The Nondelegation Doctrine: Rumors of Its Resurrection Prove Unfounded

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Occasionally, there is such a thing as legal archeology. A doctrine that has been buried for many years is dug up not only for its antiquarian interest but also because it might contribute something of value in a modern context. From a less lofty perspective, the same process might be analogized to a dog digging up a bone that had been long forgotten. Either way, this happened when the Environmental Protection Agency (EPA) was taken to court over the new National Ambient Air Quality Standards (NAAQS) that it had set for ozone and particulate matter under the Clean Air Act. In American Trucking Associations v. EPA, the District of Columbia Circuit struck down the EPA rules on the ground that they represented an unconstitutional interpretation of section 109(b) of the Clean Air Act by the EPA, in violation of Article I, Section 1 of the U.S. Constitution. The court reasoned that the EPA had provided no limiting standard or intelligible principle to guide its discretion in applying the Act. For example, in the case of ozone, the agency had changed the existing standard of 0.09 parts per million (ppm) to a new standard of 0.08 ppm, but arguably there was no principle in the EPA's application of the Clean Air Act to guide its discretion with respect to an appropriate range of

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2 See Am. Trucking, 175 F.3d at 1034 (stating that, although factors that EPA uses in determining public health concern with respect to ozone levels are reasonable, there is no "intelligible principle" informing these factors or standards).
values or limits higher or lower on the choice of values.\(^3\)

This represented a revival of the congressional nondelegation doctrine, which the Supreme Court has not employed to invalidate legislation for more than 60 years.\(^4\) Actually, although the Court had from early times occasionally discussed the doctrine, it relied on it to strike down acts of Congress on only two occasions, both when it confronted novel legislative efforts of the New Deal in the economically troubled year, 1935.\(^5\) But the resurrection of the nondelegation notion, as envisioned by the D.C. Circuit, has been short-lived. Almost perfunctorily, the Supreme Court has restored it to the obscurity in which it had dwelled without protest for so long.

The underlying concept given expression by the so-called nondelegation doctrine, is that if Congress does not supply an “intelligible principle” to guide and limit agency action, in other words to make the hard policy choices, it has attempted to delegate the legislative power itself, which is unconstitutional.\(^6\) American Trucking had been before the Supreme Court since May 2000, and, just before this article was completed, that ultimate arbiter rejected the conclusions of the D.C. Circuit and thereby quieted the intense speculation that had surrounded the decision and the doctrine. For an impressive body of commentary about the doctrine has been inspired by the bold, if not rash,

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3 See id. at 1035 (questioning rationale used by EPA).
4 See Michael N. Schmidt, Delegation and Discretion: Structuring Environmental Law to Protect the Environment, 16 J. LAND USE & ENVTL. LAW 111, 111 (2000) (commenting that revival of nondelegation doctrine after sixty years may have enormous effect on Congressional authority). See generally Amee B. Bergin, Comment, Does the Application of the EPA’s “Committed to Agency Discretion” Exception Violate the Nondelegation Doctrine?, 28 B.C. ENVTL. AFF. L. REV. 363, 365 (2001) (stating that any statute which delegates legislative power is unconstitutional); Kevin B. Covington, Environmental and Land Use Law: Federal Appellate Court Revives the Non-delegation Doctrine Environmental Case, 73 FLA. BAR. J. 81, 81 (1999) (claiming Congress is free to seek assistance in performing its legislative duties so long as it prescribes “intelligible principle”).
5 See Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (holding Congress granted overly broad power to President in permitting him to ban shipments of oil, thus violating nondelegation doctrine). See generally A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 549-50 (1935) (invalidating statutory provision that authorized President to approve industry codes of fair competition as violation of nondelegation doctrine); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (reasoning delegation of legislative power is constitutional “if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [legislate] is directed to conform. . .”).
6 See J.W. Hampton, 276 U.S. at 409 (emphasizing that Congress must outline “intelligible principle” to guide administrative agencies).
departure of the D.C. Circuit. My purpose here will be mainly to comment on that commentary to explore what might still be learned from a case that made such a huge splash in the otherwise placid waters of administrative decision-making, even though the waters have now returned to their accustomed calm. I have no doubt that much can still be learned, because the nondelegation discussion goes to constitutional fundamentals.

The most obvious rationale for the nondelegation doctrine is, of course, the separation of powers. Certain important policies are served by the doctrine. One of them ostensibly is democracy: lawmaking by the elected representatives of the people rather than by unaccountable bureaucrats. However, there is a contrary school of thought to the effect that executive agencies under the control of the President are more responsive to broad-based national considerations than is the Congress, which responds, all too faithfully, to lobbyists. This is merely an extension of the eternal debate about which is more representative: the legislature, which is in more immediate touch with the electorate but which is responsive to factions and special interests, or the executive, which does not stand in quite such immediate peril of electoral repudiation as the legislature but which is far less responsive to special interests.7

A related rationale for the nondelegation doctrine is that it encourages accountability on the part of Congress, which will be less able, if it has to make the hard choices itself, to claim credit for the successes of its programs while blaming the failures on their implementation by the regulatory agencies.8 The history of utility regulation illustrates just the sort of arrangements that can result from an apparent avoidance of accountability. In the


early days of electric power, when power companies were seeking a foothold to serve in various municipalities, the companies frequently began service on the basis of a "franchise ordinance" adopted by a city council. The ordinance granted the company a (usually exclusive) franchise to open the streets and to furnish electricity in the municipality in question and specified the rate or rates at which service would be rendered. Presumably, if the rate had to be changed (frequently raised), the ordinance would have to be amended by the municipal legislative body. This was a bothersome duty for city councils, and later for state legislatures, and one that had a political downside and very little upside. So, in due course, administrative agencies, public service commissions, and the like were created to assume the obligation of, among others, raising utility rates when necessary. Although the creation of these agencies was explained largely in terms of their expertise and specialized knowledge, there were political benefits as well. If the commissions, in an application of the broadest and most discretionary kind of standard, the injunction that prices be "just and reasonable," raised rates or took some other action that was unpopular, the legislature could, of course, disclaim responsibility. If, on the other hand, the commission took the unlikely course of doing something that was politically popular, the legislature was in a position to bask in the reflected glory. Were it not for the commissions, just imagine how difficult it would have been to get a rate increase through an elected legislature! Even if there were no filibuster, it might have been difficult even to find a legislator willing to put his or her name on the bill. All this illustrates one aspect of accountability (or, actually, the lack thereof), which is one important target of the nondelegation doctrine.

I hasten to add that, of course, specialized agencies provide substantive as well as political benefits. For example, agencies have the time and the technical expertise at least to take a stab at prescribing a number for the allowable concentrations of polluting gases in the ambient air. The issue for the D.C. Circuit was whether the standards incorporated in the Clean Air Act, a primary standard of "requisite to protect the public health" with an "adequate margin of safety" and a secondary standard of "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such
air pollutant in the ambient air,” cabin the discretion of the Environmental Protection Agency in setting specific concentration limits sufficiently to satisfy the Constitution. The Clean Air Act also directed the EPA to base standards on “air quality criteria” that “accurately reflect the latest scientific knowledge” regarding pollutant effects. The EPA by regulation developed criteria elaborating on these requirements, stating that it would consider “the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed.” Thus, the EPA proposed replacing the then current ozone standard of 0.09 ppm with a standard of 0.08 ppm. The standards for particulate matter were similarly tightened.

In the D.C. Circuit, the panel majority by Judge Williams held that

"for EPA to pick any non-zero [pollution] level it must explain the degree of imperfection permitted." The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.

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10 See 42 U.S.C. § 7408(a)(2) (requiring Administrator to issue air quality criteria for air pollutant within twelve months of pollutant’s being included on list).


12 See Am. Trucking Ass’ns, Inc. v. EPA, 175 F.3d 1027, 1035 (D.C. Cir. 1999) (arguing more people are subjected to more serious effects at ozone level of 0.09 than at 0.08); see also Schmidt, supra note 4, at 113 (discussing court’s holding in Am. Trucking).

(The Supreme Court in later reversing specifically rejected the "how much is too much" criterion.) Judge Williams said that the EPA's citation of the scientific evidence was only an assertion that standards should be adjusted whenever health effects are "possible, but not certain" at the new level. Such a principle could be used to support a standard of zero as easily as a standard akin to levels below those associated with London's Killer Fog of 1952. Although it was Congress that had initially failed to supply the "intelligible principle" of delegation, the court remanded the case to the EPA to produce such a principle. Judge Williams helpfully suggested that the EPA develop a massive health benefits formula by way of compliance. The remand to the EPA was, of course, a much-debated aspect of the decision since this remedy would not serve the purpose of advancing democracy by placing the lawmaking function in the popularly elected body. But the remedy had the virtue of arguably escaping conflict with Supreme Court authority and of not requiring Congress to start at square one in the lawmaking process.

Judge Tatel dissented, saying, among other things, that the Supreme Court had upheld authorizations far broader than the one contained in the Clean Air Act and this was essentially the ground on which the Supreme Court later reversed. The full D.C. Circuit denied en banc rehearing but the panel issued a new opinion on rehearing recasting the holding of the case. This opinion recognized a response by the EPA to the panel opinion in which it claimed to find an intelligible principle in the Clean Air Act but declined to rule on the sufficiency of the principle until it

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14 See Am. Trucking, 175 F.3d at 1036-37 (suggesting that EPA standard is arbitrary).
15 See Brax, supra note 13, at 558 (describing EPA's overly broad criteria for applying Clean Air Act as problematic).
16 See Am. Trucking, 175 F.3d at 1052-53 (leaving to agency on remand determination whether ozone has benefit, and if so, assess ozone's net adverse health effects by whatever criteria it adopts).
17 See id. at 1038 (arguing that remand ensures that courts will not hold statute unconstitutional and that agency can then salvage statute). See generally Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 YALE J. ON REG. 283, 292 (1986) (pointing out cases where courts have shown deference to administrative agencies' statutory interpretations). But see Amy Quandt, Note, American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency: A Speed-bump along the Highway of Judicial Deference to Agency Determinations, 11 VILL. ENVTL. L.J. 425, 455 (2000) (arguing that intelligible principle used by EPA was reasonable).
18 See Am. Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4, 10 (D.C. Cir. 1999) (granting rehearing with respect to enforcement of revised ozone standard).
was actually applied in the setting of ambient air quality standards. Judge Silberman, who presumably was a proponent of the nondelegation doctrine, dissented from the denial of rehearing en banc, questioning whether the doctrine applied; but if it did, chastising the panel for only remanding to the EPA instead of declaring the Act unconstitutional. Judge Tatel also dissented from the panel opinion on rehearing, rebuking the panel majority for reinvigorating the nondelegation doctrine.

What was this monster that Judge Williams had raised from the deep? The clearest articulation of the nondelegation doctrine is usually ascribed to \textit{J.W. Hampton v. United States}. This was a 1928 tariff case, in which authority had been delegated to the President to adjust duties on imported goods to reflect differences in production cost between the place of origin of the goods and the United States. The Court expounded at length upon the hopefully valid distinction between the power to make the law and the power to exercise discretion as to its execution. The

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  \item[19] See \textit{id.} at 7 (discussing Clean Air Act and EPA's guiding principles); see also Hubenthal, \textit{supra} note 13, at 17 (arguing that "court fails to acknowledge that its real inquiry is not whether Congress articulated 'intelligible principle' in Clean Air Act, but whether EPA articulated intelligible basis for its decision"). \textit{See generally} Randolph J. May, \textit{The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?}, 53 \textit{Fed. Comm. L.J.} 427, 441 (2001) (discussing Whitman v. American Trucking Ass'n and nondelegation doctrine).
  \item[20] See \textit{Am. Trucking}, 195 F.3d at 14-16 (Silberman, J., dissenting) (arguing that by not declaring statute unconstitutional, court "undermined the purpose of nondelegation doctrine"); see also Michael Richard Dimino, \textit{D.C. Circuit Court Revives Nondelegation Doctrine ... Or Does It?: American Trucking Association Inc., 23 Harv. J.L. & Pub. Pol'y 581, 590-91} (explaining Judge Silberman's dissent); Hubenthal, \textit{supra} note 13, at 35 (noting Judge Silberman's argument that, if statute were unconstitutional, court should not have remanded case).
  \item[21] See \textit{Am. Trucking}, 195 F.3d at 17 (Tatel, J., dissenting) (arguing "[not only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence, but in doing so, it stripped Environmental Protection Agency of much of its ability to implement the Clean Air Act"); see also \textit{Brax, supra} note 13, at 559-63 (outlining Judge Tatel's dissent).
  \item[22] 276 U.S. 394, 406 (1928) (articulating principle that separation of powers prohibits one branch from delegating its duties to another branch); see also \textit{I.N.S. v. Chadha}, 462 U.S. 919, 951 (1983) (using test outlined by \textit{J.W. Hampton} to determine if section of Immigration \& Nationalization Act was constitutional); Texas Bollweevil Eradication Found, Inc. v. Lewellen, 952 S.W.2d 454, 466 (Tex. 1997) (citing \textit{J.W. Hampton} to determine scope of inquiry for nondelegation questions).
  \item[24] See \textit{J.W. Hampton}, 276 U.S. at 407 (arguing that there are differences between delegating duty to another branch and adopting law, by terms of which another branch has been given guidance in applying laws and setting standards).
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Court found that equalization of production costs was an intelligible principle sufficient to meet any problem of unconstitutional delegation in this tariff context.25 Hence, no law was struck down.

And there are much older cases than *J.W. Hampton* involving what has come to be known as the nondelegation doctrine. In fact, this principle appeared quite early in *Cargo of the Brig Aurora v. United States,*26 where a ship’s cargo was condemned as having been imported in violation of the Nonintercourse Act of 1809.27 The Act expired in 1810, but Congress had passed another law providing that, in case either Great Britain or France revoked its edicts so that they would no longer obstruct neutral U.S. commerce (and the other power did not follow suit), the President could so find by proclamation, and the 1809 Act would be thereupon revived to be applied against the non-revoking power.28 The President found that France had revoked its edicts, and thereby revived the Act, which was enforced against Great Britain.29 The question was whether the delegation by Congress to the President, which essentially gave him the power to revive the Nonintercourse Act, was constitutional.30 The Court found that the delegation passed constitutional muster and did not transfer the legislative power to the President.31 The power involved simple fact-finding, which in the language of later cases incorporated an intelligible

25 *See id.* at 405 (concluding that there is guidance for application because President cannot act without investigation by Tariff Commission, and hence there are intelligible principles to guide his action); *see also* Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law,* 46 ADMIN. L. REV. 213, 223 (1994) (noting that, until recently, most cases have found that intelligible principles have been provided).

26 11 U.S. (7 Cranch) 382, 388 (1813).


28 *See Aurora,* 11 U.S. at 382 (discussing Act of Congress passed on May 1, 1810, vol. 10, p. 186).

29 *See id.* (stating that Congress provided “that in case either Great Britain or France shall, before the third day of March next, so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States,” President is authorized to “declare...same by proclamation”).

30 *See id.* at 388 (stating that material question in case was whether nonintercourse act was revived by President’s proclamation).

31 *See id.* (concluding that “we see no sufficient reason, why legislature could not exercise its discretion in reviving Act of March 1, 1809...”).
principle to guide and limit the discretion of the President.\(^{32}\) Another important case of this genre is *Field v. Clark*,\(^ {33}\) which involved the power of the President to impose reciprocal duties upon foreign imports into the United States if he found that the countries of origin of the goods were imposing duties on the agricultural or other products of the United States.\(^ {34}\) The Court sustained the delegation but emphatically declared the principle: "[t]hat congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."\(^ {35}\) The Court found that the only matter delegated to the President was the ascertainment of a particular fact, after which the machinery of the statute would do the rest.\(^ {36}\)

It was with the coming of the New Deal that the nondelegation doctrine actually succeeded in voiding a statute.\(^ {37}\) The National Industrial Recovery Act,\(^ {38}\) an experiment in industrial self-regulation, planning and wage and price stabilization, was enacted in the depths of the Great Depression, which reached its lowest point in 1932-1933. The Roosevelt Administration had responded to depressed economic conditions with this and other interventions in the economy, which offended the conservative justices on the Supreme Court. One can imagine the shock and concern with which the Nine Old Men (a New Deal epithet for the Supreme Court) viewed the economic experiments of the Depression years and the accompanying proliferation of the bureaucracy and numerous cases of apparently unfocused delegation. The confrontation was probably at its peak when the two nondelegation decisions were handed down in 1935. The

\(^{32}\) *See id.* (noting that act was clear in that it could only be reenacted after series of events took place).

\(^{33}\) 143 U.S. 649 (1892).

\(^{34}\) *See id.* at 692 (stating that reciprocal duty will be imposed on foreign imports where country of origin places duties upon U.S. export to that country).

\(^{35}\) *Id.*

\(^{36}\) *See id.* at 683 (noting that statute clearly listed factual circumstances under which law would go into effect).


first provision of the NIRA to come under constitutional scrutiny was Section 9(c) of the Act, in Panama Refining Co. v. Ryan. This provision authorized the President to prohibit the transportation in interstate commerce of “hot oil,” that is, oil produced in excess of state production quotas, such as those imposed by the Railroad Commission of Texas. The suspect provision brings to mind truckloads of oil drums rumbling day and night out of the East Texas Field. The Act provided that any violation of a rule or regulation issued under it was a misdemeanor punishable by fine or imprisonment. The President promulgated an Executive Order under Section 9(c) of the Act, authorizing the Secretary of the Interior to issue rules and regulations pursuant to the Act. The regulations thus issued provided, among other things, that all petroleum producers must keep copious records of their various transactions and make the records available for inspection by agents of the Department of the Interior. The Supreme Court found that:

Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State’s permission. It establishes no criterion to govern the President’s course. It does not require any finding by the President as a condition of his action. The Congress in § 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

This delegation of power was too much for the Court at the

39 293 U.S. 388 (1935) (examining whether NIRA violated nondelegation principle); see also Michael Comiskey, Can a President Pack - or Draft - the Supreme Court? FDR and the Court in the Great Depression and World War II, 57 ALB. L. REV. 1043, 1047 (1994) (discussing reasons why Court invalidated NIRA).

40 See Panama Ref., 293 U.S. at 418 (discussing Nat’l Indus. Recovery Act’s prohibition against interstate transportation of “hot oil”); see also 15 U.S.C. § 709(c) (1935).

41 See Panama Ref., 293 U.S. at 418–19 (discussing executive orders of President); see also 15 U.S.C. § 709(c) (1935).

42 See Panama Ref., 293 U.S. at 408 (discussing procedures that oil producers must follow); see also 15 U.S.C. § 709(c) (1935).

43 Panama Ref., 293 U.S. at 415.
time. Justice Cardozo dissented, finding in section 1, the statutory statement of policy, sufficient principles to guide the President in his implementation of the statute.44

Panama Refining paved the way for another New Deal case that wrote finis to the entire program of the NIRA. This was Schechter Poultry, the sick chicken case, which invalidated the entire Live Poultry Code formulated by the poultry industry itself and approved by the President in an Executive Order to become the law of the land.45 The defendants had been indicted and convicted of violations of the Code, including one count of selling an unfit chicken.46 The Code purported to establish a code of fair competition for the poultry industry, but in the view of the Court this gave the President virtually unfettered discretion in approving codes: "[T]he President in approving a code may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary to 'effectuate the policy' declared by the act."47 The Court had difficulty assigning a clear meaning to fair competition, the essential economic objective to be advanced by the NIRA codes.48 "Unfair methods of competition" under the Federal Trade Commission Act was distinguished by the Court as being clearer in reference and as being enforced by orderly administrative procedures.49 It was also narrower in subject matter;50 among the objectionable provisions of the Live Poultry Code were sections purporting to fix the wages and hours of employees in the industry.51 Of course, the grounds upon which the Court

44 See id. at 438 (Cardozo, J., dissenting).
49 See Schechter, 295 U.S. at 532-33 (quoting Fed. Trade Commission Act [FTCA] § 5); see also 15 U.S.C. § 45 (1914); Nicholas Barborak, Saving the World, One Cadillac at a Time; What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?, 33 AKRON L. REV. 577, 589 (2000) (stating that "[t]he FTC enforces, through litigation, the Federal Trade Commission Act which prevents the use of 'unfair or deceptive acts or practices in or affecting commerce'").
50 See Schechter, 295 U.S. at 534. (observing that NIRA was broader than FTCA); see also KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §2.6, at 71-72 (3d ed. 1994).
51 See Schechter, 295 U.S. at 527; see also Peter M. Shane, Conventionalism in Constitutionalism in Constitutional Interpretation and the Place of Administrative Agencies, 36 AM. U.L. REV. 573, 601 n.6 (1987) (stating that "[m]oreover, the Court stated
invalidated the Live Poultry Code would be equally of concern with respect to all the other industry codes promulgated under the NIRA, and hence the entire program would be invalidated under the Court's decision.\(^5\)

The Court cited three bases for its nondelegation holding: the statutory standards, such as they were, placed no limits on the Executive; the statute delegated public power to private industry groups; and there were no procedural safeguards to limit the Executive.\(^5\) The Court's view of delegation to private groups illustrated a special case that would appear again in later invocations of the nondelegation doctrine. Delegations that called upon private groups to provide the substance of an enforceable scheme were especially vulnerable.\(^5\) However, it was the very essence of the First New Deal, and especially of the NIRA, to promote "fair" competition and to suppress unruly or excessive competition and it was thought that the members of a troubled industry (and what industries were not troubled in the early Thirties?) could best comprehend the complexities of the industry and proscribe conduct thought to be disruptive of fair competition that could be formulated in the terms of criminal sanctions.\(^5\) This would be industrial self-regulation, but there was apparently no way to make it acceptable under the Constitution. (The Court had also invalidated the Live Poultry Code under the Commerce Clause,\(^5\) but in subsequent years the interpretation of that provision was broadly liberalized, and it too was not often deployed against regulatory legislation.)\(^5\)

that the Code provisions to fix hours and wages of defendants' employees in their intrastate business was a constitutionally invalid exercise of federal power\(^\)\(5\)\).\(^5\) See Schechter, 295 U.S. at 541-42; see also Milton M. Carrow, Background of Administrative Law 119 (Assoc. Law. Pub. Co. 1948) (stating that Schechter held NIRA to be unconstitutional); South Dakota v. Dept' of Interior, 69 F.3d 878, 881 (8th Cir. 1995) (noting that Indian Reorganization Act (IRA), enacted by same Congress as NIRA, had been held violative of nondelegation doctrine).

\(^5\) See Schechter, 295 U.S. at 542.

\(^5\) See id. at 543-49; see also Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (invalidating Bituminous Coal Conservation Act because wage and hours standards were set by private groups). But see Schweiker v. McClure, 456 U.S. 188 (1982) (holding Medicare hearings overseen by private insurance carriers allowable because officers had neither bias nor private interest).

\(^5\) See Davis & Pierce, supra note 50, §2.6, at 71 (stating NIRA delegated powers to private citizens to regulate markets in which they had financial interests).

\(^5\) See Schechter, 295 U.S. at 555 (holding Congress's attempt to fix hours and wages of employees through use of Live Poultry Code invalid exercise of federal power).

\(^5\) See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding National Labor Relations Act valid application of Congressional Commerce power since Congress
After this early assault on the New Deal, the nondelegation doctrine went into hibernation until recently roused (temporarily) from its slumbers.

Professor Lisa Schultz Bressman has explored the ways in which, although broad delegation as such has not been a ground for setting aside agency action for many years, the courts have managed to serve many of the policies advanced by the nondelegation doctrine by recourse to other doctrines. The Supreme Court has invoked a number of interpretative norms to defeat unchanneled delegations. For example, the Court struck down the Line Item Veto Act on the grounds of bicameralism and presentment. A cancellation by the President of an item of direct spending, the Court held, is an amendment to an act of Congress by repeal of a portion of the act and does not conform with Article I of the Constitution. Under the Presentment Clause, after a bill has passed both Houses, but before it becomes a law, it must be presented to the President, who must sign it if he approves it but return it if he does not. The plurality cannot be denied power to regulate intrastate activities having close and substantial relation to interstate commerce; see also United States v. Darby, 312 U.S. 100, 115 (1941) (holding prohibition of interstate shipment of goods produced under conditions forbidden by Fair Labor Standards Act of 1938 within Congress's constitutional authority).

58 See Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1408 (2000) (citing Court's use of bicameralism and presentment requirements and canons of statutory construction as alternative methods of enforcing nondelegation doctrine); see also Bro-Tech Corp. v. NLRB, 105 F.3d 890, 895 (3d Cir. 1997) (holding that board did not apply reasoned and rigorous decision-making as required when court reviewed legislative action taken by board in absence of clear congressional direction). But see South Dakota v. Dept. of Interior, 69 F.3d 878, 885 (8th Cir. 1995) (holding Indian Reorganization Act of 1934 unconstitutional under several nondelegation criteria, including failure of Congress to provide recipient agency with "intelligible principle" to guide exercise of delegated authority).

59 See Bressman, supra note 58, at 1408 (citing Clinton v. City of New York, 524 U.S. 417 (1998)); see also DAVIS & PIERCE, supra note 50, 2000 Cumulative Supplement §2.6, at 25 (stating majority stressed that Clinton decision was based on conclusion that Line Item Veto Act violated Article I).

60 See Clinton, 524 U.S. at 448 (plurality opinion) (holding that if Line Item Veto were valid, President would be authorized to create law not voted on by Congress or presented to President, as is constitutionally required); see also INS v. Chadha, 462 U.S. 919, 954 (1983) (holding that legislative veto involves policy determinations Congress can implement only through bicameral enactment followed by presentment to President); DAVIS & PIERCE, supra note 50, §2.4, at 42 (stating one-House veto in Chadha circumvented Article I requirement that all bills be presented to President before becoming law).

61 See U.S. CONST. art. I, § 7, cl. 2. (providing that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not
concluded that the Act violated this clause by allowing the President to amend or repeal legislation. But the real problem identified by the Court, Bressman notes, looked more like a delegation problem: “The Line Item Veto Act had delegated to the President broad authority to determine the ultimate content of law.”

The Court has also employed interpretative norms, including canons of construction, to construe delegations to avoid raising constitutional questions in a fashion closely linked to the nondelegation doctrine. One example is Kent v. Dulles, in which the Court was presented with a broadly worded statute permitting the Secretary of State to restrict rights to travel. The statute authorized the Secretary of State to issue passports according to rules prescribed by the President. Under these provisions, the President granted the Secretary the power to deny passports in his discretion. Exercising that discretion, the Secretary issued a regulation denying passports to members of the Communist Party. Understanding the First Amendment problems created by the regulation, the Court declined to interpret the statute as delegating the power to adopt the regulation. The Court noted that validating that power would

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62 See Clinton, 524 U.S. at 445 (stating Line Item Veto Act authorizes President to repeal laws for his own policy reasons, without observing procedure set out in Article I, § 7).

63 Bressman, supra note 58, at 1408; see also Davis & Pierce, supra note 50, §2.6, at 26; Steven F. Huefner, The Supreme Court’s Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than “A Dime’s Worth of Difference,” 49 Cath. U.L. Rev. 337, 339 (finding that Line Item Veto Act was "ripe for invalidation under nondelegation doctrine").

64 See, e.g., Bressman, supra note 58, at 1409 (stating Court has used clear statement rules and canon of avoidance as substitutes for nondelegation doctrine).

65 See id. at 1409-10 (citing Kent v. Dulles, 357 U.S. 116, 117 n.1 (1958)).

66 See Kent, 357 U.S. at 130-31 (Clark, J., dissenting) (citing Exec. Order No. 7856, 22 C.F.R. 51.77 as authority for Secretary of State to issue passport regulations).

67 See Bressman, supra note 58, at 1409 (stating that, pursuant to statute, President granted Secretary of State authority to deny passport at Secretary’s discretion).

68 See Bressman, supra note 58, at 1409 (stating Secretary of State exercised discretion granted by President by promulgating regulation denying passports to Communist Party members).

69 See Kent, 357 U.S. at 143 (Clark, J., dissenting) (stating that majority’s method of nullification inhibits Court’s determination of First Amendment issues of speech and association); see also Davis & Pierce, supra note 50, §2.6, at 73 (stating Court imposed
raise important constitutional questions and cited Panama Refining to support its restraint in construing narrowly all delegated powers that curtail or dilute liberty interests, where Congress has made no broader provision in explicit terms.\textsuperscript{70} Thus, by invoking the canon requiring a clear statement by Congress to support a statutory interpretation raising a constitutional issue, the Court avoided an interpretation that would raise First Amendment problems, as well as potential delegation problems.\textsuperscript{71}

In Industrial Union v. American Petroleum Institute (the Benzene case),\textsuperscript{72} the Court was asked to determine the validity of the reduction of the limit under the Occupational Safety and Health Act of occupational exposure to benzene from ten parts per million to one part per million.\textsuperscript{73} The Court was faced with a government argument that certain applicable provisions of the Act did not require that the risk from a toxic substance be quantified sufficiently to enable the Secretary of Labor to characterize the risk as significant in an understandable way.\textsuperscript{74} The Court stated that, if it adopted this broadening argument, it might have to view the provisions in question as amounting to "a sweeping delegation of legislative power" that might be unconstitutional under Schechter Poultry and Panama Refining.\textsuperscript{75} But the Court concluded that a construction of the limitation on Secretary's discretion to avoid deciding whether refusal to grant passport on basis of political affiliation violated First Amendment.

\textsuperscript{70} See Kent, 357 U.S. at 129 (stating that, where activities like travel are involved, Court will construe narrowly all delegated powers limiting those activities); see also Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 376-77 (1974) (hinting at possible constitutional violation, yet remanded to agency to determine claimed fees); DAVIS \& PIERCE, supra note 50, §2.6, at 73 (stating Court will likely continue to narrowly interpret broad delegations where broad interpretation would conflict with constitutional limits on governmental power); Bressman, supra note 58, at 1409 (noting that Court cited Panama Ref. to indicate that it would narrowly construe all delegations that infringe on liberty absent explicit Congressional language).

\textsuperscript{71} See Bressman, supra note 58, at 1410 (stating Court employed clear-statement canon to avoid delegation that would infringe on rights of some passport holders); see also Fahey v. Mallonee, 332 U.S. 245, 249-53 (1947) (holding vague statute valid because regulations created to interpret and administer statute were detailed and explicit, thereby reversing district court ruling that applied Panama Ref. and Schechter); Huefner, supra note 63, at 340 (stating Clinton decision shows Court is not prepared to resurrect nondelegation doctrine but is willing to look elsewhere to invalidate questionable legislative delegation).

\textsuperscript{72} 448 U.S. 607 (1980).

\textsuperscript{73} See id. at 611, 631 (discussing proposed one part per million exposure limit).

\textsuperscript{74} Id. at 637-41 (explaining rationale and implications of government's argument).

\textsuperscript{75} See id. at 646 (disagreeing with government's argument, quoting Schechter Poultry, 295 U.S. at 539 and citing Panama Ref., 293 U.S. 388).
statute that avoided that kind of open-ended grant should be favored. According, since the Secretary had failed to demonstrate a significant health risk for benzene exposure at all levels above one part per million, the Court required the Secretary to make a showing of such significant risk prior to imposing regulation. As Justice Scalia later noted in *Whitman v. American Trucking*, Justice Rehnquist concurred specially in *Benzene*, taking the position that the terms of delegation in the Act violated the nondelegation doctrine and calling for its resuscitation.

As Professor Bressman has pointed out, issues of legislative delegation are certainly inherent in the doctrine of *Chevron, USA v. NRDC*. Step I of *Chevron* asks whether the statutory provision at issue is ambiguous. Has Congress spoken to the precise issue presented, or is there a gap for the agency to fill? If there is ambiguity, and recourse to Step II is dictated, the question becomes whether the agency's answer is permissible or reasonable. If it is, the courts will defer to the agency's interpretation.

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76 See id. at 646 (explaining that open-ended grant of legislative power may make statute unconstitutional).

77 See id. at 634 (noting that Dow Chemical Co. study resulted in no empirical evidence of leukemia risk at exposure of 10 ppm).

78 See id. at 653 (stating that Court placed burden on agency).


80 See Indus. Union v. Am. Petroleum Inst., 448 U.S. 607, 685-88 (1980) (Rehnquist, J., dissenting) (warning that Court should not avoid "judicial duty to invalidate unconstitutional delegations of legislative authority"); see also DAVIS & PIERCE, supra note 50, §2.6, at 75. But see, Heufner, supra note 63, at 402 (stating that Rehnquist opinion did "encourage" belief in doctrine's resurrection, but *Clinton* was perfect situation to dust off doctrine for active duty and Court's failure to revive doctrine displays continued displeasure with it).


82 See *Chevron, USA v. NRDC*, 467 U.S. 837, 842 (1984) (articulating first question court is confronted with when reviewing agency's construction of statute).

83 See id. at 843 (explaining that Step II is not undertaken unless court determines that Congress has not directly addressed precise question at issue).

84 See id. at 844 (noting that legislative delegation is deemed to be controlling unless
nondelegation doctrine is complex and interesting. Professor Bressman has suggested that the courts, by "find[ing] clarity in ambiguity" when applying *Chevron*, and thereby substituting their own interpretation for an agency's, have prohibited a delegation of policy-making authority, the same result the nondelegation doctrine could have reached.\(^{85}\) *Chevron* Step II, however, operates in a way that parallels the "soft" or "new" nondelegation doctrine.\(^{86}\) For here the agency is accorded the right to make the interpretation unless its interpretation is unreasonable.\(^{87}\) A court might very well be thinking of more or less the same thing whether it calls an interpretation unreasonable or finds the terms of delegation lacking an "intelligible principle." Textualists have proved to be remarkably adept at discerning a clear legislative intent from seemingly unclear language when they wished to escape the agency interpretation. But it may be that *Chevron* has encouraged delegation by mandating it if a statutory term is ambiguous. The hard, or old, nondelegation doctrine, on the other hand, voids attempted delegation if the difficult policy determinations have not been made by the legislature.\(^{88}\)

One can go on at length pursuing the various permutations and combinations of the *Chevron* doctrine and the differing mindsets that permit devotees of plain-meaning, on the one hand, to set their own course, undistracted by the gravitational pull of the implementing agency. And, on the other hand, there are interpreters torn by ambiguity, who are compelled to accept a bureaucratic answer. *INS v. Cardoza-Fonseca*\(^{89}\) provides an arresting example of the range of judicial whimsy possible on the subject of statutory interpretation. The case involves the

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85 See Bressman, supra note 58, at 1411 (noting that courts often interpret statute in effort to deprive agency of discretion); see also Schuck, supra note 7, at 788 (observing that courts often rely on wording of statutes to preserve their control over interpretation); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP CT. REV. 429, 496 (explaining Justice Scalia's preference for narrow interpretation).

86 See *Chevron*, 467 U.S. at 844 (stating that court may not substitute its own construction of statute for reasonable interpretation by administrative agency).

87 See id. at 845 (noting that court should not disturb agency's reasonable accommodation of conflicting policies).

88 See generally 16A AM. JUR.2D Constitutional Law § 297 (outlining scope of congressional delegation powers and describing absence of congressional parameters as fatal to legislation).

familiar sequence of a new arrival on the American shores seeking asylum under the discretionary provision of the Immigration Act, on the well-known rationale that he has "a well-founded fear of persecution," if required to return to the country of origin.90 The INS interpreted this phrase as having the same meaning as the mandatory-asylum provisions of the statute, which prohibited the deportation of an alien who demonstrated a "clear probability of persecution."91 But the Supreme Court, by Justice Stevens, found that despite the appearance of ambiguity in the language, there was enough clarity to call its own shot.92 According to the Court, text and legislative history made it plain that the term, as used in the discretionary provision, did not mean the same thing as in the mandatory provision.93 Justice Stevens wrote that "[t]he question whether Congress intended the two standards to be identical [is] a pure question of statutory construction for the courts to decide."94 Justice Stevens declined to find that Congress had granted the INS authority to resolve the question. Rather, Congress had left the task of defining the standards to the courts.95 Any ambiguity residing in the text only served to empower the INS to apply the standards "to any particular set of facts."96 Justice Scalia chastised the majority for what he

90 See Cardoza-Fonseca, 480 U.S. at 424-25 (remanding petition for asylum so Board could apply proper legal standard of "well-founded fear of persecution"); see also Mazariegos v. Office of the U.S. Attorney General, 241 F.3d 1320, 1321 (11th Cir. 2001) (agreeing with INS that Guatemalan citizen seeking asylum did not have "well-founded fear of persecution"); Chanchavac v. INS, 207 F.3d 584, 589 (9th Cir. 2000) (reversing INS finding as to Guatemalan citizen's statutory eligibility for asylum and finding "well-founded fear"); Melgar de Torres v. Reno, 191 F.3d 307, 309 (2d Cir. 1999) (affirming Board of Immigration Appeal's denial of petition for asylum based on fear of persecution, citing substantial evidence of changed conditions in petitioner's country of origin); Teresa De Jesus Castillo-Villagra v. INS, 972 F.2d 1017, 1020 (9th Cir. 1992) (granting asylum petition and finding that Board improperly took notice of effect of change in Nicaraguan government on petitioner's well-founded fear of persecution).

91 See Cardoza-Fonseca, 480 U.S. at 430 (rejecting INS's "clear probability of persecution" standard as governing withholding of deportation proceedings).

92 See id. at 430-31 (holding that different standards apply to withholding alien's deportation under Immigration and Nationality Act and to applications for asylum under Refugee Act).

93 See id. at 431 (noting that "[t]he linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and objective frame of reference... [w]e simply cannot conclude that the standards are identical.").

94 Id. at 446.

95 See id. (noting that court is final authority for statutory construction).

96 See id. at 454 (Scalia, J., concurring) (arguing that majority erroneously substituted its judgment for that of appropriate agency).
believed to be its departure from *Chevron*. But Justice Scalia reached the same result as the majority by seeing the disputed terms of the statute as clear and unambiguous, but as contrary to the interpretation of the INS.\(^97\)

Interpretative norms, such as I have noted, including canons of construction and the *Chevron* doctrine, have played their part in guiding or limiting the scope of congressional delegation while the congressional nondelegation doctrine has been in remission. Professor Bressman has located the first appearance of the “new” or “soft” nondelegation doctrine in *AT&T v. Iowa Utilities Bd.*\(^98\) Professors Mark Seidenfeld and Jim Rossi, however, disagree with her interpretation of Justice Scalia’s opinion in that case, which never mentions the word “delegation.”\(^99\) The *Iowa Utilities* case involved the validity of certain Federal Communications Commission rules promulgated under the Telecommunications Act of 1996.\(^100\) The specific rule in question involved the obligation of incumbent telephone companies to furnish so-called “network elements” to entering competitors that sought to compete with the incumbents in local service.\(^101\) Network elements are simply devices or parts used by the incumbent to carry on local telephone service and which could be used by the entering competitor for the same purpose.\(^102\) Among other things, the statute requires incumbents to provide access to network elements that are “necessary” and where failure to provide access would “impair” the ability of entering competitors to provide services.\(^103\) The two words “necessary” and “impair” are the keys. The FCC had made an expansive interpretation of these standards, expressing the view that any increase in cost or decrease in quality of the entrant’s service would entitle it to

\(^{97}\) See id. at 455 (Scalia, J., concurring) (refusing to join majority in refashioning important principle of administrative law).


\(^{100}\) See Iowa Util. Bd., 525 U.S. at 370 (addressing whether FCC was authorized to implement certain pricing and non-pricing provisions under Act).

\(^{101}\) See id. at 375 (stating that Rule 319 under 47 C.F.R. § 51.319 (1997) sets forth minimum number of network elements that incumbents may make available to requesting carriers).

\(^{102}\) See id. at 387 (citing 47 U.S.C. § 153(29) which defines network element).

\(^{103}\) See id. at 375 (citing 47 U.S.C. § 251 (d)(2)).
acquire a network element.104

In addition, the FCC started from the premise that incumbents were required to furnish network elements if technically feasible, subject to exceptions as specified by the FCC.105 Further, in the view of the Supreme Court, the FCC rule allowed entrants themselves to determine what was "necessary" and what would "impair" service.106 Justice Scalia, speaking for the Court, did something that the Court had never done before: he invalidated an agency interpretation as unreasonable under *Chevron* Step II. The reason given was that the FCC had failed to supply "any limiting standard, rationally related to the goals of the Act."107 The FCC had interpreted the words "necessary" and "impair" to require incumbents to share those elements in their networks that would provide new entrants the best comparative advantage, in terms of either cost or quality of service. The Commission had not considered whether new entrants could obtain comparable elements or comparable pricing from other carriers or supply comparable elements (at comparable prices) themselves.108 Justice Scalia thus held that the FCC's interpretation impermissibly delegated to new entrants the power to determine which elements the incumbents must provide under the statute. The two defects in delegation found in the rule were, therefore, first, that the rule lacked limiting standards, and, second, that it permitted private parties, rather than the FCC, to exercise lawmaking authority. These were the same defects identified in *Schechter* as invoking the nondelegation doctrine.109 On this basis, Professor Bressman sees *Iowa Utilities* as a significant milestone in the revival of the nondelegation doctrine.110 But Professors Seidenfeld and Rossi do not agree. These authors feel that, in Justice Scalia's view,
consideration of the factors noted by Professor Bressman merely indicated that the agency had deviated from the statutory criteria that Congress had provided. Justice Scalia thus recognized that the province of defining the bounds of agency discretion, ex ante, appropriately belongs to Congress, not to the courts.

In general, Professors Seidenfeld and Rossi have little good to say about the D.C. Circuit’s resurrection of the nondelegation doctrine. First, they question the proposition advanced by Bressman, as well as by Professor Cass R. Sunstein, that the doctrine promotes the rule of law. Seidenfeld and Rossi reject the nondelegation doctrine as a form of ex ante standard, and instead favor ex post approaches to limitation of discretion. These authors claim that, “[o]nce the reality that officials must be allowed to exercise discretion is recognized, there is no principled way for the judiciary to draw a line between allowed and prohibited delegations of rulemaking authority.” They argue that the nondelegation doctrine cannot, for the most part, be enforced by the federal courts. Even though Professor

111 See Seidenfeld & Rossi, supra note 99, at 18.

112 See Sunstein, supra note 11, at 337 (finding that “[t]he nondelegation doctrine also promotes rule-of-law values”); see also Cass R. Sunstein, Nondelegation Canons, 67 U. CHI. L. REV. 315, 320 (2000) (noting that “In various ways, the nondelegation doctrine also promotes rule of law values.... Quite apart from promoting accountability, the conventional doctrine thus seems to promote goals typically associated with the rule of law.”). See generally Sargentich, supra note 37, at 419-31 (stating that nondelegation debate reaches deeply into fundamentals of administrative systems and suggesting rule of law theory as providing one approach to interpretation).

113 Seidenfeld & Rossi, supra note 99, at 9 (stating “We disagree with the claim of Judge Williams, as well as Professors Sunstein and Bressman, that the new nondelegation doctrine better promotes the rule of law, especially when the doctrine is compared to the ex post facto approach to judicial review that courts already use”).

114 Id. at 5-6; see also Charmian Barton, Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision-Making, 13 GEO. INT’L ENVTL. L. REV. 837, 864 (2001) (stating that implementation of nondelegation doctrine has proved unworkable as means of forcing Congress to produce legislation with more specificity in prescribing administrative guidelines). But see Lawrence Lessig, Lessons from a Line Item Veto Law, 47 CASE W. RES. L. REV. 1659, 1661 (1997) (disagreeing with those who believe that nondelegation doctrine is dead).

115 See Seidenfeld & Rossi, supra note 99, at 6 (noting that “[m]any commentators have recognized that the nondelegation doctrine is largely unenforceable by federal courts, because the courts are unable to develop principled ways of enforcement”); see also Barton, supra note 114, at 864 (stating that American courts have instead used alternative means of controlling administrative discretion). See generally Gary J. Greco, Standards or Safeguards: A Survey of the Delegation Doctrine in the States, 8 ADMIN. L.J. AM. U. 567, 575 (1994) (stating that Justice Marshall has said that nondelegation doctrine has been abandoned and courts have allowed broad delegations of authority by Congress).
Kenneth Culp Davis had advocated that courts require agencies to adopt rules and principles to guide their choices in deciding particular cases, ex ante approaches have never caught on and ex post review has been effective.

Instead of requiring that the agency set some limits on its discretion ex ante, judicial review acts to assure that the agency exercises its discretion responsibly, that is, wisely and accountably. The courts have adopted this approach by requiring agencies to engage in reasoned decision-making enforced by ex post review of almost all agency exercises of discretion.116

Seidenfeld and Rossi claim that, as with the more traditional (hard) nondelegation doctrine, the new (soft) doctrine increases uncertainty because it gives courts the opportunity to “override general legal requirements in a manner that is neither principled nor predictable.”117 This impairs certainty, one of the most important values underlying the rule of law.118 Another of such values is the prevention of tyranny, and here, Seidenfeld and Rossi claim, the nondelegation doctrine is also of little use.119 The authors assert that the only kind of tyranny that the nondelegation doctrine might protect against is an agency’s imposing more stringent rules on industries it arbitrarily disfavors, a risk better avoided by the arbitrary and capricious rules and by the requirement of reasoned decision-making.120

These authors concede that increased accountability, another underlying value of the rule of law, may be the best support for the new soft nondelegation doctrine advocated by the D.C. Circuit.121 But for them, it is still not a good one. The new

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117 Id. at 10; see also Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669, 1696-97 (1975) (concluding that nondelegation doctrine does not create certainty). But see Clark, supra note 23, at 645 n.116 (discussing Chevron and concluding that new nondelegation doctrine allows administrative agencies to articulate their own statutory interpretation instead of allowing courts to interpret it for them).
118 See Seidenfeld & Rossi, supra note 99, at 9-10 (stating that increased uncertainty arises when courts have to determine, by reviewing agency policy, whether regulations are in compliance).
119 See id. at 10-11 (noting that other means are available to prevent tyranny such as “arbitrary and capricious” challenge or resort to political process).
120 See id. (commenting that agency’s manipulative statutory interpretations can be challenged as “arbitrary and capricious” in setting where courts must decide if agency made reasoned decision).
121 See id. at 11-12 (declaring that accountability will be achieved through “explicit value choices” being made public).
nondelegation doctrine would have forced agencies to make a choice of values underlying their rulemaking decisions, from which they could not retreat in subsequent rulemakings. If the public became involved in this choice of values, there could possibly have been an improvement in accountability. This was not likely, however, since the public is generally interested in the ultimate rules, not in the value choices that led to their adoption. Through this interaction of rules and values, agencies might have ended up adopting values that did not represent the choices of the public, even though the public accepted the rules themselves. Agencies would then have been locked into their value choices in subsequent rulemakings. Further, Seidenfeld and Rossi argue, striking down reasonable interpretations of statutes on grounds that the interpretation has left the agency too much discretion would invite judges, politically the least accountable government decision-makers, to substitute their inclinations for those of the agency about the wisdom of the regulatory end-product. Ex ante restraints on agencies would also have a high cost in inflexibility. They would insulate the agency involved against new information, which may require a marked change in approach. Imposition of

122 See id. at 12 (stating that "[b]y forcing the agency to make such a choice from which the agency could not vary in subsequent rulemakings, the new nondelegation doctrine forces the agency to assess the value choices underlying its rulemaking decision carefully.").

123 See id. (explaining that "[I]f one optimistically believes that making such value choices explicit will encourage public debate and input in the rulemaking process, then the new nondelegation doctrine can help ensure that the agency's ultimate decision on such choices is in line with those of the nation's polity.").

124 See id. (stating that "[e]mpirical evidence suggests that even if agency value choices are explicitly revealed, the public does not engage in discussion about such choices; rather, the public tends to focus on the bottom line acceptability of the rules the agency adopts, not the value judgments that lead the agency to those rules"); see also Robert B. Reich, Public Administration and Public Deliberation: An Interpretive Essay, 94 YALE L.J. 1617, 1633-34 (1985) (discussing town meeting in which many residents were unhappy and frustrated about being furnished details of issues and being forced to decide complicated issues instead of being provided simple rules).

125 See Seidenfeld & Rossi, supra note 99, at 13 (stating that public is concerned about rules adopted and not value choices underlying those rules).

126 See id. (assuming that, if agency gets constraining interpretation wrong, in sense of interpreting statute in manner at odds with values of public, then agency cannot change its interpretation when it adopts next standard, even if agency could explain why its initial interpretation was problematic).

127 See id. at 13-14 (arguing that issues of how to structure agency discretion and how much discretion to leave to agency under any particular statutory scheme are appropriately left to political process).

128 See id. at 15 (commenting that costs that doctrine would impose by diminishing agency flexibility in rulemaking would be substantial).
ex ante limitations is best left to political processes, and courts should not be vested with authority to determine when agency-imposed ex ante limitations are sufficiently constraining.

Professors Richard Pierce and Cass Sunstein, two heavyweights of agency and environmental law, display their contrasting styles in approaching American Trucking. Pierce, an emphatic exponent of realpolitik, scoffs at the claim of the majority opinion that the “EPA’s formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentration yielding London’s Killer Fog.” He points out that either zero (requiring the de-industrialization of the United States) or close to the Killer Fog (50 times the concentration permitted by the EPA’s earlier rule) would be immediately doomed, the upper limit in court and the lower through action of the President confronting the prospect of political suicide (or through the prior action of the EPA administrator threatened by loss of employment). Sunstein, inclined to be kinder to the D.C. Circuit, writes of this range of horribles from zero to the Killer Fog as “rhetoric,” not to be taken seriously as a statement of the potential range of standards.

Pierce discusses what he calls the “science charade,” misleadingly precise or certain answers by scientists to questions

129 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, 68 (2000) (stating that both opinions in Am. Trucking are symptomatic of science charade, demanding more from science that it can deliver and finding more in science than is there); see also Sunstein, supra note 11, at 309 (characterizing Am. Trucking as remarkable); Sandra B. Zellmer, The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal, 32 ARIZ. ST. L.J. 941, 945 (2000) (summarizing view that, unless it is unlikely that Congress would have granted executive branch broad powers, it should be assumed that Congress granted agency in question implied delegation).

130 Pierce, supra note 129, at 68 (quoting Am. Trucking, 175 F.3d at 1027).

131 See id. at 69-70 (describing if lower extreme were adopted, clean-up would cost far too much, and if higher extreme were adopted, many lives would be lost to high pollution levels; neither scenario is one that politician would cherish); see also Ozone Standards, 62 Fed. Reg. 38,856, 38,864-65 (1997) (noting that all members of Ozone Advisory Committee suggested range between 0.08- 0.10 ppm); Lisa Heinzerling, Symposium: The Clean Air Act and the Constitution, 20 ST. LOUIS U. PUB. L. REV. 121, 125 (2001) (noting that industry groups asserted that any NAAQS set above zero for these pollutants would be arbitrary).

132 See Sunstein, supra note 11, at 380 (stating this view); see also Brax, supra note 13, at 573 (stating that majority's opinion is “gross exaggeration”); Thomas O. McGarity, The Clean Air Act at a Crossroads: Statutory Interpretation and Longstanding Administrative Practice in the Shadow of the Delegation Doctrine, 9 N.Y.U. ENVTL. L.J. 1, 14 (2000) (stating that EPA was in no position to allow such broad range of acceptable levels).
of human health brought about by the demands of laypersons - including lawyers, judges, legislators and the like - for certainty and precision. The Benzene case is cited as a good example of demanding a scientific answer to a question that is impossible to answer scientifically: at what level of exposure to a substance at lower levels will the inducement of cancer begin when it is known that the same substance will induce cancer in humans at higher levels? According to Pierce, the plurality in the Benzene case demonstrated “the Justices' abysmal ignorance of elementary toxicology by providing hypothetical illustrations of large and small risks that have amused and bewildered scientists ever since.” Returning to the American Trucking problem, Pierce asserts that “[t]he EPA cannot use science to determine a concentration of particulates and ozone that does not kill some people.” The majority, according to Pierce, was not alone in error since the dissent interpreted the EPA’s statement that the most certain ozone-related effects are transient and reversible as “proof that the EPA drew a line between permanent and irreversible effects and transitory and reversible effects, and/or between certain and uncertain effects.” Pierce calls this interpretation “demonstrably false” and sees it as “a typical judicial symptom of the science charade.”

Professor Pierce has emphasized the uncertainties of risk assessments and of estimates of deaths per year associated with

133 See Pierce, supra note 129, at 71-72 (discussing government’s pervasive insistence on scientific answers to all important questions forces scientists and agencies to exaggerate extent to which science can, or has, answered important questions).
134 See id. at 72 (noting Benzene case as single best example of judicial and legislative bodies insisting that scientists and agencies answer questions that science cannot answer).
135 Id.
136 Id. at 73.
137 Id. at 75.
138 Pierce, supra note 129, at 75; see also Holly Doremus, Listing Decisions under the Endangered Species Act: Why Better Science Isn't Always Better Policy, 75 WASH. U. L. Q. 1029, 1139 (1997) (proposing that articulation by agencies of more coherent general rationale for their listing decisions, which would require rejection of science charade, would improve consistency of these decisions and thereby help them survive judicial review); Wendy E. Wagner, The Science Charade in Toxic Risk Regulation, 95 COLUM. L. REV. 1613, 1617 (1995) [hereinafter Science Charade] (suggesting legal remedy that requires agencies to separate science from policy and entrusts courts with reviewing accuracy of these science-policy conclusions may be effective means of combating charade); Wendy E. Wagner, Symposium: Ethyl: Bridging the Science-Law Divide, 74 TEX. L. REV. 1291, 1291 (1996) (opining that problem is not limited to scientific expertise of judiciary, but to failure of many judges to approach complex socio-scientific cases with analytical rigor they employ in other adjudications).
various ozone concentration standards. He cites an EPA estimate that retaining the existing ozone and particulate standards instead of adopting the new standards would produce somewhere between 3,300 and 17,900 deaths per year.\textsuperscript{139} Such a spread seems exceedingly imprecise! An estimate of the difference in deaths avoided by setting the ozone standard at 0.07 ppm rather than 0.08 ppm would be about the same as estimated lives saved in moving the standard from 0.09 ppm to 0.08 ppm. But both estimates are considerably uncertain. Pierce concedes that the \textit{American Trucking} panel faced a daunting challenge because a choice of 0.00 ppm was in theory within the EPA’s discretion. The choice it made required it to choose between saving an additional 50 billion dollars per year and saving about 10,000 lives per year.

The agency’s choice of 0.08 rather than 0.09 or 0.07 ppm for the ozone standard is indistinguishable in principle from the multitude of number-based distinctions that have to be made by Congress or by regulatory agencies. Professor Pierce suggests some alternative methodologies for making the decision involved in the \textit{American Trucking} case. He first pursues a very interesting examination of cost-benefit analysis (CBA), which he regards as still useful but which must be pursued and presented with great candor about the value judgments that must form the basis of CBA and the inherent uncertainty of it.\textsuperscript{140} It is not a useful tool, he says, for reviewing courts. Although the EPA denies considering cost in making decisions under section 109(b),\textsuperscript{141} the agency does prepare a CBA that undoubtedly has a

\textsuperscript{139} See Pierce, supra note 129, at 77 (citing this EPA estimate); see also National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 at 38,862 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50) (discussing various arguments for and against new standards); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 at 38,655-56 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50) (summarizing proposed revisions). See generallyLead Indus. Ass’n v. EPA, 647 F.2d 1130, 1160-61 (D.C. Cir. 1980) (holding that evidence in record may support different conclusions by EPA when issues involved are at “very frontiers of scientific knowledge”).


\textsuperscript{141} See Pierce, supra note 129, at 85 (commenting that even though EPA states that it never considers cost in making decisions under 109(b), it always conducts CBA before it
number of “internal” uses but that would not fulfill the need of the panel majority for a “determinate, binding standard.”

According to Pierce, the American Trucking court would have found the EPA’s CBA reassuring. However, he concludes that “judicial access to the CBA would be of no help whatsoever to a court that wants to limit the EPA’s discretion.”

Pierce rejects a “zero health risk” approach as de-industrializing. He also dismisses the possibility of following the approach taken in International Union v. OSHA, where the court pursued a nondelegation analysis and remanded to OSHA, suggesting a cost-benefit solution. OSHA responded by adopting a “high degree of protection” standard. Pierce finds such an approach of no help in the ozone-particulate case. He also rejects the suggestion of the American Trucking majority that the EPA adopt a “generic unit of harm” criterion like the approach used by Oregon in devising a health plan for the poor. In determining eligibility for Medicaid, Oregon ranked treatments by the improvement in “quality-adjusted life years” that would result from each treatment, divided by the treatment’s cost.

Pierce trashes this suggestion as being

takes any action); accord Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 471 (2001) (stating that “[t]he text of 109(b), interpreted in its statutory and historical context... unambiguously bars cost considerations from the NAAQS-setting process”); see also Wendy E. Wagner, Congress, Science, and Environmental Policy, 1999 U. Ill. L. Rev. 181, 207 (1999) (noting that Section 109(b) of Clean Air Act has been read to require EPA to set standards for various air pollutants without any consideration of economic factors in determining what constitutes safe concentration of ambient air pollutants); Wagner, Science Charade, supra note 138, at 1667 (citing Section 109(b) as one of only two legislative mandates to preclude agencies from considering economic and technological feasibility in setting standards).

142 Am. Trucking, 175 F.3d at 1038 (holding that determinate, binding standard would decrease likelihood of arbitrary exercise of delegated authority).
143 Id. at 1058 (Tatel, J., dissenting) (stating that discretion of EPA is not unlimited).
144 See 938 F.2d 1310, 1313 (D.C. Cir. 1991) (addressing objections and then remanding for further consideration).
145 See Pierce, supra note 129, at 90-92 (quoting Am. Trucking and describing “generic unit of harm” approach taken by Oregon, which has twice undertaken forced revisions in order to satisfy requirements of Americans with Disabilities Act); see also Heinzerling, supra note 131, at 145 (pointing to “complete lack of recognition of the multifarious nature of the harms created by air pollution” when “generic unit of harm” definition is attempted under Clean Air Act); McGarity, supra note 132, at 18 (elaborating on QUALY’s (Quality Adjusted Life Years) approach to analysis of health and environmental risks); Sunstein, supra note 11, at 348 (stating that Court in Am. Trucking left undecided question of whether regulations should be vacated).
146 See Am. Trucking, 175 F.3d at 1039-40, n.5 (discussing quality, probability and duration of various states of health with and without treatments); Pierce, supra note 129, at 90-91 (discussing that EPA may adopt approach Oregon used in devising its health plan for poor, by attaching values to various states of health after polling sample of
similar to a CBA but as being more expensive and cumbersome and as not including any costs. It would not help tell us “how much is too much.” Professor Sunstein, for his part, is kinder to elaborate efforts at quantification. Thus, he puts in a good word for the evaluation of benefits in the health field, using “quality-adjusted life years,” though he concedes modification would be required for EPA use.\textsuperscript{147}

Professor Pierce then aims his fire directly at the \textit{American Trucking} majority. He points out that politically unaccountable judges are the least qualified to decide that saving about 10,000 lives a year at a cost of 50 billion dollars a year is not a good deal. He also asserts that making the Executive adopt a construction of the statute that will be binding on future presidents is anti-democratic. If that in fact would be the result of the majority’s solution, the point is well taken. Professor Pierce makes the final point that broad delegations of power are not a threat to our constitutional democracy because the ultimate decision-maker is the President, who is politically accountable to all the people. Arguably, this is not an argument that the Supreme Court would have found reassuring in the early New Deal days. Among the alternatives of letting judges make the policy decisions, having the current president bind future presidents and leaving the last word to each incumbent president, the last is clearly the democratic solution, and was endorsed by the Supreme Court in

Professor Cass Sunstein takes a somewhat more favorable view of *American Trucking* and of the constitutional nondelegation doctrines (new and old, soft and hard) than does Professor Pierce. At the very least, Sunstein approves of the purposes of the judges in *American Trucking* even though he prefers more minimalist ways of getting to the goals. Sunstein's analysis is far-ranging, not to say encyclopedic, and has more of the flavor of a traditional administrative law approach than Pierce's analysis. But Sunstein suggests, along the same lines as Pierce, that, although costs are nominally irrelevant to EPA determinations, they do matter in standard-setting for non-threshold pollutants. Looking at *American Trucking*, Professor Sunstein notes with approval that the EPA offered some discussion of both more stringent and less stringent alternatives to the standards that it chose but notes with disapproval the agency's failure to offer more than "minimally informative generalities."

Professor Sunstein traces the historical development of the nondelegation doctrine, noting that the Court in *Schechter* found that the statutory standards there were open-ended and self-contradictory. In the next milestone, the *Benzene* case, both the plurality and Justice Rehnquist cited the nondelegation doctrine, but only Justice Rehnquist suggested it as a basis for striking down the statute. Sunstein pays respect to the "traditional," "old" or "hard" version of the doctrine, acknowledging that it

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148 See Sunstein, supra note 11, at 307 (suggesting that proper role of doctrine consists in its statutory construction, imposing floors and ceilings on agency action, and in setting "nondelegation canons," all of which prevent agencies from acting without clear congressional authority); see also C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 Tex. Rev. Law & Pol. 1, 3 (2000) (suggesting "that only a constitutionally based canon of construction such as the nondelegation doctrine will enable the Court to reconcile conflicting objectives: the need to exercise judicial restraint, while continuing to impose manageable limitations on agency discretion"). But see Zellmer, supra note 129, at 942 (affirming that New Deal legislation, which delegated policy-making authority to executive agency or other non-legislative entity, was considered "constitutional offense under the nondelegation principle of separation of powers").

149 See Sunstein, supra note 11, at 327 (stating that reasons behind EPA's choice of regulations is both vague and puzzling).

150 See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring) (stating that legislation in question was unconstitutional delegation of legislative authority delegated to Secretary of Labor because of Congress' apprehension about legislating in this precarious area).
furthers what I would call "old-fashioned" accountability. He makes his point dramatically, if implausibly, by citing the Reichstag's delegation to Hitler of authority to rule by decree as the horrible example of what can happen if the principle is ignored. He also thinks that the doctrine promotes rule-of-law values. But, as Sunstein notes, heavy negatives outweigh these advantages: the doctrine would be largely unenforceable by the courts; Congress frequently lacks the capability to legislate in detail; and Congress is more susceptible to factional power than executive agencies.

Sunstein appears to believe, apparently unlike Pierce, that congressional accountability has a distinctive importance and significance in relation to presidential accountability in the lawmaking process. And administrators are often weakly accountable to the President or to the electorate. Sunstein traces the evolution of the thinking behind the new nondelegation doctrine to the proposals of Kenneth Culp Davis and to Judge Harold Leventhal's decision in the *Amalgamated Meat Cutters* case, which involved a general price freeze. Davis "proposed a shift from a requirement of statutory clarity to a requirement of administrative clarity," in the form of requiring agencies to establish protections against uncontrolled discretionary power and to adhere to those protections. And in *Amalgamated Meat Cutters*, Judge Leventhal emphasized the requirement of

151 See Sunstein, *supra* note 11, at 335-36 (explaining that nondelegation doctrine is meant to subject government representatives to will of people).

152 See id. at 336 (showing that nondelegation doctrine may even be important safeguard of freedom).

153 See id. at 337 (opining that nondelegation doctrine reflects Constitution's commitment to avoid abuses by enforcement officials).

154 See id. at 337-38 (elaborating on arguments against nondelegation doctrine); see also Patricia Ross McCubbin, *Case Commentary: The D.C. Circuit Gives New Life and New Meaning to the Nondelegation Doctrine in American Trucking Associations v. EPA*, 19 VA. ENVT. L.J. 57, 85-86 (2000) (proposing that administrative agencies oftentimes have more expertise and are generally less affected by politics than is Congress). See generally Heinzerling, *supra* note 131, at 127-31 (discussing various reasons supporting theory that agency-set standards do not violate Constitutional nondelegation doctrine).


156 See Sunstein, *supra* note 11, at 340-41 (explaining Davis's proposed new nondelegation doctrine in which agencies themselves provide requisite standards for discretionary action where statutes fall short).
articulated administrative standards, "enabling Congress, the courts and the public to assess the Executive's adherence to the ultimate legislative standard." The next stop in the evolutionary ascent or descent was International Union v. OSHA, in which Judge Williams wrote the opinion that remanded the case to the agency so it could develop standards that would establish a basis for its actions. Here Sunstein takes a more approving view than Pierce by suggesting that the agency on remand provided what it thought were clear ceilings and floors to discipline agency discretion. The next step was the American Trucking opinion, which created a genuinely new nondelegation doctrine. The basic idea was that agencies, on pain of constitutional invalidity, must generate "floors" and "ceilings," not too far apart, in order to limit their own power.

Professor Sunstein sees pros and cons in the D.C. Circuit's proposal. He says that the soft nondelegation approach had "unquestionable appeal" and "long historic roots." It softened the historic nondelegation doctrine in that the provision of adequate procedural safeguards would sometimes overcome a nondelegation objection. Sunstein believes that the approach of American Trucking, which he calls sophisticated as a piece of policy analysis, could have encouraged the development of "floors" and "ceilings" for EPA judgment and thereby provide a legitimate "strike zone" for regulatory law. On the other hand, he points out some of the downsides. First is the obvious problem that the new doctrine attempted to cure a failing of Congress by ordering an administrative construction of the statute. Second, the role of the judiciary in all the vast areas of regulation where

157 Amalgamated Meat Cutters, 337 F. Supp. at 759 (noting that administrative standards are checks on executive authority); see also Sunstein, supra note 11, at 343 (echoing Judge Leval's opinion in Amalgamated Meat Cutters that administrative standards form constraints on president's authority).
158 See Sunstein, supra note 11, at 348-49 (stating that new nondelegation doctrine would force agencies to limit their own power through statutory interpretation).
159 See id.
160 Id. at 349 (noting that appeal of new nondelegation doctrine lies in allowing agencies to promulgate up front their own procedures by which they will abide and allowing delegation to be upheld otherwise as constitutional).
161 See id. at 350 (stating that such approaches of new nondelegation doctrine may increase consistency of administrative agencies' policies).
162 See id. at 350-51 (asserting that allowing administrative lawmaking violates principles of nondelegation, namely, that federal lawmaking should be in hands of Congress).
constitutional nondelegation principles could apply would inevitably have been greatly expanded.\textsuperscript{163} As alternatives to the new nondelegation doctrine, Sunstein suggests in some instances recourse to ordinary judicial review or in extreme cases revival of the \textit{old} nondelegation doctrine to justify invalidation of the statute or construction of the statute by the court instead of remand to the agency.\textsuperscript{164} Professor Sunstein, in a striking display of hindsight, asserts that the \textit{Schechter} case was correctly decided; but then he was not alive in 1935 and I can remember the Blue Eagle of the NIRA. To salute \textit{Schechter} is to sign on as a Roosevelt hater, which I am sure Sunstein is not.

Applying these views, Professor Sunstein discusses the future of the Clean Air Act and proposes that the EPA endeavor to provide a detailed “benefits analysis,” designed to strengthen both technocratic and democratic forces. This approach would strengthen democratic forces by ensuring that the relevant value judgments are made publicly and exposed to democratic view. Sunstein, of course, concedes that scientific uncertainty will confound any attempt to quantify with precision. He also suggests the development of a (new) common law of regulatory protection designed to promote consistency and rationality in the protection of health and safety, and he discusses how ordinary, as opposed to extraordinary, judicial review could have accommodated the principal concerns of the court in \textit{American Trucking}. He concludes by arguing for what he calls democracy-promoting minimalism: that, in the absence of a violation of a statute, courts should not invalidate regulations unless the objection goes to the heart of the agency’s conclusions. Also, again pursuing minimalism, he recommends in appropriate cases “interim rules” after remand, or “remand without invalidation.”\textsuperscript{165}

\textsuperscript{163} See \textit{id.} at 352-54 (discussing how allowing each agency to promulgate its own standards would create inconsistencies and raise doubts as to constitutionality of those standards, forcing judiciary to police each agency).

\textsuperscript{164} See \textit{id.} at 355 (proposing that “judicial efforts to require quantification – express identification of risk levels – and to elicit relevant value judgments could accomplish most of the goals of the new nondelegation doctrine without bringing out constitutional artillery at all”); see also Dimino, \textit{supra} note 20, at 594 (asserting that old nondelegation approach is better than new one); McCubbin, \textit{supra} note 154, at 78-79 (stating that alternative to new nondelegation doctrine would be reliance on judicial review provisions of statutes).

\textsuperscript{165} See Sunstein, \textit{supra} note 11, at 372-74 (recommending “minimalist” approach of “benefits analysis” which would allow courts to uphold administrative agencies’ standards
Professor Sunstein sums up the relation of his recommended “benefits analysis” to *American Trucking* by saying that the goals of the two approaches are quite close but that *American Trucking* has the disadvantage that it involves unnecessary, even reckless, use of the Constitution. Sunstein feels that agencies should offer a detailed “benefits analysis,” should attempt to identify the gains sought by the particular regulation it has chosen and should compare these gains to those under at least two reasonable alternative regimes, one stricter and one more lenient. In that context, he says that the new nondelegation doctrine was a mistake, but that ordinary judicial review should ask the right questions about more and less stringent levels for a particular standard. If the agency can’t answer the questions, the regulation should be invalidated.

*American Trucking*, as it emerged from the D.C. Circuit, inspired a vast range of writing attacking, defending and taking mixed and conflicting positions on the decision. Some commentators have, in effect, been critical on the perfectly plausible ground that the panel did not have the courage of its convictions. If the problem is that the elected Congress gave inadequate instructions how the bureaucrats were to implement the law, the proper remedy was to strike down the law and thus require Congress to have another try at it. Some critics view upon proper justification); see also Cass. R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 6, 8 (1996) (noting that courts may be ill-equipped to decide complex cases due in part to lack of information); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L. Rev. 296, 304-05 (1998) (summarizing benefits of Sunstein’s judicial minimalism approach).


168 See, e.g., Dimino, *supra* note 164, at 598 (reasoning that Congress is proper lawmaking body); Sunstein, *supra* note 112, at 350-51 (explaining that nondelegation enables Congress, not agencies, to control content of laws). But see McCubbin, *supra* note 154, at 85-86 (arguing that Congress is more susceptible to political factions than administrative agencies).
lawmaking by institutions other than Congress with disfavor (even though lawmaking by administrative bodies seems inevitable in an age of myriad and complex problems requiring technically sophisticated solutions). One argument for Congress as the lawmaker, as opposed to agencies, is that agencies may be more readily "captured" by a few organized groups, resulting in regulations favoring the interests of those groups. Another argument is that an agency presumably pursues its statutory goal to the exclusion of other interests. Congress, on the other hand, must consider the externalities associated with a statute, such as a tax increase that might accompany an increase in benefits, while an agency may be judged solely against its statutory mandate without regard to the impact on the rest of the economy. Reviving the nondelegation doctrine by forcing Congress to make the policy choices, would have bolstered political accountability. However, it seems to me that control of the budget does give Congress considerable responsibility and power over a given agency's impact on the greater economy.

Another critique of American Trucking renames the nondelegation doctrine as applied in that case the "administrative restraint doctrine" and asserts that this new

169 See Dimino, supra note 20, at 597 (stating that agency may be more readily "captured" than Congress); see also Jonathan H. Adler, Citizen Suits and the Future of Spending in the 21st Century: From Lujan to Spending Laidlaw and Beyond: Stand or Deliver: Citizen Suits, Standing, and Environmental Protection, 12 DUKE ENVTL. L. & POL'Y F. 39, 70 (2001) (noting that groups may influence agencies' decisions). But see David B. Spence, The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law, 89 CAL. L. REV. 917, 961-62 (2001) (noting dearth of evidence that any agencies have been captured and rejecting theory).

170 See Dimino, supra note 20, at 597 (explaining that nondelegation doctrine promotes congressional accountability); see also Zellmer, supra note 129, at 956 (noting that early New Deal agencies were created with broad grants of power and provided few guidelines for their functioning).


172 See Dimino, supra note 20, at 597 (noting that Congress can exercise control over agency by withholding or withdrawing funding); see also Sunstein, supra note 11, at 335-36 (discussing accountability as key policy goal of nondelegation doctrine); Zellmer, supra note 129, at 953-54 (noting that major criticism of congressional delegations of power to administrative agencies is lessened congressional accountability).
doctrine emerged from a synthesis of the holdings in *Benzene* and *Chevron*. The rule emerging from *Benzene* is that courts should construe a statute to avoid violating the nondelegation doctrine, as the plurality did in that case. On the other hand, in *Chevron*, the rule prescribed that the agency, not the court, makes the policy choices in promulgating regulations, when the statute passed by Congress is ambiguous. "Thus, *American Trucking* concludes that 'just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority.'"

A good part of the commentary on *American Trucking* explores the extent to which the arbitrary and capricious standard of review may be said to do the same work as the nondelegation principle. Admittedly, one is a constitutional doctrine and the other is not. But, for example, *American Lung*, involving the


174 See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (endorsing construction of statute to limit Secretary's power, thus avoiding nondelegation doctrine); see also McCubbin, supra note 154, at 61 (noting use of nondelegation doctrine as interpretative tool of statutory construction in *Benzene*); Sunstein, supra note 11, at 333-34 (discussing plurality's use in *Benzene* of nondelegation doctrine to interpret statute).


176 *American Trucking Ass'ns, Inc. v. EPA*, 195 F.3d 4, 8 (D.C. Cir. 1999); see also Brax, supra note 13, at 561-62 (noting court's choice of *Chevron* approach in *Am. Trucking*); Verchick, supra note 146, at 135 (noting that *Am. Trucking* court would defer to agency's decision if it applied "intelligible principles" from statute).

177 See, e.g., Deborah Behles, Comment, *A Wrong Turn Crushes Protective Air Regulations: American Trucking Ass'n v. EPA*, 85 MINN. L. REV. 319, 350-52 (2000) (asserting that *Am. Trucking* should have been decided under arbitrary and capricious standard of review); Hubenthal, supra note 13, at 33 (noting arbitrary and capricious standard is alternative to nondelegation doctrine); Seidenfeld & Rossi, supra note 99, at 13-15 (discussing relationship between arbitrary and capricious review and nondelegation doctrine).

178 See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1373 (2001) (noting that nondelegation doctrine is grounded in Article I and separation of powers); Dimino, supra note 20, at 581 (noting that nondelegation doctrine may derive from Article I, § 1 of Constitution); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the
effect of sulfur dioxide bursts on asthmatic individuals, applied the arbitrary and capricious standard to remand to the EPA to explain adequately why sulfur dioxide bursts do not constitute a public health problem.\textsuperscript{179} This is quite similar to the remedy applied in \textit{American Trucking}, but less invasive.\textsuperscript{180} Indeed, Judge Silberman dissented from the denial of rehearing en banc in \textit{American Trucking}, asserting that the panel had taken a greater role than was justified or would have been justified under arbitrary and capricious review.\textsuperscript{181} In \textit{American Trucking}, the panel elected to send the agency a stronger and more global signal, requiring the EPA to defend its regulation, on pain of constitutional invalidation, by reference to a close, quantitative explanation why it is superior to the alternatives.\textsuperscript{182} That was arguably its mistake.

It is unlikely that the Supreme Court's reversal of the D.C. Circuit on the nondelegation doctrine will inspire a comparable body of commentary to the one that has emerged from the holding of the lower court.\textsuperscript{183} I have described Justice Scalia's treatment of the issue as "perfunctory." This may be a slight


\textsuperscript{179} See Am. Lung Ass'n v. EPA, 134 F.3d 388, 392-93 (D.C. Cir. 1998) (noting that basis for arbitrary and capricious standard of review is statutory), \textit{cert. denied}, 528 U.S. 818 (1999); \textit{see also} Todd R. Chason, \textit{American Lung Assn. V. EPA: Administrator's Refusal to Promulgate Additional Sulfur Dioxide Standards Was Inadequately Justified}, 7 U. BALTIMORE L. 201, 203 (2000) (noting that court will apply arbitrary and capricious standard to evaluate Administrator's decision); McCubbin, \textit{supra} note 154, at 79 (noting arbitrary and capricious standard approach in \textit{Am. Lung} resulted in remand for more thorough explanation).

\textsuperscript{180} See Am. Trucking Ass'n, Inc. v. EPA, 195 F.3d 4, 15-16 (D.C. Cir. 1999) (Silberman, J., dissenting) (finding that panel's approach applied closer scrutiny than under arbitrary and capricious review). \textit{See generally} Behles, \textit{supra} note 177, at 352 (finding panel's searching review in \textit{Am. Lung} unsustainable by precedent and under Administrative Procedure Act); Hubenthal, \textit{supra} note 13, at 34 (stating that use of nondelegation doctrine in \textit{American Trucking} allowed court to assume greater role in reviewing EPA standards).

\textsuperscript{181} See \textit{Am. Trucking}, 195 F.3d at 15-16 (Silberman, J., dissenting) (noting that panel's approach was more complicated); \textit{see also} Gray, \textit{supra} note 148, at 11 (noting Judge Silberman's dissent and approval of arbitrary and capricious standard); McCubbin, \textit{supra} note 154, at 70 (discussing Judge Silberman's argument for application of arbitrary and capricious standard).

\textsuperscript{182} See Sunstein, \textit{supra} note 11, at 355 (noting \textit{Am. Trucking} approach may serve to improve administrative decisions and policy); \textit{see also} Brax, \textit{supra} note 13, at 571 (discussing Sunstein's analysis as attempt to induce EPA to improve justifications for its decisions).

\textsuperscript{183} \textit{See}, \textit{e.g.}, Gray, \textit{supra} note 148, at 11 (noting \textit{Am. Trucking} decision by D.C. Circuit); McCubbin, \textit{supra} note 154, at 1-18 (evaluating \textit{Am. Trucking} opinion); Seidenfeld & Rossi, \textit{supra} note 99, at 58-59 (discussing D.C. Circuit opinion in \textit{Am. Trucking}).
overstatement. For he first notes that the Supreme Court "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."\(^{184}\) This lays to rest the most innovative facet of the D.C. Circuit approach and firmly establishes that, though the nondelegation doctrine survives in principle, it exists only in its traditional, "hard" form, under which only Congress can provide a remedy for violations.\(^{185}\)

On the larger issue whether the requisite "intelligible principle" of delegation is present in the relevant provisions of the Clean Air Act, Justice Scalia notes that that statute's limits on EPA discretion are similar to ones that the Court has approved in the past.\(^{186}\) He distinguishes the two cases in which nondelegation was employed to strike down a statute, *Panama Refining* and *Schechter Poultry*.\(^{187}\) Justice Scalia also cites a number of other cases in which the standards of delegation were approved.\(^{188}\) Justice Scalia sums up these cases: "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."\(^{189}\) In a concurring opinion joined by Justice Souter, Justice Stevens suggests that legislative power was indeed delegated to the EPA, but that this was constitutional nonetheless, because the delegation


\(^{185}\) See generally Clark, supra note 178, at 1373 (noting Congress cannot delegate legislative powers); May, supra note 19, at 442-43 (discussing "hard" and "soft" forms of nondelegation doctrine); Seidenfeld & Rossi, supra note 99, at 1-2 (discussing traditional nondelegation doctrine).

\(^{186}\) See Whitman v. Am. Trucking, 121 S. Ct. at 912-13. See, e.g., Touby v. United States, 500 U.S. 160, 163-34 (1991) (approving delegation of power to designate drug as controlled substance for purpose of criminal drug enforcement to Attorney General if doing so was necessary to avoid imminent hazard to public safety); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (approving power of Occupational Safety and Health Administration to set standard which most adequately assures, to extent feasible, and on basis of best available evidence, that no employee will suffer any impairment of health).


"provide[d] a sufficiently intelligible principle."

He reasons that the Constitution does not prevent at all this sort of delegation, provided the requisite safeguards are in place. While sensible, this view has not won the hearts of a majority.

The Supreme Court defines its difference with the D.C. Circuit in these terms:

But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." 175 F.3d, at 1034. 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. 500 U.S., at 165-67... It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are "nonthreshold" pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree.

It is therefore difficult to see, absent a new birth of the NIRA, how Congress could violate the nondelegation doctrine. In its treatment of the nondelegation doctrine, the Supreme Court cited none of the copious commentary inspired by *American Trucking*, as decided by the D.C. Circuit. The Court elected not to pursue the finer points raised by the commentators that are the subject of this article. The Court's answer to nondelegation is, "Yes, there is such a doctrine. But we never again expect to see forms

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190 Id. at 921 (Stevens, J., concurring). *See generally* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (establishing intelligible principle test); Zellmer, *supra* note 129, at 958 (discussing intelligible principle concept).

191 *See Whitman v. Am. Trucking*, 121 S. Ct. at 920-21 (Stevens, J., concurring); *see also* Greco, *supra* note 115, at 575-76 (noting importance of procedural safeguards in constitutional determinations under nondelegation doctrine); Zellmer, *supra* note 129, at 962-65 (mentioning relevance of procedural safeguards).

192 *See Whitman v. Am. Trucking*, 121 S. Ct. at 912 (stating that delegation of legislative powers is impermissible); *see also id.* at 920 (Stevens, J., concurring) (noting that majority characterized authority delegated to EPA as something other than legislative power); Clark, *supra* note 178, at 1431-32 (noting that majority in *Am. Trucking* does not find there has been legislative delegation to EPA); Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 547, 586 (2001) (stating that while *Am. Trucking* was unanimous, there is some disagreement about fundamental principles of nondelegation).

193 *See Whitman v. Am. Trucking*, 121 S. Ct. at 913.
of delegation that require us to invoke it.”194 The Court leaves us with the impression that only something like the “outrages” of the New Deal could lead the venerable doctrine on a new rampage.195 Perhaps this disposition is less upsetting than leaving the doctrine closer to the mid-stream. It will certainly be a long time before a court of appeals is once again moved to bring the doctrine out from the shadows into the sunlight.

194 Id. at 913-14 (discussing broad standards that have been upheld as intelligible principles). See generally Schechter Poultry, 295 U.S. at 430 (stating that NIRA gave no criteria for exercises of discretion); Jeffrey E. Shuren, The Modern Administrative State: A Response to Changing Circumstances, 38 HARV. J. ON LEGIS. 291, 316 (2001) (noting that since 1935, Court has upheld congressional ability to delegate under broad standards).

195 See Bergin, Comment, supra note 4, at 364 (noting United States Supreme Court reiterated in American Trucking that nondelegation issues arise only in rare instances); see also Clark, supra note 178, at 1377 (stating that nondelegation doctrine is only used in rare instances); May, supra note 19, at 443 (stating that successful delegation challenges will be made only rarely after American Trucking).