EPA's own data show that "[a]mbient PM10 concentrations decreased 25 percent between 1988 and 1996 and decreased 4 percent between 1995 and 1996." Office of Air Quality Planning and Standards, EPA, National Air Quality and Emissions Trends Report, 1996, EPA Doc. No. 454/R-97-013 (last modified Jan. 23, 1998) <http://www.epa.gov/oar/aqtrnd96/trendsfs.html>. Ambient concentrations of PM precursors (NOx, SOx) are also decreasing. Id. Given the attention devoted to these precursor compounds in the Clean Air Act Amendments

of 1990—and the backlog of control measures under these Amendments awaiting EPA's implementation—there is every reason to expect this trend to continue.

II. Congress has directed EPA to conduct more research, before it regulates $PM_{2.5}$. EPA has gone ahead and regulated anyway.

In recent years, Congress has appropriated large sums of money for continued research into the health properties of PM, so that more precise regulatory programs may be developed. In so doing, Congress has repeatedly admonished EPA not to change the existing regulatory regime until this research sheds more light on the uncertainties surrounding PM. But EPA has disregarded Congress's concerns.

In Fiscal Year 1997, for instance, Congress budgeted $18.8 million for PM research (at EPA's request), as part of the overall appropriation to EPA for scientific and technological research. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, Pub. L. No. 104-204, 110 Stat. 2874, 2909-10 (1996); H.R. Rep. No. 104-812, at 70 (1996). When it appropriated these funds for research, Congress was aware that EPA was considering whether to change the criteria and standards for regulating PM. The Conference Report accompanying the FY 1997 statutory appropriation expressed the following Congressional position:

> [A]t present, there appears to be insufficient data available for the Agency to decide what changes, if any, should be made to the current standard. In particular, some scientists have concluded that current data do not adequately demonstrate causality or provide sufficient information to establish a specific new control strategy.

Id. (emphasis added). "Given that monitoring and research into causality have only just begun, the conferees believe it may be premature for the Agency to promulgate new particulate standards at this time." Id. (emphasis added). The Conference Report thus "encourage[d] EPA to consider a 'no change' option" as part of its forthcoming proposal. Id.

EPA ignored this Congressional message and did not include a "no change" option in its proposal. National Ambient Air Quality Standards for Particulate Matter, Proposed Decision, 61 Fed. Reg. 65,638 (Dec. 13, 1996) ("Proposed Rule"). Seven months later, EPA finalized the rule. The most dramatic feature of the Final Rule was a stringent NAAQS for PM with a diameter of 2.5 microns and less ($PM_{2.5}$)—on top of the existing NAAQS for PM with a diameter of 10 microns and less (PM_{10}). 62 Fed. Reg. at 38,679, 38,683. The potential impacts of this new $PM_{2.5}$ NAAQS are huge for society and the national economy, especially since particulate matter is produced by so many different sources. EPA's own Regulatory Impact Analysis predicts that the annual national cost of partial attainment will be $8.6 billion, above and beyond that of other existing air pollution control measures. Innovative Strategies and Economics Group, EPA, Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule ES-12 (1997).

Members of Congress were astonished that EPA had chosen to promulgate a $PM_{2.5}$ NAAQS at all, given the lack of scientific evidence to warrant such a decision. See, e.g., 143 Cong. Rec. H4638 (daily ed. June 25, 1997) ("The existing body of scientific knowledge is clearly lacking, especially for particulate matter. . . . [W]hy

should we move forward with a regulatory approach before we know if there is a problem that needs to be regulated?") (statement of Rep. Doyle). Soon after EPA issued its Final Rule, Congress doubled the budget for PM research to $49.6 million—$23 million more than EPA had requested. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Pub. L. No. 105-65, 111 Stat. 1344, 1371 (1997).

In the text of the appropriation statute, Congress ordered EPA to develop, in conjunction with the National Academy of Sciences ("NAS"), "a comprehensive, peer-reviewed, near- and long-term particulate matter research program in accordance with the terms and conditions set forth for such research program in the conference report." 111 Stat. at 1371; H.R. Rep. No. 105-297, at 113 (1997) (emphasis added). The Conference Report in turn made clear that Congress had passed the PM research appropriation because of "the almost universal recognition that considerable scientific questions relative to particulate matter remain to be answered." H.R. Rep. No. 105-297, at 115 (1997). The Conference Report thus concluded:

> [W]hile reasonable people may differ as to the interpretation of the facts and that different policy judgments may be arrived at, sufficient facts are not yet available to proceed with future regulations for a new particulate standard."

Id. (emphasis added).

III. The recent report of the National Academy of Sciences, performed at the behest of Congress, confirms the lack of data to support EPA's $PM_{2.5}$ regulation.

EPA disregarded the "terms and conditions" in the Conference Report, choosing instead to press on with its new $PM_{2.5}$ NAAQS. EPA did, however, enter into a contract with the National Academy of Sciences to develop a $PM_{2.5}$ research program. On March 31, 1998, NAS issued a report outlining a five-year research plan and summarizing the current scientific knowledge regarding $PM_{2.5}$. Board on Env'tl Studies & Toxicology, National Research Council, Research Priorities for Airborne Particular Matter: I. Immediate Priorities and a Long-Range Research Portfolio 1 (1998) ("NAS Report"). The NAS Report echoed Congress's concerns about the lack of $PM_{2.5}$ data and warned of the consequent dangers of premature regulation. See, e.g., id. at 10 ("[A]t the present time, there is uncertainty as to what specific types or components of particulate matter need to reduced to achieve substantial health-risk reduction cost effectively."), 15 ("Proceeding in the absence of such information could lead policymakers to focus on standards and controls for particulate matter that are not of the highest public-health priority.").

In particular, the NAS Report questioned EPA's interpretation of the epidemiological studies on which it had based its decision to impose a $PM_{2.5}$ NAAQS:

> The new $PM_{2.5}$ standards were developed by EPA largely on the basis of evidence from epidemiological studies that found relatively consistent associations between outdoor particulate-matter concentrations and various adverse health effects . . . . The biological basis of most of the associations is essentially unknown (at the ambient particulate levels at which the associations were observed).

> There is a great deal of uncertainty about the implications of the findings for risk management, due to the limited scientific information about the specific types of particles that might cause adverse health effects, the contributions of particles of outdoor origin to actual human exposures, the toxicological mechanisms by which the particles might cause adverse health effects, and other important questions.

Id. at 1 (emphasis added). In other words, $PM_{2.5}$ might not be the real culprit in the observed adverse health effects. A $PM_{2.5}$ standard assumes that health effects are correlated to particle size and mass; it does not differentiate among the many kinds of particles that may exist within a given sample of PM. "However," said NAS, "it is not clear whether mass is the appropriate metric to explain dose-response relationships for adverse health effects of particulate matter noted in epidemiological studies." Id. at 44. "[E]xperimental studies using various biological end points have suggested that certain chemical constituents of particulate matter might underlie toxicity." Id. at 45. (EPA's Clean Air Scientific Advisory Committee ("CASAC") has raised the same concern, noting that "we have a dilemma in not being able to definitively identify the possible causative agent(s), and hence, not being able to identify the air pollution component(s) that needs to be reduced in order to reduce mortality/morbidity." Letter from George Wolff, Chairman, CASAC, to Carol Browner, Administrator, U.S. EPA, regarding Clean Air Act Scientific Advisory Committee (CASAC) Comments on the April 1995 Draft Air Quality Criteria for Particulate Matter 2 (Aug. 31, 1995).

The NAS Report diplomatically avoided expressing an ultimate opinion on the propriety of EPA's $PM_{2.5}$ regulations. But by repeatedly emphasizing the critical need for more scientific research, the Report inevitably exposed the regulations for what they

are: not the application of scientific or technical expertise, but the exercise of policy-making judgment. Page 2 of the Report was explicit about the dichotomy between science and policy in EPA's regulation. On that page, the Report drew attention to the "scientific uncertainties" that warranted further $PM_{2.5}$ research but then immediately professed not to be questioning EPA's ultimate decision to impose a $PM_{2.5}$ NAAQS, because the process of setting such standards "also involves legal requirements and policy choices." Id. at 2; see also id. at 14 ("It is important to recognize that legal requirements and policy choices are important factors in setting such standards, and this committee was not constituted or charged to address legal and policy matters.").

IV. EPA will not even begin to enforce the $PM_{2.5}$ NAAQS until after the next regularly-scheduled NAAQS review in 2002.

The irony of EPA's regulatory haste is that EPA will not be able to begin enforcing the new NAAQS for a very long time. First, EPA has to set up a nationwide $PM_{2.5}$ monitoring network, because none is currently in place. To this end, the President has sought an additional $65 million from Congress. Budget of the United States Government, Fiscal Year 1999, at 83 (1998). Next, EPA has to gather compliance data and determine which regions will be designated non-attainment. Because the $PM_{2.5}$ NAAQS uses a three-year averaging measure, "Governors and the EPA will not be able to make the first determinations as to which areas should be designated nonattainment until at least 2002 . . . ." The President, Memorandum of July 16, 1997, Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, Memorandum for the Administrator of the Environmental Protection

Agency, 62 Fed. Reg. 38,421, 38,428 (Jul. 18, 1997). Finally, after EPA decides which areas to designate nonattainment, state and local governments will have three years to develop implementation plans and an additional ten years to bring their nonattainment areas into compliance. Id.

But EPA's next scheduled NAAQS review is also in 2002. By that time, as the President has stated, "the Agency will have determined, based on data available from its review, whether to revise or maintain the standards." Id. at 38,421. "This determination will have been made before any areas have been designated 'nonattainment' under the $PM_{2.5}$ standards and before imposition of any new controls related to the $PM_{2.5}$ standards." Id. EPA thus will not even be able to enforce the new $PM_{2.5}$ NAAQS until after the next NAAQS review. EPA's rush to regulate serves no other purpose than to lock in a stringent, but unsubstantiated, $PM_{2.5}$ standard.

* * * * *

In sum, no one knows whether $PM_{2.5}$ poses any kind of health hazard. The current state of $PM_{2.5}$ science is universally characterized by vast uncertainty, bordering on total ignorance. Everyone agrees that more research is needed. Congress has appropriated large sums of money to facilitate research into $PM_{2.5}$, in lieu of supporting EPA's new $PM_{2.5}$ regulations, precisely because so much remains to be discovered about the health effects of these ubiquitous microscopic particles. EPA will not even begin enforcing the $PM_{2.5}$ NAAQS until after the next regularly-scheduled NAAQS review in 2002. Nevertheless, EPA has chosen to impose its own policy judgment.

SUMMARY OF ARGUMENT

EPA's "regulate now, research later" approach to the questions surrounding $PM_{2.5}$ is not merely unreasonable. It violates the non-delegation doctrine of Article I of the Constitution, which assigns legislative powers exclusively to Congress. Congress's role is to prescribe intelligible principles of law. The role of the agency is apply those principles to the facts, using its technical expertise. EPA seeks to regulate $PM_{2.5}$ based on studies of the health effects of much coarser fractions of PM. Without more direct evidence that $PM_{2.5}$ poses a significant public health risk, EPA's decision to promulgate a $PM_{2.5}$ NAAQS can be nothing other than a fundamental policy judgment—an illicit usurpation of Congress's exclusive Article I legislative authority. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980) ("Benzene").

EPA cannot justify its rush to regulate—and its corresponding disregard for Congress—as a precautionary response to some kind of national public health emergency that necessitates immediate executive action. Ambient concentrations of PM and PM precursors are actually decreasing. EPA does not even intend to begin enforcing the $PM_{2.5}$ NAAQS until after the next regularly-scheduled NAAQS review in 2002. Indeed, until EPA establishes a new $PM_{2.5}$ monitoring network and collects actual $PM_{2.5}$ concentration data, enforcement of the new standard is not even theoretically possible. There is thus ample time for EPA to await the results of the Congressionally-funded programs for $PM_{2.5}$ research and monitoring, before it decides whether regulation is appropriate.

This Court must intervene to prevent EPA from aggrandizing its powers at the expense of the other branches. Without judicial review to ensure that agencies heed intelligible principles in their exercise of delegated authority, the agencies will effectively be able to turn the Article I law-making process on its head, thrusting Congress into a reactive rather than proactive policy-making role. If EPA truly believes that this country should take steps to curb airborne $PM_{2.5}$ now, before the research on $PM_{2.5}$ is complete, EPA should report that conviction to Congress and allow Congress to authorize such precautionary action. EPA should not be permitted to assume for itself the role of Congress.

ARGUMENT

I. Without basis in scientific fact, EPA's $PM_{2.5}$ NAAQS is a pure legislative policy decision, in contravention of the non-delegation doctrine.

In the related ozone proceedings before this Court, Congressman Tom Bliley has filed an amicus brief, in which he urges that EPA's new ozone regulation, promulgated simultaneously with its $PM_{2.5}$ regulation, violates the non-delegation doctrine. Senator Hatch endorses the analysis in Congressman Bliley's brief and believes that it dictates a similar conclusion in this case. At bottom, the non-delegation doctrine is simply one facet of the overarching constitutional principle of separation of powers—a judicial means of ensuring that the legislative and executive branch each fulfill their proper Constitutional roles. By choosing to regulate $PM_{2.5}$ without sufficient

warrant in scientific fact, EPA has exceeded the scope of its Constitutional powers and usurped those of Congress.

As Congressman Bliley demonstrated in his brief, the non-delegation doctrine enjoys a impressive historical pedigree. No less an authority than John Locke, perhaps the most important theorist of modern democratic government, wrote in 1690 that the doctrine was a fundamental feature of any legitimate state:

> The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others.

John Locke, An Essay Concerning the True Original, Extent, and End of Civil Government § 141 (1690), in Two Treatises of Government 304, 408 (Peter Laslett rev. ed. 1960) (emphasis in original). The very first sentence of the U.S. Constitution, after the preamble, articulates the principle that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1 (emphasis added).

As Congressman Bliley also demonstrated, the non-delegation doctrine remains a vital cog in the machinery of the modern administrative state. Although some delegation of rule-making authority to specialized agencies is undeniably necessary in order for government to deal responsibly with the complex social and economic problems of twentieth-century life, it remains incumbent upon Congress to set forth intelligible principles to guide agency discretion. In turn, it is incumbent upon the executive agencies to respect Congress's principles, and upon the courts to hold the agencies accountable for applying those principles in good faith. Otherwise the most integral features of constitutional governance—consistency and accountability to the

will of the people—will be lost. Then-Justice Rehnquist best encapsulated the important functions that the non-delegation doctrine still serves today in his concurring opinion in the famous Benzene case:

> First, and most abstractly, [the non-delegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (citations omitted).

It will be the rare case, to be sure, in which a statute will be declared unconstitutional because it sought to delegate too much power to an agency. See, e.g., Milk Indus. Found. v. Glickman, 132 F.3d 1467 (D.C. Cir. 1998) (upholding Federal Agricultural Improvement and Reform Act of 1996 against non-delegation challenge); but see City of New York v. Clinton, 985 F. Supp. 168 (D.D.C.) (striking down Line Item Veto Act because it impermissibly delegated legislative power to the President), cert. granted, 118 S. Ct. 1123 (1998) (No. 97-1374) (argued Apr. 27, 1998); Massieu v. Reno, 915 F. Supp. 681, 707-11 (D.N.J.) (striking down provision of Immigration and Naturalization Act because it gave the Secretary of State unfettered discretion to deport aliens), rev'd on other grounds, 91 F.3d 416 (3d Cir. 1996).

Nevertheless, the non-delegation doctrine remains critically important as a tool of statutory interpretation, see Jackson v. Stinnett, 102 F.3d 132, 135 n. 3 (5th Cir. 1996) (construing abrogation clause of the Rules Enabling Act not to give Supreme Court the power to repeal any federal statute governing judicial procedure, in light of the non-delegation doctrine), and as a ground for stricter judicial review of agency action, see Bro-Tech Corp. v. NLRB, 105 F.3d 890, 895 (3d Cir. 1997) ("Considering the limits of Congress's constitutional power to delegate its authority, it gives us pause when the Board acts legislatively without clear Congressional direction unless there is rigorous judicial review."). Where the language of a statute is elastic, the agency—and the reviewing court—must search for intelligible principles in the purposes and logic of the statute, so as to bring the exercise of rule-making authority within discernible constraints. See International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) (remanding so that Occupational Safety and Health Administration could bring its interpretation of the OSH Act into compliance with the non-delegation doctrine), on remand, 37 F.3d 665 (D.C. Cir. 1994) (approving OSHA's lockout/tagout regulation because OSHA supplied a sufficient list of limiting principles to constrain its application of the OSH Act).

Of equal significance is the requirement that the agency apply those intelligible principles to known scientific fact. An administrative agency may never write upon a completely blank slate. Just as the agency is not entitled to displace the policy choices of Congress, neither is it entitled to take regulatory action where the scientific evidence

is not strong enough to warrant it. To do so would be to employ default assumptions that are, ipso facto, the agency's independent assessments of policy.

This is exactly what EPA has done in this case. The defining feature of this entire rule-making has been the dearth of hard data on the health effects of $PM_{2.5}$. One member of EPA's Clean Air Scientific Advisory Committee ("CASAC") openly stated that "there is almost no data" on $PM_{2.5}$. Transcript of May 16, 1996 CASAC Meeting at 54 (statement of Dr. McClellan); see also Transcript of May 17, 1996 CASAC Meeting at 108 (there is "limited primary data looking at fine particles supporting the epidemiological observations") (statement of Dr. Utell). In fact, almost all of the studies that EPA cited to support the proposed $PM_{2.5}$ NAAQS used samples of coarser fractions of PM:

> Most of the epidemiological studies did not use PM2.5 as a measure. Most used PM10 or total suspended particulates (TSP), which are only roughly correlated with PM2.5, and therefore, do not allow one to conclude that PM2.5 is the causative agent or indeed that any specific component of the PM10 is the causative agent. Some studies used sulfate, which is usually a significant chemical constituent of the PM2.5. A number of studies used British Smoke, coefficient of haze (COH), or other filter reflectance measurements which are measures of the amount of black elemental carbon in the air and not a measure of PM2.5. Still others used ambient visibility, an indicator of the accumulation mode within PM2.5.

Letter from George Wolff, Chairman, CASAC, to Carol Browner, Administrator, Environmental Protection Agency, regarding CASAC Comments on the November 1995 Drafts of the Air Quality Criteria for Particulate Matter and the Review of the National

Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information (OAQPS Staff Paper) 2-3 (Jan. 5, 1996).

Studies of coarser fractions of PM provide shaky foundation at best for ascertaining the health effects of finer fractions of PM, because the proportion of finer to coarser particles within any given sample of PM varies greatly with region and time of measurement. See Transcript of May 17, 1996 CASAC Meeting at 176 (statement of Dr. Koutrakis); Transcript of May 16, 1996 CASAC Meeting at 67-69 (testimony of John Core, Director of the Western States Air Resources Council). Nor can the health effects of finer fractions be reasonably extrapolated from the health effects of coarser fractions of PM. As EPA itself explained,

> Given the significant physical and chemical differences between the two subclasses of PM_{10}, it is reasonable to expect that differences may exist between fine and coarse fraction particles in both the nature of potential effects and the relative concentrations required to produce such effects.

Proposed Rule, 61 Fed. Reg. at 65,648 (citations omitted).

In all, EPA cited only two studies that attempted to measure the long-term health effects of $PM_{2.5}$ itself: (1) the "Six City" study by Dockery et al., performed in 1993; and (2) the American Cancer Society study by Pope et al., in 1995. EPA never reviewed the data underlying those studies, nor did it task another body to review the data and confirm the conclusions of the authors. (In fact, EPA's stated practice in this rule-making was to "rel[y] upon the scientific studies cited in the rulemaking record, rather than on the raw data underlying them." Final Rule, 62 Fed. Reg. at 38,689.) EPA did not even make the data publicly available for independent parties to review during the

rule-making process. Numerous commenters protested this failure, see, e.g., American Automobile Manufacturers Association, Comments on the Environmental Protection Agency's Proposed National Ambient Air Quality Standard for Particulate Matter under the Clean Air Act, at 26-30 (Mar. 12, 1997), and Congress even opened hearings into the issue.

In the end, EPA attempted to diffuse the whole non-disclosure issue by claiming that it did not need to rely upon either of these two studies in order to promulgate a $PM_{2.5}$ NAAQS. EPA claimed that it had sufficient justification for the $PM_{2.5}$ NAAQS from the other PM studies in the rule-making record, even though the remaining studies all involved coarser fractions of PM. Final Rule, 62 Fed. Reg. at 38,689 n.90. (EPA did also refer to studies of the short-term health effects of $PM_{2.5}$, but these studies, because they are short-term, cannot provide support for EPA's stringent $PM_{2.5}$ standard of 15 $\mu g/m^3$, measured as a three-year average of annual concentrations.) In short, EPA chose to promulgate the $PM_{2.5}$ NAAQS without any direct evidence of the health effects of $PM_{2.5}$ itself.

This can be nothing but a policy choice—a belief that, in the face of substantial uncertainty, it is better to go ahead and regulate, because future research may reveal that additional regulation is warranted. This is not necessarily an unreasonable belief, and there is certainly no reason to doubt that EPA holds it sincerely. But it is not a belief chosen by Congress or compelled by existing science. EPA is not authorized to regulate substances based on mere speculation about their health effects (see 42 U.S.C. §§ 7408(a)(1)(A), 7409), nor may it assume such power, given the non-

delegation doctrine. Policy choices this fundamental and potentially far-reaching are reserved by the Constitution to Congress.

In this respect, EPA's decision-making process in setting the $PM_{2.5}$ NAAQS was very similar to that which the Supreme Court held invalid in Benzene. In Benzene, the Occupational Safety and Health Administration ("OSHA") attempted to reduce the maximum permissible level of exposure to benzene gas in the workplace from 10 parts per million ("ppm") to 1 ppm. OSHA had substantial evidence that exposure to benzene levels greater than 10 ppm posed a significant health risk, namely leukemia. But the agency's evidence of risk from exposure to benzene at levels of 10 ppm and below was, in the Supreme Court's own words, "sketchy at best." 448 U.S. at 631 (plurality). Rather than wait for research to show whether exposure to benzene at levels lower than 10 ppm did indeed pose a significant cancer risk, OSHA decided to impose a workplace standard of 1 ppm by employing "a series of assumptions indicating that some leukemias might result from exposure to 10 ppm and that the number of cases might be reduced by reducing the exposure level to 1 ppm." Id. at 634.

The Supreme Court ruled that this decisional process contravened both the Occupational Safety and Health Act (the "OSH Act") and the non-delegation doctrine. Four members of the Court—Justice Stevens, Chief Justice Burger, and Justices Stewart and Powell—held that OSHA's failure to adduce evidence of "significant risk" would violate the non-delegation doctrine, because without such a threshold finding,

OSHA would have no meaningful constraints on its power to issue workplace standards:

> If the Government were correct in arguing that neither § 3(8) nor § 6(b)(5) [of the OSH Act] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

Id. at 646. The fifth member of the majority, then-Justice Rehnquist, concurred separately on the broader ground that the OSH Act provisions at issue were so vague as to be facially invalid under the non-delegation doctrine.

Here, as in Benzene, EPA cites no record evidence of the long-term health risks posed by exposure to $PM_{2.5}$. Instead, it extrapolates from studies of broader categories of PM, such as PM_{10}, which include larger particles and different chemical components than does $PM_{2.5}$. Yet EPA itself admits that "differences may exist between fine and coarse fraction particles in both the nature of potential effects and the relative concentrations required to produce such effects." Proposed Rule, 61 Fed. Reg. at 65,648 (citations omitted). Without a scientific basis for extrapolating from coarser to finer fractions of PM, EPA's decision to impose a $PM_{2.5}$ NAAQS based on PM_{10} data must inevitably have been based on default assumptions concerning public policy. Worse yet, by cloaking those default assumptions in the guise of scientific analysis, EPA makes it difficult for the courts or Congress or the voting public to evaluate the

wisdom of EPA's policy choices, let alone determine whether EPA is constitutionally entitled to make them. See Allentown Mack Sales & Serv., Inc. v. NLRB, 118 S. Ct. 818, 828 (1998) ("An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding."); see also Wendy E. Wagner, The Science Charade in Toxic Risk Regulation, 95 Colum. L. Rev. 1613, 1617 (1995) ("camouflaging controversial policy decisions as science assists the agency in evading various political, legal, and institutional forces").

By the logic of Benzene, EPA's decisional process in setting the $PM_{2.5}$ NAAQS is invalid. The raison d'être of the administrative agency is to collect data and apply its scientific and technical expertise, not to decide what this Nation should do when science does not indicate a particular course of action. Congress—the governmental body most immediately responsive to the will of the people—is the branch to which the Constitution assigns such fundamental judgments of national policy.

II. EPA has not identified any kind of national emergency involving $PM_{2.5}$ that would justify immediate executive intervention.

EPA's usurpation of Congressional prerogative cannot be rationalized on grounds of public necessity or emergency. For starters, there is substantial doubt whether the executive possesses the power to circumvent Congress just because it believes that it is faced with a national emergency. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646-55 (1952) (Jackson, J., concurring). If it does possess such power, this is the last case in which the power should be deployed. The plain import of Congress's legislative direction to EPA has been to research $PM_{2.5}$, not to

regulate it. The executive's power to act when its constitutional authority is ambiguous should be reserved for cases when its actions are consistent, not at odds, with Congressional policy. Youngstown, 343 U.S. at 635-38 (Jackson, J., concurring); Chamber of Commerce of United States v. Reich, 74 F.3d 1322, 1332-39 (D.C. Cir. 1996).

There is too much scientific uncertainty surrounding $PM_{2.5}$ to know whether it poses any public health threat at all. Under the existing regulatory regime, overall PM (and PM precursor) levels have actually been declining. EPA will not even begin to enforce the $PM_{2.5}$ NAAQS until after the next regularly-scheduled NAAQS review in 2002, because it will take that long just to put adequate $PM_{2.5}$ monitoring technology in place and begin to gather compliance data. By that time, the research programs that Congress has funded may reveal that EPA's regulation of $PM_{2.5}$ is not even appropriate.

At the very least, EPA should wait to prescribe a new $PM_{2.5}$ NAAQS until after the Congressionally-mandated $PM_{2.5}$ research is complete. When the results of that research and the additional $PM_{2.5}$ monitoring data are available, EPA will then be in a position to prescribe and promptly enforce whatever PM standard turns out to be scientifically justified. Setting a stringent NAAQS standard for $PM_{2.5}$ today serves only to lock in the stringency of the standard, without accelerating the process of planning or enforcement. States will not even be able to design their required implementation plans for $PM_{2.5}$ until after the next NAAQS review. EPA's unseemly haste to regulate $PM_{2.5}$ thus serves no purpose, except to sidestep the research program mandated by Congress. This approach is not scientific, it does not demonstrably protect public

health with an adequate margin of safety, and it fails to accord with Congressional intent and the proper allocation of responsibilities under the Constitution.

III. This Court should not stand aside and allow EPA to aggrandize its powers at the expense of the other branches.

For all the foregoing reasons, EPA's new $PM_{2.5}$ NAAQS represents a significant aggrandizement of its own regulatory powers and an equally significant encroachment upon the legislative powers of Congress. Most ingeniously, "the Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" Mistretta v. United States, 488 U.S. 361, 382, (1989) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)). When one branch oversteps its bounds, it necessarily intrudes upon the domain of another branch, prompting the latter branch to defend itself and thereby to correct the imbalance in the overall separation-of-powers scheme. As James Madison said in Federalist 51,

> the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.

The Federalist No. 51, at 321-22 (Clinton Rossiter ed. 1961).

This "self-executing safeguard" does not mean that, in power disputes between the legislative and executive branches, the judicial branch may sit on the sidelines and allow the other two branches to resolve their differences on their own. One branch by itself may not have sufficient "constitutional means" to resist the encroachment or self-

aggrandizement of the other. All branches, moreover, share a common interest in preventing any one branch from assuming too much power. The Supreme Court thus

> ha[s] not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.

Mistretta, 488 U.S. at 382. See, e.g., Myers v. United States, 272 U.S. 52 (1926) (invalidating statute that limited the power of the President to remove postmasters from office); INS v. Chadha, 462 U.S. 919 (1983) (invalidating statute that authorized one house of Congress to override the deportation decisions of the Attorney General); cf. Morrison v. Olson, 487 U.S. 654, 693-96 (1988) (finding no significant encroachment or aggrandizement in statute that authorized three-judge panel to supplant Attorney General and appoint independent prosecutor).

This is a prime example of a case in which the combined efforts of the legislative and judicial branches are necessary in order to adequately constrain the third. Congress cannot be expected to enact corrective legislation every time an executive agency flouts the purpose of a Congressional appropriation or exceeds the scope of its delegated rule-making powers. When the executive branch usurps Congressional authority, Congress can defend itself only by passing legislation with the approval of two-thirds of both Houses of Congress, so as to override the inevitable Presidential veto.

EPA thus may not shield its arrogation of policy-making authority from judicial review by pointing to legislative oversight mechanisms such as the Congressional

Review of Agency Rulemaking Act (5 U.S.C. §§ 801-808). Congress will do what it can, but this Court shares an equal responsibility to keep the executive agencies within separation-of-powers constraints. After all, it is not just Congress, but the public as well, who has an interest in seeing that executive agencies observe constitutional limits. Moreover, this Court has an independent self-interest in confining EPA to its proper Constitutional role: the "safeguarding of meaningful judicial review." Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J., for three-judge panel); see also Yakus v. United States, 321 U.S. 414, 426 (1944) (administrative agency's candor in setting forth statement of considerations used in setting prices under the Emergency Price Control Act helped to satisfy the non-delegation doctrine); Benzene, 448 U.S. at 686 (Rehnquist, J., concurring) ("the [non-delegation] doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards"); Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting) (the non-delegation doctrine "prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged").

Nor may EPA shield its NAAQS from judicial review by invocation of the principle of deference in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Agency interpretations of authorizing legislation are not entitled to Chevron deference when those interpretations "raise substantial constitutional questions." Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994); see

also Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-77 (1988); NLRB v. Catholic Bishop, 440 U.S. 490, 506-07 (1979). In Bell Atlantic, the administrative order at issue would have constituted a taking, under the Due Process Clause of the Fifth Amendment, and thus a potential "executive encroachment on Congress's exclusive powers to raise revenue." 24 F.3d at 1445. Even though the taking would have been perfectly constitutional once the agency compensated the private party, this Court held that the mere intrusion into constitutional territory was sufficient to puncture Chevron deference.

Finally, EPA cannot plausibly contend that invalidation of its Final Rule under the non-delegation doctrine would aggrandize judicial power at the expense of the executive branch. The non-delegation doctrine does not require a reviewing court to assess the merits of an agency's regulatory decision—only the method by which it reached it. Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595 (1993) ("The focus . . . must be solely on principles and methodology, not on the conclusions that they generate."). If EPA truly believes that $PM_{2.5}$ regulation is necessary at this time, despite the paucity of scientific evidence, EPA should recommend such precautionary action to Congress. U.S. Const., art. II, § 3 ("[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient"); Kelley v. EPA, 15 F.3d 1100, 1109 (D.C. Cir. 1994) (lauding "the clarity EPA's regulation would have provided," but ruling that EPA had no choice but to seek

limitation on lender liability under CERCLA from Congress). EPA's speculation about the health effects of $PM_{2.5}$, based on studies of other categories of PM, may or may not ultimately be proven correct, but EPA is not entitled to act on speculation. EPA must cite facts, and apply intelligible principles to those facts, in order to have constitutional warrant for its regulatory action.

CONCLUSION

Like the ozone NAAQS, EPA's decisional process in issuing the $PM_{2.5}$ NAAQS violates the non-delegation doctrine. There remains too much uncertainty about the health effects of $PM_{2.5}$ for EPA to impose any new regulation without injecting itself into Congress's legislative role. It is this Court's responsibility to prevent EPA from aggrandizing its powers at the expense of the other branches and to require EPA to perform its proper Constitutional duties.

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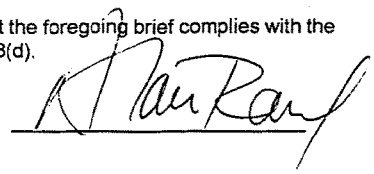
May 7, 1998

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS IN RULE 28(d)

I, Alan Charles Raul, hereby certify that the foregoing brief complies with the word limits established by D.C. Circuit Rule 28(d).



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