RECENT CASE

D.C. CIRCUIT REVIVES NONDELEGATION DOCTRINE . . . OR DOES IT?: *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *modified*, 195 F.3d 4 (D.C. Cir. 1999)

I. INTRODUCTION

Article I, Section 1 of the Constitution charges Congress with the ability and the duty to make the law.[1] Courts have always understood, however, that Congress has the capacity to delegate some legislative power to other institutional actors,[2] typically those in the executive branch.[3] Such delegations are justified by the "practical understanding that in our increasingly complex society, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[4] This does not mean that Congress enjoys unlimited authority to delegate. Under the judicially crafted "nondelegation doctrine," Congress delegates too much lawmaking power if it fails to provide an "intelligible principle to which the person or body [receiving the delegated power] is directed to conform."[5]

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1. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

2. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371-73 (1989) (upholding grant of power to the United States Sentencing Commission). Congress's authority to delegate generally is considered an adjunct to the Necessary and Proper Clause. *See* U.S. CONST. art. I, § 8, cl. 18. As a consequence of the authority conferred thereunder, "any constitutionally granted congressional power 'implies a power [to delegate] authority under it sufficient to effect its purposes.'" 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-19, at 978 (3d ed. 2000) (quoting Lichter v. United States, 334 U.S. 742, 778 (1948)) (alterations in TRIBE).

3. Although executive officials are generally the beneficiaries of delegations of legislative power, the Supreme Court has recognized that Congress may utilize other institutional actors to make law. *See Mistretta*, 488 U.S. at 372.

4. *Id.* at 372.

5. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). The general consensus is that the nondelegation doctrine arises from Article I, Section 1 of the Constitution. *See* TRIBE, *supra* note 2, § 5-19, at 977. At least two scholars have argued, however, that a law delegating legislative power to an administrative agency is not "proper," under Article I, Section 8 of the Constitution, for carrying into execution an enumerated power of the national

Since the New Deal, the United States Supreme Court has found an "intelligible principle" in exceptionally broad delegations of power from Congress.[6] However, the Supreme Court has never approved a delegation as broad as the one in the Clean Air Act (the "Act")[7]—the authority to promulgate any standard for air quality that the Environmental Protection Agency (the "EPA" or "Agency") deems "requisite to protect the public health."[8] Last May, in *American Trucking Associations, Inc. v. EPA*,[9] a panel of the Court of Appeals for the D.C. Circuit held that two sections of the Clean Air Act, as construed by the EPA, violated the nondelegation doctrine. Nevertheless, the panel remanded to the EPA so that the EPA could re-interpret the Act to pass constitutional muster.[10] Although *American Trucking* arguably allocates decisions regarding the scope of agency authority to a politically-accountable actor—an agency—rather than a court, the D.C. Circuit fails to note that it matters which politically-accountable actors make those decisions. By allowing the EPA to prescribe the limits of its own authority under the Act, the court of appeals ignored the core function of the nondelegation doctrine, which is to ensure that Congress makes policy choices. Indeed, the doctrine as applied by the court of appeals provides no limit on Congress's

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government. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 333-34 (1993). Whether the constitutional basis for the nondelegation doctrine be found in Article I, Section 1 or Article I, Section 8 is largely irrelevant for the purposes of this Comment, however. Both constitutional bases for the doctrine "make[] enforceable *against Congress* certain jurisdictional constraints on the powers of executive and judicial agents to receive and exercise delegations of authority." Gary Lawson, *Who Legislates?*, 1995 PUB. INT. L. REV. 147, 152 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) (emphasis added).

6. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) (accepting as an intelligible principle a direction to act in the "public interest, convenience, or necessity") [hereinafter *Networks Case*].

7. 42 U.S.C. §§ 7401-7671 (1994).

8. *Id.* § 7409(b)(1).

9. 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), *modified*, 195 F.3d 4 (D.C. Cir. 1999), *reh'g en banc denied*, 195 F.3d 4, 14 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (Nos. 99-1257, 99-1263). For convenience, I refer to the court's original opinion, 175 F.3d 1027, as *American Trucking I*. The panel's subsequent modification of *American Trucking I*, 195 F.3d 4, is referred to as *American Trucking II*. Lastly, I refer to the entire court of appeals's order denying rehearing *en banc* (and Judge Silberman's dissent from the denial of rehearing), 195 F.3d 4, 14, as *American Trucking III*. The designation *American Trucking* refers to the three collectively.

10. *See American Trucking I*, 175 F.3d at 1038. The panel retained jurisdiction pending remand. *See id.* at 1057.

power to delegate authority.

Properly construed, the nondelegation doctrine requires that the Clean Air Act be struck down because the text of the Act provides no limit on the scope of the EPA's authority. Indeed, the EPA can use any conceivable amount of vigor in protecting the public health—including prohibiting all industrial activity—and still be within the terms of the Act. While broad delegations in the past were approved with the knowledge that agencies would be guided by legislative history or practices under the common law, the Clean Air Act gives the EPA neither explicit nor implicit standards. As a result, the Act departs from the constitutionally-mandated system of congressional lawmaking more than does even the most permissive Supreme Court precedent. Therefore, the Supreme Court should return the Act to Congress to force Congress, rather than the EPA, to make the hard choices between public health and industrial interests.

II. FACTS AND PROCEDURAL HISTORY

Congress passed the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[11] Rather than specify the balance that was to be struck between public health and productivity, Congress delegated broad authority to the EPA to determine which levels of air pollutants would be lawful.[12] Indeed, the Act authorizes the EPA Administrator to promulgate any standard for air quality that the EPA deems "requisite to protect the public health" within an "adequate margin of safety."[13] Congress provided the EPA with little additional guidance for applying the Act.[14]

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11. *Id.* § 7401(b)(1).

12. *See id.* § 7409(a)(1)(A).

13. *Id.* § 7409(b)(1). For each pollutant, the Act requires that the EPA set a primary and a secondary standard. The direction to "protect the public health" within an "adequate margin of safety" applies only to the primary standard. The secondary standard is to be set at a level "requisite to protect public welfare." *Id.* § 7409(b)(2).

14. The terms of the Act require the EPA to consider scientific knowledge in assessing the appropriate levels at which to set air quality standards. *See id.* § 7408(a)(2) ("Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the

A. *American Trucking I*

In July 1997, in accordance with its authority under § 7409(b)(1) of the Act, the EPA announced new National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM").[15] Several parties petitioned the Court of Appeals for the District of Columbia Circuit to review the rules,[16] arguing, in pertinent part, that in promulgating the rules the EPA had construed §§ 7408 and 7409 of the Act "so loosely as to render them unconstitutional delegations of legislative power."[17]

By a two-to-one majority, a panel of the court of appeals accepted the argument, declaring that as construed by the EPA the Clean Air Act violates the nondelegation doctrine.[18] Judge Williams penned the majority opinion, which Judge Ginsburg joined.[19]

Judge Williams noted initially that the EPA regards ozone and PM as "non-threshold pollutants" that "have some possibility of some adverse health impact . . . at any exposure

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presence of such pollutant in the ambient air, in varying quantities."). Neither the Act nor the EPA has established the extent to which any scientific findings would be given weight in determining the level at which air quality standards should be set.

15. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997).

16. *See American Trucking I*, 175 F.3d at 1033.

17. *Id.* Only Part I of the court's opinion dealt with the nondelegation doctrine. *See id.* at 1034-40. In Part II, the court held that the Clean Air Act prohibited the EPA from considering the costs of its regulations, and that the EPA should not have considered "the environmental damage likely to result from the NAAQS' financial impact on the Abandoned Mine Reclamation Fund." *Id.* at 1040-45. In addition, the court found that the EPA rules were consistent with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1994), the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-1571 (Supp. IV 1998), and the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994). *See id.* at 1040-45. The court specifically addressed the ozone standard in Part III, declaring, first, that the 1990 revisions to the Clean Air Act limited the EPA's ability to revise and enforce the new ozone NAAQS and second, that the EPA could not ignore the possible health benefits of ozone in setting a new NAAQS. *See id.* at 1045-53. Part IV considered challenges to the PM standard. *See id.* at 1053-57. First, the court rejected the EPA's choice of PM_{10} for coarse particulate matter as "arbitrary and capricious." *Id.* at 1054-55. In addition, the court held (1) that the EPA did not need to treat $PM_{2.5}$ as a "new pollutant," (2) that the EPA did not need to identify a biological mechanism explaining PM's harmful effects, and (3) that the Clean Air Act does not require secondary NAAQS to be set at levels that eliminate all adverse visibility effects. *Id.* at 1055-57.

18. *See id.* at 1034.

19. *See id.* at 1033 n.*.

level above zero."[20] As such, the only risk-free level for ozone and PM—fully to "protect the public health"—is zero.[21] According to Judge Williams, therefore, "[f]or [the] EPA to pick any non-zero level it must explain the degree of imperfection permitted."[22] The court did not find fault with the factors the EPA chose for this purpose, but instead focused on the "lack[] [of] any determinate criterion for drawing lines" between different standards.[23] In other words, although the EPA "basically considers severity of [the health] effect, certainty of [the health] effect, and size of population affected,"[24] the EPA "articulated no 'intelligible principle' to channel its application of these factors" when setting NAAQS for a non-threshold pollutant.[25] Thus, the discretion conferred to the EPA exceeded the constitutional limits of the nondelegation doctrine.

The panel rejected the EPA's arguments in defense of its ozone and PM standards. Judge Williams characterized the EPA's position as essentially "that a less stringent standard [than that set by the EPA] would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm."[26]

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20. *Id.* at 1034. The court acknowledged the EPA's uncertainty as to whether PM below a certain level is not harmful but asserted that "the indeterminacy of PM's status d[id] not affect EPA's analysis, or ours." *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1035. The D.C. Circuit previously approved the EPA's use of these factors in *Lead Industries Association, Inc. v. EPA*, 647 F.2d 1130, 1161 (D.C. Cir. 1980).

25. *Id.* at 1033. Judge Williams described this point in somewhat humorous terms:

> Here it is as though Congress commanded [the] EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

Id.

26. *Id.* at 1035. In defending its decision to set the ozone NAAQS at 0.08 ppm, for example, the EPA opined that its choice of 0.08 ppm was "superior" to the existing level of 0.09 ppm "because more people are exposed to serious effects at 0.09 ppm than at 0.08." *Id.* The EPA gave three reasons why it did not further reduce the level to 0.07 ppm. First, the EPA argued that the public health effects of ozone at below 0.08 are "transient and reversible," as well as "less certain and less severe." *Id.* Next, the EPA cited the findings of the Clean Air Scientific Advisory Committee that the NAAQS should not be set below 0.08 (even though the committee gave no reasons for its recommendations). *See id.* Lastly, the EPA argued that a level of 0.07 would be "closer to peak background levels that infrequently occur in some areas due to [natural] sources." *Id.* at 1036. Judge

According to Judge Williams, this argument proved nothing more than "larger public health harms (including increased probability of such harms) are, as expected, associated with higher pollutant concentrations."[27] But it provided no limit at all: the EPA's suggested criteria for incrementally tightening NAAQS—that harmful health effects are possible, but not certain, at lower levels of exposure—"could as easily, for any nonthreshold pollutant, justify a standard of zero" as any other standard.[28] At the other extreme, Judge Williams argued, the EPA's rationale could ostensibly "justify a refusal to reduce levels below those associated with London's 'Killer Fog' of 1952."[29] No intelligible principle tells the EPA where to stop.[30]

Instead of overturning the Act and returning it to Congress, however, the court remanded to the EPA:

> 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.[31]

A remand to the EPA, according to the panel, "serves at least two of the three basic rationales for the nondelegation doctrine": restricting the likelihood that an agency will "exercise the delegated authority arbitrarily," and enhancing the opportunity for "meaningful" judicial review.[32] The court conceded, however, that remand did not serve the third

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Williams also noted an additional argument frequently made by the EPA (although curiously not made in this case) that "there is a greater uncertainty that [harmful] health effects exist at lower levels than the level of the standard." *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The 1952 London Killer Fog ended the lives of four thousand people in one week, due to extremely high levels of particulate matter. *See id.* (citing W.P.D. Logan, *Mortality in the London Fog Incident, 1952*, THE LANCET, Feb. 4, 1953, at 336-38).

30. *See id.* at 1037. Indeed, according to the court, the latitude claimed by the EPA exceeded even OSHA's claim in *International Union, UAW v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991), to have authority to "do nothing at all," to "require precautions that take the industry to the brink of ruin," or to chose anything in between. *American Trucking I*, 175 F.3d at 1037. In addition, the panel refused to find "special conditions"—such as the war powers of the President, the sovereign attributes of the delegatee, or inherent characteristics of the field of regulation—that might justify an "exceptionally relaxed application of the nondelegation doctrine." *Id.* (citing *International Union, UAW*, 938 F.2d at 1317-18).

31. *American Trucking I*, 175 F.3d at 1038.

32. *Id.*

function of "ensur[ing] . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[33] Under the court's standard, "[t]he agency will make the fundamental policy choices."[34] Judge Williams viewed the disposition as a compromise between the nondelegation doctrine and the two canons of avoidance of unnecessary constitutional questions[35] and deference to an administrative agency's interpretation of a statute the agency enforces:[36] "[T]he remand . . . ensure[s] that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage."[37]

Judge Tatel dissented from Part I of the court's opinion.[38] In Judge Tatel's view, by threatening to strike down the Clean Air Act—which, as Judge Tatel noted, "has been on the books for decades"—the court ignored both the Supreme Court's nondelegation jurisprudence since the New Deal and the restrictions in fact placed on the EPA's discretion by the Act.[39]

Arguing first from precedent, Judge Tatel asserted that the

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33. *Id.* (quoting Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring)).

34. *Id.*

35. The canon that counsels avoidance of unnecessary constitutional questions amounts to a prudential restraint on judicial review. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (summarizing the doctrine of constitutional avoidance); *cf.* Kent v. Dulles, 357 U.S. 116, 129 (1958) (construing statute not to reach a constitutional question). Notwithstanding the doctrine of avoidance, a court has a duty to decide the constitutional issues that properly come before it. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 102 (1968).

36. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984). As the Supreme Court recently stated, *Chevron* "deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1300 (2000) (internal quotation marks and citations omitted). *See generally* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

37. *American Trucking I*, 175 F.3d at 1038. The court also suggested "intelligible principles" the EPA might adopt that would survive scrutiny. *Id.* For instance, "it might be appropriate to use standards drawn from other areas of the law, such as the familiar 'more probable than not' criterion." *Id.* Cost-benefit analysis, however, would be prohibited by law. *See id.* at 1038, 1038 n.4. As a last resort, the court concluded, if the EPA were unable to articulate an intelligible principle to justify a specific NAAQS, "it can so report to the Congress . . . and seek legislation ratifying its choice." *Id.* at 1039.

38. *See id.* at 1057 (Tatel, J., dissenting in part).

39. *Id.*

Act's requirement that NAAQS be "requisite to protect the public health" was "narrower and more principled than delegations the Supreme Court . . . ha[d] upheld since *Schechter Poultry*."[40] Indeed, Judge Tatel cited six Supreme Court decisions, spanning five decades, in which broad delegations of legislative power had been upheld.[41]

Judge Tatel stressed that the Act cabined the EPA's discretion by requiring it to set NAAQS based on the "latest scientific knowledge."[42] In promulgating the ozone and PM NAAQS, the EPA had followed guidelines developed by the American Thoracic Society to identify which health effects were significant enough to warrant protection, then set the NAAQS within the range recommended by the Clean Air Scientific Advisory Committee.[43] In addition, the EPA asserted that more stringent criteria, in the case of ozone, would run the risk of targeting naturally-caused pollution and, in the case of PM, would fail to produce statistically-significant health effects.[44] If the EPA arbitrarily selected its scientific evidence or otherwise departed from its own procedures, then the ozone and PM NAAQS would be subject to challenge independent of nondelegation grounds.[45] Judge Tatel concluded, however, that

40. *Id.* at 1057-58 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-42 (1935) (striking down a delegation of authority to the President to set labor policy by approving industry-inspired codes)).

41. *See id.* These cases are *Touby v. United States*, 500 U.S. 160, 165 (1991) (upholding delegation to regulate drugs that pose an "imminent hazard to public safety"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding delegation to regulate "as public convenience, interest, or necessity requires"); *Lichter v. United States*, 334 U.S. 742, 778-86 (1948) (upholding delegation authorizing War Department to recover "excessive profits" earned on military contracts); *Yakus v. United States*, 321 U.S. 414, 427 (1944) (upholding delegation to set "fair and equitable" commodities prices); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (upholding delegation to determine "just and reasonable" power rates) and the *Networks Case*, 319 U.S. 190, 225-26 (1943) (upholding delegation to regulate in the "public interest, convenience, or necessity").

42. *American Trucking I*, 175 F.3d at 1059 (Tatel, J., dissenting in part) (quoting 42 U.S.C. § 7408 (a)(2) (1994)).

43. *See id.* The Clean Air Scientific Advisory Committee was established by the Clean Air Act. *See* 42 U.S.C. § 7409(d)(2) (1994). By law, the Committee must consist of at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies, but also may include other members. *See id.* § 7409(d)(2)(A). The court noted that the Committee in this case included, in addition to the mandatory members, medical doctors, epidemiologists, toxicologists, and environmental scientists from leading research institutions throughout the country. *See American Trucking I*, 175 F.3d at 1059 (Tatel, J., dissenting in part).

44. *See id.* at 1059-61.

45. *See id.* at 1061.

"[t]he Constitution requires that Congress articulate intelligible principles; Congress has done so here."[46]

B. *American Trucking II*

The EPA, along with various other parties, petitioned for rehearing by the panel,[47] arguing that (in the wake of *American Trucking I*) the EPA had discerned a limiting principle from the statute—that NAAQS levels must be "necessary" to protect the public health (neither more nor less stringent) and that a standard 95 percent confidence interval separates health effects that could be the product of chance from heath effects caused by a regulated pollutant.[48] By the same two-to-one majority as in *American Trucking I*, the court rejected the EPA's argument as too late.[49] "[O]nly after the EPA itself has applied [the principle] in setting a NAAQS," the court asserted, "can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine."[50]

The court proceeded to clarify its rationale for ordering a remand in *American Trucking I*.[51] The court first identified the central policy issue raised in *American Trucking I*: who should choose among the constitutionally-permissible interpretations of an ambiguous principle in a statute delegating authority to an administrative agency, taking into account "the purpose of the Act, its factual background and the statutory context in which [it] appear[s]."[52] According to the panel, the Supreme Court's approach in the *Benzene Case*,[53] which allows a court to identify an intelligible principle, has "given way" to *Chevron*,[54] which counsels deference to an agency's interpretation of an

46. *Id.* Judge Tatel made the final point that the Act gives the state governments, who are politically accountable, primary responsibility for developing a plan to achieve whatever NAAQS the EPA sets. *See id.* "[I]f the states disagree with the standards EPA has set, they have 535 representatives in Congress to turn to for help." *Id.*

47. *See American Trucking II*, 195 F.3d 4, 6 (D.C. Cir. 1999).

48. *See id.* at 6 n.1.

49. *See id.* at 6-7.

50. *Id.* at 7.

51. *See id.* at 7-8.

52. *Id.* (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946)) (alterations in original).

53. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) [hereinafter the *Benzene Case*].

54. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

ambiguous statutory term.[55]

C. *American Trucking III*

In addition to its petition for rehearing by the panel, the EPA petitioned for rehearing en banc.[56] In a plurality decision, the Court of Appeals for the District of Columbia Circuit refused to rehear the case.[57]

Judge Silberman dissented from the denial of rehearing en banc.[58] In the first instance, Judge Silberman observed that the nondelegation doctrine is "not in particularly robust health."[59] After labeling Justice Rehnquist's effort to revitalize the doctrine in the *Benzene Case* as "heroic[]," Judge Silberman "sad[ly]"conceded that, as interpreted by a majority of the Supreme Court, the nondelegation doctrine places "only a theoretical limitation" on the scope of congressional delegations.[60] The sections of the Clean Air Act at issue in *American Trucking I*, Judge Silberman concluded, do not come so close to the "dimly perceivable" boundaries of the nondelegation doctrine as to raise a serious constitutional question.[61]

Assuming arguendo that the EPA's construction of the Act did raise a constitutional nondelegation question, Judge Silberman argued that the panel "should have held the statute unconstitutional," rather than remanding to the EPA.[62] The panel's disposition of the case, according to Judge Silberman,

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55. *American Trucking II*, 195 F.3d at 8.

56. *See American Trucking III*, 195 F.3d 4, 14 (D.C. Cir. 1999).

57. *See id.* at 13. At the time the court decided *American Trucking III*, there were eleven active judges on the D.C. Circuit. Of those eleven, Judge Wald (who is no longer on the court) and Judge Henderson, did not participate. Five judges (Chief Judge Edwards and Judges Silberman, Rogers, Tatel, and Garland)—a majority of those participating in the decision but a minority of active judges on the court—voted to re-hear the case. Four judges (Judges Williams, Ginsburg, Sentelle, and Randolph) voted to deny rehearing. Because a majority of all the active judges on the circuit must vote "aye" to re-hear a case en banc, the court denied the EPA's motion. *See id.* at 13-14.

58. *See id.* at 14 (Silberman, J., dissenting from denial of reh'g en banc). Judge Tatel also dissented from the denial of rehearing en banc, joined by Chief Judge Edwards and Judge Garland. *See id.* at 16 (Tatel, J., dissenting from denial of reh'g en banc). In his opinion, Judge Tatel reiterated the criticisms of his dissent in *American Trucking I*.

59. *Id.* at 14 (Silberman, J., dissenting from denial of reh'g en banc).

60. *Id.*

61. *Id.*

62. *Id.* at 15 (Silberman, J., dissenting from denial of reh'g en banc).

undermined the constitutional purpose of the nondelegation doctrine by "demand[ing] that EPA in effect draft a different, narrower version of the Clean Air Act."[63] Were the panel's rule accepted, Congress could delegate "almost limitless policymaking authority to an agency," so long as the agency constrained itself.[64]

III. COMMENTARY

Judge Silberman's comment that the nondelegation doctrine is "not in particularly robust health"[65] is an extreme understatement. The Supreme Court has struck down congressional delegations of power to the executive in only two cases[66]—*Panama Refining Co. v. Ryan*[67] and *A.L.A. Schechter Poultry Corporation v. United States*.[68] These cases function as anomalies in constitutional law, however, as the Supreme Court has sanctioned delegations of legislative power in nearly every case in which the issue was presented since 1937.[69]

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63. *Id.* Judge Silberman acknowledged that the panel's disposition of *American Trucking I* preserved meaningful judicial review and limited agency arbitrariness, but noted that these "purposes are obviously derivative of the [nondelegation] doctrine's primary function of ensuring that Congress makes key policy decisions." *Id.* at 15 n.2. Judge Silberman argued that the "primary function" is the *only* function "that has any connection to the doctrine's constitutional source." *Id.*

64. *Id.* at 15. Judge Silberman suggested, in conclusion, that the relevant portions of the Administrative Procedure Act, *see, e.g.*, 5 U.S.C. § 706(2)(A) (1994) (requiring that regulations not be arbitrary or capricious); *id.* §§ 702, 704, 706 (requiring that administrative action be subject to some judicial review), constrain agency discretion independent of the nondelegation doctrine. *See American Trucking III*, 195 F.3d at 15 (Silberman, J., dissenting from denial of reh'g en banc). Indeed, Judge Silberman opined that whether the EPA's regulations would survive scrutiny under the APA was "quite uncertain." *Id.*

65. *Id.* at 14 (Silberman, J., dissenting from denial of reh'g en banc).

66. *See* Mistretta v. United States, 488 U.S. 361, 373 (1989). The *Mistretta* Court apparently did not consider *Carter v. Carter Coal Co.*, 298 U.S. 238 (1935), to rest on the nondelegation doctrine, perhaps because the primary focus of the *Carter* opinion was on the reach of the Commerce Clause. Although the common understanding is that the Supreme Court never struck down a statute on nondelegation grounds prior to 1935, Professor Schoenbrod notes that pre-New Deal cases did in fact use the nondelegation doctrine to strike down statutes. *See* SCHOENBROD, *supra* note 5, at 34-35.

67. 293 U.S. 388, 414-20 (1935) (striking down Congress's delegation of unlimited authority to the President to prohibit the interstate transportation of oil).

68. 295 U.S. 495, 529-42 (1935) (striking down Congress's delegation of authority to the President to set labor policy by approving industry-inspired codes).

69. *See Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny,

Instead, the Supreme Court has relied on the nondelegation doctrine merely as a tool to channel statutory interpretation,[70] searching for an intelligible principle in "[t]he purposes of [an] Act, the requirements it imposes, and the context of the provision in question."[71]

Against this backdrop, *American Trucking* may be an admirable attempt to ensure that a semi-accountable governmental body divines an intelligible principle.[72] Arguably, when a court construes Congress's grant of authority to an administrative agency so as to avoid a nondelegation challenge, the court necessarily decides the scope of the agency's authority.[73] Because the judicial branch is purposefully disconnected from the popular will, a court may choose intelligible principles contrary to the preferences of both Congress and the American people.

That said, the D.C. Circuit did not go far enough. By its terms, *American Trucking* requires a court to defer to an administrative agency's efforts to find a limiting principle in a

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when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

70. *See Benzene Case*, 448 U.S. 607, 642-46 (1980) (avoiding a nondelegation question by requiring OSHA to justify the cost of whatever benzene exposure standard it set, even though the plain words of the statute required only that OSHA ensure employee health "to the extent feasible"); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974) (refusing to allow agencies the power to tax regulated parties because a different interpretation might infringe Congress's taxing power). *Cf.* Clinton v. City of New York, 524 U.S. 417, 446-49 (1998) (holding the Line Item Veto unconstitutional for violation of the Presentment Clause, U.S. CONST. art. I, § 7, and not reaching the question whether the Act also violated the nondelegation doctrine).

71. *Networks Case*, 319 U.S. 190, 226 (1943) (internal quotation marks omitted); *see also* RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS § 3.4, at 50-51 (2d ed. 1992) ("In some cases, the Court . . . determine[d] that the goals and purposes stated in the preamble of an act constituted the necessary standards. In other cases, the Court has . . . us[ed] the legislative history or prior administrative usage and experience to give words a sufficiently narrow meaning.") (footnotes omitted). In the *Networks Case*, the Court upheld a statute that directs the FCC to regulate "in the public interest, convenience or necessity." 319 U.S. at 226. The Court affirmed Congress's broad delegation of authority only after finding that the statute's purpose and context constrained the FCC's discretion. *See id.* So construed, "[t]he public interest to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'" *Id.* at 216 (quoting 42 U.S.C. § 303(g)).

72. *See generally* BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 20-24 (3d ed. 1998) (asserting that administrative agencies are politically accountable because they are largely controlled by White House political appointees).

73. *But see* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 790-93 (1999) (arguing that enforcement of the nondelegation doctrine will make courts, rather than Congress, legislate).

statute that on its face does not contain one.[74] This result, like the status quo, safeguards the availability of judicial review and protects against administrative arbitrariness.[75] At the end of the day, there is no doubt that an agency will find narrow and specific criteria against which to measure the exercise of its authority.[76] The problem is that Article I, Section 1 requires agencies not merely to choose one "intelligible principle" out of the range of possibilities, but to follow the "intelligible principle" set by Congress.[77] Regardless of the logic behind whatever the agency ultimately chooses, the "intelligible principle" will have been chosen by a body other than "Congress, the branch of our Government most responsive to the popular will."[78] The core function of Article I, Section 1 is that Congress—not a court or an administrative agency—make the hard political choices that our system of representative government requires Congress to make.[79] Indeed, "[i]t is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: . . . the basic policy decisions governing society are to be made by the

74. *See American Trucking I*, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

75. *See id.* Preserving judicial review and protecting against administrative arbitrariness are important independent of the nondelegation doctrine. The availability of judicial review is a requirement in this context of Article III. *See* Crowell v. Benson, 285 U.S. 22 (1932). The Fifth Amendment Due Process Clause may be implicated in a regime without judicial review of administrative decisions, *see* U.S. CONST. amend. V, but Due Process itself does not require Article III review. Only if judicial review is conducted by a federal tribunal should the tribunal conform to the requirements of Article III. *See* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 299-300 (1990). In addition, the Administrative Procedure Act requires that regulations not be arbitrary or capricious, *see* 5 U.S.C. § 706(2)(A), and be subject to some judicial review, *see id.* §§ 702, 704, 706.

76. *See* Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

77. *American Trucking III*, 195 F.3d 4, 14, 15 n.2 (D.C. Cir. 1999) (Silberman, J., dissenting from denial of reh'g en banc).

78. *Benzene Case*, 448 U.S. at 685 (Rehnquist, J., concurring in judgment).

79. *See, e.g.*, J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 583 (1972) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1971)) ("At its core, the [nondelegation] doctrine is based on the notion that agency action must occur within the context of a rule of law *previously formulated by a legislative body*." (emphasis added)). *See generally* SCHOENBROD, *supra* note 5; TRIBE, *supra* note 2, § 5-19 at 986. In addition to allowing Congress to avoid hard political choices in the first instance, broad delegations of authority allow Congress to claim credit prematurely for solving issues of national policy. "When Congress delegates, it tends to do only half its job: to distribute rights without imposing the commensurate duties." SCHOENBROD, *supra* note 5, at 9.

Legislature."[80]

In support of this end, a strict nondelegation approach is superior both to *American Trucking* and the status quo. The strict approach would require a court to focus first and foremost on the text of the statute passed by Congress, thereby forcing Congress to define the scope of an agency's authority.[81] The fact that the text did not provide an "intelligible principle" would give rise to a strong presumption that the Act violated the nondelegation doctrine. This presumption could be overcome only by clear and convincing evidence to the contrary, which could be supplied by legislative history, context, and common law background.[82] If the court did not find an "intelligible principle" to guide agency decision-making through these techniques, it should send the statute back to Congress.

Were the Supreme Court to apply a strict nondelegation approach to the Act, it would have no choice but to send the Act back to Congress. The text of the Act tells the EPA "to protect the public health" within an "adequate margin of safety,"[83] but it provides no indication of how the EPA is to value public health against other considerations. Interpreted literally, Congress delegated to the EPA the authority to ignore all factors besides public health, even when to do so would require more than a complete de-industrialization.[84] In short, the delegation to the EPA in the Clean Air Act authorizes the EPA to balance public health against the entire industrial economy. This exceeds any delegation of authority previously

80. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

81. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 552-53 (1935) (Cardozo, J., concurring).

82. *Cf.* Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979) (refusing to imply a private right of action when the text of the statute did not expressly indicate that one should be available); Thompson v. Thompson, 484 U.S. 174, 189 (Scalia, J., concurring in judgment) (criticizing the majority for examining the context of an act to determine whether a private right of action should be available).

83. 42 U.S.C. § 7409(b)(1) (1994).

84. *See American Trucking I*, 175 F.3d at 1038 n.4. For instance, the literal interpretation would authorize the EPA to ban ozone and particulate matter, a result that is unquestionably not what Congress intended. *See id. Cf.* FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1304-06 (2000) (declining to accept the FDA jurisdiction over tobacco because if FDA had the authority to regulate tobacco use, the agency would have to ban the substance despite Congress's desire not to ban it).

upheld under Article I.[85]

In addition, the statute lists its purposes, although it does not indicate their relevant weights. The Act declares that Congress's purposes include "protect[ing] and enhanc[ing] the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[86] Thus, the Act acknowledges the conflict between industrial and environmental concerns, but provides no way to resolve the conflict. In fact, the use of cost-benefit analyses have been prohibited.[87]

Lastly, neither standards used in the common law nor longstanding administrative practice guide the EPA in figuring out how to balance protecting public health against other industrial concerns. First, other than the requirements of nuisance law, there is no common law of environmental regulation; the EPA regulates on a blank slate. Second, because the Act directs the EPA to regulate pollutant levels rather than the conduct of regulated parties, previously approved pollutant levels do not constrain the Agency's subsequent regulations, even as to the same pollutant.[88] In other words, the Agency has discretion to set whatever standards it wants, regardless of prior pollutant levels.

Supreme Court decisions that evidence both an effort to bolster the structural elements of the Constitution,[89] and an inclination to revisit Article I limits on congressional authority once thought to be long-dead,[90] indicate that the Supreme

85. *See American Trucking I*, 175 F.3d at 1037.

86. 42 U.S.C. § 7401(b)(1) (1994).

87. *See American Trucking I*, 175 F.3d at 1040.

88. *Cf. Brown & Williamson*, 120 S. Ct. at 1296-97 (noting an FDA reversal in policy regarding the agency's authority to regulate tobacco). The tightening of the air quality regulations in 1997 demonstrates quite clearly that prior pollutant levels do not constrain the EPA's discretion. *See generally* Pranay Gupte & Bonner R. Cohen, *Carol Browner, Master of Mission Creep*, FORBES, Oct. 20, 1997, at 170.

89. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998) (striking down the Line Item Veto Act); Printz v. United States, 521 U.S. 898 (1997) (forbidding federal commandeering of state executive officials); New York v. United States, 505 U.S. 144 (1992) (invalidating Congress's attempt to force New York State to take title to nuclear waste as outside Congress's Article I powers).

90. *See* United States v. Lopez, 514 U.S. 549 (1995) (striking down a congressional prohibition on the possession of guns in school zones on the ground that the statute overstepped Congress's authority under the Commerce Clause). *Lopez* itself reinvigorated the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, which, like the nondelegation doctrine, had not been enforced since the New Deal. There is no basis for claiming that nondelegation doctrine precedent since the

Court may be willing to consider a strict approach. Adopting this approach will not be easy, given the fear that the Court may become overly involved in issues of policy. Justice Scalia, for example, has argued that, assuming all would agree that Congress may delegate to other institutional actors some discretion involving policy considerations, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."[91] Therefore, according to Justice Scalia, "it is small wonder that [the Supreme Court] ha[s] almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[92]

These arguments miss the point. The fact that the Court has rarely deployed the nondelegation doctrine in the past—and will exercise due care in using the doctrine in the future—does not mean that the doctrine should not be applied to a statute that delegates so broadly as to exceed any reasonable understanding of what constitutes a permissible degree of policy judgment. In asserting the continued vitality of the Commerce Clause, for instance, the Court in *United States v. Lopez*[93] admitted that questions of Congress's Commerce Clause[94] power are "necessarily one[s] of degree,"[95] but found that the statute then at issue was so removed from interstate commerce as to be outside Congress's reach.[96] The Court "ought not to shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that [it would] thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era."[97]

I do not wish to overstate the impact of renewed judicial

New Deal is more entrenched than Commerce Clause precedent before *Lopez* because both doctrines were involved in the same cases from the New Deal era. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 307, 311 (1936) (finding a violation of both the nondelegation doctrine and the Commerce Clause in Congress's attempt to regulate minimum wages by adopting standards of groups of producers).

91. *Mistretta*, 488 U.S. at 415-16 (Scalia, J., dissenting).

92. *Id.* at 416.

93. 514 U.S. 549 (1995).

94. U.S. CONST. art. I, § 8, cl. 3.

95. *Lopez*, 514 U.S. at 555 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

96. *See id* at 567.

97. *Benzene Case*, 448 U.S. at 686 (Rehnquist, J., concurring in judgment).

enforcement of the nondelegation doctrine. Under the status quo, the political branches essentially bargain among themselves in an attempt to find the institution best able to make regulations.[98] An agency is never independent of the elected officials of government, because Congress may decline to fund an existing agency or may limit an agency's discretion by passing additional legislation.

Lawmaking by institutions other than Congress alters dynamics of the political system in at least two ways. First, an agency may be more readily "captured" than Congress, resulting in regulations that represent the interests of only a few organized groups.[99] Second, an agency often pursues its statutory goal, to the exclusion of other interests. In other words, though Congress must consider the externalities associated with a statute (the tax increase that might accompany an increase in benefits, for example), an agency

98. If agencies are independent of Congress but dependent on the President, then the President gains an upper hand in negotiations *vis-à-vis* Congress, and vice versa. This Comment treats departments and agencies as part of the presidential administration, but agency independence from the President is an area of considerable controversy with potential impacts on the nondelegation doctrine. Delegating power to an independent agency allows for decisions to be made on a non-political basis, which may or may not be beneficial from the country's or Congress's perspective. Broad delegations of power have been justified both because they allow for independent judgments and because they allow for a presidential administration to influence policy in accord with its electoral mandate. *Compare, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (upholding independent counsel statute because the Court understood presidential influence to be harmful in the context of prosecuting his administration), *with* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (granting EPA deference in its interpretation of the Clean Air Act even though previous EPA regulations interpreted the Act differently). Under *Chevron*, "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely on the incumbent administration's views of wise policy to inform its judgments." *Chevron*, 467 U.S. at 865. Obviously, this justification for deference does not apply with as much force when the agency has been deliberately insulated from presidential control. *See generally* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (denying President Franklin Roosevelt the power to remove members of the Federal Trade Commission).

99. *See generally* THEODORE LOWI, THE END OF LIBERALISM 298-99 (1969). Professor Lowi points out that Congress, in addition to being more representative of the country than an agency, is in a better position to receive input from poorly-funded interests. Interests that might organize to persuade Congress on a single statute might not retain the funds to monitor an agency on a daily basis. Monitoring at the agency level requires a daily presence, because when problems are designated to be dealt with in an agency, "issues get strung out over time, which benefits strong special interest groups comparatively more than weaker interests." ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 14 n.23 (1993).

may be judged solely against its statutory mandate, regardless of the effect on other parts of the economy.[100] Reviving the nondelegation doctrine would indeed bolster political accountability, by forcing Congress to accept more responsibility for its policy choices.[101] However, the nondelegation doctrine would not guarantee objectively "better" regulation, nor would it eliminate the essential interplay between the executive and legislative branches.

IV. CONCLUSION

Properly construed, Article I's limits on Congress's delegation of lawmaking authority ensure that political judgments are made by Congress. Although purporting to preserve at least some of the functions of the nondelegation doctrine, *American Trucking* rejects the core Article I protections the doctrine affords. By remanding to the EPA, *American Trucking* allows an administrative agency to specify the boundaries of its own authority. This is plainly wrong. Instead, because a majority of the three judge panel found that neither the text, the legislative history, nor the common law background of the Clean Air Act contained an intelligible principle, the court should have declared the Act unconstitutional. The United States Supreme Court should grant certiorari and correct the error.

Michael Richard Dimino[*]

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100. *See* AMAN & MAYTON, *supra* note 99, at 14 n.24. Occasionally, agency myopia is the fault of Congress or the courts, rather than the agency itself. The EPA, for example, is prohibited from doing a cost-benefit analysis to assess its regulations. *See* Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130, 1148-49 (D.C. Cir. 1980). By prohibiting the EPA from conducting cost-benefit analysis, Congress specifically prohibited a mechanism that would limit the EPA's discretion. Requiring the EPA to promulgate only a standard whose benefits exceed its costs would constitute an intelligible principle for purposes of nondelegation analysis.

101. *See* United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result) ("Congress . . . is the appropriate forum where the conflicting pros and cons should have been presented and considered."); McGautha v. California, 402 U.S. 183, 272 (1971) (Brennan, J., dissenting) (arguing that having legislatures making policy decisions makes those representatives politically accountable and also limits arbitrariness); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980) (arguing that ensuring congressional decision-making is the primary goal of the nondelegation). No American will care about a legislator's vote on every issue. Forcing legislators to make a record of their positions does, however, allow every citizen interested in an individual issue to research individual members' votes on matters that would otherwise be delegated to an agency and to vote in congressional elections accordingly.

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