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NOTES

A CALL TO RESTORE LIMITATIONS ON UNBRIDLED CONGRESSIONAL DELEGATIONS: *AMERICAN TRUCKING ASS'NS V. EPA*

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INTRODUCTION

In May 1999, a three-judge panel handed down a decision in *American Trucking Ass'ns v. United States Environmental Protection Agency*[1] that revived the debate on whether the nondelegation doctrine should be restored as a limitation on congressional delegations to administrative agencies. The court used the nondelegation doctrine to determine that the EPA's interpretation of the Clean Air Act, which it used in setting the revised national ambient air quality standards, constituted an unconstitutional delegation of legislative power.[2] The court specifically ordered the EPA to develop an "intelligible principle" to guide the setting of its air quality standards in order to save the Clean Air Act from being found an unconstitutional delegation of legislative authority.[3] The court reasoned,

> it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"[4]

With these words, the court remanded the case to the EPA with directions to either set out a principle that would cabin its regulatory discretion or, if it could not construct an intelligible principle, petition Congress for legislation that would

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1. 175 F.3d 1027 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

2. *See id.* at 1038.

3. *Id.* at 1034 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

4. *Id.*

ratify the new air quality standards.[5]

The court's use of the nondelegation doctrine sent shock waves through the legal community leading many to question whether the court resurrected a once dead doctrine that could threaten the effective work of all modern day agency regulations. Scholars responded quickly and critically to the court's decision.[6] Although few have stepped forward to defend the court's construction of a new delegation doctrine, a substantial amount of the scholarship has called for the original doctrine's revival[7] or advocated its use as a tool to review agency interpretation of statutory authority.[8] The Supreme Court ignored this call when it rejected the *American Trucking* version of the nondelegation doctrine with its decision in *Whitman v. American Trucking Ass'ns*.[9]

On February 27, 2001, the Supreme Court reversed *American Trucking*[10] without analyzing whether the *American Trucking* nondelegation doctrine advanced the polices underlying the original doctrine and ignored the value of the doctrine as a check on agency discretion.[11]

Instead, the Court chose to narrowly construe its past precedent in failing to adopt the *American Trucking* nondelegation doctrine. This Note advocates the

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5. *See id.* at 1038, 1039-40.

6. *See generally* Craig N. Oren, *Run over by American Trucking Part I: Can EPA Revive Its Air Quality Standards?*, 29 ENVTL. L. REP. 10653 (1999) (arguing that the court's decision should be viewed as representing "rhetorical flourish" and should be justified through the arbitrary-and-capricious test where the courts are charged with taking a hard look at the agency's explanation for its actions); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 305 (1999) (describing the revival of the nondelegation doctrine as "a crude and unhelpful response to existing problems in modern regulation"); Recent Cases, *Administrative Law—Nondelegation Doctrine—D.C. Circuit Holds that EPA Construction of Clean Air Act Violates Nondelegation Doctrine*, 113 HARV. L. REV. 1051 (2000) (arguing that the court's approach undermines the underlying interests upon which the doctrine is based).

7. *See generally* JOHN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132 (1980); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 65-67 (1982) (concluding that a restrictive approach to the rules that allows broad delegation has gained a "fresh dignity"); Thomas J. Bryne, *The Continuing Confusion over Chevron: Can the Nondelegation Doctrine Provide a (Partial) Solution?*, 30 SUFFOLK U. L. REV. 715 (1997) (explaining that for Congress to be truly accountable to the people and serve its representative function it must perform all essential legislative functions); John Evan Edwards, Casenote, *Democracy and Delegation of Legislative Authority:* Bob Jones University v. United States, 26 B.C. L. REV. 745 (1985) (allowing Congress to abdicate its public policy making duties through administrative delegations undermines the Constitution and the Founders' vision of democratic government).

8. Kenneth Culp Davis has authored many works promoting this ideal. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

9. 121 S. Ct. 903 (2001).

10. *Id.* at 914.

11. *See id.*

position that the Supreme Court made a mistake in failing to adopt the new delegation doctrine laid out in *American Trucking* while rejecting any argument that the original delegation doctrine should be revised. To do so would threaten the mechanics of modern day government and substantiate the underlying fears of those who criticize the *American Trucking* panel's decision.

This Note advances the theory that the nondelegation doctrine has evolved into a legal tool for courts to use in reviewing agency regulatory actions to ensure that agencies are not straying from the policies laid out by Congress. Part I charts the evolution of the nondelegation doctrine from its inception in the early Nineteenth Century to its present day form. Part II analyzes the District of Columbia Circuit panel's decision in *American Trucking*. Part III asserts that the Supreme Court should have adopted the D.C. Circuit's reasoning in *American Trucking* because it allows the Court's to recognize the doctrine's underlying principles while recognizing Congress' need to delegate.

I. EVOLUTION OF THE NONDELEGATION DOCTRINE

A. History of the Nondelegation Doctrine

As a prerequisite to a full analysis and understanding of *American Trucking*, a discussion of the underlying precepts of the nondelegation doctrine and its status as a legal concept prior to the D.C. Circuit's 1999 decision is necessary. Such an analysis is best achieved by looking at the underlying principles of the doctrine and then charting the doctrine's evolution from its original purpose of defining legislative power to the current "intelligible principle" test. Throughout this evolution, the Supreme Court has only used the doctrine three times to strike down a statute as an unconstitutional delegation of power.[12]

The nondelegation doctrine is not specifically articulated in the U.S. Constitution, but courts have long recognized that its roots are located in Article I, Section 1, which grants legislative power exclusively to Congress.[13] This power cannot be waived, even if Congress and the public desire to do so.[14] The purposes of the nondelegation doctrine are to protect the integrity and boundaries set by the separation of powers principle[15] and to monitor permissible delegations

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12. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). One group of scholars has argued that because all three of these cases occurred within a year of each other, they were the result of "a temporary judicial hostility toward centralized national regulation, rather than concern over an allegedly unconstitutional transfer of legislative discretion." Aranson et al., *supra* note 7, at 10.

13. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

14. *See* Sunstein, *supra* note 6, at 331. Article I, Section 1 states in relevant part, "[a]ll legislative Powers herein granted shall be vested in a Congress." U.S. CONST. art. I, § 1.

15. As the Supreme Court has made clear, the preservation of liberty will only be accomplished if the fundamental importance of the separation of governmental powers is

in order to ensure the grant of even limited power will not be abused.[16] As observed by one commentator, "to the extent that the nondelegation doctrine is called upon to help enforce the structural commitment to separation of powers, its principal focus is the movement of power: is the authority of one branch being transferred to another, which will now possess a dangerous concentration of government power?"[17] However, while early cases recognized the existence of the doctrine, the Supreme Court did not invalidate a challenged delegation for the first 138 years of the nation's history, nor has the Court rendered a decision in the last sixty-five years that has struck down a statute on nondelegation grounds.[18]

1. The Original Form of the Nondelegation Doctrine.—In its purest form the nondelegation doctrine prohibits Congress from delegating any of its lawmaking power to any other entity. Originally, the doctrine served as the primary restraint on the growth of federal regulatory authority, but as the government grew, many recognized that the doctrine required a measure of relaxation.[19] The cases that consider the nondelegation doctrine "chronicle the Court's purposeful struggle to construct, if possible, a constitutional model for the administrative state that would enable Congress to use means it deemed necessary to pursue ends it deemed appropriate, without sacrificing ideas and forms central to the Constitution."[20]

The foundation of the Court's nondelegation doctrine was laid out in Nineteenth Century cases challenging congressional delegations to the executive and judicial branches. In these early analyses, the Court took a formalistic approach, focusing on a strict enforcement of the separation of powers. *Wayman v. Southard*[21] addressed a challenge against a provision of the Process Act of 1792 that allowed the Supreme Court to issue rules that regulated the service of process and execution of judgments in federal courts. The Court acknowledged

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acknowledged by each branch of government. *See* Mistretta v. United States, 488 U.S. 361, 380 (1989) (citing Morrison v. Olson, 487 U.S. 654, 685-96 (1988)).

16. *See* Field v. Clark, 143 U.S. 649, 692-93 (1892).

17. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479 (1989).

18. *See* Sunstein, *supra* note 6, at 332.

19. *See* Edwards, *supra* note 7, at 752 (arguing that while the need for Congress to be able to delegate is apparent, so is the necessity of incorporating some limitations on the delegations to preserve the government envisioned by the Founders); Brian M. Jorgensen, *Delegations in Danger: The Texas Supreme Court Reinvigorates the Nondelegation Doctrine by Holding That the Official Cotton Growers' Boll Weevil Eradication Foundation Violated the Separation of Powers Clause in the Texas Constitution*: Texas Boll Weevil Eradication Foundation, Inc. v. LeWellen, 952 S.W.2d 454 (Tex. 1997), 29 TEX. TECH. L. REV. 213, 216 (1998) (concluding that Congress does not have the time, resources or expertise to create detailed statutes that control every regulatory agency) (citing 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 74 (3d ed. 1994)).

20. Farina, *supra* note 14, at 480.

21. 23 U.S. (10 Wheat.) 1 (1825).

that Congress could not delegate "powers which are strictly and exclusively legislative[,]" but Justice Marshall, writing for the majority, held that the Act did not involve such a delegation.[22] Justice Marshall refused to define the precise boundary of what constituted a delegable versus a nondelegable legislative power, but he nonetheless concluded that the Act was constitutional because it merely delegated "a power to vary *minor* regulations, which are within the great outlines marked by the legislature."[23]

The legislative/nonlegislative distinction set out by Marshall in *Wayman* was again addressed in *Field v. Clark*,[24] where Congress delegated to the President the responsibility of determining whether the country of origin of entering goods imposed reciprocally unequal and unreasonable tariffs on American goods.[25] If the President made such a determination, then a tariff would take effect against the country importing the goods.[26] Unlike *Wayman*, the Court in *Field* was more willing to discuss the meaning of "legislative power." In the Court's view, Congress was allowed to delegate the implementation of a previous policy decision.[27] The Court held that as long as the delegee was merely an "agent of the law-making department" and the duties of the delegee did not include "the expediency or the just operation" of the statute, the delegation would satisfy the standard of the delegation doctrine.[28]

2. The Intelligible Principle Standard.—In the early Twentieth Century, the Court began to stray from the strict legislative/nonlegislative distinction that was articulated in *Field.* For example, in *United States v. Grimaud*,[29] ranchers indicted for grazing sheep on federal land without a permit challenged a statute that delegated broad regulatory authority to the Secretary of Agriculture to protect public forests from fire destruction and other depredations.[30] The underlying problem addressed in *Grimaud* was that the enabling statute did not set forth a defined set of conditions upon which the Secretary could base his decisions, and thus, the statute did not meet the legislative/nonlegislative standard set out by *Field*. However, the Court still upheld the statute because of the *Wayman* court's statement that, "when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations."[31] The broad statutory discretion sanctioned in *Grimaud* made it increasingly difficult to distinguish legislative activity from nonlegislative activity. The Court began to look not only at the nature of the delegated power,

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22. *Id.* at 42.
23. *Id*. at 45 (emphasis added).
24. 143 U.S. 649 (1892).
25. *See id.* at 680-82.
26. *See id.* at 693.
27. *See id.* at 693-94.
28. *Id*. at 693.
29. 220 U.S. 506 (1911).
30. *See id*. at 509.
31. *Id*. at 517 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

but the extent of the power delegated.[32]

The Court substantially advanced the "fill up the details" analysis in 1928, in *J.W. Hampton, Jr., & Co. v. United States*,[33] where it announced a new standard for assessing delegability. "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[34] This standard led to the first successful nondelegation challenges and the total abandonment of the legislative/nonlegislative distinction.

3. Successful Delegation Challenges.—Hampton provided the basis for the Court to sustain broad congressional delegations of legislative power to agencies, thus making it difficult for early Twentieth Century legal observers to see any viability left in the doctrine.[35] President Roosevelt's New Deal and its sweeping delegations to private and public entities changed the legal playing field. The Supreme Court, which had not found a delegation to be unconstitutional in 168 years,[36] found three New Deal delegations to be in violation of the nondelegation doctrine in a little over a year.

In *Panama Refining Co. v. Ryan*,[37] the Court examined section 9(c) of the National Industrial Recovery Act (NIRA), which authorized the President to prohibit any interstate shipment of petroleum products that violated state law. The Court developed a test to determine whether the provision had the specificity necessary to constitute a constitutional delegation of power to the President.[38] In analyzing the statute, Chief Justice Hughes determined that section 9(c) was in fact an unconstitutional delegation because it did not provide the appropriate guidelines or policy statements within its text.[39] In short, the Court determined that the statute was not a valid delegation because it did not provide an intelligible principle or legislative criteria that would cabin the President's discretion in implementing the provision of the statute.[40]

Three months later the Court was presented with a similar issue in *A.L.A. Schechter Poultry Corp. v. United States*.[41] The statute at issue was NIRA provision 3, which gave the President the power to "approve codes of fair

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32. *See* Farina, *supra* note 14, at 483.

33. 276 U.S. 394 (1928) (upholding a statute that gave the President the power, after an investigation by the Tariff Commission, to increase the congressionally established tariff schedule, if necessary, to level the costs of production between the U.S. and a competing country).

34. *Id.* at 409.

35. *See* Jorgensen, *supra* note 16, at 231.

36. *See* Sunstein, *supra* note 6, at 332.

37. 293 U.S. 388 (1935).

38. The three prongs of the test were: (1) whether the statute's text articulated a policy regarding the statute's text; and (2) whether Congress set forth a standard that called for presidential action; and (3) whether the President was required by Congress to first make a finding before exercising the authority under the statute. *See id.* at 415.

39. *See id.*

40. *See id.* at 431-33.

41. 295 U.S. 495 (1935).

competition" for the poultry industry.[42] In holding the provision to be an unconstitutional delegation of legislative power, the Court rejected the government's argument that analogized provision 3 to a trio of recent cases that upheld delegations to the ICC, the FCC, and FTC.[43] Chief Justice Hughes, again writing for the majority, distinguished the three cases from the present controversy by noting, in part, that in these prior decisions Congress had created an expert administrative entity that was guided by "statutory restrictions adapted to the particular activity."[44] The Court concluded that no such claim could be made for the NIRA because it gave the President "unfettered discretion" in making laws that he felt were necessary to expand or rehabilitate the industry.[45]

In his concurring opinion, Justice Cardozo, referred to the *Panama Refining* decision and concluded that Congress had gone too far in its delegation of legislative power to the President.[46] Cardozo reasoned that the delegated power was "unconfined and vagrant"[47] and clearly represented an attempt to create a delegation that was "not confined to any single act nor to any class or group of acts identified or described by reference to a standard."[48] The combined language of Chief Justice Hughes and Justice Cardozo seemed to indicate that the Court was monitoring congressional delegations with a closer eye in order to maintain the separation of powers in the federal government.

In *Carter v. Carter Coal Co.*,[49] the Court examined the Bituminous Coal Conservation Act of 1935 (BCCA), which gave a board of coal producers and miners authority to set minimum prices for the represented districts, as well as wage rates and maximum labor hours for the entire industry.[50] The Court concluded that this delegation was unconstitutional because it was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[51] The Court made it clear that congressional delegations to private entities would not be tolerated.

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42. *Id.* at 521-22 (quoting 15 U.S.C. § 703(c) (1933)).

43. *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) (holding that the Federal Radio Commission was delegated responsibility to assign radio frequencies under public interest standard); FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934) (holding that he Federal Trade Commission was delegated power to eliminate unfair methods of competition); N.Y. Cent. Sec. Co. v. United States, 287 U.S. 12 (1932) (finding that the Interstate Commerce Commission was delegated the authority to regulate ownership of railroad systems in a manner that served the public interest).

44. *A.L.A. Schechter Poultry*, 295 U.S. at 540.

45. *Id.* at 537.

46. *See id.* at 551 (Cardozo, J., concurring).

47. *Id.*

48. *Id.*

49. 298 U.S. 238 (1936).

50. *See id.*

51. *Id.* at 311.

This rapid succession of cases marks the first and only occurrence when the Supreme Court has invoked the nondelegation doctrine to invalidate congressional delegations of power,[52] raising some important questions. Primarily, why did the Court invoke the nondelegation doctrine in these particular situations? Moreover, what was it about the years of 1935 and 1936 that distinguish them from the almost two hundred years of jurisprudence that expressed the view that the nondelegation doctrine was a "nondoctrine"?[53] The only rational explanation to these questions is that the Court was concerned about the concentration of power in the central government resulting from Roosevelt's New Deal legislation, and, since the substantive due process rule had been terminated, the Court was looking for another means to control potentially excessive government authority.[54] This rationale is supported by the Court's quick return to the view that such broad delegations did not violate the separation of powers principle, so long as Congress articulated an intelligible principle supporting the delegation. As one commentator stated:

> The "intelligible principle" construct no longer permitted even a fiction that division of power was being preserved . . . . [T]he edifice of government now appeared as an ordered collection of weight-bearing and subsidiary components: agency decisions were acknowledged to be "indeed binding rules of conduct," but were accepted as "subordinate rules" that existed "within the framework of the policy which the legislature has sufficiently defined." The emphasis was shifting from power divided to power kept in check.[55]

Therefore, the Court became less concerned with preserving the separation of powers principle and became more concerned with preventing the formation of a tyrannical government by external control over its power.

4. Post New Deal Delegation Decisions.—The underlying sentiments of the intelligible principle constraint were manifestly evident in *Yakus v. United States*,[56] where the Emergency Price Control Act of 1942 was challenged for its grant of authority to the Office of Price Administration.[57] The Act gave authority to the Administration to establish maximum prices for commodities in order to prevent inflation.[58] The Court reasoned that "[o]nly if [it] could say that there is

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52. *See* Aranson et al., *supra* note 7, at 10.

53. *Id.* at 12.

54. *See id.* at 16. Aranson argues that the Court's experimentation with the nondelegation doctrine as a substitute for substantive due process was limited because other legal doctrines, such as procedural due process, equal protection, and the First Amendment, were better suited to limiting excessive grants of power because they only voided the uncontained authority, while the nondelegation doctrine voided the entire statute. *See id.* at 16-17.

55. Farina, *supra* note 14, at 485 (quoting Panama Ref. Co. v. Ryan, 293 U.S. 388, 428-29 (1935)).

56. 321 U.S. 414 (1944).

57. *See id.* at 418.

58. *See id.* at 419-20.

an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed," would it be justified in overriding the means that the Administrator chose to prevent inflation.[59] The Court went on to hold that the Emergency Price Control Act was a constitutional delegation because it was able to ascertain standards from the Act that allowed for external review of the Administrator's decisions.[60]

The approval of the Emergency Price Control Act marks the return of the nondelegation doctrine as a dead-letter principle;[61] however, some have argued that the decision represents an exception falling under Congress's war power because it involved a delegation to a public official during a wartime emergency.[62] However, as evidenced by cases following *Yakus*, the Court did not view the case as a wartime exception, but rather as the expression of the general policy that broad delegations of powers will be upheld.[63] The Court shifted its focus from ensuring that Congress established the policy framework for regulatory decisions, to questioning whether external power to control the delegee's decision could be exerted under the delegation at issue. "After *Yakus*, the constitutionally relevant inquiry is no longer whether Congress resolved certain types of issues, but whether it supplied enough policy structure that someone can police what its delegee is doing . . . ."[64] The Court's experimentation during the New Deal era with the nondelegation doctrine as a limit on regulatory authority was short lived, and the Court quickly reverted back to the days of only paying lip service to the doctrine as it upheld broad delegations.

While the Court has not invoked the doctrine in the last sixty-four years, it has not repudiated the doctrine either.[65] In many of its decisions, the Court has still used the doctrine as a theoretical check on Congress's delegations of authority.[66] Rather than examine whether the delegation was in fact permissible, the Court has instead used the principles of the doctrine to narrowly construe broad statutes in order to find them constitutional.

In *Kent v. Dulles*,[67] the Court reviewed the Secretary of State's promulgated regulations that prohibited the issuance of a passport to any current or recent past member of the Communist party.[68] Two applicants were denied passports for their refusal to sign an affidavit asserting they were currently or had previously

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59. *Id*. at 426.
60. *See id.*
61. *See* Aranson et al., *supra* note 7, at 12.
62. *See id.*
63. *See id.*
64. Farina, *supra* note 14, at 486.
65. *See* Sunstein, *supra* note 6, at 332.
66. *See* Edwards, supra note 7, at 755.
67. 357 U.S. 116 (1958).
68. *See id.*

been members of the Communist Party.[69] Both applicants brought suit challenging the Secretary's decision. Justice Douglas, writing for the majority, narrowly construed the statute[70] as only allowing denial of passports based on citizenship or illegal activities.[71] Justice Douglas justified this reading by saying that a broader reading of the statute might render the statute an unconstitutional delegation.[72] Acknowledging that the right to travel is a fundamental liberty of all citizens, the Court determined that the Secretary's regulations were invalid because only Congress can rightfully limit such a liberty.[73] The Court therefore effectively dodged the delegation issue by choosing a construction of the statute that would not violate the principles of the doctrine.

From *Kent*, commentators have concluded that when a congressional delegation interferes with a fundamental right, such as the right to travel, the Court will assume that Congress did not intend to delegate the interfering power without a showing of "a clear statement of congressional intent."[74] In *National Cable Television Ass'n v. United States*,[75] the Court again narrowly construed a statute in order to avoid the nondelegation issue; however, in this case the delegation did not involve a fundamental right.

National Cable brought into question a statute that mandated federal agencies charge private individuals and corporations for the cost of services provided.[76] A corporation challenged the Federal Communication Commission's (FCC) fee assessment that covered all the costs of regulating the corporation. Justice Douglas again authored the majority opinion, in which he interpreted the statute as allowing the charging of fees only to cover the benefits conferred and not the ability to charge an amount that recouped all of the costs of regulation.[77] The Court determined that such a fee would constitute a tax.[78] Since the Court determined that only Congress has the ability to tax, it found that Congress could not have intended to delegate the taxing power, even though one could reasonably read the statute as such.[79]

Although the Court did not invoke the delegation doctrine in either *National Cable* or *Kent*, the Court did reveal that congressional competence "to exercise certain powers will play a role in determining how explicit a delegation must

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69. *See id.* at 118-20.

70. *See id.* at 129.

71. *See id.* at 128.

72. *See id.* at 130.

73. *See id.* at 129.

74. Aranson et al., *supra* note 7, at 12 (citing STEPHEN BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 263 (1979)).

75. 415 U.S. 336 (1974).

76. *See id.* at 337. Fees were to be based on the "value to the recipient, public policy or interest served, and other pertinent facts." *Id.* (quoting The Independent Officers Appropriation Act, 31 U.S.C. § 483 (1952)).

77. *See id.* at 342-43.

78. *See id.* at 340-41.

79. *See id.*

be."[80] These cases also reveal that the Court is able to avoid the permissible delegation issue by narrowly construing a statute to limit the delegated authority so the statute will not violate the nondelegation doctrine. While congressional competence and standards will often limit overbroad delegations, it is evident from these cases that the Court will go out of its way to avoid striking down a statute as an unconstitutional delegation.[81] Recent cases, however, seemed to signal a renewed interest in the use of the nondelegation doctrine as a means to monitor agency discretion.[82] It is this new line of cases that served as the foundation for *American Trucking*.

B. The Roots of American Trucking

Following *Schechter* and *Panama Refining*, the nondelegation doctrine returned to its days of dormancy,[83] and the Court gave Congress a substantial amount of deference in delegating authority to administrative agencies.[84] However, since the issuance of *National Cable* and *Kent*, there have been concurring, dissenting, and majority opinions calling for a retreat from the court's highly deferential position.[85]

In *Amalgamated Meat Cutters v. Connally*,[86] a three-judge panel was presented with a challenge to the Economic Stabilization Act of 1970. The Act gave the President the power "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries."[87] The President then delegated these powers to the Cost of Living Council.[88] In upholding the delegation, the court looked to procedural controls that would place limits on the

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80. Edwards, *supra* note 7, at 758.

81. *See id.* at 755-58.

82. *See, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980); Int'l Union, United Autos. Aerospace & Agric. Workers of Am. v. OSHA, 37 F.3d 665 (D.C. Cir. 1994).

83. "The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes." Fed. Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring). "A leading commentator flatly advised attorneys in 1958 that delegation claims were so farfetched that making them would discredit one's other claims." Schoenbrod, *supra* note 10, at 1233.

84. *See* Jessica Roff, Note, South Dakota v. United States Department of Interior: *Another Broken Promise to the United States Indians*, 49 ADMIN. L. REV. 453, 459 (1997) (arguing that Supreme Court decisions recognize legislative need to adapt to "complex conditions with which Congress cannot deal directly").

85. *See, e.g.*, *Indus. Union Dep't*, 448 U.S. at 671.

86. 337 F. Supp. 737 (D.C. Cir. 1971) (widely recognized as an authoritative statement of modern day approach to delegation doctrine). *See, e.g.*, Aranson et al., *supra* note 7, at 14; Schoenbrod, *supra* note 10, at 1241.

87. *Amalgamated Meat Cutters*, 337 F. Supp. at 764.

88. *See id.* at 743.

power delegated to the Council.[89] The court reasoned that the Administrative Procedure Act's requirements for judicial review and notice-and-comment rulemaking applied to the Council and thus provided adequate limits on the delegated power.[90] The opinion asserts that, in order to resolve a delegation doctrine issue, a court must look to the procedural and substantive controls within a statute to determine if they create adequate limitations on the agency's power.[91]

The Supreme Court returned to the delegation issue in 1980, in *Industrial Union Department v. American Petroleum Institute*[92] where the Court was presented with a challenge to the Occupational Safety and Health Administration's (OSHA) promulgation of standards that lowered the level of permissible benzene exposure levels.[93] OSHA cited its enabling statute[94] as the authority for lowering the permissible level of exposure. In the plurality opinion, written by Justice Stevens, four Justices returned to the use of the nondelegation doctrine as a tool of statutory construction.[95] The plurality reasoned that the agency's interpretation of the act would constitute an unconstitutional delegation because the agency would have unbridled discretion in regulating the private sector.[96] The Court concluded that Congress could not have intended such a broad delegation,[97] and thus, the statute must be read as requiring OSHA to show significant risk before setting the permissible benzene standards.[98]

Justice Rehnquist concurred in the judgment,[99] but argued that a portion of the Act should be struck down because it constituted an unconstitutional delegation of power.[100] In his famous concurrence, Justice Rehnquist argued that Congress had not properly identified a means of limiting the agency's discretion.[101] Since Congress had not made the policy choice of when OSHA should and should not regulate, Rehnquist concluded that the Act violated the nondelegation doctrine and must be struck down.[102]

Justice Rehnquist made the same argument in his dissent in *American Textile Manufacturers Institute, Inc. v. Donovan*.[103] This time, joined by then Chief Justice Burger, Justice Rehnquist again called for OSHA's enabling act to be

89. *See id.* at 759-60.
90. *See id.* at 760-62.
91. *See* Aranson et al., *supra* note 7, at 14; Sunstein, *supra* note 6, at 342-44.
92. 448 U.S. 607 (1980).
93. *See id.* at 613.
94. 29 U.S.C. § 655(b) (1999).
95. *See Indus. Union Dep't*, 448 U.S. at 646.
96. *See id.* at 651-53.
97. *See id.* at 646.
98. *See id.* at 651.
99. *See id.* at 671 (Rehnquist, J., concurring).
100. *See id.* at 687-88.
101. *See id.* at 672.
102. *See id.* at 687-88.
103. 452 U.S. 490, 547 (1981).

struck down as an unconstitutional delegation of power.[104] At issue was whether the Act required OSHA to undergo a cost benefit analysis in setting the permissible exposure levels of cotton dust for workers.[105] The majority concluded that the Act did not impose such a requirement.[106] Rehnquist, however, reasoned that if the Act did not require such an analysis, the regulatory power delegated to OSHA would be an unconstitutional delegation of legislative responsibilities to the Executive Branch, and thus, must be struck down as a violation of the nondelegation doctrine.[107] These cases indicate that at least a portion of the Court was retreating from its willingness to uphold all delegations.

In 1983, the Court stuck down the legislative veto provision of immigration law in *INS v. Chadha*.[108] The Court concluded the veto provision was an invalid delegation of legislative authority because it allowed legislative action without going through all the proper channels of the legislative process.[109] The dissent viewed the majority's rationale as contrary to the Court's precedent of upholding law made outside of the legislative process.[110] In justifying its decision, the majority attempted to distinguish legislative delegations to the Executive Branch from a delegation of full legislative power to one or both of the Houses.[111] The Court reasoned that executive agencies were subject to judicial review which ensured compliance with the statute.[112] The Court concluded that there was not a similar check on Congress and thus, the delegation was invalid.[113] The distinctions offered by the Court in *Chadha* have been criticized and have led to the conclusion that *Chadha* stands for "a transition [by the Court] to 'a significant judicial tightening of the limits within which Congress may entrust anyone with lawmaking power.'"[114]

Further manifestations of such judicial tightening began to be expressed in Supreme Court cases dealing with statutory delegations involving personal liberties[115] and in a variety of lower court cases.[116] In the most notable of these

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104. *See id.* at 543-48 (Rehnquist, J., dissenting).

105. *See id.* at 494.

106. *See id.* at 509.

107. *See id.* at 548.

108. 462 U.S. 919 (1983).

109. *See id.* at 944-59.

110. *See id.* at 983-89 (White, J., dissenting) (arguing that the Court has made a practice of upholding delegations to the Executive Branch and agencies which do not go through all the proper channels of the legislative process).

111. *See id.* at 951-54.

112. *See id.* at 953 n.16.

113. *See id.* at 952-54.

114. Schoenbrod, *supra* note 10, at 1235-36 (quoting Laurence Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 17 (1984)).

115. *See* United States v. Robel, 389 U.S. 258 (1967). The Court was faced with a challenge to the Subversive Activities Control Act of 1950 that prohibited people, defined as members of a "Communist-action organization," from being employed in any defense facilities. The majority used First Amendment grounds to determine the delegation was unconstitutional. *See id.* at 267-68.

cases, *South Dakota v. United States Department of Interior*,[117] the Eighth Circuit Court of Appeals decided that a section of the Indian Reorganization Act (IRA), which authorized the Secretary of the Interior to acquire land for Native Americans in trust, was an unconstitutional delegation of legislative power.[118] The Supreme Court granted the Department of Interior's petition for certiorari, vacated the opinion, and remanded to the Eighth Circuit with instructions to vacate the district court's decision and to remand the case back to the Secretary of the Interior for reconsideration.[119] In so doing, the Court did not take the opportunity to weigh in on the issue of whether the delegation was an unconstitutional grant of legislative power.[120] This has led one commentator to conclude that no court, even on identical facts, would be likely to follow the Eighth Circuit opinion because of the Supreme Court's "near abandonment" of the doctrine.[121]

These cases indicate that the courts have become less concerned with the original form of the doctrine, which monitored all delegations of legislative power, and have instead began to express the concept that the nondelegation doctrine only allows delegations where there are judicial limitations placed on the agency's power by the terms of the statute. As one commentator has observed, "Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits."[122] It seems it was this concept that came to life in the D.C. Circuit's *American Trucking* decision.

II. FACTUAL BACKGROUND OF *AMERICAN TRUCKING*

A. The EPA's Duties Under the Clean Air Act

Since the passage of the 1970 Clean Air Act (CAA), Congress has granted authority to the EPA to establish and revise the national ambient air quality standards (NAAQS). The standards set the permissible level of pollutants to which the public can be exposed in the outside air.[123] In regards to air pollutants

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Conversely, Justice Brennan would have found the delegation unconstitutional because it represented a vague delegation that impeded fundamental rights. *See id.* at 275 (Brennan, J., concurring).

116. *See* Massieu v. Reno, 915 F. Supp. 681 (D.N.J. 1996), *rev'd*, 91 F.3d 416 (3d Cir. 1996).

117. 69 F.3d 878 (8th Cir. 1995).

118. *See id.* at 885.

119. United States Dep't of Interior v. South Dakota, 519 U.S. 919, 919-20 (1996).

120. *See id.*

121. Sunstein, *supra* note 6, at 335.

122. Farina, *supra* note 14, at 487 (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir.) (en banc) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941 (1976)). Farina observes that Judge Leventhal "aptly characterized the course of nondelegation theory in the courts." *Id.*

123. *See* 42 U.S.C. § 7409(b) (1995).

that fall under the provisions of the CAA,[124] the EPA is charged with setting a "primary ambient air quality standard[] . . . requisite to protect the public health."[125] The CAA provisions have been read to require the EPA to consider only public health when setting the air quality standards.[126] Once the EPA determines that a pollutant reasonably endangers public health or welfare and sets the permissible level of exposure, the Act requires the EPA to re-examine the NAAQS every five years and, if necessary, revise them.[127]

The EPA has asserted that the improvement in air quality standards has led to the prevention of at least 45,000 deaths, 13,000 heart attacks and 7000 strokes annually.[128] However, as air quality standards become stricter, the more difficult and expensive the emissions control measures are likely to be for the creators of air pollution.[129] Thus, any change to the air quality standards will have a pronounced effect on the nation's economy, leaving the EPA susceptible to legal challenges regardless of whether it lowers the standards, raises them, or leaves them unchanged.[130] Car manufacturers, power producers and industry in general have been strictly opposed to the raising of the standards, while environmental groups are constantly pressuring for stricter air quality standards.[131] Due to the scrutiny and opposition that accompanies any revision of the standards, the EPA has been reluctant to revisit the NAAQS, even though the CAA commands that the standards be reviewed every five years.[132]

B. EPA's 1997 Revision of the NAAQS

In 1993, the American Lung Association sought and received an order from the Arizona District Court that required the EPA to complete its review of the air

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124. *See id.* §§ 7408-09.

125. *Id.* § 7409(b). Although the provisions in the CAA do not provide for an "adequate margin of safety" for the secondary air quality standards, the secondary standards are envisioned "to be more stringent than the primary ones." Sunstein, *supra* note 6, at 314.

126. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1040 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

127. *See* 42 U.S.C. §§ 7408(a)(1)(A), 7409(d)(1) (1995). To determine if a revision is necessary the EPA must again determine whether the new standard is "requisite to protect the public health" with an "adequate margin of safety." *Id.* § 7409(b)(2).

128. *See* J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 130 (1998).

129. *See* Oren, *supra* note 6, at 10654.

130. *See* Sunstein, *supra* note 6, at 322.

131. *See id.*

132. *See* 42 U.S.C. § 7409(d) (1995); Envtl. Def. Fund v. Thomas, 870 F.2d 892 (2d Cir.) *cert. denied sub nom.* Ala. Power Co. v. Envtl. Def. Fund, 493 U.S. 991 (1989) (holding that the EPA has a nondiscretionary obligation under § 7409(d) to decide every five years whether to revise air quality standards, but Act does not require EPA to revise the standards).

quality standards.[133] The court, over strong objections from the EPA, ordered the agency to issue a new final rule for publication in the Federal Register by January 31, 1997.[134] The case resulted in the EPA issuing its 1997 revisions of the air quality standards, which lowered the threshold for both the ozone and particulate matter.[135] The costs associated with achieving compliance with the new standards by the year 2010 range from the EPA's conservative annual direct cost of $9.6 billion for ozone and $37 billion for particulate matter, to the critics' estimates of $90 billion to $150 billion annually.[136]

Because the new air quality standards require further reduction by generators of both ozone and particulate matter, millions of activities and business practices would be directly affected by the tightening of such emissions.[137] As the effects of these revisions became widely publicized, numerous parties filed petitions in the D.C. Circuit Court of Appeals for review of the 1997 NAAQS.[138] The primary thrust of these challenges to the air quality standards questioned the accuracy of the scientific data the EPA used to support its promulgations.[139] Additionally, some small business owners further challenged the EPA's interpretation of sections 108 and 109 of the CAA, arguing that the EPA had construed the statute in a manner that rendered it an unconstitutional delegation of legislative power.[140] It was this additional challenge to the CAA that proved to be the most noteworthy issue addressed by the court in *American Trucking*.

In examining the controversy surrounding the EPA's air quality standards, the D.C. Circuit Court diverged from the usual practice of upholding broad congressional delegations by remanding the air quality standards back to the EPA with instructions to develop an intelligible principle that limited the Agency's discretion in promulgating the NAAQS.[141] In so doing, the court revived the nondelegation doctrine, and held that the EPA's interpretation of the CAA was an unconstitutional delegation of legislative power.[142] Although the court did not find the CAA unconstitutional, it did hold that if the EPA could not come up with

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133. *See* Am. Lung Ass'n v. Browner, 884 F. Supp. 345 (D. Ariz. 1994).

134. *See id.* at 349.

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

136. *See* Lucinda Minton Langworthy, *EPA's Air Quality Standards for Particulate Matter and Ozone: Boon for Health or Threat to Clean Air Act?*, 28 ENVTL. L. REP. 10502, 10507 (1998).

137. *See* Oren, *supra* note 6, at 10655.

138. Electric utilities, industrial interests, a trucking association, and several Midwestern states challenged the validity of the new air quality standards. *See* Kevin B. Covington, *Federal Appellate Court Revives the Nondelegation Doctrine in Environmental Case*, 73 FLA. B.J. 81, 81 (1999).

139. *See id.*

140. *See id.*

141. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

142. *See id.* at 1033, 1037-38.

an intelligible principle to cabin its discretion, it would have to petition Congress for ratification of its standards.[143] The decision shocked the legal community and raised a host of important questions. Primarily, commentators and observers queried whether *American Trucking* represented a revival of the nondelegation doctrine,[144] a new form of the doctrine,[145] or some totally different doctrine.[146]

C. Explanation of American Trucking

The *American Trucking* panel's decision proved to be quite controversial within the legal community. Then EPA Administrator Browner has branded the court's decision as "extreme, illogical and bizarre."[147] Professor Craig Oren dismissed the court's decision as "rhetorical flourish,"[148] and still others viewed the case as requiring the EPA to openly consider a cost-benefit analysis when setting air quality standards.[149] Another prominent interpretation was that the panel revived the nondelegation doctrine of the New Deal Era, endangering all environmental regulations.[150] The Supreme Court put an end to this view by reversing the panel's decision based on the Court's view that no precedent supported the idea of an agency being able to cure an unconstitutional delegation.[151] The Court dismissed the panel's attempt at creating a new form of the nondelegation doctrine and reenforced the view that broad congressional delegations will continue to be upheld.[152]

This Note views the decision in yet a different light and argues that the panel properly aimed to expand the concept of the nondelegation doctrine as a method to judicially limit unbridled agency authority.[153] Further, this Note argues that the Supreme Court erred in reversing the decision because the panel's opinion is rooted in both precedent and the underlying principles of the nondelegation doctrine that the Court chose to ignore. However, before discussing how the *American Trucking* decision extends this method of instituting limitations on agency regulatory authority, the panel's reasoning and holding must be understood.

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143. *See id.* at 1040.

144. *See* Covington, *supra* note 136, at 81-83; Oren, *supra* note 6, at 10654, 10658-59.

145. *See generally* Sunstein, *supra* note 6, at 340-49.

146. *See generally id.* at 349-56; Recent Cases, *supra* note 6, at 1051-56.

147. Oren, *supra* note 6, at 10654.

148. *Id.*

149. *See id.*

150. *See* Linda Greenhouse, *An Arcane Doctrine Surprisingly Upheld*, N.Y. TIMES, May 15, 1999, at A11; Cass R. Sunstein, *The Court's Perilous Right Turn*, N.Y. TIMES, June 2, 1999, at A25.

151. *See* Whitman v. Am. Trucking Ass'ns,, 121 S. Ct. 903, 912 (2001).

152. *See id.*

153. This view was first expressed by the prominent administrative law scholar, Kenneth Culp Davis and later expressed in *Amalgamated Meat Cutters*. *See* Davis, *supra* note 8, at 713-14; Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.C. Cir. 1971).

In *American Trucking*, the court deviated from its normal practice of granting discretion to an agency's interpretation of its enabling statute. Instead, the court used the nondelegation doctrine challenge as an excuse to closely examine the EPA's method of setting air quality standards for ozone and particulate matter.[154] The court took notice that both ozone and particulate matter were non-threshold pollutants, meaning that zero would be the only concentration level free of direct health effects.[155] Based on the non-threshold classification, the court held that before the EPA could pick any nonzero number, it must first explain why the degree of risk was acceptable.[156] In an effort to do so, the EPA explained to the court that prior to picking a nonzero number, it considered the size of the population affected, the possible severity of the effects, and the certainty of the effects of the pollutant when it revised the air quality standards.[157] Despite this explanation, the court did not find the factors sufficient and reasoned that "[t]he factors that EPA has elected to examine for this purpose [explaining why the degree of risk was permissible] 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."[158] The court concluded that the factors the EPA offered for explanation did not themselves limit the agency's ability to choose any level for the air quality standards that it saw fit.[159]

Although the court approved of the three factors the EPA used to assess the health effects for the non-threshold pollutants, it was unwilling to sustain the EPA's decision based on those factors. For the court, the problem was that the factors did not explain why the new ozone standard of .08 ppm would constitute the level that was "requisite . . . to protect the public health" with an "adequate margin of safety," whereas the ozone standards of .09 ppm or .07 ppm did not.[160] The court reasoned that the EPA was justifying its choice of air quality standards based on the intuitive argument that less pollution equals greater public benefit.[161] Although certainly true, such an argument offered neither an intelligible principle that served to limit the EPA's discretion in setting the air quality standards nor a basis for judicial review.[162]

The EPA argued that the .08 ppm standard was the optimal standard because anything lower would be closer to background levels of ozone.[163] From this dissent, Judge Tatel argued in his dissent that the EPA's revision of the air

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154. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034-38 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

155. *See id.* at 1034.

156. *See id*.

157. *See id.* at 1034-35.

158. *Id*. at 1034.

159. *See id.*

160. *Id.* at 1034-35, 1034 n.1 (quoting 42 U.S.C. § 7409(b) (1995)).

161. *See id.* at 1036.

162. *See id.*

163. *See id.*

quality standards "ensured that if a region surpasses the ozone standard, it [will] do so because of controllable human activity, not because of uncontrollable natural levels of ozone."[164] However, the majority attacked this reasoning, noting that it could just as easily be used to "justify a refusal to reduce levels below those associated with 'London's Killer Fog' of 1952,"[165] because the higher the level chosen by the EPA, the more probable it is that it resulted from "controllable human activity" rather than "uncontrollable natural levels of ozone."[166] Moreover, the court determined that Tatel's assertion could not satisfy the necessary "intelligible standard" because the EPA has not adopted such a reading of the statute, and thus, it could not be used to defend its setting of the NAAQS.[167] The court concluded that neither the CAA nor the EPA's interpretation of the CAA possessed the necessary intelligible principle to satisfy the nondelegation doctrine.

Under the old delegation doctrine, the court's holding would have had the effect of invalidating sections 108 and 109 of the Clean Air Act. In this case, however, instead of invalidating the Act, the court remanded the air quality standards for review. The court concluded,

> [w]here (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.[168]

The Court viewed the remand of the standards to the EPA as being consistent with two of the three underlying principles of the nondelegation doctrine.[169] The Court viewed the three functions of the nondelegation doctrine as being: 1) not to allow an agency to exercise delegated authority arbitrarily; 2) to allow for meaningful judicial review; and 3) to ensure that Congress makes the important social policy choices to the "extent consistent with orderly governmental administration."[170]

By requiring the agency to develop an intelligible principle, the court placed limits on the EPA's authority for setting the NAAQS. The court found that such limitations would ensure that the regulatory authority would not be used arbitrarily.[171] The court reasoned that these self-imposed limits would allow for

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164. *Id*. at 1060 (Tatel, J., dissenting)

165. *Id.* at 1036.

166. *Id.*

167. *See id*. The court refrained from saying whether this would be a sound reading of the statute. *See id.* However, because the court found that the reasoning was flawed in that it allowed the EPA to justify practically any promulgated standard, one can reasonably conclude that the court would not approve of such a reading.

168. *Id*. at 1038.

169. *See id*.

170. *Id.* (quoting Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980)).

171. *See id.*

meaningful judicial review, which in turn would serve as a check on the agency's use of its regulatory authority.[172] In short, the agency would set boundaries on its own authority, and the courts would make sure that the agency stayed within those boundaries. However, the court had difficulty justifying the remand in light of the third function of the doctrine, which seeks to ensure that Congress makes the important social policy choices.

One problem with a court instructing an agency to set an intelligible standard limiting its own regulatory authority is that the court directs the agency to make important social policy choices rather than allowing Congress to fulfill this legislative duty.[173] In sidestepping this problem, the *American Trucking* court seemed to address this issue by alluding that the third prong of the doctrine no longer needed to be satisfied. It reasoned:

> The agency will make the fundamental policy choices. But the remand does ensure that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage. In any event, we do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine voiced in Justice Rehnquist's concurrence.[174]

The court balanced Congress' need to delegate the performance of legislative duties with the separation of powers concept that legislative power must be confined to Congress. It is this former concern that made the nondelegation doctrine a nondoctrine. But as *American Trucking* illustrates, another solution exists. By instructing the EPA to define an intelligible principle to limit its authority, the court allowed the congressional delegation to stand because it did not invalidate the CAA. The court's ruling also ensures that the EPA would neither interpret the Act in a way allowing the agency to seize legislative power that Congress did not intend to delegate, nor violate the nondelegation doctrine.[175]

The position, taken by the court in *American Trucking* marks the beginning of another shift in the evolution of the nondelegation doctrine. This Note views the case as standing for the proposition that courts are looking for ways to better monitor the regulatory power of agencies, while still allowing Congress to delegate to the extent that it does presently. Unfortunately, the Supreme Court failed to agree with this view.

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172. *See id.*

173. *See* Sunstein, *supra* note 6, at 350-51; Oren, *supra* note 6, at 10661.

174. *Am. Trucking*, 175 F.3d at 1038 (citing *Indus. Union Dep't*, 448 U.S. at 607 (Rehnquist, J., concurring)).

175. *See Indus. Union Dep't*, 448 U.S. at 651. On its way to tightly construing the statute, the Court held that the agency interpretation of its enabling statute was invalid because it would have violated the nondelegation doctrine and Congress could not have intended to delegate to this magnitude. *See id.*

III. THE SUPREME COURT SHOULD HAVE ADOPTED THE MAJORITY'S OPINION IN *AMERICAN TRUCKING*

The Supreme Court should have adopted the nondelegation doctrine as means of monitoring the regulatory power of agencies, because it is consistent with constitutional norms as well as the doctrine's underlying principles. The Supreme Court ignored the arguments in support of the nondelegation doctrine and the benefits of the doctrine being used as a tool that monitors and limits agency regulatory power. In so doing, the Court failed once again to protect the constitutional principles of the nondelegation doctrine.

In *Whitman v. American Trucking*, the Supreme Court held that "[s]ection 109(b)(1) of the CAA, which . . . requir[es] the EPA to set air quality standards at the level that is "requisite" . . . to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent."[176] The Court pointed to its past rulings on nondelegation doctrine challenges and concluded that the determinate criterion that the D.C. Circuit required was not necessary.[177] Further, the Court stated that it had "almost never second-guess[ed] Congress" and found no precedent in support for remanding a invalid delegation to an agency.[178] The Court reasoned that it had never suggested an agency could remedy an invalid delegation by adopting a narrow construction of the statute.[179] In fact, it viewed such a concept as "internally contradictory . . . . [because] [t]he very choice of which portion of the power to exercise . . . would itself be an exercise of the forbidden legislative authority."[180] While the Court cited its past decisions as support for finding a constitutional delegation was made to the EPA, it ignored the fact that the *American Trucking* doctrine furthered the nondelegation principles.

Although the nondelegation doctrine has long been considered a constitutional principle, the Court has been hesitant to enforce the doctrine because of Congress' need to delegate its authority.[181] It is the goal of this section to assert that, instead of underenforcing and ignoring the constitutional principles underlying the nondelegation doctrine, as it did in *Whitman*, the Court should have adopted the *American Trucking* approach which judicially ties Congress' need to delegate to the doctrine and balances it with the three other underlying principles of the nondelegation doctrine.

A. Underlying Principles of the Nondelegation Doctrine

As the *American Trucking* court articulated, the nondelegation doctrine is charged with enforcing three principles. First, the doctrine insures that an agency

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176. Whitman v. Am. Trucking Assn'ns, 121 S. Ct. 903, 914 (2001).

177. *See id.* at 913.

178. *Id.* (quoting Mistretta v. United States 488 U.S. 361, 416 (1989)).

179. *Id.* at 912.

180. *Id.*

181. *See id.* at 914; *see also* Mistretta v. United States, 488 U.S. 361, 372-73 (1989).

will not exercise its delegated authority arbitrarily.[182] Second, it ensures that meaningful judicial review of an agency's actions will be feasible.[183] Third, it ensures political accountability in the legislative process by ensuring that Congress is responsible for making important social policy decisions.[184] Despite these articulated rationales, a fourth principle has stopped the Court from using the doctrine in many situations. This principle has been characterized as a "practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[185] Although this understanding is correct, it does not allow for delegations that give agencies unbridled discretion, and thus it is still necessary to place limits on the delegated authority to preserve the system of government embodied in the Constitution and envisioned by the Founders.[186] The *American Trucking* approach to the delegation doctrine serves as a way to balance all four of these principles in a manner that will allow reasonable and workable limits to be placed on agency regulatory authority.

B. Limiting Agency Authority Through Meaningful Judicial Review

By remanding the air quality standards back to the EPA with instructions to develop an intelligible principle to limit its regulatory authority, the *American Trucking* court ensured that the agency would not use its authority arbitrarily, and provided a method of ascertaining standards that would allow for meaningful judicial review.[187] Thus, the *American Trucking* doctrine allows Congress to grant broad delegations to agencies while requiring the agency to set out limiting standards if Congress has not clearly done so.[188] Without these limitations, a court could not conduct judicial review to make sure an agency was not arbitrarily using its regulatory authority; therefore, the delegation would be inconsistent with the principles of the nondelegation doctrine.

One criticism levied against the court's reasoning was that the court asked the agency to define the limiting factors instead of Congress. Observers argued that this method of ascertaining limitations on an agency's authority will not clarify the congressional intent in a manner that will allow for the judicial review required by the doctrine.[189] These same observers argue that Congress has laid out an intelligible standard in the Clean Air Act by requiring that the air quality standards be set to protect the public health.[190] Even those who argue against the

182. *See Am. Trucking*, 175 F. 3d at 1038.
183. *See id.*
184. *See Am. Trucking*, 175 F.3d at 1038.
185. *Mistretta*, 488 U.S. at 372.
186. *See* Edwards, *supra* note 7, at 752.
187. *See Am. Trucking*, 175 F.3d at 1038.
188. *See* Sunstein, *supra* note 6, at 310.
189. *See* Recent Cases, *supra* note 6, at 1055.
190. *See id.* at 1054.

revival of the nondelegation doctrine, however, realize that such a standard does nothing to rein in the EPA's discretion in setting the standards.[191] The public health standard has offered the court guidance in determining that it is Congress' intent to have the EPA set the air quality standards based solely on health considerations.[192] Thus, the court in *American Trucking* already knew what Congress had intended for the agency to consider in setting the NAAQS.

For meaningful judicial review, however, the court also needed to know what factors the agency actually considered and what guidelines it used to determine the appropriate balance of health benefits as compared with the potential degree of risk.[193] If the EPA cannot ascertain such factors, there is no way for the court to determine whether the agency is complying with the congressional mandate to regulate in a manner that protects the public health. Thus, the Clean Air Act grants the EPA unrestricted authority that could easily be used arbitrarily because the court would be unable to limit the agency's ability to regulate air quality standards.[194]

The nondelegation doctrine requires that regulatory actions be subject to meaningful judicial review. As long as Congress has made the policy choice of a principle that guides the agency in the proper use of its authority, it does not matter whether Congress or the agency sets the necessary boundaries that permit this review to take place. In this case, Congress made the policy choice of requiring the EPA to regulate in a manner that protects the public health. The public health standard does not limit the agency regulatory power or allow for meaningful review, so it is up to the agency to come up with an interpretation that is consistent with Congress's policy choice, limits its own authority, and provides a standard that allows a court to determine if the agency has acted arbitrarily.

C. Balancing Political Accountability with the Need to Delegate

In *American Trucking*, the panel held that to remand the case and allow the agency to "extract a determinate standard on its own," would not serve the third function of the nondelegation doctrine.[195] The court reasoned that instead of

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191. *See* Oren, *supra* note 6, at 10664.

192. *See Am. Trucking*, 175 F.3d at 1038.

193. *See id.*

194. Although it could be argued that Congress itself would serve as a check on agency regulatory power, the delegation of such unrestricted power would prevent meaningful judicial review and remove the administrative branch from judicial actions. Thus, the court would be stripped of its duty to determine what is a proper delegation. As one commentator has said, "[t]he determination of whether Congress has rightly delegated authority to an administrative agency must be made by the courts, not Congress." Edwards, *supra* note 7, at 775. The arbitrary and capricious standard of review would similarly fail as a check on agency power, because the court would be unable to determine if the agency acted arbitrarily without standards that reveal when the EPA can act.

195. *Am. Trucking*, 175 F.3d at 1038.

Congress, the agency would be making fundamental policy choices.[196] Although the court's reasoning has merit, it ignores the fact that the third prong of the doctrine requires Congress to make the fundamental policy choices in order to increase political accountability in the legislative process.[197] Phrasing the inquiry in terms of accountability, it becomes evident that the *American Trucking* nondelegation doctrine does serve the third function of the doctrine by increasing the accountability of the legislative process as a whole.

The Constitution entrusts Congress with the lawmaking authority because it is directly accountable to the people through the electoral process; moreover, the nondelegation doctrine serves to ensure that this accountability will always be present in the legislative process.[198] Thanks to an ever expanding central government, however, Congress has been required to delegate its legislative authority, and courts have responded by upholding broad delegations in order to allow Congress to meet its governmental responsibilities.[199] Consequently, the nondelegation doctrine has been rarely invoked and accountability in the legislative process has withered away.[200] Agency heads are not held politically responsible for their actions, because they are appointed rather than elected and are subjected to only limited review by their appointers.[201] In essence, the congressional need to delegate has trumped the doctrine's purpose of ensuring political accountability. Therefore, it should not matter whether the *American Trucking* version of the doctrine ensures political accountability in the legislative process, because the original form of the delegation doctrine did not.[202] Rather, by characterizing the inquiry in terms of ensuring political accountability in the legislative process as a whole, one can conclude that the *American Trucking* nondelegation doctrine better achieves this goal than older manifestations of the doctrine.[203]

Although Congress' need to delegate overran the original form of the nondelegation doctrine, the *American Trucking* doctrine balances this congressional need with the doctrine's underlying principles in order to ensure that the legislative process will be subject to an increased level of political accountability. By exposing agencies to nondelegation challenges, courts will provide a forum for agencies to be held accountable to the public.

By strengthening the air quality standards, the EPA made a regulatory decision that affected the entire nation.[204] The public responded by bringing legal challenges against the EPA's evidentiary findings and its regulatory

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196. *See id.*

197. *See generally* William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority over Regulations*, 20 CARDOZO L. REV. 939, 940-45 (1999).

198. *See* Mistretta v. United States, 488 U.S. 361, 371-72 (1989).

199. *See* Covington, *supra* note 136, at 82-83.

200. *See* Schoenbrod, *supra* note 10, at 1238-46.

201. *See* Sunstein, *supra* note 6, at 338.

202. *See* Schoenbrod, *supra* note 10, at 1246.

203. *See* 1 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 3.75 (2d ed. 1978).

204. *See* Oren, *supra* note 6, at 10657-58.

authority.[205] Environmental groups responded in defense of the agency and the Court of Appeals for the District of Columbia heard both sides of the political and legal debate.[206] Such a description of the case sounds like a process which should be taking place in the legislative branch rather than the courts. However, because courts recognize the need for Congress to delegate, courtroom challenges provide the most effective means for the public to hold agencies politically responsible for regulatory acts.[207] More troubling than having political debates taking place in courtrooms is that the courts have compromised one of the public's strongest weapons in holding rule promulgators accountable by granting agencies broad delegations of legislative authority.[208] Courts would rather uphold these delegations than void a congressional act that has passed through all the channels of the lengthy legislative process.[209]

One of the most unattractive features of the old delegation doctrine was that it required courts to strike down a congressional act. The *American Trucking* doctrine solves this problem by remanding the erroneous agency interpretation, rather than eradicating the entire act.[210] Further, if the agency cannot come up with an interpretation of the act that does not violate the doctrine, then it must return to Congress for ratification of the agency's interpretation or to develop a nonviolative interpretation.[211] In this regard, the courts serve as the voice of the public in ensuring that the entire legislative process is held politically accountable.

The *American Trucking* approach to the doctrine is not without its critics. One objection shared by observers is that the arbitrary and capricious standard of review could have resolved the controversy in *American Trucking* better than the nondelegation doctrine.[212] Such critics believe the court used the delegation doctrine as an easy way to distinguish this case from its past decisions that would have upheld the EPA's ability to use its discretion in setting standards within a relevant range of options.[213] However, these observers ignore the benefits of using the nondelegation doctrine as an increased level of scrutiny instead of the

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205. *See* Covington, *supra* note 136, at 81.

206. *See id.*

207. *See generally* Schoenbrod, *supra* note 16, 1242-46.

208. *See* McGautha v. California, 402 U.S. 183, 271-87 (1971) (Brennan, J., dissenting); Yakus v. United States, 321 U.S. 414, 423 (1944); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 759 (D.C. Cir. 1971).

209. *See* Aranson et al., *supra* note 7, at 16-17 (arguing that the Court's experimentation with delegation doctrine was short lived because of doctrine's requirement that challenged legislation be deemed void).

210. *See* Sunstein, *supra* note 6, at 309-10.

211. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1040 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

212. *See* Oren, *supra* note 6, at 10657-59; *Am. Trucking Ass'ns v. EPA*, 195 F.3d at 14-16 (Silberman, J., dissenting).

213. *See* Oren, *supra* note 6, at 10663; *Am. Trucking*, 175 F.3d at 1037.

arbitrary and capricious standard. The arbitrary and capricious standard only allows a court to criticize an agency's decision, while the nondelegation doctrine allows the court to require the agency to develop standards it must follow when regulating, and it calls Congress to reinterpret its legislative delegation.[214] Such a call will, in turn, increase the consistency and reflectiveness involved in agency decisions, making administrative rulemaking more effective.[215] Although the *American Trucking* nondelegation approach increases the likelihood of well-informed and consistent regulatory action, it does appear to give the judiciary branch power that it is not authorized to possess.

Others have criticized that the Court of Appeals for the District of Columbia for developing a test for unconstitutional delegations that it had neither the authority to enforce nor the authority to require other courts to follow.[216] As a result, courts may ignore constitutional principles and base their decisions on their own policy preferences.[217] However, this argument ignores three important principles. First, Supreme Court precedent utilizes the nondelegation doctrine to narrowly construe legislation in order to find that a legislative delegation did not violate the doctrine.[218] From such precedent, it is apparent that the Court reasoned that Congress could not have intended to delegate legislative authority that constituted a violation of the nondelegation doctrine.[219] Second, there is the general constitutional principle that whenever possible, statutes should be construed so as to be constitutional.[220] Finally, it is generally accepted that Congress should be allowed to make broad delegations of power.[221]

When these three principles are examined in conjunction with the delegation doctrine, rules become evident that will guide a court in addressing a delegation challenge. First, a court should try to construe the statute in a manner that constrains agency authority by allowing meaningful judicial review. If the court cannot construe the statute in such a manner, then the court should determine whether the agency can use its expertise to limit its own authority, thus complying with Congress' broad delegation and serving the purposes of the delegation doctrine. Only after the agency has failed to establish such a standard will the court find the statute unconstitutional. As a final check on the court's power of review, Congress can act as the final arbitrator with the ability to overrule the court's decision through legislation. Because the authority for the *American Trucking* doctrine rests in these recognized principles, any argument that the judiciary is trying to seize unauthorized power must fail.

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214. *See Am. Trucking*, 175 F.3d at 1040 (suggesting that EPA return to Congress to address revision of air quality standards).

215. *See* Sunstein, *supra* note 6, at 350.

216. *See* Recent Cases, *supra* note 6, at 1056.

217. *See id.*

218. *See, e.g.*, Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980); Kent v. Dulles, 357 U.S. 116 (1958).

219. *See Indus. Union Dep't*, 448 U.S. at 651

220. *See, e.g.*, *Kent*, 375 U.S. at 129-30.

221. *See* Mistretta v. United States, 488 U.S. 361, 372-73 (1989).

In *American Trucking*, the court employed these constitutional principles to increase legislative accountability. The public sought to hold the agency accountable for its action by raising a nondelegation doctrine challenge, arguing that the EPA has interpreted the CAA in a manner that constitutes an unconstitutional delegation of power. Based on the principles that Congress would not have intended to delegate authority in violation of the doctrine and that the statutes are mandated to regulate in a manner which protects the public health, the court interpreted the statute in a way that constrained the EPA's regulatory power.[222] After determining that the EPA could not come up with such an interpretation, the court did not invalidate the CAA because such an action would violate the understanding that Congress must be allowed to delegate in order to accomplish all of its legislative duties.[223] Instead, the court remanded the air quality standards to the EPA and instructed the agency to use its expertise to come up with an intelligible standard that limits its regulatory authority.[224]

The EPA was then faced with the option of either returning to Congress to have its air quality standards ratified or using its expertise to come up with an intelligible standard. If the agency went to Congress, Congress would have been forced to address the issue, thus increasing accountability through the legislative process.[225] If the agency used its expertise to come up with an intelligible standard defining the appropriate balance between health benefits and potential risks that allow regulation, the administrative process would have become more consistent and reflective in nature.[226] Either way, the accountability of the legislative process will be increased. Thus, by using statutory construction principles to balance Congress' need to delegate with the accountability principle of the nondelegation doctrine, the *American Trucking* court had constructed a test that would allow courts to enforce, rather than ignore, the underlying constitutional principles that the nondelegation doctrine represents. The Supreme Court chose to ignore how the panel's decision promoted limiting agency authority through meaningful judicial review and increasing the accountability of the legislative process while recognizing Congress' need to make broad delegations. Thus, the Court chose to ignore, yet again, the constitutional principles underlying the nondelegation doctrine.

CONCLUSION

While these principles show that the *American Trucking* doctrine is grounded in constitutional principles, it does not answer the Supreme Court's argument that there is no support for remanding an unconstitutional delegation to an agency

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222. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir.), *modified per curiam*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

223. *See id.* at 1038.

224. *See id.* at 1040.

225. *See* Schoenbrod, *supra* note 10, at 1243-46.

226. *See* Sunstein, *supra* note 6, at 350.

for the purpose of coming up with a limiting construction.[227] However, Supreme Court cases have advanced the theories that the nondelegation doctrine require the courts to narrowly construe statutes, because it is presumed that Congress does not intend to make unconstitutional delegations.[228] Thus, it is not a new idea to narrowly construe congressional statutes to ensure that Congress can continue to delegate.

Until *American Trucking*, courts served as the body responsible for narrowly constraining the statutes. As a result, the nondelegation doctrine and its underlying policies of preventing arbitrary use of agency power through meaningful judicial review and promoting accountability have been ignored.[229] The Supreme Court held that it had never required a statute to have a "determinate criterion" for which *American Trucking* searched.[230] However, looking at Supreme Court precedent, it has never really enforced the underlying principles of the doctrine either. As one scholar stated "[t]he Supreme Court's application of the delegation doctrine, by way of an amorphous and ultimately meaningless definition of legislative power undercuts the accountability the Constitution seems to protect."[231] Looking at the history of the Court in last 200 years, it does not just seem to undercut accountability, it clearly fails at promoting any of the doctrine's underlying principles.

By allowing courts to place agencies in the position of narrowly construing congressional delegations, the Supreme Court could have restored meaning to the nondelegation doctrine and in so doing, would have increased the accountability of the legislative process as a whole while ensuring a more meaningful judicial review to monitor agency discretion. The idea of having a body other than Congress narrowly construe its delegations is well supported by Supreme Court precedent, and the added benefits of balancing the need of Congress to delegate legislative authority with the doctrine's underlying principles justifies the panel's decision in *American Trucking.*

The nondelegation doctrine has had little effect on enforcement of the separation of powers principle on which this country's government was founded. Supreme Court precedent supports the premise that the Court does nothing more than acknowledge the principles that underlie the doctrine.[232] In its last two opinions addressing a challenge based on the doctrine, the Court refused to revive the doctrine as a check on grants of legislative power.[233] The Court held in *Mistretta v. United States* that "in our increasingly complex society, replete with ever changing and more technical problems" Congress could not do its job

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227. *See Whitman*, 121 S. Ct. at 912.

228. *See supra* notes 210-11 and accompany text.

229. *See* Schonbrod, *supra* note 16, at 1237 (arguing that "[d]espite the adequacy of what the Court says about delegation it nonetheless asserts what it does in practice fulfills the doctrine's purposes. The Court is wrong.").

230. *Whitman*, 121 S. Ct. at 913.

231. *Id.* at 1246.

232. *See* discussion *supra* Part I.A-B.

233. *See Whitman* 121 S.Ct. at 914; *Mistretta*, 488 U.S. at 371.

without being able to make broad delegations.[234]

The Supreme Court should have adopted the *American Trucking* doctrine as a solution to the problem of enforcing the nondelegation doctrine, while still allowing Congress to make broad delegations of legislative authority. The proposed doctrine emphasizes construing statutes to ensure they include limits on agency regulatory authority. These limits will not hold agencies accountable for their decisions but will place Congress on notice that it may have to reconsider its legislative delegation if it does not statutorily restrict the agency or if the agency cannot establish self restrictions. In short, the proposed delegation doctrine increases the accountability of the legislative process as a whole, ensures that an agency will not use its authority arbitrarily, and ensures meaningful judicial review without detracting from Congress' ability to delegate. The proposed delegation doctrine allows courts to balance these constitutional concerns in a manner that protects the integrity of the separation of powers principle. The Supreme Court ignored these policies in *Whitman* and as result, ensured that courts will continue to pay only lip service to the nondelegation doctrine and ignore the principles upon which this country was founded. The Supreme Court erred in not adopting *American Trucking*, thus allowing congressional delegations to continue to go unchecked.

234. *See Mistretta*, 488 U.S. at 372.