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## ESSAY

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# THE FALSE PROMISE OF THE “NEW” NONDELEGATION DOCTRINE

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In a remarkable recent decision, *American Trucking Ass'ns, Inc. v. EPA*, a panel of the U.S. Court of Appeals for the District of Columbia rejected the Environmental Protection Agency's ozone rules.<sup>1</sup> The decision, written per curiam by Judge Stephen Williams, is significant because it brings to the fore a new twist on the nondelegation doctrine, reinvigorating a spirited debate that has engaged administrative law scholars since the New Deal.<sup>2</sup> Unlike the traditional nondelegation doctrine, which allows a court to declare a statute unconstitu-

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1 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), *modified and reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *cert. granted sub nom. Browner v. Am. Trucking Ass'ns, Inc.*, 120 S. Ct. 2003 (2000), *and cert. granted, Am. Trucking Ass'ns v. Browner*, 120 S. Ct. 2193 (2000). Judge Williams's opinion echoes his previous invalidation of safety regulations in *UAW v. OSHA (Lockout/Tagout I)*, 938 F.2d 1310, 1313 (D.C. Cir. 1991).

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

tional if Congress has not provided an “intelligible principle” to guide its delegation of authority to an agency,<sup>3</sup> Judge Williams’s approach to nondelegation does not require a court to pass judgment directly on the constitutionality of a statute. Instead, under the “new” nondelegation doctrine endorsed in *American Trucking*, a court evaluates the validity of a statutory delegation based on whether the agency has adopted an interpretation of the statute that provides adequate administrative standards to guide its exercise of discretion.<sup>4</sup>

The normative basis for the new nondelegation doctrine, as Judge Williams and others argue, is the promotion of the rule of law.<sup>5</sup> As we set out below, however, the rule of law benefits of the new nondelegation doctrine are no greater than those delivered by the current, well-accepted means of political and judicial oversight of agency action. At the same time, the rule of law is not the be-all and end-all of regulatory systems. There are countervailing benefits to a system that allows for regulatory flexibility; in fact, some degree of flexibility is unavoidable. Those benefits are especially important when evaluating the new nondelegation doctrine because that doctrine implements the rule of law only to a limited extent. The thesis of this Essay is that the benefits of the new nondelegation doctrine in promoting the values underlying the rule of law pale in comparison to that doctrine’s impact on agencies’ abilities to address the particularities of many problems that they are statutorily assigned to remedy.

## I. JUDICIALLY ENFORCED EX ANTE CONSTRAINTS OR EX POST REVIEW?

In *American Trucking*, a panel of the D.C. Circuit considered the EPA’s revisions to national ambient air quality standards (NAAQS) for ozone and small airborne particulate matter.<sup>6</sup> For primary NAAQS, the Clean Air Act requires that the agency set such standards at a level requisite to protect public health, leaving an adequate margin of safety.<sup>7</sup> Contrary to the implicit assumption underlying this statutory provision, it is generally acknowledged that there are no certain “safe”

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3 See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418 (1935) (striking down a statutory provision allowing the President to ban oil extracted in excess of quantities permitted by state law because “Congress left the matter to the President without standard or rule”).

4 See *Am. Trucking*, 175 F.3d at 1033.

5 See, e.g., *id.* at 1038; sources cited *infra* note 18.

6 See *Am. Trucking*, 175 F.3d at 1034–40.

7 See Clean Air Act, 42 U.S.C. § 7409(b)(1) (1994).

levels of ozone or small particles in the air.<sup>8</sup> The D.C. Circuit has held in several cases that the EPA may not take costs into account in determining NAAQS.<sup>9</sup> Hence, the level required by the statute depends entirely on how the EPA interprets the term "the public health."<sup>10</sup> In previous rulemaking proceedings, the EPA has set forth criteria for determining NAAQS, considering the seriousness of adverse health effects from violations of the standard, whether those effects are temporary or permanent, and the size of the sensitive population affected by the violations.<sup>11</sup> In revising the ozone NAAQS, the EPA also considered whether naturally-occurring levels of pollution at some places in the nation might exceed the standard, which would render compliance with the NAAQS impossible.<sup>12</sup>

In *American Trucking*, the court rejected the EPA rulemaking on the ground that, although the factors the EPA used to revise the ozone and particulate NAAQS were relevant, the agency did not provide a precise description of how it took those factors into account in setting ambient standards.<sup>13</sup> Judge Williams did not merely reject the

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

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

10 Clean Air Act, 42 U.S.C. § 7409(b)(1).

11 See National Primary and Secondary Ambient Air Standards for Lead, 40 C.F.R. § 50 (1999); see also National Ambient Air Quality Standards for Sulfur Dioxides, 40 C.F.R. § 50 (1999) (declining to revise the sulphur dioxide NAAQS to protect asthmatics from short-term exposure); Letter from George T. Wolff, Chair of Clean Air Scientific Advisory Committee, to Carol M. Browner, EPA Administrator (June 1, 1994), reprinted in 59 Fed. Reg. 58,977, 58,978 (1994) (stating that a unanimous CASAC recommendation that a short-term NAAQS for sulphur dioxide had not been granted because "the effects [of such exposures] are short-term, readily reversible, and typical of response seen with other stimuli"). In deciding to revise the ozone and particulate matter NAAQS, the EPA similarly considered "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed." *Am. Trucking*, 175 F.3d at 1034–35 (quoting Ozone Final Rule, 40 C.F.R. § 50.10 (1997); EPA, REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION: OAQPS STAFF PAPER at II–2 (1996)).

12 See *Am. Trucking*, 175 F.3d at 1059–60 (Tatel, J., dissenting).

13 See *id.* at 1057; *id.* at 1034 ("Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute.").

EPA's explanation of the revised standard as inadequately reasoned or inadequately supported by evidence. Rather, he imposed on the EPA the obligation that it interpret the Clean Air Act in a manner that sufficiently constrains the agency in setting all NAAQS under the statute.<sup>14</sup> In short, Judge Williams's opinion hints that the EPA would have to specify a formula by which it would have to evaluate the effect of ambient air pollution on the public health that would definitively specify how the EPA factors every type of health effect into its decision about whether exposure to a level of pollution threatens the public health. Because Judge Williams invoked nondelegation principles as a basis for this decision,<sup>15</sup> it is not one that Congress could override simply by codifying the factors that the EPA had considered or reaffirming that the EPA had the discretion it assumed under the Clean Air Act.<sup>16</sup>

*American Trucking* can be interpreted as a judicial effort to require agencies to self-impose ex ante constraints on their discretion, rather than as a traditional application of ex post judicial review. In his opinion, Judge Williams notes that such ex ante constraints are normatively desirable because they minimize arbitrary decisionmaking by the agency, enhance the likelihood of meaningful judicial review, and help to assure that government is responsive to the popular will.<sup>17</sup> Recent articles by Professor Cass Sunstein and Professor Lisa Schultz Bressman also argue that the new nondelegation doctrine promotes the values of the rule of law.<sup>18</sup>

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14 See *id.* at 1034.

15 See *id.* at 1038 (acknowledging that ordinarily the nondelegation doctrine requires invalidation of the statute).

16 See *id.*

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

*Id.*

17 See *id.* Judge Williams also noted these concerns in his earlier opinion in *UAW v. OSHA* (Lockout/Tagout I), 938 F.2d 1310, 1313 (D.C. Cir. 1991).

18 See Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1424-27 (2000) (defending the approach of *American Trucking* and arguing for its expansion); Sunstein, *supra* note 8, at 337 ("The nondelegation doctrine . . . promotes rule of law values."); *id.* at 350 ("While constrained administrative discretion [under the new nondelegation doctrine] does not mean congressional lawmaking, it does tend to promote predictability, consistency, and visibility in law, and to ensure against ad hoc discretion by administrators, discretion that might be exercised arbitrarily.").

The rule of law serves several functions. First, it reduces uncertainty for those subject to the law, helping them to better plan their affairs.<sup>19</sup> Second, it diminishes the likelihood of government "tyranny" by ensuring that government applies laws generally—ensuring equal treatment for similarly situated individuals or firms, rather than arbitrary treatment against those who might be disfavored at the moment.<sup>20</sup> Third, the rule of law helps to assure political accountability in the sense that, to be effective, rules must be known to the public, which allows for political response to the rules.<sup>21</sup>

In theory, separation of powers and the requirement that the legislative branch adopt rules of general application to govern behavior of those subject to the government's power provide the primary means for ensuring that our legal system reflects the rule of law. But the demands of the modern state call for a more flexible government structure that can gather necessary information about, and respond more readily to, problems that may call for technical solutions and quick action. Hence, dating at least to the beginning of the twentieth century, and probably to the formation of the United States, executive officials have been given discretion to develop the rules that govern private behavior so long as they do so pursuant to statutes that give them meaningful guidance about how to exercise that discretion.<sup>22</sup>

Once the reality that officials must be allowed to exercise such discretion is recognized, there is no principled way for the judiciary to draw a line between allowed and prohibited delegations of rulemak-

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

20 See RONALD DWORKIN, *LAW'S EMPIRE* 95–96 (1986) (noting that his theory of "law as integrity" secures "a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does"); cf. HART, *supra* note 19, at 21 ("Legal control is . . . primarily, though not exclusively, control by directions which are in this double sense *general*").

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

22 See *United States v. Grimaud*, 220 U.S. 506, 522 (1911) (upholding the Secretary of Agriculture's requirement that ranchers obtain a permit to graze sheep in national forests); *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 387 (1813) (upholding an Act of Congress granting the President the authority to declare whether either Great Britain or France had ceased violating the neutral commerce of the United States, allowing that declaration to revise specified statutory provisions).

ing authority. Many commentators have recognized that the nondelegation doctrine is largely unenforceable by federal courts, because the courts are unable to develop principled ways of enforcement.<sup>23</sup> As Justice Scalia has noted, the problem of excess discretion is one of degree not type,<sup>24</sup> and unlike other questions of degree with which the courts regularly deal, there are no “judicially manageable and defensible criteria for distinguishing permissible from impermissible delegations.”<sup>25</sup> Hence, except for several now-discredited cases decided in 1935,<sup>26</sup> the Supreme Court has upheld all delegations of rulemaking power to agencies that also exercise executive and judicial functions.<sup>27</sup>

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

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23 See Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1128–30 (1977); Richard J. Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244–47 (1989).

24 See *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., concurring and dissenting).

Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.

*Id.*

25 Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324 (1987); see also Richard J. Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 393–403 (1987); Stewart, *supra*, at 325–28.

26 See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

27 Some lower courts, however, have applied the doctrine to invalidate statutes. See, e.g., *South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996). The doctrine remains alive and well in state constitutional jurisprudence, where high courts of several jurisdictions have held delegations to be violations of state constitutions. See, e.g., Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999) (discussing state courts' approaches to nondelegation and providing an institutional design explanation for this distinct approach).

thereby channel what otherwise might be unbounded discretion in applying law.<sup>28</sup>

Administrative law doctrine, however, generally has not followed Professor Davis's suggestion. The Supreme Court has consistently held that agencies can announce general standards that guide conduct in adjudications and then can apply those standards in the very case in which the agency announces them.<sup>29</sup> In addition, courts have allowed agencies to liberally grant waivers of their rules and, in some instances, have even upheld rules only because the agency has reserved the right to grant such waivers.<sup>30</sup> The courts have consistently favored ex post review over the ex ante standards Judge Williams required in *American Trucking*.

To be sure, some cases have adopted aspects of Professor Davis's call for agencies to limit their own discretion by setting standards ex ante that will bind how the agency adjudicates particular cases. For example, in *Retail, Wholesale and Department Store Union v. NLRB*,<sup>31</sup> the D.C. Circuit announced a balancing test for determining when an agency abuses its discretion by changing policy in an adjudication and then applying the new policy to conduct that occurred before the new policy was created.<sup>32</sup> The court reversed the NLRB for applying a new striker replacement policy to a company that had fired striking workers prior to the Board's announcement of the new policy in a previous adjudication.<sup>33</sup> In addition, in a handful of cases, courts of appeals have held that agency decisions that are not based on any ascertain-

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28 See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 50 (1969) (opining, with respect to the nondelegation doctrine and the rule of law, that "the emphasis should not be on legislative clarification of standards but on administrative clarification"); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969) ("The key should no longer be statutory words; it should be the protections that administrators in fact provide, irrespective of what the statutes say or fail to say."). Judge Friendly advocated a similar position, both in academic works and published opinions. See, e.g., *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966); HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 5-6 (1962).

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

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

31 466 F.2d 380 (D.C. Cir. 1972).

32 See *id.* at 390.

33 See *id.* at 393.



ble standards violate the Due Process Clause of the Constitution.<sup>34</sup> But these cases are notable in large part because they represent adoption of Professor Davis's approach only in extreme instances when an agency ignores reasonable reliance interests created by its own prior decisions, or when an agency gives absolutely no basis for its decisions.<sup>35</sup>

Even the case that perhaps best supports the new nondelegation doctrine, *Amalgamated Meat Cutters v. Connally*,<sup>36</sup> does not hold that agencies are bound by their previous policy determinations and interpretations of statutes.<sup>37</sup> In *Amalgamated Meat Cutters*, the court rejected a traditional nondelegation challenge to the Economic Stabilization Act of 1970,<sup>38</sup> which gave the President broad authority to issue regulations and orders to stabilize wages and prices.<sup>39</sup> Judge Leventhal, writing for the three judge panel, stated:

Another feature that blunts the "blank check" rhetoric [of the delegation] is the requirement that any action taken by the Executive under the law . . . must be in accordance with further standards as developed by the Executive. This requirement, inherent in the Rule of Law and implicit in the Act, means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action.<sup>40</sup>

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

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

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34 See, e.g., *Holmes v. N.Y. City Hous. Auth.*, 398 F.2d 262, 264-65 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964).

35 In addition, it is noteworthy that while these cases remain good law, virtually all were decided prior to the Supreme Court's reaffirmation that agencies can make policy via adjudication in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 269 (1974).

36 337 F. Supp. 737 (D.D.C. 1971).

37 See *id.* at 748.

38 Pub. L. No. 91-379, 84 Stat. 799 (1970), amended by Pub. L. No. 91-558, 84 Stat. 1468 (1970); Pub. L. No. 92-8, 85 Stat. 13 (1971); Pub. L. No. 92-15, 85 Stat. 38 (1971) (expired 1974).

39 See 337 F. Supp. at 742-43.

40 *Id.* at 758.

discretion within the "vaguish, penumbral bounds" of the broad statutory standard.<sup>41</sup>

More importantly, the opinion clearly asserts that agencies are free to change their approaches and policies regarding wage and price controls if they can justify such changes.<sup>42</sup> In other words, the agency is free to experiment with various policies and interpretations of the statute so long as it provides intelligible reasons for why it chose the policy it did in light of its statutory requirements and past decisions.

This, however, is the essential requirement of *ex post* review of agency decisions under the arbitrary and capricious standard. Instead of requiring that the agency set some limits on its discretion *ex ante*, judicial review acts to assure that the agency exercises its discretion responsibly—that is, wisely and accountably.<sup>43</sup> The courts have adopted this approach by requiring agencies to engage in reasoned decisionmaking enforced by *ex post* review of almost all agency exercises of discretion.<sup>44</sup>

## II. THE "NEW" NONDELEGATION DOCTRINE AND THE RULE OF LAW

We disagree with the claim of Judge Williams, as well as Professors Sunstein and Bressman, that the new nondelegation doctrine better promotes the rule of law, especially when the doctrine is compared to the *ex post* approach to judicial review that courts already use. In terms of the three values underlying the rule of law—certainty, prevention of tyranny, and accountability—the new nondelegation doctrine provides little benefit. Unlike Professor Davis's original proposal

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41 *Id.* at 759.

42 *See id.* at 747–48.

43 *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 428–30, 432 (contending that heightened scrutiny of agency reasoning preserves both liberal values reflected in the Constitution and progressive values which undergird the administrative state); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 470–74 (1987) (arguing that "hard-look" judicial review constrains agencies from engaging in improperly motivated decisions).

44 The Supreme Court has stated that a rule

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

*Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

that agencies operate pursuant to announced rules and standards in making case by case decisions, the new nondelegation doctrine invalidates rules of general applicability that the agency has adopted.

These rules already provide the certainty that those subject to regulation need in evaluating whether an agency will tolerate their behavior. The new nondelegation doctrine does make it more difficult for the agency to change course, because the agency is required to have articulated a constraining interpretation prior to its promulgation of rules. This creates some increase in certainty regarding the future value of regulated entities' investments, but it does not provide any additional certainty regarding what conduct is prohibited or allowed by the rules. In fact, by threatening judicial override of such rules based on judges' subjective evaluations that the discretion left by the agency's interpretation of its statute is too unbounded, the new nondelegation doctrine increases the uncertainty about whether regulated entities will have to comply with the rule.<sup>45</sup> As with the more traditional nondelegation doctrine, the new doctrine allows courts to override general legal requirements in a manner that is neither principled nor predictable.

The value of the new nondelegation doctrine as a means of preventing tyranny is also suspect. The agency already has issued a rule of law that applies generally to all that come within its letter. The new nondelegation doctrine does not aim at ensuring neutral enforcement of such a pre-announced rule of law. Rather, it aims to constrain agency discretion before the agency adopts general rules in the first place. In other words, the only kind of tyranny the new nondelegation doctrine might protect against is the possibility that an agency will adopt rules of greater stringency for industries that the agency arbitrarily disfavors. Current administrative law doctrine, however, already contains sufficient political and judicial checks without the new nondelegation doctrine to guard against an agency manipulating the meaning of statutes to arbitrarily penalize disfavored industries.<sup>46</sup> In a rulemaking, were an agency to engage in such arbitrary manipulation of factors made relevant by the agency enabling act, the affected industry is free to participate in agency notice and comment rulemaking proceedings and thus publicly to show the malevolence of

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<sup>45</sup> Cf. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1696-97 (1975) (making a similar point about the traditional nondelegation doctrine).

<sup>46</sup> For a discussion of how agency procedures and their relationship to the three constitutionally specified branches provide meaningful checks on agency decision-making, see generally Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541-62 (1992).

the agency rulemaking.<sup>47</sup> The industry might then use this showing to bring political pressure on the agency not to adopt the rule. If the agency adopted the rule nonetheless, the industry could challenge any such manipulation as arbitrary and capricious.<sup>48</sup> Under judicially imposed requirements of reasoned decisionmaking, while an agency is not precluded from varying how it applies the law from one rule to the next, it must explain any such variation in that application.<sup>49</sup> Thus, even without the new nondelegation doctrine, agencies are constrained from arbitrarily changing the meaning of their enabling act from rule to rule.

Increased accountability is probably the best argument for the new nondelegation doctrine. Under the doctrine, an agency would have to declare the meaning of a statute that granted the agency significant rulemaking discretion prior to engaging in any rulemaking under that statute. Resolving the meaning of a statute that grants an agency unbridled discretion usually will involve a discourse about the relative weights and tradeoffs of various goals that prompted passage of the statute. Thus, for example, when the Communications Act of 1934<sup>50</sup> authorized the FCC to issue broadcast licenses to further the public interest, the Act left undecided whether the broadcast license system should promote large, efficient broadcast companies, or smaller stations that, although they would not reach as many listeners or provide as slick programming, would devote attention to issues of local concern.<sup>51</sup> The choice between these two visions of the United

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47 See Administrative Procedure Act, 5 U.S.C. § 553(c) (1994).

48 See Administrative Procedure Act, 5 U.S.C. § 706 (1994).

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

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

*Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1989) (Breyer, J.) (citations omitted).

50 47 U.S.C. § 307 (1994).

51 See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137-38 (1940) (describing Congress's intent to leave the FCC broad discretion under the public interest standard to adjust regulation "to the rapidly fluctuating factors characteristic of the evolution of

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

Unfortunately, there are reasons to believe that requiring the agency to commit to a set of value choices independent of the context in which they arise may undermine political accountability. Empirical evidence suggests that even if agency value choices are explicitly revealed, the public does not engage in discussion about such choices; rather, the public tends to focus on the bottom line acceptability of the rules the agency adopts, not the value judgments that lead the agency to those rules.<sup>52</sup> Given this propensity of the citizenry to care about rules rather than the value choices underlying those rules, the new nondelegation doctrine could have the perverse effect of decreasing accountability. To illustrate how this might come about, consider the EPA's setting of the ozone and particulate NAAQS. Suppose in setting the first NAAQS, in order to satisfy Judge Williams's nondelegation concerns, the EPA provides an indication of the relative impact of lives lost versus temporary but reversible inconvenience from disease. Suppose that compared to the values placed on these effects by the populace, the EPA actually overvalues temporary inconvenience and undervalues lives lost. Because of the precise impacts of the particular pollutant that the EPA addresses in this first NAAQS, the standard is the same as would have occurred had the EPA ascribed the

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broadcasting"); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) (specifying criteria for awarding broadcast licenses that emphasize local ownership and management of radio stations).

<sup>52</sup> See Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1633-34 (1985) (noting the negative reaction William Ruckelshaus received in response to public fora he held to get guidance on how the EPA should make value judgments, such as the balance it should strike between health risks and unemployment, in setting a standard for airborne arsenic). While this also may be true of congressional decisionmaking, it is not as problematic, because accountability of Congress is achieved through elections—where people can and do focus on the bottom line—not review of Congress's justification for its laws.

correct—that is popularly held—values to these impacts. Because the bottom line rule is consistent with the public's values, and because the public cares only about such bottom lines, there is no challenge to the rule. The effect would be to commit the agency to an incorrect valuation of the effects of lost lives and temporary inconvenience from disease on the public health. The impacts of the next pollutant that the EPA considers might be such that the incorrect valuation results in a standard that the public finds unacceptable. But, because the agency already committed to an interpretation of the statute that leads to this standard, the agency is not free to set the second standard at a level consistent with the underlying public values.

In the previous example, it is assumed that if the agency gets the constraining interpretation wrong, in the sense of interpreting the statute in a manner at odds with the values of the public, then the agency cannot change its interpretation when it adopts the next standard, even if the agency could explain why its initial interpretation was problematic. Were the agency free to change its interpretation, then the new nondelegation would not provide any constraint on the agency that arbitrary and capricious review does not already provide.<sup>53</sup> The point of this hypothetical is to illustrate that, because the public cares about the rules adopted and not the value choices underlying those rules and because the new nondelegation doctrine requires ex ante constraints on how the agency resolves those value judgements, agency rules may end up being less politically accountable.

In terms of accountability, perhaps even worse than the limitation that the new nondelegation doctrine imposes on agencies' abilities to respond to the public's assessment of its rules is the doctrine's impact on the role of the courts in implementing regulations. The doctrine empowers a court to invalidate an agency interpretation of a statute when the presiding judges believe that the interpretation leaves the agency too much discretion about how to implement the statute. But, the issue of how much discretion an agency should have in implementing a regulatory scheme depends in complex ways on a host of factors. It may be appropriate to give an agency discretion when the regulatory context is so technical that those not well-steeped in that context cannot appreciate the impact of various regulatory alternatives. It may be appropriate to give an agency discretion when the

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53 At least one environmental law scholar has concluded that, despite Judge Williams's nondelegation rhetoric, *American Trucking* is really a rejection of the EPA's rule as arbitrary and capricious. See Craig N. Oren, *Run Over by American Trucking Part I: Can EPA Revive Its Air Quality Standards*, 29 ENVTL. L. REP. 10,653, 10,657-58 (1999).

statute identifies a public problem that all agree must be alleviated, but the nature of the political system dooms congressional attempts to solve the problem. It may be appropriate to give an agency discretion when the subject of regulation changes too quickly for the Congress to keep up by constantly updating statutes. These criteria for granting agencies discretion cannot be reduced to some principle that courts can then use to determine when and how discretion should be left to the agency. Hence, the issues of how to structure agency discretion and how much discretion to leave to the agency under any particular statutory scheme are appropriately left to the political process. Allowing the judiciary to strike down otherwise reasonable interpretations of statutes on grounds that the interpretation left the agency too much discretion invites judges—politically the least accountable government decision-makers—to substitute their inclinations for those of the agency about the wisdom of the regulatory bottom line.

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

Some might contend that the lack of judicial accountability under the new nondelegation doctrine is no different from that occasioned by courts striking down agency decisions under the arbitrary and capricious standard.<sup>54</sup> But, judicial invalidation of statutory interpretation under the new nondelegation doctrine would be particularly difficult for the political branches to overcome. Agencies have a variety of means to try to put in place policies that underlie rules that courts initially strike down as arbitrary and capricious. An agency can simply readopt the rule with a fuller explanation of why the rule makes sense under the statute;<sup>55</sup> it can modify provisions of the rule the agency considers non-essential to meet judicial demands on re-

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54 See, e.g., Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity of the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 302–03.

55 See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 424–27 (2000).

view;<sup>56</sup> or it can implement the policy on a case-by-case basis, avoiding problems of finding support for predictions of how the rule would operate outside of the particular factual circumstances of the case before it.<sup>57</sup> Assuming that the new nondelegation doctrine is more than merely arbitrary and capricious review in disguise, however, an agency cannot recover from a decision striking an interpretation under that doctrine without adopting a substantially more limiting interpretation of the statute or getting Congress to pass a statute explicitly adopting the rule that the court struck.<sup>58</sup>

### III. THE FLEXIBILITY COSTS OF THE NEW NONDELEGATION DOCTRINE

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

Ex ante constraints on agencies are always imperfect, even if those constraints are self-imposed by the agencies.<sup>59</sup> As proponents of dynamic statutory interpretation have recognized, the meaning of a statute that best furthers the goals underlying the statute may vary because of changed circumstances and even changed preferences of the polity.<sup>60</sup> The Supreme Court has also recognized the need for agencies to have flexibility in interpreting statutory terms that do not resolve a particular issue facing the agency. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,<sup>61</sup> the Court not only announced that the judiciary should defer to permissible agency interpretations of statutes that the agency administers, but also allowed the EPA to change its interpretation of a provision in the Clean Air Act—a

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56 See *id.* at 427–33.

57 See Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 801–06.

58 If Judge Williams is serious that the new nondelegation doctrine responds to an interpretation that fails to save a statute from being a violation of the traditional nondelegation doctrine, see *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999), then Congress would be powerless to adopt a statute that codifies the agency interpretation, as that statute would, a fortiori, also violate the traditional nondelegation doctrine.

59 For further discussion of the imperfections of ex ante constraints, see generally Seidenfeld, *supra* note 46.

60 See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

61 467 U.S. 837 (1984).



change that was prompted at least in part by the election of President Reagan.<sup>62</sup>

To understand how the new nondelegation doctrine would forfeit agency discretion, even if the agency exercises that discretion responsibly, consider agency "interpretations" of vague statutory provisions intended to constrain agency decisionmaking. Under the new nondelegation doctrine, the agency would have to adopt a binding interpretation the first time it issues a rule pursuant to those provisions. But, at that time, the agency might not yet have discovered all the factors that ultimately are relevant in applying the statute. For example, returning to the ozone and particulate NAAQS illustration from *American Trucking*, the EPA's experience to date with ambient air pollution may indicate that transient, reversible health effects from such pollutants are not significant compared with other effects. It might therefore be tempted to interpret the impact on the public health under the Clean Air Act to exclude such effects. Suppose, however, that ten years from now biologists discover an ambient air pollutant that causes some exposed individuals to have to be hospitalized for years. The effect of the pollutant reverses itself completely after several years, but in the meantime, the victim of the exposure is incapacitated. Under existing arbitrary and capricious review, the EPA could include such significant reversible impacts in its public health assessment, as long as it could show that these effects differ from those of previously regulated pollution in a manner that justifies consideration of these reversible impacts. Under the new nondelegation approach, once the agency interpreted the statute to omit reversible impacts, the agency could not take these unforeseen impacts into account without Congress amending the statute. Similarly, an agency interpretation may reflect values that the polity no longer holds. As medical improvements increase the quality of life for the elderly, the EPA may want to increase the contribution of extending the life of the old and infirm in its consideration of what constitutes a threat to public health.

#### IV. APPROPRIATE MEANS FOR IMPOSING EX ANTE CONSTRAINTS

We do not mean to suggest that ex ante constraints on agencies are per se inappropriate. In order to ensure that agencies do not pursue values entirely at odds with those held by the polity, Congress must be able to constrain agencies to remain true to any vision of the agency role adopted by the legislature and to prevent the agency from

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62 See *id.* at 862-64.

exercising powers beyond those granted by the legislature. Ex ante constraints, in the form of specific statutory provisions, play an important role in limiting agency discretion.<sup>63</sup> But, because the factors that go into the determination of the appropriate extent and the means by which agency discretion should be limited are essentially political rather than legal in nature, imposition of ex ante limitations is best left to political processes.<sup>64</sup> The new nondelegation doctrine, as much as the more traditional doctrine, contravenes this fundamental tenet of administrative governance by vesting courts with authority to determine when such agency-imposed ex ante limitations are sufficiently constraining.

It has been argued that the Supreme Court has already recognized the new nondelegation doctrine applied by Judge Williams in *American Trucking*.<sup>65</sup> The argument, advanced in an essay by Professor Bressman in which she argues for wider application of the new nondelegation doctrine, makes a novel link between the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*<sup>66</sup> and the D.C. Circuit's recent decision in *American Trucking*.<sup>67</sup> Professor Bressman's link between the opinion in *Iowa Utilities Board*, written by Justice Scalia, and the new nondelegation doctrine articulated by the D.C. Circuit in *American Trucking* is at odds with Justice Scalia's previously-articulated concern with courts' abilities to enforce a constitutional nondelegation doctrine.<sup>68</sup> Courts, after all, will have the same problem articulating principles, whether they are evaluating the degree of specificity provided by Congress or by an agency. Our analysis of the normative underpinnings of the new nondelegation doctrine suggests

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63 See Seidenfeld, *supra* note 30, at 446.

64 Cf. Jim Rossi, *Hamstringing State Agency Authority to Promulgate Rules: A Questionable Way to Improve Environmental Regulation*, 29 ENVTL. L. REP. 10,735 (1999) (arguing that a recent Florida administrative procedure reform that requires the legislature to provide more specific ex ante constraints but relies on courts to enforce these constraints does not enhance political accountability); Jim Rossi, "Statutory Nondelegation": *Learning from Florida's Recent Approach to Administrative Procedure Reform*, 8 WIDENER J. PUB. L. 301 (1999) (same); see also Seidenfeld, *supra* note 30, at 453 (describing generally difficulties in using ex-ante constraints to change how agencies make policy decisions).

65 See Bressman, *supra* note 18, at 1438-41.

66 525 U.S. 366 (1999).

67 See Bressman, *supra* note 18, at 1438-41.

68 See *supra* note 24. Prior to ascending to the bench, however, Justice Scalia acknowledged that the doctrine may be worth reviving. See Antonin Scalia, *A Note on the Benzene Case*, 4 REG., July/Aug. 1980, at 28 ("[E]ven with all its Frankenstein-like warts, knobs and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice.").

little value to reinterpreting the case as anything but a *Chevron* step two case.<sup>69</sup> Justice Scalia himself characterized *Iowa Utilities Board* this way, finding the words “necessary” and “impair” in the Telecommunications Act of 1996<sup>70</sup> subject to more than one meaning.<sup>71</sup> At *Chevron* step two, the Court did not defer to the agency, as it often does, but found the agency’s interpretation to be unreasonable, because the language of the relevant provisions of the Telecommunications Act of 1996 precluded the agency’s interpretation.<sup>72</sup> Justice Scalia did focus on whether the rule contained a “limiting standard” and whether private actors, rather than the agency, would determine the terms of access.<sup>73</sup> In Justice Scalia’s view, however, consideration of these factors was not an implicit endorsement of a new nondelegation doctrine; instead, the factors indicated that the agency had deviated from the statutory criteria that Congress provided.<sup>74</sup> Justice Scalia thus recognized that the province of defining the bounds of agency discretion, *ex ante*, appropriately belongs to Congress, not to the courts.

Although the analogy between portions of Justice Scalia’s analysis and *American Trucking* seems plausible to the extent both cases focus on statutory criteria, when viewed through the lens of nondelegation, the cases take divergent approaches in the range of options they leave for Congress. In *Iowa Utilities Board*, the Court left open the possibility

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69 In *Chevron* step two, having determined that Congress has been silent or ambiguous with respect to the precise question at issue, a court determines whether the agency’s interpretation of what Congress has said is reasonable. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1983).

70 47 U.S.C. § 251(d) (Supp. II 1994).

71 See *Iowa Utilities Board*, 525 U.S. at 388 (“We need not decide whether, as a matter of law, the 1996 Act requires the FCC to apply [the incumbent’s] 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.”); *id.* at 397 (“Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency . . .” (citation omitted)); see also *id.* at 428 (Breyer, J., concurring and dissenting) (“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.”).

72 See *id.* at 392 (“Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we must vacate [the unbundled access rule].”).

73 See *id.* at 388.

74 According to Justice Scalia, the Commission’s interpretation was “simply not in accord with the ordinary and fair meaning” of the terms “necessary” and “impair.” *Id.* at 390. This was because the agency had not adequately supported its interpretation. See *id.* (“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.”).

that Congress could authorize FCC discretion to adopt the very rule that the Court struck down.<sup>75</sup> The decision in *American Trucking*, however, forecloses congressional authorization of the role the EPA granted itself in NAAQS absent more specific ex ante constraints on the agency's discretion.<sup>76</sup> Thus, the Supreme Court cannot be said to have endorsed the new nondelegation doctrine applied by Judge Williams in *American Trucking*.

#### CONCLUSION

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

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<sup>75</sup> See *id.* at 397.

<sup>76</sup> See *Am. Trucking Ass'ns, Inc. v. EPA*, 173 F.3d 1027, 1047-48 (D.C. Cir. 1999).

