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The Nondelegation Doctrine After Whitman v. American Trucking Associations: Constitutional Precedent Breathes a Sigh of Relief

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THE NONDELEGATION DOCTRINE AFTER
WHITMAN V. AMERICAN TRUCKING
ASSOCIATIONS: CONSTITUTIONAL PRECEDENT
BREATHE S A S I G H O F R E L I E F

"Now where is that rudderless boat? Let it be one of our first
purposes to discover. With the first glimpse we obtain of it, the
dawn of our success shall begin. This boat shall guide us, with a
rapidity which will surprise even ourselves . . . ."

Edgar Allan Poe, *The Mystery of Marie Roget* (1850)

INTRODUCTION

Midway through the United States Supreme Court’s 2000 Term,
the Court announced its decision in *Whitman v. American Trucking
Associations*, marking the most explicit foray into the constitutional
“nondelegation doctrine” in several years. The decision came in the
wake of a controversial opinion by the Circuit Court of Appeals for
the District of Columbia.

Early in 1999, the D.C. Circuit Court took a step toward reviving
the long-dormant nondelegation doctrine when it ruled that the
Environmental Protection Agency’s (EPA’s) interpretation of the
Clean Air Act (CAA) represented an unconstitutional delegation of

2. Courts employ the nondelegation doctrine as a mode of constitutional analysis to limit the scope
of delegated “legislative” power to executive and judicial actors, including administrative agencies. See
infra Part I.
3. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, panel opinion modified & reh'g en banc denied
195 F.3d 4 (D.C. Cir. 1999). The Supreme Court's *Whitman* decision was styled as such due to
President George W. Bush's appointment of Christine Todd Whitman as Administrator of the
Environmental Protection Agency. The Supreme Court had entertained petitions for certiorari under the
caption *Browner v. American Trucking Associations*, denoting the previous EPA Administrator. For
clarity's sake, the lower court decisions will be referred to as *American Trucking* and the Supreme
Court decision as *Whitman*.
legislative power. In *American Trucking*, a divided court rejected long-standing EPA procedures for setting National Ambient Air Quality Standards (NAAQS) for ozone (O₃) and particulate matter (PM), citing the lack of an “intelligible principle” to guide discretionary decision making. The court took issue with the scope of the EPA’s rulemaking authority, proclaiming that the agency’s procedures in revising the NAAQS were based upon mere “intuitive proposition[s]” that allowed wholly discretionary line-drawing. The *American Trucking* court resolved the nondelegation matter in a novel fashion, remanding the issue for consideration to the EPA to see if the agency itself could discern an intelligible principle that would justify long-enshrined rulemaking procedures. The decision contained elements of what may be termed the “classic” nondelegation doctrine analysis as well as a not-so-subtle suggestion that courts should examine agency implementation of a congressional grant through a new nondelegation prism.

5. 175 F.3d at 1034-36.


7. At issue was the CAA language directing the EPA to promulgate air quality standards that, “in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.” 42 U.S.C. § 7409(b)(1).


9. The court also found an independent basis for vacating and remanding the particulate matter standard. See id. at 1053-55 (finding that EPA’s use of parts per million smaller than ten microns as indicator of coarse particulates was arbitrary and capricious).

10. See id. at 1034.

11. When using “classic” nondelegation analysis, a court briefly examines the statute containing the congressional delegation in search of workable standards to guide agency decisions; once that principle is identified, agency decisionmaking is subject to very little, if any, delegation scrutiny. See Loving v. United States, 517 U.S. 748, 771 (1996) (noting that since the New Deal era, the Court has “upheld, without exception, delegations under standards phrased in sweeping terms”); see also infra Part II.A.

12. This alternative approach to the nondelegation doctrine is best defined as an examination of an agency’s self-regulation within its congressional grant of authority. See infra Part III.A. Rather than examining the text of a statute to discern the scope of power conferred upon an agency, courts would
The implications of the *American Trucking* decision were potentially enormous on both pragmatic and theoretical grounds. Pragmatically, the NAAQS are the centerpiece of the CAA and function as the mechanism to protect the public from the deleterious effects of airborne pollutants.\(^\text{13}\) Numerous other environmental statutes entrusted to the EPA would also likely have been at risk if the agency’s rulemaking structure were held constitutionally inirm.\(^\text{14}\) Other agency decisions outside the environmental realm could also be challenged, had the Supreme Court sustained the court of appeals’ logic.\(^\text{15}\) Theoretically, the D.C. Circuit’s championing of the so-called new nondelegation doctrine presaged a shift away from typical judicial deference to statutory grants of agency authority.\(^\text{16}\)

The EPA’s inevitable response to the *American Trucking* decision was a petition for certiorari to the United States Supreme Court;\(^\text{17}\) the Court granted the petition for *Browner v. American Trucking*

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examine the *internally-promulgated* procedural and substantive checks suggested by an agency. See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969) [hereinafter Davis, *New Approach*] (explaining generally the principles behind this approach to nondelegation issues); see also infra Part II.A.

\(^{13}\) As Judge Tatel’s dissent from the denial of rehearing stressed, “[t]he panel’s nondelegation holding . . . stripped the Environmental Protection Agency of much of its ability to implement the Clean Air Act, this nation’s primary means of protecting the safety of the air breathed by hundreds of millions of people.” Am. Trucking Ass’n v. EPA, 195 F.3d 4, 17 (D.C. Cir. 1999) (Tatel, J., dissenting from denial of rehearing en banc).

\(^{14}\) Other analogous EPA rulemaking authority with similar enabling statutes include the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992(k) (1994) and the Safe Drinking Water Act, 42 U.S.C. § 300f to 300j-26 (1994). The potential threat to other environmental legislation comes from similar grants of authority in other enabling acts; industry representatives would likely seek judicial invalidation of those statutes if the line of reasoning in *American Trucking* received higher court or other jurisdictional approval. See Brief of Amici Curiae States of New York, California, Connecticut, Maine, Maryland, New Hampshire, Pennsylvania, Rhode Island, and Vermont at *3, Am. Trucking Ass’ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (No. 99-1257) [hereinafter Brief of New York].

\(^{15}\) See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 349 (1999) [hereinafter Sunstein, *Clean Air Act*] (“The new doctrine could well be applied not only to EPA decisions under the Clean Air Act, but to all EPA decisions, as well as decisions from [the Occupational Safety and Health Administration], the Federal Trade Commission, the Federal Communication Commission, the Consumer Product Safety Commission, and many more.”).


\(^{17}\) 68 U.S.L.W. 3577 (U.S. Feb. 28, 2000).
Associations on May 22, 2000. The Court heard oral argument in Browner on November 7, 2000, after examining party briefs and copious amici contributions. The Supreme Court announced its unanimous decision to reverse the lower court on February 27, 2001.

The Court rejected the American Trucking court’s interpretation of the nondelegation doctrine in summary fashion; instead, the Court held that the CAA provision at issue was “well within” the proscriptions of allowed congressional delegations. In so holding, the Court adopted the reasoning of decades of unbroken precedent that upheld broad congressional delegations of power. What is abundantly clear from the succinct nondelegation portion of the Whitman opinion is that the emerging framework of nondelegation analysis espoused by the American Trucking court has yet to find favor within the Court. The Supreme Court categorically indicated that the relevant portions of the CAA provided a particularly poor vehicle to recalibrate the scope of the nondelegation doctrine.

Although the Supreme Court had recently decided several nondelegation doctrine cases, Whitman was a golden opportunity for the Court to better outline the ambiguous contours of the nondelegation doctrine. Especially under the complex machinations of the CAA, the Court seemingly had ample legislative history, administrative regulations, and other judicial tools to clarify the

19. Over thirty amicus briefs were on file with the Court, including those from industry leaders lobbying to affirm the circuit court and from environmental advocates rallying behind classic nondelegation arguments. See, e.g., Brief of Amici Curiae Environmental Defense et al., Am. Trucking Ass’ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (No. 99-1257) [hereinafter Brief for Environmental Defense]; Brief of Amici Curiae American Crop Protection Association et al., Am. Trucking Ass’ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (No. 99-1257) (outlining arguments on behalf of a wealth of agricultural producers and distributors).
21. See id. at 913-14.
22. See infra Parts I.A and VI.
23. See infra Part V.
proper role of congressional delegations within a system of workable
government. This Note will examine the Court’s treatment of the
nondelegation doctrine issues in the case and suggest that the
Supreme Court, though reaching the proper outcome regarding
congressional delegation, failed to delineate appropriate guidelines
for what constitutes a core constitutional doctrine.

Part I of this Note outlines a brief history of the nondelegation
doctrine, including the evolving Supreme Court view of the purposes
of the analytical framework for congressional delegations of
legislative power. Part II examines the emerging “new”
nondelegation framework as espoused by influential past D.C. Circuit
opinions and legal commentators. Part III examines the legislative
and administrative requirements that limit the EPA’s discretion
within the CAA. Part IV examines the American Trucking decision in
light of both the classic and the emerging nondelegation frameworks.
Given that background material, Part V reviews the Supreme Court
treatment of the nondelegation issue in Whitman. Part VI suggests
that the Whitman nondelegation holding was the correct one, as the
EPA’s rulemaking authority was indeed well within the permissible
constitutional parameters for congressional delegation under the
CAA. Part VI also outlines the shortcomings of the Whitman Court’s
analytical approach to the nondelegation issues. This Note concludes
that the nondelegation doctrine remains intact after the Whitman
decision, albeit as a virtually toothless method of reigning in
excessive legislative delegations.

I. EVOLUTION OF THE NONDELEGATION DOCTRINE: HISTORY,
PURPOSE, AND STATUS

A. History of the Nondelegation Doctrine

The nondelegation doctrine has its roots in Article 1, Section 1 of
the United States Constitution, which provides that “[a]ll legislative
Powers herein granted shall be vested in a Congress of the United States. The basis for judicial analysis of the doctrine lies in classic separation of powers principles; the legislative branch cannot legitimately delegate legislative power to another coordinate branch. The United States Supreme Court has had many occasions to apply this minimal textual guidance to claims of excessive congressional delegation of legislative power to another branch. Early decisions promoted executive branch fact-finding as a natural accompaniment to congressional action; in essence, Congress had promulgated law circumscribing fundamental choices and left daily application of the law to executive branch actors. The practical effect of further nondelegation decisions was to liberally expand Congress’ ability to delegate to administrative agencies. At the heart of the broad deference granted to Congress was the pragmatic view that Congress’ ability to respond to complex, rapidly changing issues required delegations to flexible, specialized agencies.

The Supreme Court routinely approved congressional delegations to both coordinate branches and administrative agencies until the politically turbulent New Deal era. In just over five months, the Supreme Court invalidated two separate sections of the National

27. See J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (establishing an "intelligible principle" test in upholding congressional grant of discretionary tariff control to President); Field, 143 U.S. at 680 (upholding Congress' assignment of trade suspension powers in President "for such time as he shall deem just"); Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 389 (1813) (upholding delegation to the President of authority to lift European embargo when neutral commerce was restored).
29. See, e.g., Mistretta, 488 U.S. at 361 (approving delegation of authority to set sentencing guidelines with United States Sentencing Commission); NBC v. United States, 319 U.S. 190 (1943) (upholding Federal Communications Commission authority to regulate broadcast licensing).
31. See infra notes 32-37 and accompanying text.
Industrial Recovery Act (NIRA). Stressing that delegated power without limits or statutory guidance threatened to erode the protections of individual rights under a separation of powers analysis, the Schechter Court ominously warned of delegated power "unconfined and vagrant."

Despite the Court's concern over unguided congressional delegations, the Court has not invalidated a provision of any federal statute on strict nondelegation grounds since the 1935 decisions. Ever-broader statutes passed muster under the post-New Deal delegation decisions, as the Supreme Court embraced a prudential view of Congress' role in making important social choices. As to discretionary agency decisions, the Court generally acquiesced to quite vague delegations; it had "no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." Indeed, the Court approved some delegations based on authorizing language remarkably similar to that challenged in American Trucking; for example, the Court has outlined that "one cannot plausibly argue that [an] 'imminent hazard to the public safety' standard is not an

32. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 534-41 (1935) (invalidating section 3 of the NIRA because presidential approval of "codes of fair competition" was governed by "no standards"); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (invalidating section 9(c) of the NIRA as "Congress ha[d] declared no policy, ha[d] established no standard, ha[d] laid down no rule" in allowing the President to exclude hot oil from interstate commerce).

33. Schechter, 295 U.S. at 551 (Cardozo, J., concurring). One year later, the Court confronted a particularly standardless delegation in Carter v. Carter Coal Co., 298 U.S. 238 (1936). There, the Court invalidated a portion of the Bituminous Coal Conservation Act which delegated the power of setting commodity prices to biased mining boards. See id. at 310-11. Although the Court invalidated the statutory section on due process grounds, it cited Schechter with approval for its delegation analysis. See id. at 311-12.


intelligible principle." As is commonly observed, the only Supreme Court cases that ever invalidated any provisions of federal statutes under a classic nondelegation framework were decided in 1935; or, more bluntly, the nondelegation doctrine has experienced one good year and over two hundred bad ones. Justice Scalia summarized the Court’s approach most adequately in Mistretta, when he observed: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?"

B. Purposes of the Nondelegation Doctrine

At the heart of the judiciary’s concern with unbounded congressional delegations of authority is the fear that decisions of major social import will be made by agencies that are less responsive or less representative than Congress. Additionally, judicial limits on vague delegations of power theoretically ensure that Congress will provide agencies with useful guidance within legislative grants of authority. Finally, requiring intelligible principles in statutory delegations insures that "courts charged with reviewing the exercise

36. Touby v. United States, 500 U.S. 160, 165 (1991). In Touby, the Court upheld the validity of the Controlled Substances Act, which authorized the Attorney General to identify controlled substances when necessary to avoid public safety impacts. Id. The relevant portion of the CAA outlines that the EPA should establish criteria for pollutant emissions which may “reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7408(a)(1)(A) (1994).

37. See Sunstein, Clean Air Act, supra note 15, at 330-31. Given the ultimate outcome in Whitman, the nearly unblemished streak of Court-approved congressional delegations remains intact.


40. See Benzene, 448 U.S. at 685-86 (Rehnquist, J., concurring); see also J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
of delegated legislative discretion will be able to test that exercise against ascertainable standards. 41

Despite the noble purposes underlying the classic nondelegation doctrine, courts have repeatedly declined to give the doctrine teeth or use it to provide a judicial check on unbounded legislative discretion and agency rulemaking. 42 Some of the louder calls for a renewed delegation jurisprudence to reign in congressional delegation began in the late 1960s, spurred by a commentary from Kenneth Culp Davis. 43

II. JUDICIAL REVIEW AND STATUTORY CONSTRUCTION: THE SLOW EVOLUTION OF THE NEW NONDELEGATION FRAMEWORK

A. Theoretical Underpinnings and Initial Support

Davis’ essay posited that the classic form of nondelegation jurisprudence was rightfully dead and buried. 44 Davis did admit the political reality that Congress could not legislate specifically on complex scientific issues, matters of great fluidity, and issues requiring particular expertise. 45 Still, Davis rallied behind the idea that the judiciary should assume a larger role in policing agency implementation of broad statutory goals. 46 Specifically, Davis advocated renewing the nondelegation doctrine through agency self-policing. 47 Theoretically, agency administrators could develop procedural and substantive shields to their own unburdened discretion. 48 Forced to abide by these protections under the judiciary’s watchful eye, agencies would self-regulate and thus

41. Benzene, 448 U.S. at 686 (Rehnquist, J., concurring).
43. See Davis, New Approach, supra note 12, at 713.
44. See id. at 714-15.
45. See id. at 720-21.
46. Id. at 728-29.
47. See id. at 725-30.
48. Id. at 726-27.
promote the classic nondelegation doctrine goal of producing an internal intelligible principle.\footnote{49}

Like the admittedly lofty goals elucidated in classic nondelegation decisions, the new mode of delegation analysis had a baseline assumption that arbitrary decisionmaking by unelected and unresponsive government members should be avoided.\footnote{50} “[A]dministrative limiting standards, once promulgated, function no differently than if Congress had written them into the original statute—that is, they bind agencies in implementing the statutory provision to which they apply. In this way, the standards serve to limit administrative discretion and prevent arbitrary administrative decisionmaking.”\footnote{51} The inherent analytical appeal of the new delegation approach quickly gained adherents in lower courts.\footnote{52}

\textbf{B. Lower Court Approval of Davis’ New Delegation Thinking}

In \textit{Amalgamated Meat Cutters v. Connally}, a federal trial court confronted a challenge to the Economic Stabilization Act of 1970, which authorized the President to “issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries at levels not less than those prevailing on May 25, 1970.”\footnote{53} The court upheld the essentially limitless statute by advocating a subsidiary administrative law.\footnote{54} In the majority’s view, there was an “on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature’s ultimate standard and objective.”\footnote{55}

\footnote{49} See \textit{id.} at 729-30.
\footnote{50} See Bressman, \textit{supra} note 28, at 1416.
\footnote{51} \textit{Id.}
\footnote{52} See, e.g., \textit{Amalgamated Meat Cutters v. Connally}, 337 F. Supp. 737, 759 (D.D.C. 1971) (requiring “subsidiary administrative policy, enabling . . . the public to assess the Executive's adherence to the ultimate legislative standard”).
\footnote{54} See \textit{Amalgamated Meat Cutters}, 337 F. Supp. at 759.
\footnote{55} \textit{Id.} Commentators have noted that Judge Leventhal’s majority opinion recalls \textit{Schechter Poultry’s} emphasis on procedural safeguards (or lack thereof in the NIRA) as a check on arbitrary executive agency action. See Sunstein, \textit{Clean Air Act, supra} note 15, at 343-44.
The D.C. Circuit thereafter expanded its agency-narrowing opinions in an awkwardly-styled decision popularly referred to as Lockout/Tagout I. In Lockout/Tagout I, industry advocates challenged Occupational Safety and Health Administration (OSHA) requirements \(^{57}\) stemming from statutory language that indicated that OSHA should issue regulations “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” \(^{58}\) OSHA interpreted this meager statutory guidance to require regulations of any “significant risk” to the point of technological and economic “feasibility.” \(^{59}\) The court, finding that OSHA’s analysis of its authority was too open-ended, avoided deep analysis of the agency interpretation and remanded the case back to the agency for an interpretation both “reasonable and consistent with the nondelegation doctrine.” \(^{60}\) Of particular importance was the court’s expansion of Amalgamated Meat Cutters’ agency-limiting approach to invalidate a statute unless an agency sufficiently limited its own discretion. \(^{61}\) On remand, the Circuit Court approved OSHA’s narrow interpretation of operational principles, resulting in a significant cabining of authority. \(^{62}\) While OSHA retained discretion under Lockout/Tagout II, the agency latitude in action was hardly the blank check alluded to in Lockout/Tagout I. \(^{63}\)

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59. Lockout/Tagout I, 938 F.2d at 1317.

60. Id. at 1313.

61. See id. By contrast, Judge Leventhal relied on internal procedural safeguards to uphold the statutory delegation in the earlier decision. See Amalgamated Meat Cutters, 337 F. Supp at 757-59.


63. See Sunstein, Clean Air Act, supra note 15, at 346 (“The question left open by the court's decision was whether its invocation of the nondelegation doctrine was a kind of sport, or whether it signaled a broader development in administrative law.”). At least within the D.C. Circuit, the decision in American Trucking provided the surprising answer. See id. at 347 (describing the American Trucking decision as “remarkable”).
Numerous other circuits and lower courts had previously or ultimately adopted similar reasoning as the Lockout/Tagout cases in evaluating agency authority, indicating some juridical support for an agency-narrowing approach to the nondelegation doctrine. Other appellate court decisions kept alive the “traditional” forms of the nondelegation doctrine. Legal commentators also kept up the academic debate over the possible reformulation of the nondelegation doctrine as something akin to Davis’ agency-driven discretionary limits.

C. Glimmers of the New Process in the Supreme Court

1. Initial Supreme Court Reception of the “New” Nondelegation Doctrine.

In Federal Energy Administration v. Algonquin SNG, the Supreme Court, in an initial foray into nondelegation through an agency-narrowing lens, explicitly rejected such an approach. There, the Court confronted a challenge to the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, which authorized the President to control oil imports by imposition of licensing fees when he

64. See Sunstein, Clean Air Act, supra note 15, at 342. See, e.g., Ressler v. Pierce, 692 F.2d 1212, 1220-22 (9th Cir. 1982) (mandating greater procedural limits on the Department of Housing and Urban Development’s rent subsidy selection program, even at greatly increased cost to agency); Carey v. Quern, 588 F.2d 230, 232-34 (7th Cir. 1978) (criticizing Chicago’s welfare determination program as standardless under the Illinois General Assistance statute); Burke v. United States, 968 F. Supp. 672, 680-81 (M.D. Ala. 1997) (rejecting an unwritten DEA policy regarding remission of seized property as a threat to liberty).

65. See South Dakota v. Dep’t of Interior, 69 F.3d 878, 885 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996). The Eighth Circuit held that a section of the Indian Gaming Regulatory Act was unconstitutional on nondelegation grounds. The statute authorized the Secretary of the Interior to acquire landholdings outside demarcated reservations for the “purpose of providing land for the Indians.” Id. at 882. The panel found no intelligible principle bounding the public uses of potential acquisitions. See id.


68. See id. at 559.
“deem[ed] necessary” to protect “national security.”69 Although the Trade Act hardly set out standards for evaluation with mathematical precision, the Court upheld the delegation as “far from unbounded,” because “clear preconditions to Presidential action” easily fulfilled the intelligible principle test outlined in Hampton.70 Most importantly, the Court argued that any notion of judicial narrowing of the statute to avoid an unconstitutional delegation was unwarranted in light of specific factors outlined within the originating statute and the necessity of promulgating flexible rules.71

The lenient application of the nondelegation doctrine in Algonquin SNG took a decidedly complex turn in Industrial Union Department v. American Petroleum Institute (commonly referred to as the Benzene case).72 There, the Court reviewed the Occupational Safety and Health Act’s delegating to the Secretary of Labor the ability to promulgate safety standards “which most adequately assure[ ], to the extent feasible, . . . that no employee will suffer material impairment of health.”73

In Benzene, the American Petroleum Institute challenged a regulation that severely reduced permissible occupational exposure to benzene, a carcinogen.74 OSHA’s position was that it had the statutory authority to regulate the level of carcinogens to the lowest possible level of exposure that was economically and technologically feasible.75 The Court, with Justice Stevens writing for a plurality, rejected the agency interpretation and construed the statute as

70. Algonquin SNG, 426 U.S. at 559 (following J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).
71. See id. at 559. In other words, if the CAA sets an intelligible principle, it is the end of the nondelegation inquiry. See Hampton, 276 U.S. at 409. Any failure by the EPA to articulate that intelligible standard in particular rulemaking would be solely a question of administrative law rather than constitutional doctrine. See Reply Brief of American Lung Association at *7, Am. Trucking Ass’n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (No. 99-1257).
74. See Benzene, 448 U.S. at 613.
75. See id. at 637.
requiring a threshold finding of significant risk in the workplace before the agency was authorized to promulgate a specific regulation.\textsuperscript{76} Then-Justice Rehnquist, in concurrence, more strenuously categorized the statute as a congressional hand-off to OSHA of a politically sensitive workplace issue.\textsuperscript{77} Justice Rehnquist lobbied for a revivified nondelegation doctrine—one that would take up the judicial mantle and direct Congress to make the "hard choices" of social policy for which they were elected.\textsuperscript{78} The key distinction between Justice Stevens' plurality opinion and Justice Rehnquist's concurrence is the perceived role of the nondelegation doctrine as a tool for reigning in agency exercise of "legislative" authority.\textsuperscript{79} The plurality utilized the doctrine as a tool of statutory construction—the first glimmer of the judicial notion that Congress ought to make clear statements if it wishes to delegate significant discretionary authority to agencies.\textsuperscript{80} Rehnquist's concurrence was further reaching, urging an invalidation of the statute due to excessive congressional delegation.\textsuperscript{81}

The Court quickly had an opportunity to adopt Rehnquist's nondelegation line of thinking in the next Term, upon review of the very same section of the Occupational Safety and Health Act (OSH Act).\textsuperscript{82} In Cotton Dust, the Court analyzed the OSHA Administrator's authority to set health standards "to the extent feasible" under section 6(b)(5) of the OSH Act.\textsuperscript{83} Justice Rehnquist could persuade only Chief Justice Burger to join in his dissent; there, he rejected the grant

\textsuperscript{76.} See id. at 614-15.
\textsuperscript{77.} See id. at 680-85 (Rehnquist, J., concurring) (reviewing legislative history of OSHA and public policy purposes).
\textsuperscript{78.} Id. at 687.
\textsuperscript{79.} The plurality opinion would thus come closer to Davis' proposed formulation of the nondelegation doctrine, while Justice Rehnquist's concurrence echoed the more classic form of constitutional analysis.
\textsuperscript{80.} See Benzene, 448 U.S. at 646.
\textsuperscript{81.} See id. at 686-88 (Rehnquist, J., concurring).
\textsuperscript{83.} Id. at 509.
of authority as "so vague and precatory as to be an unconstitutional delegation." 84

After the OSHA cases, the Supreme Court could hardly have been characterized as riding the new wave of nondelegation thinking that was promulgated by Davis and other commentators. 85 In recent years, however, the Court has increasingly decided administrative regulation cases under a statutory construction framework, harkening to Davis' principles, if not his specific doctrine. 86

2. The Latest Delegation Interpretation Challenges: The Role of the New Nondelegation Canons in Narrowing the Scope of Agency Discretion

The Supreme Court has recently demonstrated support for so-called "clear statement" principles in analyzing prominent agency rulemaking cases. 87 In AT & T Corp. v. Iowa Utilities Board, the Court analyzed the Federal Communication Commission's (FCC's) interpretation of the Telecommunications Act of 1996. 88 Under the Act, the FCC promulgated standards to consider when to grant new telecommunications carriers access to existing local telephone market networks. 89 The statute directs the FCC to determine whether proprietary access to new markets was "necessary" and whether failure to provide access would "impair" establishment of new provider services. 90 The Court analyzed the incumbent service

84. Id. at 545 (Rehnquist, J., dissenting).
86. See infra Part II.C.2.
88. See id.; see also 47 U.S.C. § 251 (West Supp. 1999)
89. See 47 C.F.R. § 51.319(a)-(g) (2000).
90. 47 U.S.C. § 251(d)(2). At least in academic circles, the seemingly open-ended congressional delegations of rulemaking power to the FCC have come under scrutiny as possible areas for successful nondelegation challenges. See Randolph J. May, The Public Interest Standard: Is It Too Indeterminate To Be Constitutional?, 53 Fed. Comm. L.J. 427 (2001) (calling for greater congressional responsibility in the communications arena through more specific grants of rulemaking power).
providers’ challenge under a *Chevron* framework,91 but used language strikingly close to Kenneth Culp Davis’ original proposition in invalidating the FCC’s interpretation.92 The Court’s opinion in *Iowa Utilities Board* echoed the need for agency self-policing, as the FCC failed to supply any “limiting standard, rationally related to the goals of the Act.”93 Because the FCC’s interpretation inevitably made entry into existing markets attractive (as opposed to wholly original telecommunications networks initiated by erstwhile market participants), the “necessary” and “impair[ment]” standards would have had no real meaning.94 The analytical import of the decision is its indication that the Court was willing to use the agency’s own expert resources as a policy tool for limiting discretion under a broad congressional delegation.95 Under this mode of analysis, agencies would be well served to determine a criterion that would effectuate statutory purpose before promulgating rules that shape an essentially open-ended statute.96

Other decisions of recent Supreme Court vintage seemingly demonstrate a growing acceptance of statutory narrowing as a constraint to excessive agency action under broad statutory delegations.97 In *FDA v. Brown & Williamson Tobacco Corp.*, the Court confronted a recent Food and Drug Administration (FDA) effort to regulate tobacco based on the FDA’s interpretation of its statutory authority over cigarettes emanating from the Food, Drug &

91. A *Chevron* analysis is a two-step process inquiring first whether Congress has directly spoken by statute to delineate an agency’s proper role in implementing statutory purpose. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). If a statute is ambiguous or silent, a court proceeds to step two and asks whether the agency’s interpretation is reasonable in light of the statute’s legislative history and purpose. See *id*.

92. Evidence that *Iowa Utilities Board* exemplifies a possible turn of the Court toward an agency-narrowing framework for administrative analysis is the subject of well-documented commentary. See generally Bressman, *supra* note 28.


94. See *id* at 389-90.

95. See *id*.

96. See *id* at 390; see also Bressman, *supra* note 28, at 1434-38.

The Court reviewed a recent policy change by the FDA to regulate tobacco products; the Court rejected the FDA's approach by examining the underlying statute and other tobacco-related legislation. Specifically, the Court indicated that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." Amici in *Whitman* extrapolated the *Brown & Williamson* decision to indicate that the Court "recognize[s] that a clear statement rule plays a crucial role in constraining agency behavior and enforcing the principles underlying the nondelegation doctrine." While such an implication has yet to be recognized in an on-point case, the Court now clearly conceptualized judicial narrowing as intimately related to the purposes behind the nondelegation doctrine.

III. THE ARENA OF ANALYSIS: LEGISLATIVE AND ADMINISTRATIVE BACKGROUND TO THE CLEAN AIR ACT

The CAA, over several decades, seems to have embodied the limited administrative role envisioned by adherents of the classic nondelegation doctrine. Congress has, through continual reworking of broad enabling legislation, sufficiently cabined EPA authority to guard against any "unconfined and vagrant" rulemaking. Since
1970, Congress has adopted numerous limits to the EPA's NAAQS rulemaking authority, including substantive restraints and procedural requirements. The EPA faces numerous substantive hurdles in reformulating the NAAQS under the CAA. Initially, when evaluating the need for an initial or revised NAAQS, section 108 of the CAA significantly constrains EPA rulemaking authority. Under the auspices of section 109, the EPA may only consider factors "based on" air quality criteria—that is, only those factors impacting human health and welfare. The EPA Administrator may make air quality criteria determinations only after identifying two independent factors: "(A) emissions of [the pollutant] . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; [and] (B) the presence of [the pollutant] in the ambient air results from numerous or diverse mobile or stationary sources."

Accordingly, the air quality criteria determination limits the EPA's ability at the outset to those pollutants in the ambient atmosphere (thus excluding indoor air pollutants) that can reasonably be anticipated to endanger human health or welfare.

The subsection (B) limitation on air pollutant sources particularly limits the jurisdictional reach of the statute; existing NAAQS cover only six pollutants out of the hundreds known to science. Air quality criteria must also be based upon "the latest scientific

105. See infra notes 107-17 and accompanying text.
106. See infra notes 118-22 and accompanying text.
107. For a concise and helpful elaboration of the limits to EPA authority under the CAA with regard to the NAAQS, see Brief of Respondents Massachusetts and New Jersey at *29-34, Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (No. 99-1257) [hereinafter Brief of Massachusetts].
109. Id. § 7409(b)(1). Air quality criteria are descriptions of scientific information on health and welfare effects of pollutants. See id. § 7408(a)(2).
110. Id. § 7408(a)(1)(A)-(B).
111. In comparison, section 112(b)(1) of the CAA, which addresses toxic air pollutants and has no jurisdictional limit as in section 108, regulates over 180 pollutants. See id. § 7412(b)(1) (setting general guidelines for toxic air pollutant regulation).
knowledge” and must indicate “all identifiable effects on public health and welfare.”\textsuperscript{112}

Once the EPA determines air quality criteria under the requirements of section 108, its promulgation of NAAQS is limited to standards “based on” air quality criteria which are “requisite to protect the public health” with “an adequate margin of safety.”\textsuperscript{113} The EPA confronts a similar set of limits to determine secondary NAAQS under section 109; to adequately protect the public welfare, the EPA must consider a host of synergistic factors before promulgating a standard.\textsuperscript{114}

The CAA contains additional structural limits to the EPA promulgation of NAAQS in the form of mandatory review of the standards every five years.\textsuperscript{115} The EPA must also appoint an independent scientific review committee (the Clean Air Scientific Advisory Committee, or CASAC) to assist in the evaluation of NAAQS options.\textsuperscript{116} If the regulations establishing or revising the NAAQS depart in any important respect from the CASAC recommendations, the EPA is obliged to explain its departure in the public record.\textsuperscript{117}

The CAA also ensures immense public participation in the NAAQS promulgation process, effectuating the nondelegation doctrine goal of political accountability.\textsuperscript{118} The EPA must provide public notice and comment periods for all data, methodologies, and significant legal implications of a proposed NAAQS.\textsuperscript{119} The EPA

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\item \textsuperscript{112} \textit{Id.} \S 7408(a)(2).
\item \textsuperscript{113} \textit{Id.} \S 7409(b)(1).
\item \textsuperscript{114} \textit{See id.} \S 7602(h) (defining public “welfare” for use in secondary standard calculations).
\item \textsuperscript{115} \textit{See id.} \S 7409(d)(1). Previous Court decisions upheld virtually-open ended grants of authority with no definitive time limit on executive initiatives. \textit{See Field v. Clark}, 143 U.S. 649, 680 (1892) (upholding the President’s ability to suspend free trade for commodities “for such time as he shall deem just”).
\item \textsuperscript{116} \textit{See 42 U.S.C.} \S 7408(b)(2).
\item \textsuperscript{117} \textit{See id.} In setting the instant ozone standard, the EPA declined to set the NAAQS any lower than the range supported by the unanimous CASAC. \textit{See National Ambient Air Quality Standards for Ozone}, 62 Fed. Reg. 38,856, 38,868 (1997) [hereinafter NAAQS for Ozone].
\item \textsuperscript{118} \textit{See supra} Part I.B.
\item \textsuperscript{119} \textit{See 42 U.S.C.} \S 7607(d)(3).
\end{itemize}
\end{footnotesize}
must also provide a reasoned explanation for its decisions\textsuperscript{120} and respond to any significant comments.\textsuperscript{121} All rule promulgation processes are subject to judicial review under the CAA.\textsuperscript{122}

The administrative record surrounding the EPA actions in the NAAQS promulgation process demonstrates the lack of unbounded discretion warned against in previous Court decisions on the nondelegation doctrine.\textsuperscript{123} The EPA's discretion in promulgating the revised O\textsubscript{3} NAAQS followed the significantly-cabined process outlined under the CAA.\textsuperscript{124} The EPA initially determined the need for a revised standard in accordance with the five-year review provisions of Section 109(d).\textsuperscript{125} Reviewing published information, the EPA concluded that a significant body of "clear evidence from human clinical studies" now demonstrated negative human health effects at former NAAQS levels.\textsuperscript{126}

The EPA further determined that a new standard of 0.08 parts per million (ppm) would greatly benefit sensitive populations as well as dramatically reduce the number of negative health effects and dangerous exposures in the general populace.\textsuperscript{127} Perhaps most significantly, the EPA then demonstrated the inadvisability of setting the NAAQS at 0.07 ppm by delineating exposures at that level as more transient and reversible than exposures at 0.08 ppm.\textsuperscript{128} The Administrator, following similar procedures in setting the NAAQS for particulate matter (PM), ultimately based the annual standard on a

\begin{thebibliography}{9}
\bibitem{120} See \textit{id.} § 7607(d)(6)(A).
\bibitem{121} See \textit{id.} § 7607(d)(6)(B).
\bibitem{122} See \textit{id.} § 7607(b)(1), (d)(9). This review procedure would capture much of the proposed benefit from an agency-remand procedure as espoused by the \textit{American Trucking} majority. See \textit{Am. Trucking Ass'ns v. EPA}, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (citing reduced agency arbitrariness and improved judicial standards for review as advantages of agency remand).
\bibitem{124} See generally NAAQS for Ozone, \textit{supra} note 117.
\bibitem{125} See 42 U.S.C. § 7410.
\bibitem{126} NAAQS for Ozone, \textit{supra} note 117, at 38,863.
\bibitem{127} See \textit{id.} at 38,867-68 (demonstrating superiority of 0.08 ppm exposure in the general population as compared to 0.09 ppm).
\bibitem{128} See \textit{id.} at 38,868.
\end{thebibliography}
ninety-five percent confidence level of statistically significant exposure-related health effects.\footnote{129}

Congress spoke to the EPA through the CAA and provided “multiple specific restrictions” on discretionary interpretation of Section 109.\footnote{130} The CAA prescribes the legal standard that the EPA is to apply, factors to consider in evaluating that standard, the body of experts that the EPA must consult, and a “veritable code of rules” to follow in implementing congressional policy.\footnote{131} In addition to the complex series of requirements that are set out in the CAA, intangible limits to EPA decisionmaking will likely reduce any pragmatic danger of overstepping congressional bounds.\footnote{132}

Given the extensive legislative oversight provided to the EPA throughout the history of the CAA, the EPA’s authority in promulgating the NAAQS would seem to compare “extremely favorably to the assignments of authority from Congress to the executive that [the Supreme Court] has upheld, many of which have left large and basic questions for the agency to address.”\footnote{133} In the NAAQS promulgation process, congressional influence and guidance

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\textbf{132.} See Richard J. Pierce, Jr., The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine, 52 ADMIN. L. REV. 63, 94-95 (2000) (arguing political accountability of the President serves as an adequate check to unbounded EPA rulemaking under section 109). At oral argument for Browner, the EPA outlined the intelligible principle under the CAA as follows: “[f]or a discrete set of pollutants and based on published air quality criteria, EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air.” Argument Transcripts: 99-1257: Browner v. American Trucking Associations at 5, available at http://www.supremecourtus.gov/calendar/arguments_trans.html (visited Nov. 21, 2000) [hereinafter Argument Transcripts]. General Seth P. Waxman argued on the EPA’s behalf, outlining that the lower court’s demand for a determinate criterion “fundamentally misconceive[d]” the CAA and duties of the EPA Administrator under the statute. See id. at 14.

\textbf{133.} Brief of Massachusetts, supra note 107, at *35 (citing as examples Yakus v. United States, 321 U.S. 414 (1944); Opp Cotton Mills v. Admin’t Wage & Hour Div., Dep’t of Labor, 312 U.S. 126 (1941); Buttfield v. Stranahan, 192 U.S. 470 (1904)).
is present at virtually every significant decision point, effectively eliminating the risk of unbridled EPA discretion. ¹³⁴

IV. AMERICAN TRUCKING ASSOCIATIONS V. ENVIRONMENTAL PROTECTION AGENCY: THE D.C. CIRCUIT COURT’S ATTEMPT AT RECONCILING THE CLASSIC AND NEW NONDELEGATION FRAMEWORKS

A. In Search of an Intelligible Principle: The Majority’s Nondelegation Analysis

Despite the long and detailed outline of administrative requirements in the NAAQS promulgation process, various industry participants challenged the EPA’s decisionmaking authority in promulgating NAAQS for O₃ and PM. Included among these challenges was a nondelegation argument; ultimately, it was the D.C. Circuit Court’s acceptance of the rather offhanded argument that generated much of the controversy in Whitman. Judge Williams, writing for the American Trucking majority, wove both classic and new nondelegation elements into the opinion. ¹³⁵ Most notably, the initial paragraph of the decision states that “EPA appears to have articulated no ‘intelligible principle’ to channel its application of [the Clean Air Act]; nor is one apparent from the statute.”¹³⁶ The mixing of the interpretive language is curious if viewed through either the classic or new nondelegation prisms.¹³⁷ Traditionally, the only interpretation at issue would involve the relevant portions of the

¹³⁴ See id. at *29-37; see also Am. Trucking Ass’ns v. EPA, 175 F.3d 1027, 1058-61 (D.C. Cir. 1999) (Tatel, J., dissenting in part) (“The Agency has been given a well defined task by Congress . . . . The Clean Air Act outlines the approach to be followed by the Agency . . . . Yet there are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers . . . .”).
¹³⁵ See Am. Trucking, 175 F.3d at 1034-38.
¹³⁶ Id. at 1034 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).
¹³⁷ Indeed, the majority’s intermingling of two distinct concepts—constitutional analysis under Article I and common statutory interpretation—arguably borrows words from classic delegation cases but “places them in a context that distorts their meaning.” Reply Brief for Petitioners at *4, Am. Trucking Ass’ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (No. 99-1257) [hereinafter Petitioner’s Reply Brief].
NONDELEGATION DOCTRINE

CAA; any intelligible guidelines would be scoured from the enabling statute rather than any subsequent agency rulemaking. Conversely, the dawning trend of delegation cases to be decided under new tenets would focus on the agency application of the original statute.

Examining section 109(b)(1) of the CAA, the court found the EPA's lack of "determinate criterion for drawing lines" to be "fatally incomplete." At issue were the newly-promulgated regulations for ground-level O₃ and PM. Of particular note was the EPA's conclusion that both O₃ and PM were non-threshold pollutants; that is, no particular point exists at which exposure to the pollutant would be harmless. As such, the EPA's decision to set the allowable exposure point along a continuum of pollutant levels was, to the court, riddled with indeterminacy. In essence, the EPA's "explanations for its decisions amount to assertions that a less stringent standard 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." The court objected to such an approach as a simple restatement of the truism that more pollution is bad for public health, while less pollution is a benefit. The court outlined that picking a point along the continuum for a non-threshold

138. See supra Part II.A.
139. See Davis, New Approach, supra note 12, at 714-15; supra Part II.
140. Under the subsection, the EPA must set each NAAQS at the level "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1) (1994). Subsection 109(d)(1) of the CAA mandates that any EPA revision of existing NAAQS (as was the case in the court of appeals) is governed by the same standard. See 42 U.S.C. § 7409(d)(1).
141. Am. Trucking, 175 F.3d at 1034 (D.C. Cir. 1999).
142. In 1997, the EPA issued, after a public notice and comment period, standards for both compounds to protect human health and the public welfare. See generally NAAQS for PM, supra note 129; NAAQS for Ozone, supra note 117.
143. See Am. Trucking, 175 F.3d at 1034. Arguably, threshold pollutants pose no nondelegation dangers under section 109 of the CAA, as the EPA could set a determinate point at which no harm to public health would exist. Presumably, this criterion would settle the circuit court's rhetorical question of "how much [pollution] is too much?" Id.
144. See id. at 1036. The decision states in colorful illustration: "[h]ere it is as though Congress commanded EPA to select 'big guys,' and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point." Id. at 1034.
145. Id. at 1035.
146. See id.
pollutant was arbitrary and in no way explained why one level rather than another was "requisite to protect the public health with an adequate margin of safety."\textsuperscript{147} Stressing that the EPA's logic could be used to justify any arbitrary point along the continuum of pollutant exposure, the court opined that the EPA's standard "could also be employed to justify a refusal to reduce levels below those associated with London's 'Killer Fog' of 1952."\textsuperscript{148} Consequently, the court concluded that the EPA had adopted a wider latitude in its authority\textsuperscript{149} than that claimed by OSHA in a previous D.C. Circuit case.\textsuperscript{150}

B. A Novel Solution: Remanding to EPA to Narrow an Impermissible Congressional Delegation

Comparing the EPA's interpretation of CAA section 109 to OSHA's claimed authority in \textit{Lockout/Tagout I}, the court elected to take the same salutary approach, remanding the issue to the EPA to search for an intelligible principle in the enabling statute.\textsuperscript{151} Judge Williams, drawing from his own past opinion, explained:

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

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\textsuperscript{147} \textit{Id}. (quoting 42 U.S.C. § 7409(b)(1)).
\textsuperscript{148} \textit{Id}. at 1036-37. The atmospheric event referred to by the panel majority caused approximately 4000 deaths in a week as a result of exposure to particulate levels in excess of 2500 µg/m\textsuperscript{3}. \textit{See id.}
\textsuperscript{149} \textit{See id}. at 1037.
\textsuperscript{150} \textit{See Int'l Union United Auto., Aerospace, & Agric. Implement Workers of Am. v. Occupational Safety and Health Admin.}, 938 F.2d 1310, 1317 (D.C. Cir. 1991) (\textit{Lockout/Tagout I}). There, the court characterized OSHA's interpretation of its enabling act as latitude to "do nothing at all" or to "require precautions that take the industry to the verge of economic ruin" with "all positions in between . . . evidently equally valid." \textit{Id.}
\textsuperscript{151} \textit{Am. Trucking}, 175 F.3d at 1038.
\end{flushleft}
but to give the agency an opportunity to extract a determinate standard on its own.\textsuperscript{152}

The EPA appealed the adverse decision and petitioned the panel for a rehearing, which was denied with no further discussion of the nondelegation issues.\textsuperscript{153} On a separate petition for rehearing en banc, the panel voted five to four in favor of rehearing.\textsuperscript{154} However, federal appellate procedural rules allow full panel review only if a majority of active judges votes to rehear.\textsuperscript{155} Because eleven active judges sit on the D.C. Circuit, the petition fell short of the six votes necessary to mandate a rehearing en banc.\textsuperscript{156} In the per curiam opinion outlining the denial of rehearing en banc, the court rejected the EPA’s proffered intelligible principle in the CAA as inapposite, because the agency had failed to outline the principle in any actual NAAQS rulemaking procedure.\textsuperscript{157} The EPA filed a petition for certiorari with the United States Supreme Court, which granted it soon thereafter.\textsuperscript{158} The Court heard oral argument for \textit{Whitman v. American Trucking Associations} on November 7, 2000, and handed down the final decision on February 27, 2001.\textsuperscript{159}

The circuit court’s decision to remand the NAAQS rulemaking procedure to the EPA for further determination exemplifies the new nondelegation approach.\textsuperscript{160} As such, the Supreme Court had before it

\textsuperscript{152} \textit{Id.} at 1038 (citing \textit{Lockout/Tagout I}, 938 F.2d at 1313). The agency-narrowing strategy was applied in a previous D.C. District Court opinion from some years prior. \textit{See Amalgamated Meat Cutters v. Connally}, 337 F. Supp 737, 758-59 (D.D.C. 1971).

\textsuperscript{153} \textit{See Am. Trucking Ass’ns v. EPA}, 195 F.3d 4 (D.C. Cir. 1999). The court granted rehearing on some issues unrelated to nondelegation. \textit{See id.} at 8-10 (granting rehearing on initial interpretation of factors allowed in NAAQS rulemaking for ozone).

\textsuperscript{154} \textit{See id.} at 4. Two judges recused themselves from the petition for rehearing. \textit{See id.}

\textsuperscript{155} \textit{See FED. R. APP. P.} 35(a) (outlining the active judge majority vote requirement for a petition for rehearing en banc).

\textsuperscript{156} \textit{See Am. Trucking}, 195 F.3d at 13.

\textsuperscript{157} \textit{See id.} at 6-7.

\textsuperscript{158} 68 U.S.L.W. 3719 (U.S. May 23, 2000).

\textsuperscript{159} A transcript of the oral argument is available at the Supreme Court’s website. \textit{See generally} Argument Transcripts, \textit{supra} note 132.

\textsuperscript{160} \textit{See supra} Part ILA-B. In addition, the court’s per curiam opinion provides a glimpse into the source of the original majority’s agency-narrowing strategy. \textit{See Am. Trucking}, 195 F.3d at 8 (citing
the first opportunity to speak directly on the role of agency self-
interpretation and the explicit place of the “new” nondelegation
doctrine in constitutional analysis.

V. THE NONDELEGATION DOCTRINE AT A CROSSROADS: SUPREME
COURT TREATMENT OF NONDELEGATION ISSUES IN WHITMAN V.
AMERICAN TRUCKING ASSOCIATIONS

The Supreme Court’s disposition of the nondelegation issue in
Whitman—the subject of voluminous briefs, legal commentary and
amicus contributions—covers little more than two pages in the
evenerable Supreme Court Reporter.161 For its succinct treatment,
Justice Scalia’s opinion162 reaffirmed the traditional tenets of the
nondelegation doctrine and found that the CAA section at issue easily
fit within the liberal framework for analysis of congressional
degradation.163

Justice Scalia’s opinion initially recognized that in a nondelegation
case, the constitutional question is whether the challenged statute has
delegated “legislative power” to the agency.164 The Court
categorically rejected the lower court’s interpretation of agency-
narrowing of a broad congressional delegation and with it, the so-
called “new” nondelegation approach:

We have never suggested that an agency can cure an unlawful
degregation of legislative power by adopting in its discretion a
limiting construction of the statute. . . . The idea that an agency
can cure an unconstitutionally standardless delegation of power

Davis, New Approach, supra note 12.
161. See Whitman, 121 S. Ct. at 911-14.
162. The decision was unanimous in the nondelegation result; that is, Congress properly delegated
power under the CAA to the EPA; additionally, the Court held that the D.C. Circuit Court’s agency-
narrowing approach was incorrect. Justices Thomas, Breyer and Stevens each filed concurrences;
Justice Souter joined in the latter concurrence. See infra notes 174-81 and accompanying text.
163. See Whitman, 121 S. Ct. at 913.
164. Id. at 912.
The Court went on to apply the traditional intelligible principle test to section 109(b)(1) of the CAA. The Court held that the scope of the statute "is in fact well within the outer limits of our nondelegation precedents." The Whitman Court recognized that past Supreme Court decisions have approved of extremely expansive delegations of authority; namely, those delimited only within the "public interest." Reflecting on the paucity of successful nondelegation challenges, the Court summarized its position: "In short, we have '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.'" In even broad delegations, however, the Court noted that

165. Id. at 912 (citations omitted).
167. Whitman, 121 S. Ct. at 913 (citing NBC v. United States, 319 U.S. 190, 225-26 (1943)).
168. Id. (citing Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).
it did not interpret the nondelegation doctrine as requiring a “determinate criterion” within each authorizing statute.\footnote{170}

Perhaps most important to the Court’s holding that Congress provided an intelligible principle was the statutory language requiring that the EPA set standards “requisite” to protect human health.\footnote{171} The Court interpreted this qualifier to mean that air quality standards were to be set “not higher or lower than is necessary to protect the public health with an adequate margin of safety.”\footnote{172} The Court ultimately reversed the Court of Appeals’ holding on the delegation issue and remanded back to that court on separate and distinct grounds.\footnote{173}

Justice Stevens wrote a separate concurrence, joined by Justice Souter.\footnote{174} The gist of Justice Stevens’ concurring opinion was a criticism of Justice Scalia’s classification of the delegated power at issue. The Court, according to Justice Stevens, pretended that the authority delegated to the EPA under the CAA is not actually legislative power but instead some unidentified species of executive discretion.\footnote{175} In the alternative, Justice Stevens suggested that the Court simply identify the power at issue as legislative in nature, but sufficiently cabined by the terms of the authorizing statute.\footnote{176} The concurrence stressed that such an interpretation would properly characterize governmental power by its inherent nature—not by the entity exercising it.\footnote{177} In conclusion, Justice Stevens summarized: “It seems clear that an executive agency’s exercise of rulemaking authority pursuant to a valid delegation from Congress is ‘legislative.’

\footnote{170}{Id. The Court further recognized the near-axiomatic in repeating that a “certain degree of discretion, and thus of lawmaking, inhere[s] in most executive or judicial action.” \textit{Id.} (quoting \textit{Mistretta}, 488 U.S. at 417 (Scalia, J., dissenting)) (emphasis omitted).}
\footnote{171}{Id. at 914.}
\footnote{172}{Id.; \textit{see also} 42 U.S.C. § 7409(b)(1) (1994).}
\footnote{173}{\textit{See Whitman}, 121 S. Ct. at 914.}
\footnote{174}{\textit{See id.} at 920 (Stevens, J., concurring in part and concurring in the judgment).}
\footnote{175}{\textit{See id.} at 920-21.}
\footnote{176}{\textit{See id.} at 920.}
\footnote{177}{\textit{See id.} at 920-21.}
As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it."\textsuperscript{178}

Justice Thomas concurred separately.\textsuperscript{179} He wholly agreed with the Court's intelligible principle and agency remand findings yet voiced concern over the very premise of congressionally-proscribed limits to otherwise vague delegations.\textsuperscript{180} Noting that the Constitution does not mention intelligible principles, Justice Thomas hypothesized that some legislative power delegations, though completely demarcated by intelligible principles, might nevertheless violate the Constitutional mandate that \textit{all} legislative power be vested in Congress. In a strict analytical framework, Justice Thomas indicated that the Supreme Court nondelegation jurisprudence may have "strayed too far from our Founders' understanding of separation of powers."\textsuperscript{181}

\section*{VI. \textit{Whitman} and the Nondelegation Doctrine: Faithful Adherence to a Devalued Doctrine}

\subsection*{A. An Analysis of What the Whitman Court Did Say: Scant Treatment of a Constitutional Doctrine}

The Supreme Court's brief treatment of the delegation issues demonstrated that the NAAQS as promulgated fit within the hallowed intelligible principle analysis of past Supreme Court decisions.\textsuperscript{182} In rejecting the circuit court's doctrinal treatment, the Court reasserted the place of the nondelegation doctrine within constitutional analysis

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\item \textsuperscript{178} \textit{Id.} at 921. Justice Stevens clearly indicated that his concurrence in the result was aligned with the Court holding that the CAA was within the constitutional boundaries of permissible delegation. On this point, the \textit{Whitman} opinions were unanimous. \textit{See id.} at 920.
\item \textsuperscript{179} \textit{See Whitman}, 121 S. Ct. at 919 (Thomas, J., concurring).
\item \textsuperscript{180} \textit{See id.} at 920. Justice Breyer also concurred separately, on issues unrelated to the Court's nondelegation holding. \textit{See id.} at 921-24 (Breyer, J., concurring in part and concurring in the judgment).
\item \textsuperscript{181} \textit{Id.} at 920. Thomas recognized that the outer limit of the intelligible principle doctrine was beyond the scope of the case before the Court. \textit{See id.} In limiting his decision to the issues before the Court, Thomas noted that "none of the parties to this case has... asked us to reconsider our precedents on cessions of legislative power." \textit{Id.}
\item \textsuperscript{182} \textit{See id.} at 913.
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\end{footnotesize}
and simultaneously dismissed the notion that self-limiting application of near-unbounded rulemaking power could cure an otherwise overly permissive congressional delegation.\footnote{See id. at 912.}

The \textit{Whitman} Court decided the general nondelegation issue correctly, at least in terms of adherence to previous precedent.\footnote{See id. at 913-14.} The Supreme Court has long sustained broad congressional delegations of authority to administrative agencies.\footnote{See \textit{Am. Trucking} 175 F.3d at 1057 (Tatel, J., dissenting in part) ("Yet this court now threatens to strike down section 109 of the Act as an unconstitutional delegation of congressional authority unless EPA can articulate an intelligible principle cabining its discretion. In doing so, the court ignores the last half-century of Supreme Court nondelegation jurisprudence . . . ."); see also Brief for Environmental Defense, \textit{supra} note 19, at *20; Sunstein, \textit{Clean Air Act}, \textit{supra} note 15, at 330-31.} Benchmark nondelegation cases have often echoed judicial sentiments of approval when congressional delegations entail administrative discretion in policy realms that require expert and flexible decisionmaking.\footnote{See \textit{Yakus v. United States}, 321 U.S. 414, 426-27 (1944) (sustaining delegation of authority to the Price Administrator to fix "fair and equitable" commodities prices on grounds of swift decisionmaking capability); J.W. Hampton, Jr., \& Co. v. United States, 276 U.S. 394, 406 (1928) ("if Congress were required to fix every [tariff] rate, it would be impossible to exercise the power at all.").} Justice Scalia’s opinion stressed that the classic intelligible principle test remained a vital part of the nondelegation analysis.\footnote{See \textit{Whitman}, 121 S. Ct. at 912-13.}

The Court also correctly held that the D.C. Circuit Court’s remand interpretation had no proper constitutional footing within the nondelegation doctrine.\footnote{See \textit{supra} Part I.B.} The underlying purpose of the nondelegation doctrine is that Congress, as the representatives of the populace, must make the important societal choices concomitant with their elected status.\footnote{See id. at 913.} By rejecting the agency-narrowing approach espoused by Judge Williams, the Court implicitly ratified the underlying principles of the nondelegation framework. The \textit{Whitman} majority left no doubt that courts had a predominant role to play in ensuring judicial review of delegation dilemmas; conversely, the
Court outlined that administrative agencies have no role in finding the proper constitutional limits to unfettered legislative grants of authority.\textsuperscript{190}

The \textit{Whitman} Court's clarion call to Congress and administrative agencies, indicating the role of courts in resolving delegation challenges, was certainly necessary. The end result of the \textit{American Trucking} decision—remand to the EPA—provided an at least arguably superior approach to resolution of delegation challenges. Judge Williams characterized the agency-narrowing approach as an open attempt for the agency to "extract" an intelligible principle from the CAA.\textsuperscript{191} In doing so, the panel claimed to serve "at least two of three basic rationales for the nondelegation doctrine."\textsuperscript{192} The circuit court outlined that an agency's self-defined limits would both diminish the likelihood of arbitrary exercise of delegated authority providing for meaningful standards for any necessary judicial review.\textsuperscript{193}

While couching the benefits of such a remand strategy positively, the \textit{American Trucking} court explicitly conceded that the agency remand approach "of course does not serve the third key function of [the] non-delegation doctrine,"\textsuperscript{194} that is, to assure that important social policy choices are made by Congress.\textsuperscript{195} Although the circuit court offered the unsupported assertion that the agency could still make the basic policy choices under a remand strategy,\textsuperscript{196} such a conclusion contradicted numerous other portions of the opinion. Notably, the court's scant examination of the CAA indicated only

\begin{itemize}
\item \textsuperscript{190} See \textit{Whitman}, 121 S. Ct. at 912. Simultaneously, the Court conceded that it "almost never felt qualified" to question the propriety of a given congressional delegation. \textit{Id.} at 913.
\item \textsuperscript{191} \textit{Am. Trucking}, 175 F.3d at 1038.
\item \textsuperscript{192} \textit{Id}.
\item \textsuperscript{193} See \textit{id}; see also Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971).
\item \textsuperscript{194} \textit{Am. Trucking}, 175 F.3d at 1038 (emphasis added).
\item \textsuperscript{195} See Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); see also supra Part I.B.
\item \textsuperscript{196} See \textit{Am. Trucking}, 175 F.3d at 1038.
\end{itemize}
perfunctorily that no intelligible principle was discernible from the statute.\textsuperscript{197}

The circuit court’s solution to the impermissible delegation—remand to the agency for a clarification of operative principles—blatantly and improperly ignores the predominant values behind the classic nondelegation doctrine.\textsuperscript{198} If a statutory grant of authority is ambiguous or impermissibly open ended, then an administrative narrowing of proper agency action in no way satisfies the nondelegation goal that elected representatives make important social policy choices.\textsuperscript{199}

By [remanding to EPA] . . . the panel undermines the purpose of the nondelegation doctrine. That purpose is, of course, to ensure that Congress makes the crucial policy choices that are carried into law. . . . It hardly serves—indeed, it contravenes—that purpose to demand that EPA in effect draft a different, narrower version of the Clean Air Act.\textsuperscript{200}

Perhaps most problematic about the remand strategy in \textit{American Trucking} is the court’s awkward attempt to shoehorn the purported solution into an improperly labeled framework.\textsuperscript{201} “The fundamental point of the nondelegation doctrine is to ensure legislative rather than administrative judgments about the content of federal law.”\textsuperscript{202} A remand to the EPA for failure to delineate its own construction of a decades-old statute hardly fits the classic definition of the

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\textsuperscript{197} See \textit{id.} at 1034. The court failed to examine any legislative history or prior interpretations of the CAA in declaring the absence of an intelligible principle. See \textit{id.}

\textsuperscript{198} See Sunstein, \textit{Clean Air Act}, supra note 15, at 350-351.

\textsuperscript{199} See \textit{Am. Trucking}, 195 F.3d at 15 (Silberman, J., dissenting from petition for rehearing en banc).

\textsuperscript{200} Id. Judge Silberman also contended that any benefits of an agency remand—including guarding against arbitrariness and providing standards for judicial review—are values of only secondary importance. See \textit{id.} at 16 n.2. Given the doctrine’s constitutional origins, only the benefits from Congress' popular expression would have dispositive analytical value. See \textit{id.}


\textsuperscript{202} Id. at 350.
nondelegation doctrine. The ultimate implication of the remand strategy failed to provide meaning to the constitutional origins of the nondelegation doctrine.

If indeed the nondelegation doctrine exists to guard against untrammeled grants of legislative authority, it is difficult to envision how allowing the EPA to interpret its own enabling statute would serve such lofty political accountability goals. Simply put, if agency interpretation of its own enabling statute has a proper role, it falls short of the constitutional importance attached to the nondelegation doctrine label affixed by the American Trucking court. On this level, the Whitman Court was correct in proclaiming that courts indeed have the final say in determining legislative delegations.

On a theoretical level, commentators on the “new” nondelegation doctrine have noted inherent political safeguards that would largely blunt any objections to agency narrowing of ambiguous congressional grants of authority. Specifically, proponents of the new mode of thinking argue that agencies may adopt procedural hurdles to arbitrary decisionmaking. As far back as Schechter Poultry, the Court recognized that internal agency procedures could promote accountability and allow for a forum in which the public voice might

203. See id. at 351.
205. See id. at *32. Agency-narrowing, while in practice a common part of review under numerous administrative law canons, has long been rejected as a constitutional minimum once delegation concerns are satisfied. See Am. Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). There, the Court held that the nondelegation doctrine does not require “that the legislative standards be translated by the [agency] into formal and detailed rules of thumb prior to their application to a particular case. If the agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.” Id.
206. See Sunstein, Clean Air Act, supra note 15, at 351. Framing what might well be a valid administrative law challenge under the Administrative Procedure Act in nondelegation terms confuses the inquiry. See supra notes 198-205 and accompanying text.
208. See Bressman, supra note 28, at 1423-30 (arguing that administrative narrowing promotes rule of law and satisfies delegation concerns).
be heard.209 Further, as Judge Williams argued in *American Trucking*, such administrative self-policing would provide both a shield against arbitrary agency action and meaningful standards for judicial review.210

The *Whitman* Court, only tangentially touching on the ultimate implication of agency remand, explained that such an intellectual construct was "internally contradictory."211 While safeguards from within an agency may provide some measure of comfort, such theoretical shields do not provide an excuse for confusing nondelegation doctrine jurisprudence.212

Explicit in the D.C. Circuit Court’s criticism of the EPA’s interpretation of the CAA was a call to reformulate the notions of delegation jurisprudence.213 However, the *Whitman* case provided a suitably unimpressive vehicle for doing so under auspices of "new" agency self-policing.214 Under the CAA, Congress has carefully specified the EPA’s responsibilities and monitored subsequent agency actions.215 Further, the cooperative efforts between Congress and the EPA over the past three decades have led to ongoing, constant reassessment of proper executive branch responsibilities (as

210. *See* Am. Trucking Ass’ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999); *see also* Sunstein, *Clean Air Act, supra* note 15, at 350 (arguing if agencies use procedures as safeguards to discipline their own discretion, then “an otherwise troubling delegation might be upheld”).
213. *See Am. Trucking*, 175 F.3d at 1034-37 (D.C. Cir. 1999). Given that the D.C. Circuit Court could very well have invalidated the EPA action on administrative grounds, the signals that the panel wished to bring the doctrine to the fore were unmistakable. *See* SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) (requiring administrative agencies to explain the rationale behind regulatory enactments); Royce C. Lamberth, *Reflections on Delegation in the Chevron Era*, 56 FOOD & DRUG L.J. 11, 15 n.26 (2001) (pointing out nonconstitutional grounds that the D.C. Circuit may have used to reject the EPA’s CAA interpretation).
215. *See supra* Part III.
well as federal-state relations) under NAAQS implementation.\footnote{216} Replacing the classic nondelegation doctrine with the "new" mode of delegation analysis, constitutional in name but rooted in statutory narrowing, would require abandonment of six decades of unbroken precedent.\footnote{217} Most troubling, though not noted by the \textit{Whitman} Court, was the potential implication of such a remand approach for other statutory delegations, given that the CAA is relatively specific. "[T]he Court cannot invalidate Section 109 without calling into question countless Acts of Congress."\footnote{218} As the \textit{Whitman} holding exemplified, the best hope from a separation of powers viewpoint was the suggestion that the democratically elected Congress, not an unelected judiciary, amend the CAA through traditional channels.\footnote{219}

\textbf{B. That Left Unsaid: Baffling Omissions from Whitman}

Despite the \textit{Whitman} Court's straightforward treatment of the nondelegation doctrine, the court failed to travel down a slightly more complex, yet beneficial, analytical road. Given past precedent in the air pollution and technically complex delegation realms, the Court would have done well to further describe the doctrine as applied in this rather tangled administrative age. Instead, the Court's reflexive

\footnote{216} See \textit{supra} Part III. "The CAA illustrates how 'separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.'" Petitioner's Reply Brief, \textit{supra} note 137, at *10 (quoting Loving v. United States, 517 U.S. 748, 771 (1996)).


\footnote{218} Petitioner's Reply Brief, \textit{supra} note 137, at *10. Some amici had an even gloomier forecast of the implications of a Supreme Court affirmance of the court of appeals' reasoning. See Brief of Massachusetts, \textit{supra} note 107, at *41. "The notion, embraced by the court below, that a congressional assignment of authority, or an agency's exercise of that authority, is constitutionally defective because it does not specify precise stopping points for regulation would require fundamental restructuring of much of modern government." \textit{Id}.

\footnote{219} Indeed, the Supreme Court has "repeatedly . . . said that when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.'" \textit{Whitman v. Am. Trucking Ass'ns}, 121 S. Ct. 903, 912 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).
citation to broadly-worded precedent, in the face of a narrowly cabined statutory grant of authority, ill-serves the underlying purposes of the nondelegation doctrine.

Although the nondelegation doctrine is cemented by separation of powers concerns, the Court has often cited to the realities of a workable modern government which requires the delegation of significant authority to expert, scientifically capable agencies.\(^{220}\) Strangely, the Court in \textit{Whitman} failed to cite past "necessity" rationales to justify the broad CAA delegations, though courts generally give particular deference to delegations in the complex environmental realm.\(^{221}\) The Court's omission of this rationale is more surprising given Justice Scalia's explicit opinion on the issue.\(^{222}\)

The \textit{Whitman} Court paused only briefly to consider the actual intelligible principles involved with the NAAQS sections of the CAA.\(^{223}\) The Court could have examined the statute at issue in more depth at the expense of a laundry list of general statutory language approved in past nondelegation holdings.\(^{224}\) The enabling language at

\begin{quote}
\begin{itemize}
\item \textit{See, e.g.,} Mistretta \textit{v.} United States, 488 U.S. 261, 372 (1989) (stating "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").
\item \textit{See United States v. Grimaud,} 220 U.S. 506 (1911). There, the Court upheld U.S. Forest Service permit requirements, articulating "[i]n the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management." \textit{Id.} at 516; \textit{see also} United States \textit{v.} Henry, 136 F.3d 12 (1st Cir. 1998) (holding that substantive factors are unnecessary to sustain Resource Conservation and Recovery Act delegation, because a list of factors suffice to provide intelligible principle).
\item As the author of the majority \textit{Whitman} opinion once observed:
\begin{quote}
By no means can the environmental laws be considered among those conferring the greatest amount of discretion upon the agencies. In fact, they are probably among those conferring the least. Not only is general policy not left to be disposed of by the agencies under the general standard of "public interest, convenience and necessity," but in some areas even cost-benefit analysis is excluded. For example, national primary ambient air quality standards are to be established not in light of what is "feasible" or "reasonable" . . .
\end{quote}
\textit{but rather on the sole basis of what is "requisite to protect the public health."}
\item \textit{See Whitman,} 121 S. Ct. at 912-13.
\item The Court cited numerous cases approving broad statutory delegations; incredibly, congressional direction to regulate nationwide industries in the "public interest" has passed the Court's liberal test for
\end{itemize}
\end{quote}
issue in section 109 is much more narrowly demarcated than numerous delegations the Court previously sustained and should have been developed in more detail.\textsuperscript{225}

If, at the D.C. Circuit’s urging, the Supreme Court wished to retool nondelegation jurisprudence into an agency-narrowing prism, it could scarcely have chosen a worse vehicle to do so than section 109 of the CAA.\textsuperscript{226} The congressional guidance involved with the multiple reworkings and refinings may represent the statutory high water mark of principled delegation to an executive agency.\textsuperscript{227} Congress has consistently revisited the CAA when new scientific evidence emerged; Congress has indeed exercised its constitutional responsibility to legislate with “exact[ing] care.”\textsuperscript{228} The court of appeals’ call for a “determinate criterion”\textsuperscript{229} was both pragmatically impossible and scientifically unjustified in the context of air pollution control.\textsuperscript{230} In \textit{Whitman}, the Supreme Court should have taken the time to say as much.

In an area as technically complex and as administratively bounded as NAAQS promulgation, the \textit{Whitman} opinion stopped short of the constitutional muster. \textit{See id.} at 913; \textit{see also} New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24-25 (1932) (approving of agency power to approve railroad consolidation in the public interest).

\textsuperscript{225} \textit{See}, e.g., Fed. Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944) (upholding FPC’s authority to determine “just and reasonable rate[s]” for consumers); NBC v. United States, 319 U.S. 190, 225-26 (1943) (affirming the Federal Communication Commission’s authority to regulate broadcast licensing in the “public interest”).

\textsuperscript{226} \textit{See Brief of Massachusetts}, \textit{supra} note 107, at 38-43; Robert W. Adler, \textit{American Trucking and the Revival (?) of the Nondelegation Doctrine}, 30 \textit{Envtl. L. Rep.} 10233, 10233 n.132-33 (Apr. 2000) (noting the discretion inherent in most environmental statutes, including risk-benefit analysis, would remain unintelligible under a self-policing agency regime).

\textsuperscript{227} Section 109’s directives are “far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years.” Am. Trucking Ass’ns v. EPA, 195 F.3d 4, 16 (D.C. Cir. 1999) (Tatel, J., dissenting from denial of rehearing en banc) (citing 42 U.S.C. §§ 7409 (b)(1), 7408(a)(2)).

\textsuperscript{228} \textit{See Brief for Petitioners at *23-24, Am. Trucking Ass’ns v. EPA}, 175 F.3d 1027 (D.C. Cir. 1999) (No. 99-1257) [hereinafter Petitioner’s Brief] (noting that CAA occupies nearly 300 pages in the United States Code, is scientifically complex, and is “extraordinarily detailed and prescriptive”).

\textsuperscript{229} Am. Trucking Ass’ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

\textsuperscript{230} That the court of appeals would require a quantitative congressional guide for the EPA is difficult to deny; hints as to the types of guidance that would have passed Constitutional muster are definitionally quantitative. \textit{See id.} at 1037-40 (citing cost-benefit analysis, generic units of harm, and quality-adjusted life years as determinate criteria).
analysis that would have clarified some of the relevant factors in determining the intelligible principles so critical to congressional action. That the Court could miss such an opportunity to instruct Congress on the necessary types of guidance is unfortunate.

Instead, the Court merely indicated that agency discretion could vary based upon the type of power congressionally conferred. The Court answered the question of whether an intelligible principle is required with a resounding yes; but it chose to answer queries as to what could even theoretically comprise such principles with an equally resounding silence.

A more detailed and specific nondelegation analysis could have also better settled the Court of Appeals’ contention that a statute needed a determinate criterion to remain intelligibly bounded. The Whitman Court’s cherry-picked references to cases in which the continuum arguments were not clearly raised dodges the issue. In essence, the Court avoided the unique nature of non-threshold

231. “It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.” Mistretta, 488 U.S. at 415 (Scalia, J., dissenting).

232. See Randolph J. May, The Nondelegation Doctrine: Justices Missed the Boat Recently by Reviving Ban on Transferring Power, FULTON COUNTY DAILY REP., Mar. 29, 2001, at 10 [hereinafter May, Nondelegation Doctrine] (“[B]y relying on cases affirming such standardless legislation, the Supreme Court missed an important opportunity. It could have signaled a rethinking of its nondelegation jurisprudence . . .”).


234. See id. The Court did indicate that a generic sliding scale approach was proper; that is, no congressional guidance was necessary for wholly minor delegations, but “substantial guidance” was necessary on matters “that affect the entire national economy.” Id. Such a characterization merely implies that what is an intelligible principle in one case may not be in another. The Court was silent as to any other factors or criteria by which to conduct future nondelegation inquiries.

235. See Am. Trucking Ass’n v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

236. See Whitman, 121 S. Ct. at 913. Justice Scalia stated:

In Touby, for example, we did not require the statute to decree how “imminent” was too imminent, or how “necessary” was necessary enough, or even—most relevant here—how “hazardous” was too hazardous. Similarly, the statute at issue in Lichten authorized agencies to recoup “excess profits” paid under wartime Government contracts, yet we did not insist that Congress specify how much profit was too much.

Id. at 913 (citations omitted).
pollutants by citing to generic adjectives from past broad nondelegation holdings.237

More on-point precedent was certainly available. In the air pollution realm, the Court's previous decisions have properly sustained agency rulemaking along a continuum of possibilities, without requiring Congress to provide a determinate criterion to explain a precise point selected.238 As such, the Court's insistence in citing previously approved standards might further frustrate valid delegation challenges in the future.239

VII. THE FUTURE OF THE NONDELEGATION DOCTRINE

The Whitman decision had several implications for the long and relatively storied constitutional jurisprudence surrounding the nondelegation doctrine. Initially, the Court reaffirmed the traditional "classic" doctrinal analysis, including the search for an intelligible principle within congressional delegations of power.240 Additionally, the Court reasserted that the search for intelligible principles would not be overly demanding, as delegations as broad as those in the "public interest" sufficiently cabined agency discretion.241

237. See id. (approving past nondelegation decisions finding intelligible principles in statutory guidelines governing "imminent" harm, "excess" profits, and "necessary" efforts to guard public safety).

238. See Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980). Justice Stevens' plurality opinion announced that the Secretary of Labor had to make a threshold determination of a "significant risk of harm" from benzene exposure prior to promulgating a regulation. Id. at 642 (Stevens, J., announcing decision of court as plurality). Justice Marshall's dissent, joined by three other Justices, saw no need to engage in this threshold determination. Id. at 708-11 (Marshall, J., dissenting). Accordingly, eight of the nine Justices agreed that Congress could delegate authority to select a permissible benzene exposure level under either an extremely broad "reasonably necessary standard" or under a modest threshold determination. Most significantly, benzene is a non-threshold pollutant like ozone; thus the Whitman Court had clear precedent to support an agency's ability to select among a continuum of possible pollutant levels, once modest statutory requirements were met. See Brief of New York, supra note 14, at 10-11.

239. See infra Part VII.


241. See id. at 913 (citing NBC v. United States, 319 U.S. 190, 225-26 (1943)).
The Court’s unanimous opinion also ended the debate over the “new” form of delegation analysis supported by the D.C. Circuit Court in the lower opinion. To the Whitman Court, any question as to an overly broad delegation was a matter for the judiciary; any recipient of delegated authority would have no voice to determine the constitutionality of the congressional action.

The Court’s analysis of the nondelegation issues left analytical gaps in its apparent simplicity. The CAA, with its multilayered approach to agency rulemaking, is one of the more complex statutes ever adopted by Congress. Given the procedural hurdles involved in the EPA’s promulgation of NAAQS, little danger existed that the EPA would run amok and drive industry to ruin with draconian ambient air quality standards.

Despite these ample pegs within the statutory language, the Court chose to hang its hat on the broad language of past decisions and a few talismanic references within the CAA itself. The Court made clear that any delegation would have to be within the “outer limits” of its nondelegation precedent—limits which are quite broad. Perhaps more troubling is the Court’s reliance on the statutory language requiring the EPA to find the “requisite” level of restrictions necessary to protect public health. While there indeed may be an intelligible principle lurking within these statutory qualifiers, the Court’s insistence that the EPA may promulgate a “correct” level of pollution portends an abdication of congressional responsibility.

243. See Whitman, 121 S. Ct. at 912.
244. See supra Part III.
245. But see Am. Trucking, 175 F.3d at 1034 (criticizing EPA for not providing a determinate criterion in setting NAAQS).
247. Whitman, 121 S. Ct. at 913.
248. Id. at 912, 914.
249. See May, Nondelegation Doctrine, supra note 232, at 10 (“If the Supreme Court would stop touting its earlier approval of such indeterminate delegations as the public interest standard, it might send Congress a message that not all delegations will pass constitutional muster.”).
all Congress must do to delegate difficult decisions is to mandate that an agency promulgate regulations "requisite" to meet the "public interest," any constitutional protection provided by the nondelegation doctrine essentially vanishes.

As the full import of the Whitman decision disseminates throughout the legal community, any regulatory challenges will likely only add to the two-hundred plus "bad years" suffered by the doctrine. The Whitman Court affirmed that highly generic language such as "requisite" and "necessary" would sufficiently cabin congressional delegations of administrative authority, even though the delegations could implicate the entire American economy. Given Justice Scalia's answer to his own rhetorical question from Mistretta, precious few, if any, congressional delegations would not survive a constitutional challenge. And now, given the Court's apparent reliance on "magic words" in its analysis, Congress is unlikely to adopt a statutory construct that would violate traditional nondelegation analysis.

Regulatory challenges in the face of vague congressional delegations will likely lean more heavily on traditional administrative avenues in the post-Whitman landscape. For example, the CAA and general administrative law precedent provide ample procedural safeguards against any untoward action or decisions by the EPA. The CAA itself contains provisions under which agency action is challengeable on traditional administrative law grounds; indeed, the CAA judicial review subsection mirrors those judicial review

250. See Whitman, 121 S. Ct. at 913.
251. See supra notes 231-37 and accompanying text.
252. See May, Nondelegation Doctrine, supra note 232, at 10.
253. See Patricia Ross McCubbin, The D.C. Circuit Gives New Life and New Meaning to the Nondelegation Doctrine in American Trucking Ass'ns v. EPA, 19 VA. ENVTL. L.J. 57, 79 (2000); see also Sunstein, Clean Air Act, supra note 15, at 361 ("[T]he work done by the American Trucking court under the rubric of the nondelegation doctrine is far more reasonably done under review of agency action for arbitrariness.").
254. See 42 U.S.C. § 7607(d)(9)(A) (1994) (allowing a reviewing court to vacate or reverse agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").
provisions of the Administrative Procedure Act. Review under the CAA for arbitrariness would adequately protect against EPA mistakes in the NAAQS rulemaking process. Any judicial inquiry would allow a court to review the EPA’s inclusion of all relevant factors in the rulemaking process, conclusions drawn from scientific studies, and explanations for one NAAQS level over another.

CONCLUSION

The Supreme Court heard oral argument on Browner v. American Trucking Associations on November 7, 2000. The Court handed down its unanimous opinion in the re-styled Whitman v. American Trucking Associations on February 27, 2001. In evaluating the delegation of authority to the EPA under Clean Air Act sections 108 and 109, the Court had the opportunity to revisit a somewhat antiquated constitutional doctrine in light of a vocal lower-court call to revitalize the judicial check on legislative delegation. While the new nondelegation approach has some appeal on a superficial level, the Whitman decision indicated that the “new” nondelegation doctrine does not yet possess sufficient analytical or pragmatic superiority to justify the reversal of two centuries of jurisprudence enshrining

256. For a review of procedural protections within the NAAQS statutory guidelines, see supra notes 118-22 and accompanying text.
257. See McCubbin, supra note 253, at 79 (noting review under CAA would satisfy all questions reviewed by court of appeals under nondelegation spectrum). Even the D.C. Circuit has in the past turned to the internal CAA arbitrariness review standards in evaluating the EPA’s decision not to promulgate a more exacting NAAQS for sulfur dioxide. See Am. Lung Ass’n v. EPA, 134 F.3d 388 (D.C. Cir. 1998). There, the court remanded the EPA’s decision concerning sulfur dioxide levels because the agency’s explanation of the “link between [the Agency’s] conclusion and the factual record . . . [was] missing.” Id. at 392. Rather than follow this recently-hewn path, in essence the American Trucking court constitutionalized the agency remand procedure by cloaking it in nondelegation terms.
258. The oral argument combined two appeals from the circuit court’s decision into a single session, yet delineated equal time for the nondelegation challenges and statutory construction governing revisions to the O3 standard. See generally Argument Transcripts, supra note 132.
259. As noted, the most influential basis for this agency-narrowing approach to delegation issues was Kenneth Culp Davis’ essay. See Davis, New Approach, supra note 12; see also supra Part II.A-B.
judicial acquiescence to congressional delegations. In Whitman, the Supreme Court quickly disposed of the delegation issues and clearly rejected the D.C. Circuit’s unconventional approach to agency-narrowing as a method of constitutional interpretation.

The Whitman case provided a poor vehicle for substantial alteration of an historically-enshrined approach. If the Court were to have upheld the analytic straitjacket suggested by the circuit court, the nine-member Court would thoroughly hinder the EPA’s statutory mission, especially in light of the ever-growing understanding of ambient air pollution. Thankfully, the EPA’s statutory mandate of continual review of NAAQS in light of a host of limiting features hardly portends the “runaway agency” imagery of the lower court’s opinion. Based upon the strong language of the Whitman opinion and its unanimous support, the evolving “new” view of nondelegation seems to have little future in Supreme Court jurisprudence.

Numerous, redundant layers of statutory guidance adequately limit the EPA’s ability to set the NAAQS; as the Court recognized, further agency-proposed narrowing in the form of “determinate criteria” is both unnecessary and unwise. The CAA stands as one of Congress’s most detailed, comprehensive acts; the judicial invalidation of such a broadly-textured NAAQS process would call into question most other major environmental statutes and likely

260. See supra Parts I.A and V.
262. See supra Part VI.B.
263. The CAA explicitly makes EPA development of NAAQS dependent on the “latest scientific knowledge” available on “identifiable effects on public health or welfare.” 42 U.S.C. 7408(a)(2) (1994); see also supra Part III.
264. Judge Williams’ majority opinion, concluding that lack of a determinate criterion would allow the EPA to set a PM standard just below that of the disastrous London Fog, was almost certainly an overstatement. See Am. Trucking Ass’ns v. EPA, 175 F.3d 1027, 1036 (D.C. Cir. 1999). The thousands of deaths from that atmospheric event were triggered by pollution concentration levels approximately fifty times the NAAQS for O₃ and PM before the latest, more stringent CAA revisions. See id. at 1036-37 (citing W.P.D. Logan, Mortality in the London Fog Incident, 1952, LANCET, Feb. 4. 1953, at 336-38). Before elevating allowable concentrations to such catastrophic levels, the EPA would have to disregard substantial evidence cited in previous NAAQS rulemakings indicating health threats from low levels of O₃ and PM. See Fierce, supra note 132, at 68.
265. See supra Part V.
reverberate into other legislative arenas.\textsuperscript{266} Given the internal statutory protections of the CAA and additional protections under the Administrative Procedure Act, the Supreme Court acted correctly in rejecting the lower court’s nondelegation approach.\textsuperscript{267}

Though proper under Supreme Court precedent and pragmatically wise, the Court’s mode of rejecting the lower court’s analysis does little to enshrine the nondelegation doctrine as a useful tool of constitutional interpretation. Instead, the Court’s decision risks devaluing constitutional analysis to the point that a few talismannic references to “requisite” standards in the “public interest” would suffice to make even wholesale congressional delegations of power constitutional.\textsuperscript{268} Unfortunately, in attempting to reaffirm the health of the nondelegation approach, the Court may have sealed the doctrine’s ultimate fate as an analytical framework best left to the New Deal era.\textsuperscript{269} While the nondelegation doctrine may seem to remain an enshrined part of constitutional analysis, its usefulness may be akin to a valued museum piece—in all likelihood, an inevitable repository for the vintage doctrine within a highly complex administrative age.\textsuperscript{270}

\textit{Darren Summerville}\textsuperscript{271}

\begin{footnotes}
\footnote{266}{See Brief of New York, \textit{supra} note 14, at *3.}
\footnote{267}{See Am. Trucking Ass’ns v. EPA, 195 F.3d 4, 15 (D.C. Cir. 1999) (Silberman, J., dissenting from denial of rehearing en banc).}
\footnote{268}{See \textit{supra} Part VI.B.}
\footnote{269}{\textit{Contra} David Schoenbrod & Marci A. Hamilton, \textit{Victory in Disguise: Industry Wins One in the Form of Supreme Court Ruling for Nondelegation Rule}, FULTON COUNTY DAILY REP., Mar. 26, 2001, at 9 (disagreeing with “those who would inter the nondelegation doctrine on the basis of the Court’s 9-0 vote”). While the nondelegation framework is technically intact after \textit{Whitman}, it is difficult to conceptualize of the doctrine as more than an imminently small hurdle for congressional action at this point in constitutional jurisprudence.}
\footnote{270}{See \textit{supra} Part VI.}
\footnote{271}{The author wishes to thank Professors William Edmundson, Neil Kinkopf, and Victor Flatt for their suggestions and advice concerning the genesis of this work. Additionally, I want to express my sincere appreciation to my wife, Kristin Summerville, for her unyielding support and encouragement in my pursuit of a legal education.}
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