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Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State

Lisa Schultz Bressman

Essay

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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

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:

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

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

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

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.