BYU Law Review

Volume 2000 | Issue 2 Article 4

5-1-2000

The Weak Nondelegation Doctrine and American Trucking Associations v. EPA

Gabriel Clark

The Weak Nondelegation Doctrine and *American Trucking Associations v. EPA*

I. INTRODUCTION

"A marked tendency of modern legislation is to deal with regulatory problems by setting forth less frequently in the legislation itself the particular rules that shall control."[1] James Landis wrote those words in 1938, and they are just as true today as they were then. Landis's statement highlights the conflict underlying the legal and political debate over whether Congress should be allowed to pass legislation that does not set forth "the particular rules that shall control."[2]

Congress delegates legislative authority when it refuses to set forth controlling rules and requires another branch to do so.[3] The "strong nondelegation doctrine" prohibits such delegations of legislative authority to another branch.[4] This doctrine is a valid constitutional principle, and courts continue to discuss it. However, notwithstanding the doctrine's constitutional support and its verbal acknowledgement by courts, strong nondelegation, with few exceptions, has not actually been applied by courts. Since courts do not apply the strong nondelegation doctrine, Congress is allowed to continue to delegate tremendous decision-making power to the executive branch. Additionally, because courts have not, do not, and likely will not, apply the strong nondelegation doctrine any time soon, it is simply unworkable.

1. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 68 (1938).

2. *Id.*

3. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9 (1993).

4. This Note defines strong nondelegation as encompassing two theories. First, the traditional strong nondelegation doctrine prohibits all delegations of legislative authority. Second, the more modern version of the strong nondelegation doctrine allows some delegations of legislative authority, but only when Congress clearly articulates an intelligible principle to guide the agency's exercise of discretion. In addition, for consistency, this Note uses the term "nondelegation doctrine" instead of the "delegation doctrine." Although the two terms generally refer to the same concept, the nondelegation doctrine is not limited to delegations of legislative authority. This Note concentrates on the doctrine's application to delegations from the legislative to the executive branch.

Under the status quo—in which broad delegations of legislative authority are upheld—administrative agencies often possess significant decision-making discretion, and those agencies sometimes abuse the discretion given them. If the only options available to the courts were application of the strong nondelegation doctrine or maintenance of the status quo, the status quo would likely prevail, notwithstanding its associated problems. This is the case because application of the strong nondelegation doctrine would require courts to declare as unconstitutional many current statutes that delegate legislative power. Fortunately, another option exists.

The so-called "weak nondelegation doctrine" allows Congress to delegate legislative authority to an agency if the agency thereafter takes action to sufficiently narrow its own discretion under the statute. For instance, the D.C. Circuit recently decided *American Trucking Associations v. EPA* ("*American Trucking*"),[5] and held that the Environmental Protection Agency's ("EPA") interpretation of the Clean Air Act ("CAA") violated the nondelegation doctrine because the EPA did not articulate an intelligible principle to limit the discretion given by the CAA.[6] The D.C. Circuit applied weak nondelegation in this case as an alternative to strong nondelegation.

The weak nondelegation doctrine is a desirable alternative to strong nondelegation because it does not prevent congressional delegations of legislative power, but it can correct some of the more serious problems associated with those delegations. Part II discusses the nondelegation doctrine's background, including its constitutional foundations and the case law that has developed the doctrine. Part III examines the *American Trucking* decision, including a discussion of the case's statutory and regulatory context, an examination of the case's holding and possible rationales for the holding, and an analysis of how the majority's decision supports the weak nondelegation doctrine. Part IV examines how weak nondelegation can be defended against criticism from both strong nondelegation supporters and nondelegation opponents. It then illustrates how Judge Tatel's *American Trucking* dissent, as well as the United States Supreme Court and D.C. Circuit case law, support weak nondelegation. Finally, it discusses possible practical implications of the *Ameri-*

5. American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir.) (per curiam), *reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam).

6. *See id.*

can Trucking decision's application of weak nondelegation. This Note concludes that, instead of perpetuating the stalemated argument over whether strong nondelegation should be resurrected, courts should adopt the weak nondelegation doctrine as a workable and desirable alternative that can be supported by the Constitution, case law, and public policy.

II. BACKGROUND

Reasonable arguments support both sides of the nondelegation debate. Strong nondelegation supporters argue that delegation of legislative authority is unconstitutional and threatens the integrity of our federal government. An examination of the Constitution supports this position. Nondelegation opponents argue that the strong doctrine threatens to paralyze civilized society by preventing the federal government from fulfilling its responsibilities, an argument recognized by the Supreme Court.[7]

In spite of the constitutional arguments for strong nondelegation, the doctrine has, for all intents and purposes, been dormant for quite some time. Litigants have long asserted nondelegation claims when challenging administrative agency action, but the Supreme Court has consistently agreed with the doctrine in principle only.[8] Notwithstanding the Court's verbal agreement with the theory of strong nondelegation, the Court's holdings have born no relationship to the articulated standards.[9]

This section sets forth, first, the constitutional arguments for and against the nondelegation doctrine and, second, a brief overview of the Supreme Court's nondelegation case law. This Note does not, however, attempt to answer the question of whether the Constitution actually prohibits delegation of legislative power.

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

8. *See, e.g., infra* Part II.B.

9. *See id.*; 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3:1, at 149 (2d ed. 1978).

A. The Strong Nondelegation Doctrine and the Constitution

1. The Constitution's language

Article I of the United States Constitution establishes the legislative branch and enumerates that branch's powers.[10] The first section of Article I states, "All legislative Powers herein granted shall be vested in a Congress of the United States."[11] Article I further states that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[12]

Articles II and III establish the executive and judicial branches respectively and enumerate the powers granted to those branches.[13] These articles use similar restrictive language: "The executive Power shall be vested in a President of the United States of America"[14] and "[t]he judicial Power of the United States, shall be vested in one supreme Court."[15] This constitutional text shows that (1) specific powers are given to specific branches of the federal government, and (2) since each branch is vested with only its power and not with the power of any other branch, these powers should not be shared among the branches.

James Madison's writings further support these two propositions. First, addressing concerns of an overly powerful federal government, Madison stated that "[t]he powers delegated by the proposed Constitution to the Federal Government[] are few and defined."[16] If the federal government as a whole possesses few and defined powers, then the branches *within* that government must also possess few and defined powers. Madison later responded to critics' arguments that the Constitution threatened the nation's liberty because of the inadequate separation of powers between the three branches. Recognizing the threat posed by the consolidation of too much power in any one branch, he stated that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a

10. *See* U.S. CONST. art. I, §§ 1, 8.
11. *Id.* § 1.
12. *Id.* § 8, cl. 18.
13. *See id.* at arts. II, III.
14. *Id.* at art. II, § 1, cl. 1.
15. *Id.* at art. III, § 1, cl. 1.
16. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

few or many . . . may justly be pronounced the very definition of tyranny."[17] Madison then argued the Constitution does not allow such concentration of powers in one branch.[18] *The Federalist No. 48*, arguing for checks and balances, further reinforces the principle that one branch should not exercise another branch's powers.[19]

In addition to what the Constitution says on this subject, it is also important to note what it does not say. As in all other areas of constitutional law, there is ample room for disagreement over whether the Constitution necessarily prohibits the delegation of legislative power. Nondelegation opponents are quick to point out that the theories previously mentioned are not explicit in the constitutional text. Nondelegation opponents maintain that the Constitution contains no "separation of powers" provision, no "nondelegation" provision, and no definition of legislative, executive, or judicial powers.[20]

2. Constitutional arguments supporting the strong nondelegation doctrine

Support for the strong nondelegation doctrine focuses primarily on the doctrines of enumerated powers and separation of powers. The doctrine of enumerated powers holds that the three branches derive their power only from the Constitution's vesting clauses, which specifically enumerate what powers are vested in each branch.[21] Therefore, if the Constitution does not enumerate a power in a branch's vesting clause, then that branch cannot exercise that power.[22] Under this analysis, the legislative branch cannot delegate

17. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961). *See also id.* at 325 (quoting Montesquieu that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates"); *id.* at 326 (stating that "[t]he magistrate in whom the whole executive power resides cannot of himself make a law").

18. *See id.* at 324-31.

19. *See* THE FEDERALIST NO. 48 (James Madison) (Jacob E. Cooke ed., 1961).

20. *See, e.g.,* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 (1994).

21. *See id.* at 1238; Gary Lawson, *Who Legislates?*, 1995 PUB. INTEREST L. REV. 147, 150-51 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) [hereinafter *Who Legislates?*]; *see also supra* notes 10-15 and accompanying text.

22. *See* Lawson, *supra* note 20, at 1238; *Who Legislates?*, *supra* note 21, at 150-51. *See generally* SCHOENBROD, *supra* note 3, at 155-57 (noting debate at the Constitutional Convention supporting the proposition that the Constitution prohibits delegation).

legislative authority since Article I does not enumerate such a power.[23] By negative implication, since the Constitution vests "[a]ll legislative Powers"[24] in the legislative branch and does not vest any legislative powers in the executive branch, the executive branch cannot exercise legislative powers delegated to it.[25] The separation of powers also supports these twin conclusions; because the legislative branch is separate from the executive branch, the executive branch cannot exercise the legislative branch's powers.[26]

3. Constitutional arguments opposing the strong nondelegation doctrine

Nondelegation opponents primarily criticize the strong nondelegation doctrine on functional grounds, but some have challenged strong nondelegation's constitutional basis using the Constitution's text and history. Some opponents, for instance, argue that the Constitution's language is properly interpreted to authorize delegations, that broad delegations of legislative power were common during the Framers' time, and that the Framers did not see any problem with such delegations.[27]

Opponents also attempt to side step constitutional issues by arguing that administrative agencies do not exercise legislative authority. First, a statute may give an executive agency very broad discretion to issue regulations. Second, the agency may exercise discretion and issue those regulations as the statute requires. According to this argument, if statutes require agencies to issue regulations and the agencies do so, then the agencies have merely executed the law, as the Constitution authorizes. Therefore, the agencies have not exercised legislative authority.[28]

23. *See* Lawson, *supra* note 20, at 1238; *Who Legislates?*, *supra* note 21, at 150-51. *See generally* SCHOENBROD, *supra* note 3, at 155-57.

24. U.S. CONST. art I, § 1.

25. *See* SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 37 (1975) (arguing that the primary support for the nondelegation doctrine should be constitutional supremacy and "the simple expectation . . . that neither the government nor any of its parts should change the constitutional arrangement of offices and powers"); Lawson, *supra* note 20, at 1238; *Who Legislates?*, *supra* note 21, at 150-51. Note that Barber's conclusion is reinforced by Article I, Section 8 of the Constitution, which enumerates the legislative powers Congress is authorized to perform. *See* U.S. CONST. art. I, § 8.

26. *See* BARBER, *supra* note 25, at 37.

27. *See* DAVIS, *supra* note 9, § 3:4.

28. *See Who Legislates?*, *supra* note 21, at 151-52.

B. The Evolution of Nondelegation Case Law

Time and time again, the Supreme Court has reiterated that the Constitution prohibits the delegation of legislative authority. The Court has repeatedly stated there are limits on the amount of discretion that Congress can grant to executive agencies. But despite the sometimes-forceful language, the Court has repeatedly refused to hold broad grants of authority unconstitutional.[29] While this discussion does not attempt to exhaustively analyze the historical case law, a fairly clear picture can be obtained from the relatively few cases that follow.

1. The pre–New Deal era

a. Phase I: Denial that a delegation has taken place. Near the end of the nineteenth century, after upholding several fairly broad delegations,[30] the Supreme Court decided *Field v. Clark*.[31] The statute in question authorized the President to suspend Tariff Act provisions and impose duties on foreign nations upon finding that the foreign nation imposed unequal and unreasonable duties on American goods. The statute defined neither "unequal" nor "unreasonable."

The *Field* opinion contains some of the Court's most well-known and most forceful nondelegation statements. For example, the Court stated, "That 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."[32]

More important than the Court's strong language, however, is the consistency of the holding with prior and subsequent cases. As the Court had so often done previously, it held that the statute did not unconstitutionally delegate but did not explain why.[33] So, according to *Field*, determining whether a foreign country's tariffs are

29. There is, of course, room to argue whether many statutes actually delegate legislative power, but this Note assumes that many statutes do delegate because (1) even nondelegation opponents agree that many statutes delegate, and (2) the inquiry as to whether an improper delegation exists is not as important under weak nondelegation. *See* DAVIS, *supra* note 9, § 3:1 at 149-50 (stating that the Supreme Court "has upheld congressional delegations without standards").

30. *See* DAVIS, *supra* note 9, § 3:4, at 158-59.

31. 143 U.S. 649 (1892).

32. *Id.* at 692.

33. *See id.* at 692-93.

unequal or unreasonable is not an exercise of legislative power, even without any standards indicating what unequal and unreasonable mean.

b. Phase II: Recognition of "acceptable" delegations.[34] In *J.W. Hampton, Jr. & Co. v. United States*,[35] the Supreme Court changed the way that it addressed nondelegation cases. Like *Field*, *J.W. Hampton, Jr. & Co.* involved a statute authorizing the President to adjust tariff rates upon determining that adjustments were necessary to compensate for low foreign production costs. The Court, as always, reaffirmed the nondelegation doctrine's lofty purpose of preserving the integrity of the three branches of the federal government.[36] The Court then announced that "[i]f 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."[37] Although the Court's prior holdings, including *Field*, clearly communicated that Congress could delegate to executive officials the power to make policy decisions with little or no statutory guidance, this was the first time the Court explicitly acknowledged the acceptability of some delegations of legislative authority.[38] The Court therefore authorized Congress to delegate as long as it limited the delegatee's discretion by providing the delegatee with an intelligible principle to guide the exercise of delegated legislative power.

It would be reasonable to expect that this new, more lenient formulation would allow the Court to actually enforce in deed a principle that it so often supported only in word. But, with the exception of two cases during the New Deal era, the Court has steadfastly refused to actually apply the nondelegation doctrine and has often not even required an intelligible principle.[39]

34. The acceptance of certain delegations of legislative authority is contrary to the traditional strong nondelegation doctrine. This Note, however, does not distinguish this "intelligible principle" formulation from the traditional strong nondelegation doctrine for two reasons. First, both the traditional and the modern strong nondelegation doctrines place the primary responsibilities on Congress, while the weak nondelegation doctrine places responsibilities on the agency itself. Second, arguments favoring weak nondelegation apply equally whether we compare it to the traditional or the modern strong nondelegation doctrine.

35. 276 U.S. 394 (1928).

36. *See id.* at 406.

37. *Id.* at 409 (emphasis added).

38. *See* SCHOENBROD, *supra* note 3, at 35-36.

39. *See* DAVIS, *supra* note 9, § 3:5.

2. The New Deal era

The New Deal brought with it the National Industrial Recovery Act ("NIRA") and two central nondelegation cases, *Panama Refining Co. v. Ryan*[40] and *A.L.A. Schechter Poultry Corp. v. United States*.[41] These cases support strong nondelegation claims that the Court can and should strike down impermissible delegations of legislative power.[42] Yet, for nondelegation opponents, these cases represent only anomalies, holdings unsupported by prior or subsequent case law and lending little or no support to the strong nondelegation doctrine.[43]

In *Panama Refining Co.*, petroleum producers challenged an executive action taken pursuant to section 9(c) of the NIRA. Section 9(c) authorized the President to regulate interstate and foreign transportation of petroleum products "withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law."[44] According to the Court, section 9(c) gave "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."[45] The Court determined that the statute contained nothing that "limit[ed] or control[led] the authority conferred by § 9(c)."[46] The Court ultimately concluded that it was impossible to derive from the statute an intelligible principle that limited the President's discretion and therefore held that the statute unconstitutionally

40. 293 U.S. 388 (1935).

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

42. *See* SCHOENBROD, *supra* note 3, at 37-40.

43. *See* DAVIS, *supra* note 9, § 3:8.

44. *Panama Ref. Co.*, 293 U.S. at 406 (quoting 48 Stat. 195, 200, which states:

> (c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.).

45. *Id.* at 415. Namely, the Court concluded that the statute qualified the President's discretion in no way, provided no guidance as to the circumstances or conditions in which the President was to exercise the power, provided "no criterion to govern the President's course," did "not require any finding by the President as a condition of his action," and "declare[d] no policy" to guide the exercise of power. *Id.*

46. *Id.* at 419.

delegated legislative authority.[47] The Court noted, in dicta, that if an intelligible principle could be derived through a reasonable interpretation of the statute, then the President would be required to act within those limits and the statute would be saved.[48]

A.L.A. Schechter Poultry Corp. addressed section 3 of the NIRA. Section 3 authorized the President to establish "codes of fair competition" in trades or industries when the President made certain findings.[49] These codes were authorized "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest."[50]

Acting under section 3, the President established the "Live Poultry Code."[51] The Court first asked "whether Congress . . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."[52] The Court next examined the supposed statutory constraints on the President's powers.[53] In the Court's opinion, the statutory requirements served only as prerequisites to the codes' operation and not as limitations on the President's discretion.[54] The statute authorized the President to issue codes to rehabilitate industries but gave no guidance as to what codes should be established or what industries should be regulated under those codes.[55] The Court therefore held that the statute unconstitutionally delegated legislative power.[56]

Other than these two cases, the Court's case law throughout the New Deal era continued the trend illustrated by *J.W. Hampton, Jr. & Co.*, in which broad delegations were upheld despite the often-questionable existence of any intelligible principle.[57]

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

48. *See id.* at 431.

49. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-22 (1935).

50. *Id.* at 523 (quoting Act of June 16, 1933, c. 90, 48 Stat. 195, 196).

51. *Id.* at 521, 523-25.

52. *Id.* at 530.

53. *See id.* at 538. The Court determined that the statute required the President to find the groups that urge the President to enact regulations "'impose no inequitable restrictions on admission to membership' and are 'truly representative'" and that the code will not "'promote monopolies or . . . eliminate or oppress small enterprises.'" *Id.* (citing 48 Stat. 195, 196).

54. *See id.*

55. *See id.* at 541-42.

56. *See id.*

57. *See* DAVIS, *supra* note 9, § 3:5.

3. The post–New Deal era

World War II brought the end of the New Deal era but not the end of the Court upholding broad delegations of legislative power. In *Yakus v. United States*,[58] the Court addressed whether the Emergency Price Control Act of 1942 ("EPCA") unconstitutionally delegated legislative power to the Price Administrator to fix maximum prices of rents and commodities during World War II in order to effectuate the purposes of the EPCA. The Court, in conclusory fashion, held that no unconstitutional delegation existed and stated that Congress had provided "the legislative objective, . . . prescribed the method of achieving that objective—maximum price fixing—,[*sic*] and . . . laid down standards to guide the administrative determination."[59]

Later, in *Lichter v. United States*,[60] the Court examined whether the Renegotiation Act unconstitutionally delegated to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission the power to renegotiate wartime contracts with private contractors. The Act authorized the administrators to direct renegotiation when, in their opinion, a contract had or would result in excessive profits. The Act gave no definition of excessive profits. The Court held that the Renegotiation Act did not unconstitutionally delegate.[61] In reaching that holding, the Court heavily emphasized the importance of giving Congress and the President sufficient leeway to protect the nation in times of war.[62]

58. 321 U.S. 414 (1944).

59. *Id.* at 423 (The EPCA's purpose was "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering . . . ; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes . . . ; to prevent hardships to persons engaged in business . . ." *Id.* at 420 (citation omitted).).

60. 334 U.S. 742 (1948).

61. *See id.* at 787.

62. *See id.* at 778-82.

4. The modern approach

Although there are several modern nondelegation cases,[63] *Mistretta v. United States*[64] adequately illustrates the modern state of the law. In *Mistretta*, the Supreme Court addressed whether the Sentencing Reform Act of 1984 ("SRA") unconstitutionally delegated legislative power to the United States Sentencing Commission ("Sentencing Commission"). The SRA authorized the Sentencing Commission to establish sentencing guidelines that would be binding upon federal courts.[65]

The Court, as usual, paid homage to the strong nondelegation doctrine but then noted that delegation was not entirely prohibited and "'must be fixed according to common sense and the inherent necessities of the government co-ordination.'"[66] The Court reaffirmed that the critical inquiry is whether the statute articulates an intelligible principle to guide the delegatee's decision making.[67] Importantly, *Mistretta* explicitly endorses Congress's ability to delegate by stating that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[68] The Court also enumerated the statutory limitations on the Sentencing Commission's discretion. For instance, Congress outlined in the SRA the Commission's goals, the purposes of sentencing, the means of regulating sentencing, the limitations on the guidelines, and the factors to consider in setting the guidelines.[69]

III. *AMERICAN TRUCKING ASSOCIATIONS*

To understand the importance of *American Trucking*, this section will discuss: first, the decision's statutory and regulatory context; second, the holding; third, alternative rationales for the holding; and, finally, how the decision supports weak nondelegation.

63. *See, e.g.*, Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974); National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

64. 488 U.S. 361 (1989).

65. *See id.* at 367.

66. *Id.* at 372 (quoting J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).

67. *See id.*

68. *Id.*

69. *See id.* at 374-76.

A. The Statutory and Regulatory Context of American Trucking Associations

1. The Clean Air Act

At issue in *American Trucking* were national ambient air quality standards ("NAAQS") promulgated by the EPA.[70] The EPA issued those regulations pursuant to sections 108 and 109 of the Clean Air Act ("CAA").[71]

First, CAA section 108 authorizes the EPA to create and update a list of air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[72] After including a pollutant in the list, the statute directs the EPA to establish "[a]ir quality criteria" that "reflect the latest scientific knowledge" and that indicate "the kind and extent of all identifiable effects on public health or welfare" caused by that pollutant.[73]

Next, CAA section 109 authorizes the EPA to establish primary and secondary NAAQS for air pollutants on the section 108 list.[74] The CAA orders the EPA to establish and revise primary and secondary NAAQS based on the section 108 criteria.[75] The statute requires the primary NAAQS to be "requisite to protect the public health" with "an adequate margin of safety."[76] Secondary NAAQS must be based on the criteria and be "requisite to protect the public welfare from any known or anticipated adverse effects associated with" the pollutant's presence.[77] Section 109 gives the EPA no other guidance in the exercise of its discretion in establishing NAAQS.

In addition, section 109 also requires the EPA to review and revise the existing section 108 criteria and NAAQS at least every five years.[78] The EPA must also add new pollutants to the section 108 list and establish NAAQS for those pollutants as deemed necessary.[79]

70. *See* American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033 (D.C. Cir.) (per curiam), *reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam).

71. *See id.*

72. 42 U.S.C. § 7408(a)(1)(A) (1994).

73. *Id.* § 7408(a)(2).

74. *See id.* § 7409(a).

75. *See id.* § 7409(b)(1).

76. *Id.*

77. *Id.* § 7409(b)(2).

78. *See id.* § 7409(d)(1).

79. *See id.*

2. The EPA's ozone and particulate matter final rules

After a 1993 lawsuit challenging the EPA's failure to comply with the section 109 requirement to review and revise NAAQS every five years, the EPA revised the primary and secondary NAAQS for particulate matter ("PM") and ozone.[80] The EPA issued the final PM and ozone NAAQS in July 1997 ("PM final rule" and "ozone final rule") pursuant to sections 108 and 109.[81]

The EPA began regulating PM in 1971 and established a more stringent standard in 1987.[82] The 1997 PM final rule established and regulated a new category of particulate matter, PM 2.5 (particulate matter with a diameter of less than 2.5 microns).[83]

The EPA began indirectly regulating ozone in 1971 and promulgated less stringent standards specifically addressing ozone in 1979.[84] The 1997 ozone final rule's requirements were more stringent than the 1979 standard. The ozone final rule required ozone concentrations lower than 0.08 part per million (ppm) averaged over an eight hour period instead of the older standard, which required 0.12 ppm averaged over a one hour period.[85]

80. *See* American Lung Ass'n v. Browner, 884 F. Supp. 345 (D. Ariz. 1994); Brief of Non–State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards at 7, *American Trucking Ass'ns v. EPA* (No. 97-1440); Lucinda Minton Langworthy, *EPA's New Air Quality Standards for Particulate Matter and Ozone: Boon for Health or Threat to the Clean Air Act?*, 28 ENVTL. L. REP. 10,502, 10,503 (1998); A. Tina Batra & Marcia C. Sugrue, Note, *EPA's Not-So-Final Rules: Congress' Attack on EPA's New Ozone and Particulate Matter Rules*, 4 ENVTL. LAW. 611, 613 (1998).

81. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) (to be codified at 40 C.F.R. pt. 50).

82. *See* Brief of Non-State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards at 5, *American Trucking Ass'ns v. EPA* (No. 97-1440) (stating that 1971 standards regulated particles of less that 45-50 microns in diameter and that 1987 standards regulated particles less than 10 microns in diameter); Langworthy, *supra* note 80, at 10,503 (explaining the progression from the initial PM standards (regulating total suspended particles ("TSP")) to standards regulating particles less than 10 microns in diameter (PM_{10})).

83. *See* Batra & Sugrue, *supra* note 80, at 613. The "short-term" primary standard limits the "24-hour average ambient $PM_{2.5}$ concentrations to no more than 65 micrograms per cubic meter." Brief of Non-State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards at 9, *American Trucking Ass'ns v. EPA* (No. 97-1440). The primary "long-term" standard limits "annual average concentrations to" 15 micrograms per cubic meter. *Id.* at 10. The "EPA also established $PM_{2.5}$ standards equal to the primary standards." *Id.* at 22.

84. *See* Langworthy, *supra* note 80, at 10,503-04.

85. *See id.* For a discussion focusing on the ozone standards, see generally F. William Brownell & Ross S. Antonson, *Implementing the New Eight-Hour NAAQS for Ozone—What Happened to the 1990 Clean Air Act?*, 11 TUL. ENVTL. L.J. 355 (1998).

The EPA claimed the new standards would potentially "prevent as many as 15,000 premature deaths, and hundreds of thousands of cases of significantly decreased lung function in children" each year.[86] The EPA, however, did not consider the economic costs of attaining the ozone and PM NAAQS when deciding to adopt the standards.[87] Although these costs played no role in the EPA's decision, EPA estimates place the implementation costs of the PM standards at $37 billion per year and the costs of the ozone standards at $9.6 billion per year.[88] Less optimistic estimates placed the annual implementation costs for both standards at $80 to $150 billion per year.[89] Along with the direct monetary costs, some predicted that the new standards would cause significant unemployment and other economic hardships.[90]

The *American Trucking* petitioners challenged the ozone and PM final rules by asserting that the CAA unconstitutionally delegated legislative power to the EPA.

B. The American Trucking Associations *Decision*

1. The court's holding

The D.C. Circuit did not declare that sections 108 and 109 of the CAA unconstitutionally delegated legislative power. The court instead held only that the *EPA's interpretation* of those sections "render[ed] them unconstitutional delegations of legislative power."[91] The court identified as the primary problem the EPA's

86. *Testimony of Carol M. Browner Administrator United States Environmental Protection Agency Before the Subcommittees on Health and Environment and Oversight and Investigations of the Committee on Commerce United States House of Representatives* (visited Nov. 1, 1999) <http://www.wienviro.com/r71001a.txt> (stating other benefits, including "reduced cancer from air toxics reductions [and] reduced adverse effects on vegetation, forests, and natural ecosystems . . . . Estimated total monetized health and public welfare benefits . . . rang[e] in the tens of billions of dollars annually.").

87. *See* American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1040 (D.C. Cir.) (per curiam), *reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam).

88. *See* Brief of Non-State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards at 3, *American Trucking Ass'ns v. EPA* (No. 97-1440); Langworthy, *supra* note 80, at 10,505-06.

89. *See* Batra & Sugrue, *supra* note 80, at 615; Langworthy, *supra* note 80, at 10,505-06.

90. *See* Langworthy, *supra* note 80, at 10,505-06.

91. *American Trucking Ass'ns*, 175 F.3d at 1034.

failure to indicate any criteria for determining "how much is too much" ozone or PM.[92] The court remanded to the agency, giving the EPA an opportunity to save the statute by formulating an interpretation that articulates an intelligible principle for identifying unsafe levels of these pollutants.[93]

2. Alternative interpretations of the rationale for this decision

a. The traditional interpretation: The EPA did not articulate an intelligible principle to guide its discretion in setting the ozone and PM standards. According to the court, the EPA failed to identify the principle on which the agency based its decision to select the final ozone and PM levels.[94] The court accepted the criteria the EPA used to determine the health effects of various ozone and PM concentrations, but faulted the EPA for failing to adequately define what level is too high, based on those factors.[95] The court found the rationale provided by the EPA could justify almost any standard the EPA wished to set.[96] The court reasoned that the EPA has too much discretion if it is free to choose between a slightly-above-zero standard and a deadly-to-a-large-number-of-people standard.[97] The EPA must explain the reason *why* it should select "this" level and not "that" level.[98] The court recognized that the EPA could use its criteria to explain the health effects of ozone at 0.01 ppm, 0.05 ppm, and 0.10 ppm, however, the EPA did not explain which level is "requisite to protect the public health" with an "adequate margin of safety" and why another level is not.[99]

92. *Id.*

93. *See id.* at 1033-34.

94. *See id.* at 1034. It is beyond this Note's scope to analyze whether an unconstitutional delegation actually existed in this case, to justify the majority's decision, or to advocate a framework for determining the existence of an unconstitutional delegation. For a discussion on an analytical model for identifying unconstitutional delegations, see generally BARBER, *supra* note 25, at 43-44; SCHOENBROD, *supra* note 3, at 180-91; David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1249-58 (1985) [hereinafter Schoenbrod, *Could the Court Give it Substance*]. *But see* Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 398-403 (1987).

95. *See American Trucking Ass'ns*, 175 F.3d at 1034, 1036.

96. *See id.*

97. *See id.*

98. *Id.*

99. 42 U.S.C. § 7409(b)(1) (1994) (quoted in *American Trucking Ass'ns*, 175 F.3d at 1034).

Judge Tatel took issue with the majority's conclusion.[100] In his dissent, Tatel first offered examples of extremely broad delegations, ones broader than the CAA, which the Supreme Court has upheld.[101] He then challenged the majority's conclusion that no intelligible principle guided the EPA's choice of ozone and PM standards.[102]

b. An alternative interpretation: The nondelegation doctrine was a convenient tool to send the EPA a message. Over the past several years, the EPA has received criticism from various parties. Most significantly, critics have alleged that the agency has placed politics ahead of science.[103] Although probably not the principal rationale behind the decision, perhaps the court wanted to send the EPA a warning that it should improve its practices. Perhaps the nondelegation doctrine simply provided the court with the right tool in the right situation.

First, Judge Tatel, in his dissent, alluded that something more than pure legal theory compelled the majority's holding. He referred to the petitioners' claims that the "EPA arbitrarily selected the studies it relied upon or drew mistaken conclusions from those studies."[104] Tatel also stated, citing the majority's opinion, that the nondelegation analysis does not address "whether EPA failed to live up to the principles it established for itself."[105] These statements indicate Tatel's recognition that the majority saw some potentially improper behavior on the part of the EPA and that the majority might have taken that into consideration in making their decision.

Second, the *American Trucking* petitioners, a group made up mostly of manufacturing and industry interests, included concerns about the EPA's practices in their briefs. The *Brief of Non-State Peti-*

100. *See American Trucking Ass'ns*, 175 F.3d at 1057 (Tatel, J., dissenting).

101. *See id*. at 1057-58.

102. Tatel argued that the EPA had articulated a principle because the EPA "set the ozone level just above peak background concentrations where the most certain health effects are not transient and reversible, and the fine particle level at the lowest long-term mean concentration observed in studies that showed a statistically significant relationship between fine particle pollution and adverse health effects." *Id*. at 1061.

103. *See* Gary Lee, *Agency Takes a Hit From One of Its Own*, WASH. POST, June 27, 1996, at A27; *Science's Belated Complaint*, WALL ST. J., June 7, 1999, at A22; Bonner R. Cohen, *The People v. Carol Browner: EPA on Trial* (visited Oct. 6, 1999) <http://www.nwi.org/SpecialStudies/EPAReport/EPAstudy.html>; David L. Lewis, *EPA Science Versus Carol Browner* (visited Nov. 2, 1999) <http://www.nwi.org/SpecialStudies/EPAReport/ DrLewis.html>.

104. *American Trucking Ass'ns*, 175 F.3d at 1061 (Tatel, J., dissenting).

105. *Id*.

tioners on Fine Particulate Matter National Ambient Air Quality Standards referred to actions and failures by the EPA that raise questions about the integrity of the agency's science. For instance, the petitioners questioned the EPA's ability to promulgate scientifically credible standards when faced with the severe time constraints under which the agency operated in this case.[106] The petitioners specifically referred to the Clean Air Scientific Advisory Committee's ("CASAC") reservations about the PM standards' scientific basis.[107] The petitioners criticized the EPA's alleged failure to adequately address the possibility that pollutants other than PM had caused the health effects seen in the studies that the EPA relied on.[108] Of additional concern to the petitioners was the EPA's alleged failure to reveal the data underlying the studies on which the agency based its decisions. The petitioners claimed that the data should be revealed to allow private reanalysis to determine the studies' credibility.[109] If true, the petitioners' allegations raise serious questions about the EPA's scientific practices.

Third, it is not just the usual suspects that have alleged EPA improprieties. David Lewis, a former senior EPA researcher, has spoken out against his former employer. Lewis claims that the EPA issues regulations based on questionable science.[110] Lewis alleges that often administrators will decide to issue a regulation and then expect scientists to justify their decision.[111]

In addition, the National Wilderness Institute ("NWI"), a pro-environmental organization, published a report detailing several instances of alleged EPA misconduct. The report alleges that the EPA used improper lobbying efforts, used delay tactics to avoid disclosing information to Congress, persecuted and manipulated agency employees, submitted fabricated factual analyses to a federal court, and issued regulations without adequate scientific basis.[112] The NWI's report refers to a 1992 study by the Science Advisory Board ("SAB"), a panel established by the EPA. It quotes the SAB study

106. *See* Brief of Non-State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards, at 7-9, *American Trucking Ass'ns v. EPA* (No. 97-1440).

107. *See id.*

108. *See id.* at 14-17.

109. *See id.* at 18-22.

110. *See* Lewis, *supra* note 103.

111. *See id.*

112. *See* Cohen, *supra* note 103.

saying that the "EPA has not always ensured that contrasting, reputable scientific views are well-explored and well-documented from the beginning to the end of the regulatory process."[113] The NWI's report also quotes the SAB study saying that "[s]cience should never be adjusted to fit policy . . . . Yet a perception exists that EPA lacks adequate safeguards to prevent this from occurring."[114] Lewis has stated that this situation persists under EPA Administrator Carol Browner.[115]

Although speculative, it is possible that the majority saw some truth to these allegations. If so, the majority would have greater incentive to use the nondelegation doctrine to require the EPA to come forward with a valid scientific basis for the ozone and PM standards. Requiring the EPA to reveal the standards on which their decision was based makes it more difficult for the agency to engage in underhanded tactics that may have influenced prior decisions.

3. The majority's decision supports the weak nondelegation doctrine

The strong nondelegation doctrine places on Congress the burdens of not delegating legislative authority or providing an intelligible principle when they do delegate. The *American Trucking* decision does not apply the strong nondelegation doctrine. The court did not declare the statute unconstitutional, did not require Congress to pass a statute that does not delegate legislative authority, and did not require Congress to pass a statute clearly articulating an intelligible principle. The court instead required that the agency formulate its own intelligible principle.[116] By placing on the agency

113. *Id.* (quoting SAB, *Safeguarding the Future: Credible Science, Credible Decisions*, Mar. 1992).

114. *Id. See also Science's Belated Complaint*, *supra* note 103, at A22.

115. *See Science's Belated Complaint*, *supra* note 103, at A22.

116. Note also that the approach in *American Trucking* differs from the approach in *Industrial Union Department v. American Petroleum Institute,* 448 U.S. 607, 614-15 (1980) (plurality opinion) ("*Benzene*"). In *Benzene*, the Court did not require that the agency provide an intelligible principle through a reasonable statutory interpretation. The Court held that the Occupational Safety and Health Act ("OSH Act") required the Secretary of Labor to find that a toxic substance posed a significant risk before issuing regulations under section 3(8). *Id.* The *Benzene* court thus proffered its own reasonable statutory interpretation and articulated an intelligible principle to guide OSHA's discretion. *See id.* at 645-46. *Benzene*, however, was decided before *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Chevron Doctrine now precludes a court from initially imposing its own statutory interpretation of an ambiguous statute on an agency that administers the statute. *See id.* at 842. Weak nondelegation allows those agencies to articulate an intelligible principle when the stat-

the burden of articulating the intelligible principle, the majority's opinion supports the weak nondelegation doctrine.

Several statements in the opinion support the proposition that the court applied weak instead of strong nondelegation. First, the court recognized that by requiring the agency to articulate an intelligible principle their approach it did not "'ensure[] . . . that important choices of social policy are made by Congress.'"[117] Requiring Congress to articulate an intelligible principle, as strong nondelegation does, would ensure that Congress made those choices. Second, the majority stated that their approach avoids "hold[ing] unconstitutional a statute that *an agency*, with the application of its special expertise, could salvage."[118] The court demanded articulation of an intelligible principle to save the statute, and this statement indicates that the agency, not just Congress, may articulate that principle. Third, the majority stated that they did "not read current Supreme Court cases as applying the strong form of the non-delegation doctrine."[119]

On the other hand, one could argue that the court did apply strong nondelegation. The court required the agency to articulate an intelligible principle; but since that principle is referred to as a reasonable interpretation of the statute, it is arguable that Congress actually articulated the principle by passing a statute susceptible to such an interpretation. Acknowledging the creativity exhibited in statutory interpretation probably gives Congress credit for something they did not actually do. Although the intelligible principle must be a reason-

ute they administer leaves them with broad discretion. Therefore, weak nondelegation squares with the Chevron Doctrine by giving administering agencies an opportunity to articulate a principle rather than allowing courts to provide one themselves. Judge Silberman, however, argued that if a statute actually violated the Constitution by delegating legislative authority, then a court could most likely strike down the statute without offending the Chevron Doctrine. *See* American Trucking Ass'ns v. EPA, 195 F.3d 4, 15 (D.C. Cir.) (per curiam) (Silberman, J., dissenting from denial of rehearing en banc), *denying reh'g*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam). This Note, however, could not possibly undertake a comprehensive analysis of the relationship between weak nondelegation, the Chevron Doctrine, and traditional judicial review of agency decision making.

117. *American Trucking Ass'ns*, 175 F.3d at 1038 (quoting *Industrial Union Dep't*, 448 U.S. at 685).

118. *Id.* (emphasis added).

119. *Id.* This statement by the D.C. Circuit might be interpreted to mean that it did not believe the Supreme Court has applied pre–*J.W. Hampton, Jr. & Co.* strong nondelegation, but that interpretation is unreasonable because it has not been an issue since the early twentieth century.

able interpretation of the statute, the court recognized that the CAA is terribly vague, that it confers on the agency nearly unlimited discretion, and that the only hope to avoid declaring the statute unconstitutional was for the EPA itself to provide a principle, consistent with the CAA, that limited the agency's own discretion. It would be too much of a stretch, however, to say that because this principle is consistent with the CAA, Congress actually articulated the principle.

The most likely conclusion is that the *American Trucking* majority applied weak nondelegation. Therefore, Part IV analyzes the arguments for and against weak nondelegation, the judicial support for weak nondelegation, and the practical consequences of the *American Trucking* decision.

IV. ANALYSIS

A. Arguments For and Against Weak Nondelegation

The *American Trucking* majority applied weak instead of strong nondelegation.[120] Application of strong nondelegation would have led the court to hold section 109 of the CAA unconstitutional. The court refused to take that step and instead remanded to the agency, asking the agency to provide the intelligible principle.[121]

Weak nondelegation is susceptible to attack from two sides—from strong nondelegation supporters and from nondelegation critics. Strong nondelegation supporters argue that weak nondelegation is unacceptable because it allows Congress to unconstitutionally delegate. Nondelegation opponents claim that the status quo is acceptable. Each claim either that weak nondelegation is not supportable by the Constitution, case law, or public policy, or that it is not judicially manageable. Nonetheless, weak nondelegation can be defended against criticism from both sides. Moreover, not only does the *American Trucking* majority decision support weak nondelegation, additional judicial support can be found in Judge Tatel's dissent and in earlier Supreme Court and D.C. Circuit case law.

120. *See id.*

121. *See supra* notes 91-99, 116-119 and accompanying text.

1. Addressing strong nondelegation supporters

a. Strong nondelegation supporters' arguments against weak nondelegation. Supporters of strong nondelegation are the most vigorous opponents of weak nondelegation. They believe that it is unconstitutional for Congress to delegate any legislative power to another branch; and, if it does delegate legislative power, Congress must articulate an intelligible principle.[122] These parties argue that, because the weak nondelegation doctrine requires that agencies, not Congress, propose intelligible principles to limit their own discretion, the weak nondelegation doctrine does not satisfy the Constitution. No matter what an agency is required to do, if Congress is allowed to delegate legislative authority without at least articulating an intelligible principle, then Congress has violated the Constitution.

The goals of strong nondelegation include promoting (1) more effective decision making, (2) better public policy, (3) greater congressional responsibility, (4) greater congressional accountability, (5) more democratic government, and (6) protection of liberty.[123] Weak nondelegation does not accomplish what some see as the strong nondelegation doctrine's most important goal, promoting congressional accountability for difficult policy choices.[124] Because weak nondelegation allows Congress to delegate broad policymaking power to agencies, Congress can still avoid making difficult policy choices. The fact that the weak nondelegation doctrine requires agencies to place limits on their own discretion to make difficult decisions does not make elected officials more accountable for the decisions.

These parties also argue that weak nondelegation cannot accomplish another of the doctrine's primary goals, promoting better decision making.[125] In response, weak nondelegation doctrine supporters

122. *See, e.g.,* SCHOENBROD, *supra* note 3; BARBER, *supra* note 25.

123. *See* SCHOENBROD, *supra* note 3, at 12-18; Schoenbrod, *Could the Court Give it Substance*, *supra* note 93, at 1238. *But see* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 329-35 (1987) (arguing that enforcing the traditional nondelegation doctrine might simply cause Congress to delegate greater decision-making power to congressional subcommittees, which could produce even worse results than agency decision making).

124. *See, e.g.,* BARBER, *supra* note 25, at 40-41 (arguing Congress cannot delegate decision-making power in an attempt to avoid making substantive decisions); SCHOENBROD, *supra* note 3, at 13-20.

125. *See generally* SCHOENBROD, *supra* note 3, at 82-96, 101-06, 109-31 (noting problems with delegations of legislative power and with agency decision making in general that minimal nondelegation could not likely overcome).

argue that limiting agency discretion leads to better decisions because the agency must select its decision from a range of reasonable alternatives.[126] Commentators, however, have pointed to several aspects of agency decision making that call into question whether agencies can ever be trusted to make good public policy decisions.[127] Agency capture theory, for instance, would counsel against giving agencies the responsibility to limit their own power.[128] According to this argument, if the agency decision-making process is inherently flawed, then allowing agencies to make decisions limiting their discretion is not going to lead to better final decisions.

b. Weak nondelegation should nonetheless be acceptable to strong nondelegation supporters. For the reasons that follow, strong nondelegation supporters should support weak nondelegation, despite the opposing arguments discussed above. The problem strong nondelegation supporters face is that strong nondelegation is unworkable because courts repeatedly refuse to apply it. Not surprisingly, Congress has shown no willingness to stop delegating, and courts have shown no inclination to force Congress not to do so.[129] Judge Silberman of the D.C. Circuit aptly described the situation when he wrote that the Supreme Court "has acknowledged only a theoretical limitation on the scope of congressional delegations."[130] Until this situation changes, which it should, strong nondelegation supporters should support steps, even small steps, which move the situation in the direction they want to go. Weak nondelegation may not achieve the ultimate goal of strong nondelegation supporters, but it does lead toward their objectives.

Some commentators have advocated striving for the next best alternative since it is impracticable to expect abandonment of the administrative state in its current form.[131] Given weak nondelegation's obvious lack of doctrinal foundation—it accomplishes practical goals but does not square with the strong nondelegation doctrine's consti-

126. *See* DAVIS, *supra* note 9, § 3:15, at 206.

127. *See* BARBER, *supra* note 25, at 3; SCHOENBROD, *supra* note 3, at 119-34.

128. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1683-85 (1975) (explaining various views on agency capture theory).

129. *See* DAVIS, *supra* note 9, §§ 3:2, 3:15, at 215-16.

130. American Trucking Ass'ns v. EPA, 195 F.3d 4, 14 (D.C. Cir.) (per curiam) (Silberman, J., dissenting from denial of rehearing en banc), *denying reh'g*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam).

131. *See* Lawson, *supra* note 20, at 1252-53.

tutional basis—the theory of the second best may provide the best support for weak nondelegation. This theory suggests "if an incorrect precedent creates a constitutional disequilibrium, it is foolish to proceed as though one were still in an equilibrium state."[132] Since strong nondelegation supporters believe that incorrect precedent has caused the current situation's disequilibrium, they should embrace the opportunity to correct that disequilibrium. The theory of the second best has been used to support the establishment of institutions, such as the legislative veto, to compensate for the current acceptance of the delegation principle.[133] The argument applies just as well to weak nondelegation because it could limit agencies' discretion and thereby approximate a more constitutionally acceptable situation.

In addition, weak nondelegation, despite its constitutional weaknesses, accomplishes some of strong nondelegation's most important goals, goals that move toward a constitutional equilibrium. The *American Trucking* majority stated that the technique applied in that case (weak nondelegation) satisfied "two out of three rationales for the nondelegation doctrine."[134] First, weak nondelegation reduces the likelihood of undesirable, arbitrary agency decisions.[135] While criticizing the panel's decision in *American Trucking*, Judge Silberman agreed that the scope of administrators' discretion is a "legitimate concern of the nondelegation doctrine."[136] Second, weak nondelegation "[e]nhance[s] the likelihood that meaningful judicial review will prove feasible."[137] For instance, a reviewing court can more easily determine whether an agency's decision is reasonable if it can readily identify the bounds within which the agency must make its decision.

132. *Id.* at 1253.

133. *See id.* at 1252-53.

134. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir.) (per curiam), *reh'g denied*, 195 F.3d (D.C. Cir. 1999) (per curiam).

135. *See id.*; DAVIS, *supra* note 9, § 3:15, at 206, 208, 215 (The nondelegation doctrine's purpose should be, and can be, effectively used to "protect private parties against injustice on account of unnecessary and uncontrolled discretionary power." *Id.* at 208.).

136. *American Trucking Ass'ns v. EPA*, 195 F.3d 4, 14 (D.C. Cir.) (per curiam) (Silberman, J., dissenting from denial of rehearing en banc), *denying reh'g*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam).

137. *American Trucking Ass'ns*, 175 F.3d at 1038.

The weak nondelegation doctrine does not, however, ensure that Congress makes "important choices of social policy."[138] In further criticizing the panel's majority decision, Judge Silberman stated that the majority's approach would allow Congress "to delegate almost limitless policymaking authority to an *agency*, so long as the agency provides and consistently applies an 'intelligible principle.'"[139] Silberman's criticism has merit, but he must realize, indeed he acknowledged earlier in his dissent, that Congress already delegates this way and agencies already possess and exercise almost limitless policymaking authority.[140] Therefore, it simply cannot be argued that weak nondelegation will cause improper delegations. Surely, if courts will not stop Congress from delegating broadly to agencies, then courts should at least take steps to ensure that agencies who receive such broad delegations narrow their own discretion within reasonable bounds. The goals that the weak nondelegation doctrine does accomplish are not insignificant, and weak nondelegation should not be discounted simply because it does not accomplish all the goals that strong nondelegation supporters desire.

2. Addressing nondelegation opponents

a. Weak nondelegation should be acceptable to nondelegation opponents. Nondelegation opponents typically oppose the strong nondelegation doctrine for functional reasons. The weak nondelegation doctrine, however, satisfies many of these functional concerns. The weak nondelegation doctrine is judicially manageable, politically feasible, and accomplishes goals that even nondelegation opponents should appreciate.

(1) Weak nondelegation is more judicially manageable than strong nondelegation. The weak nondelegation doctrine suffers from one of the strong nondelegation doctrine's main problems—identifying when a delegation of legislative authority exists is very difficult because there is no clear definition of legislative power.[141] This concern, however, is less troublesome for the weak nondelegation doctrine and therefore makes the doctrine more judicially manageable. The difficulty in identifying an unacceptable delegation is

138. *Id.*

139. *American Trucking Ass'ns*, 195 F.3d at 15.

140. *See id.* at 14.

141. *See* Pierce, *supra* note 94, at 398-403.

less troublesome because the weak nondelegation doctrine does not force the reviewing court to make the difficult choice of upholding the delegation or declaring the statute unconstitutional. Given courts' aversion to invalidating statutes, courts faced with this choice have found it difficult to honestly apply the doctrine that would likely have led them to hold many statutes unconstitutional.[142] When given the weak doctrine's less drastic choice, that of approving the statute and the agency's interpretation or remanding for the agency to declare an intelligible principle, courts will be more able to apply honestly the weak nondelegation standard.[143]

(2) Weak nondelegation is more politically feasible than strong nondelegation. It is arguable that strong nondelegation will never be applied because it is politically infeasible. First, nondelegation opponents argue that the federal government could not function if Congress lacked the ability to broadly delegate legislative authority.[144] In addition, since a broad coalition of interests benefits from broad delegations—for example, in different situations both industry and environmental interests can advance their agendas when agencies receive broad delegations—it is entirely possible that courts will never choose to stir the hornets' nest by applying strong nondelegation.[145] Finally, application of strong nondelegation would arguably not produce optimal results. For instance, whatever strategy Congress employed to avoid offending the doctrine—such as delegating increasing authority to congressional subcommittees to formulate the more detailed legislation required by the strong doctrine—would be less desirable than the current situation.[146] The weak nondelegation doctrine avoids these possible pitfalls.

(3) Nondelegation opponents should appreciate the goals that weak nondelegation can accomplish. All but the most ardent and blind supporters of agency power should recognize the desirability of limiting the power and discretion of a government body that is not directly accountable to the public. The weak nondelegation doctrine

142. The Supreme Court's self-deceptive techniques of denying the existence of delegations and then of identifying congressionally provided intelligible principles demonstrate that the Court has never honestly applied the strong nondelegation doctrine. *See* DAVIS, *supra* note 9, §§ 3:5, 3:6; Stewart, *supra* note 123, at 328.

143. The identification and advocation of particular standards is beyond this Note's scope. *See supra* note 94.

144. *See* DAVIS, *supra* note 9, § 3:3; Stewart, *supra* note 123, at 329-35.

145. *See* Stewart, *supra* note 123, at 328.

146. *See id.* at 329-35 (arguing that subdelegation to congressional subcommittees would be worse than delegation to agencies).

rectly accountable to the public. The weak nondelegation doctrine helps impose such limits.[147]

b. At least one prominent nondelegation opponent already supports weak nondelegation. Kenneth Culp Davis, an outspoken critic of strong nondelegation, enunciated a nondelegation theory that includes characteristics of weak nondelegation.[148] Davis's argument is essentially functional, arguing that the nondelegation doctrine should be structured to accomplish important practical goals and not to accommodate a doctrinal preference.[149]

According to Davis, administrative standards can limit agency discretion and reduce agency arbitrariness just as effectively as statutory standards.[150] Additionally, Davis argued that his theory is preferable because (1) legislators often cannot or will not provide statutory standards required by strong nondelegation, (2) courts have been unwilling to force Congress to stop delegating, and (3) courts can force agencies to establish those standards.[151] For instance, Davis argued that courts could require agencies to engage in rulemaking to establish necessary standards, guides, rules, limits, and procedures.[152]

The proposition that courts can force an agency to articulate standards to limit the agency's discretion has been supported by *International Union, UAW v. OSHA* ("*Lockout/Tagout I* & *II*")[153] and *American Trucking*.[154] One could argue, however, that these cases only establish that when courts require agency standards, agencies will simply propose almost equally broad interpretations of the gov-

147. *See supra* notes 129-140 and accompanying text.

148. *See* DAVIS, *supra* note 9, § 3:15. Davis identified five steps (only four of which are relevant here) to create an effective nondelegation doctrine:

> (a) the purpose of the non-delegation doctrine should [be] . . . protecting against unnecessary and uncontrolled discretionary power; (b) the exclusive focus on standards should be shifted to an emphasis more on safeguards than on standards; (c) when legislative bodies have failed to provide standards, the courts . . . should require that the administrators must . . . supply the standards; (d) the non-delegation doctrine should . . . [require] officers with discretionary power . . . to structure their discretion through appropriate safeguards and to confine and guide their discretion through standards, principles, and rules.

Id. But see Schoenbrod, *Could the Court Give it Substance*, *supra* note 94, at 9.

149. *See* DAVIS, *supra* note 9, § 3:15.

150. *See id.* at 211.

151. *See id.*

152. *See id.* at 214.

153. *See infra* Part IV.A.3.b.

154. *See supra* Part III.B.3.

erning statute. This does not have to be the case, though. If courts stand their ground, require meaningful limits, and actually take action when they are not satisfied, then agencies will likely comply.

There are, however, differences between weak nondelegation as proposed by this Note and as proposed by Davis's theory. For instance, Davis would place greater emphasis on procedural safeguards and less emphasis on standards.[155] Davis therefore places great weight on the administrative decision-making procedures used. He gives procedure such weight because, he argues, procedures can reduce arbitrariness in administrative decisions, which is the nondelegation doctrine's goal.[156] This Note, however, does not go so far as to argue that procedures, however important, should replace substantive standards and limitations in this context. Notably, by denying rehearing on the nondelegation issue, the D.C. Circuit indicated that it did not accept Davis's procedural safeguards approach.[157]

Not only can weak nondelegation be defended against both strong nondelegation supporters and nondelegation opponents, the weak nondelegation doctrine is also supported by various judicial sources.

3. Judicial support for weak nondelegation

a. Judge Tatel's American Trucking *dissent supports weak nondelegation.* Notwithstanding his disagreement with the result, Judge Tatel's dissent in *American Trucking* supports both an essential premise underlying weak nondelegation and use of the doctrine. Tatel opposed the majority's decision to remand the ozone and PM NAAQS to the EPA and to require the agency to articulate an intelligible principle. Tatel based this opposition on two grounds. First, the Supreme Court has repeatedly upheld delegations giving agencies broader discretion than the CAA gives in this situation.[158] Second, the CAA effectively confined the EPA's discretion.[159] Tatel also

155. *See generally* DAVIS, *supra* note 9, § 3:15.

156. *See id.* at 209.

157. *See* American Trucking Ass'ns v. EPA, 195 F.3d 4, 8 (D.C. Cir.) (per curiam), *denying reh'g*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam).

158. *See* American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1057 (D.C. Cir.) (per curiam), *reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam).

159. *See id.*

cited *Lockout/Tagout II*[160] as an example of a decision in which the D.C. Circuit upheld constraints on agency discretion that were no more significant than the limits on the EPA's discretion to promulgate PM and ozone NAAQS.

Despite his disagreement with the result, Tatel did not disagree with the premise that statutes sometimes delegate excessive discretion to agencies. Tatel cited *Lockout/Tagout I*[161] to distinguish section 109 of the CAA from the standard at issue in *Lockout/Tagout I* & *II*, section 3(8) of the Occupation Safety and Health Act ("OSH Act").[162] Tatel, however, never questioned the court's holding in *Lockout/Tagout I* that the Occupational Safety and Health Administration's ("OSHA") interpretation of section 3(8) qualified as an improper delegation.[163] Since he relied on and did not disagree with the holding in *Lockout/Tagout I*, one can infer that he agreed with the holding and with the general proposition that improper delegations actually exist and are not simply a legal fiction that courts talk about but never actually recognize.[164]

Moreover, Tatel's dissent arguably accepts the use of weak nondelegation. First, his dissent disagreed with *how* the majority applied the doctrine but did not argue against the doctrine itself.[165] For instance, he did not disagree with weak nondelegation's premise that

160. International Union v. OSHA, 37 F.3d 665 (D.C. Cir. 1994) [hereinafter *Lockout/Tagout II*] (discussed *infra* Part IV.A.3.b.).

161. International Union v. OSHA, 938 F.2d 1310, 1317-18 (D.C. Cir. 1991) [hereinafter *Lockout/Tagout I*] (discussed *infra* Part IV.A.3.b.).

162. *See American Trucking Ass'ns*, 175 F.3d at 1058.

163. *See Lockout/Tagout I*, 938 F.2d at 1317-18.

164. It would be reasonable, however, given Tatel's analysis of why the EPA's interpretation of section 109 is not unconstitutional notwithstanding *Lockout/Tagout I*, to take Tatel's dissent as support for the allowance of nearly unlimited delegations. Tatel actually offers a facially persuasive argument, but on closer examination it is difficult to accept the argument that section 3(8)'s mandate to establish standards "reasonably necessary or appropriate to provide safe" workplaces is significantly different from section 109's mandate to establish standards "'requisite' to protect the public health." *American Trucking Ass'ns*, 175 F.3d at 1058 (quoting 42 U.S.C. § 7409(b)(1) (1994); *Lockout/Tagout I*, 938 F.2d at 1316). "Requisite," even with the other purported constraints contained in the CAA does not seem significantly more precise than "reasonably necessary or appropriate." *Id.* Tatel focuses on "requisite" in contrast to "reasonably requisite" as if it were intuitively clear what standard is "requisite" to protect public health and as if the addition of "reasonably" hurls the inquiry into an abyss from which no answer can be derived. *See id.* at 1058-59. Tatel's argument that the interpretation accepted by the court in *Lockout/Tagout II* is similar to the EPA's interpretation of section 109 seems more reasonable. *See id.* at 1059.

165. *See American Trucking Ass'ns*, 175 F.3d at 1057-61.

courts can and should remand regulations and require agencies to articulate intelligible principles limiting the agencies' discretion. Additionally, Tatel's reliance on *Lockout/Tagout I* & *II* further supports the weak doctrine because the D.C. Circuit applied weak nondelegation in those cases (albeit leaving the threshold very low), and he did not express any dissatisfaction with that approach. Therefore, although Tatel disagrees with the majority's result in *American Trucking*, his dissent did not argue against the principle of weak nondelegation in general.[166]

b. The United States Supreme Court's and the D.C. Circuit's recent nondelegation decisions support weak nondelegation. The Supreme Court and the D.C. Circuit have both issued opinions in the last several years that indicate a willingness to adopt and, most importantly, enforce weak nondelegation. Most notably, *Mistretta v. United States*,[167] *Industrial Union Department v. American Petroleum Institute ("Benzene")*,[168] and *Lockout/Tagout I* & *II*[169] support this proposition.

Mistretta indirectly supports weak nondelegation. First, *Mistretta*, like so many cases before it, explicitly authorizes some delegations of legislative power.[170] Second, *Mistretta* supports limiting delegatees' discretion.[171] Although *Mistretta* could be interpreted to reinforce strong nondelegation because under the Court's case law the statute at issue provided an intelligible principle,[172] this argument more likely demonstrates that strong nondelegation does not work. Even with the laundry list of factors and limitations imposed by the statute, Congress left the Sentencing Commission with incredibly broad authority to make important public policy choices.[173] The

166. In fact, Tatel's dissent argued the EPA's decision should be upheld because the "EPA actually adhered to a disciplined decision-making process." *Id.* at 1059. *See also* American Trucking Ass'ns v. EPA, 195 F.3d 4, 15 (D.C. Cir.) (per curiam) (Silberman, J., dissenting), *denying reh'g*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam). This resembles Kenneth Culp Davis's argument that courts should ensure the presence of administrative safeguards rather than statutory standards. *See* DAVIS, *supra* note 9, § 3:15; discussion *supra* Part IV.A.2.b.

167. 488 U.S. 361 (1989).

168. 448 U.S. 607 (1980) (plurality opinion).

169. International Union v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) ("*Lockout/Tagout I*"); International Union v. OSHA, 37 F.3d 665 (D.C. Cir. 1994) ("*Lockout/Tagout II*").

170. *See Mistretta*, 488 U.S. at 372-73.

171. *See id.* at 372, 379.

172. *See id.* at 373-76.

173. *See id.*

Court's desire to constrain discretion and inability or unwillingness to accomplish that goal using strong nondelegation supports adoption of a new theory. *Mistretta* supports weak nondelegation because weak nondelegation, unlike strong nondelegation, allows the Court to constrain delegatees' discretion and does not require the Court to disallow all delegations, a step the Court has been, and continues to be, unwilling to take.

In addition, although the Court did not actually apply weak nondelegation, the Supreme Court's plurality in *Benzene* supports the principles underlying weak nondelegation. At issue in *Benzene* were OSHA's regulations regarding occupational exposure to benzene. The American Petroleum Institute challenged the regulations as unconstitutional delegations of legislative power. The plurality held that OSHA's interpretation of section 6(b)(5) of the OSH Act gave the agency unlimited discretion to regulate industries to the brink of economic ruin in order to remove all potential health hazards from the workplace.[174] However, the plurality did not hold that the statute unconstitutionally delegated, but instead remanded OSHA's regulations, requiring the agency to comply with the principle identified by the Court.[175] The principle required OSHA to find that a hazard poses a "significant risk" to workers before regulating that hazard.[176]

Benzene did not apply weak nondelegation because the Court, rather than the agency, articulated the intelligible principle, but this opinion nonetheless supports weak nondelegation.[177] Weak nondelegation limits agencies' discretion within reasonable bounds notwithstanding the limitless statutes under which the agencies operate. This opinion supports the principles underlying weak nondelegation because the plurality agreed that an agency's discretion should be limited when that agency receives a broad legislative mandate.[178] The approach was different, but the underlying principle and the result support weak nondelegation.[179]

174. *See Industrial Union Dep't*, 448 U.S. at 641.

175. *See id.* at 662.

176. *See id.* at 639.

177. *See id.* at 639.

178. *See id.* at 645-46.

179. Note also Justice Rehnquist's concurrence wherein he argued for application of strong nondelegation and identified three factors, of which the D.C. Circuit stated that their

As indicated previously, the D.C. Circuit applied weak nondelegation in *Lockout/Tagout I & II*.[180] In *Lockout/Tagout I*, the D.C. Circuit accepted the National Association of Manufacturers' ("NAM") argument that OSHA's interpretation of section 3(8) of the OSH Act gave the agency unlimited discretion to promulgate regulations.[181] The D.C. Circuit held that OSHA's interpretation of the statute violated the nondelegation doctrine because it gave the agency discretion to regulate any industry to the brink of economic collapse or to not regulate at all.[182] Because a reasonable alternative interpretation existed, the court remanded the regulations to OSHA with instructions to adopt an interpretation of section 3(8) that limited OSHA's discretion.[183] By requiring that the agency articulate the intelligible principle, the D.C. Circuit applied weak nondelegation.

In *Lockout/Tagout II*, the NAM asked the D.C. Circuit to hold that OSHA's revised interpretation of section 3(8) failed to adequately limit the agency's discretion and that OSHA's interpretation therefore violated the nondelegation doctrine.[184] OSHA's new regulations interpreted the OSH Act as requiring that regulations under section 3(8) provide a "'high degree of worker protection.'"[185] The court held that this interpretation provided a sufficient constraint on the agency's discretion and satisfied the nondelegation doctrine.[186] By upholding the intelligible principle articulated by the agency, the D.C. Circuit upheld its prior use of weak nondelegation.

B. The Practical Consequences

Finally, this Note considers the practical consequences of the *American Trucking* decision. The first question is whether the EPA can articulate an intelligible principle that will satisfy the D.C. Circuit. It is entirely possible that the EPA based the ozone and PM

approach satisfied two. *See id.* at 685 (Rehnquist, J., dissenting); discussion *supra* Part IV.A.1.b.

180. *See Lockout/Tagout I*, 938 F.2d 1310 (1991); *Lockout/Tagout II*, 37 F.3d 665 (1994).

181. *See Lockout/Tagout I*, 938 F.2d at 1313, 1316; s*ee also*, *Lockout/Tagout II*, 37 F.3d at 668.

182. *See Lockout/Tagout I*, 938 F.2d at 1317-18.

183. *See id.* (quoting 58 Fed. Reg. 16,612, 16,615).

184. *See Lockout/Tagout II*, 37 F.3d at 667-68.

185. *Id.* at 669.

186. *See id.*

NAAQS on an intelligible principle. It is possible that on remand the EPA might be able to articulate those principles with more clarity than they were able to in the proposed rules, the final rules, their briefs, or at oral argument. If the EPA revises their regulations and the new standards are litigated, the court may find that the new standards articulate an intelligible principle. In that case, *American Trucking* would end up much like *Lockout/Tagout I* & *II*.[187] However, some commentators have argued that since ozone and PM are nonthreshold pollutants and since the EPA cannot consider economic costs in establishing NAAQS, the EPA may have serious problems and may be unable to articulate an intelligible principle.[188]

Since the D.C. Circuit has denied the EPA's petition for rehearing and petition for rehearing *en banc* on the nondelegation issue, those options are no longer available to the agency. In their petition for rehearing, the EPA identified a principle on which they claimed the regulations were based and argued that it qualified as an intelligible principle.[189] The panel did not express whether the agency's claimed principle would be acceptable on remand, leaving the agency the option of articulating that principle in new regulations.[190]

Even if the EPA can articulate such a principle, another question is whether the EPA will do so. It seems unreasonable for the EPA to refuse to promulgate new rules if they believe that they have a satisfactory principle. The EPA, however, has a tremendous stake in the nondelegation issue because it affects almost every action they take under the many statutes that authorize their actions. The EPA is very serious about establishing new ozone and particulate matter standards and probably does not want to waste time and money promulgating standards that might be struck down.[191] The EPA may therefore choose to litigate in order to obtain a more clear answer as to the standard to which they will be held. Moreover, the EPA may believe that any attempt to articulate a standard will simply lead to further litigation, as in *Lockout/Tagout I* & *II*, and that an immediate

187. *See Lockout/Tagout I*, 938 F.2d at 1326; *Lockout/Tagout II*, 37 F.3d at 668.

188. *See* David M. Friedland & David M. Williamson, *D.C. Circuit Strikes Down Ozone and Particulate Matter Rules*, METROPOLITAN CORP. COUNSEL (Mid-Atlantic Firms), July 1999, at 8, *available in* Westlaw, Legal Newspapers, METCC.

189. *See* American Trucking Ass'ns v. EPA, 195 F.3d 4, 6-7 (D.C. Cir.) (per curiam), *denying reh'g*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam).

190. *See id.*

191. *See* Friedland & Williamson, *supra* note 188, at 8.

appeal to the Supreme Court will bring them to the same ultimate result in a shorter time and with less effort.

If the EPA cannot or does not articulate a satisfactory principle, the next question is whether the Supreme Court will grant *certiorari*. First, it seems unlikely that the Supreme Court would allow the D.C. Circuit to significantly modify the EPA's operations under a statute as prominent as the CAA without reviewing the case.[192] Moreover, given the Supreme Court's current composition and its recent trend in nondelegation cases,[193] the time may be right for the Court to lay down a more definite nondelegation standard.[194] The fact that the Supreme Court decided *FDA v. Brown & Williamson Tobacco Corp.*[195] indicates the Court's willingness to address delegation issues, which may indicate a willingness to hear *American Trucking*. The Court's decision in *Brown & Williamson* indicates that the Court may not allow the broad delegations at issue in *American Trucking*. The issue in *Brown & Williamson* was whether the FDA could regulate tobacco products without an express delegation of such power by Congress to the FDA in the Food, Drug, and Cosmetic Act ("FDCA") or in any other statute.[196] The Court held that the FDA could not regulate tobacco under the current statutory scheme.[197] Although the Court did not go so far as to hold that the FDA could not regulate tobacco without an express delegation of such power, this holding does indicate that in some contexts the majority is unwilling to broadly interpret delegations of legislative power.[198]

192. *See id.*

193. *See*, Friedland & Williamson, *supra* note 188, at 8; *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., __ U.S. __, 120 S. Ct. 1291.

194. *See* Schoenbrod, *Could the Court Give it Substance*, *supra* note 94, at 1234-35 (noting the support given to the nondelegation doctrine by various Justices); Friedland & Williamson, *supra* note 188, at 8.

195. __ U.S. __, 120 S. Ct. 1291 (2000).

196. *See id.* at 1297.

197. *See id.* at 1297, 1301.

198. The majority's holding focused primarily on how Congress' established statutory scheme actually precludes the FDA's regulation of tobacco rather than on whether the FDA could so regulate without an express grant of authority. *Id.* at 1297, 1301, 1309, 1312-13 (Illustrating how the statutory scheme established by Congress indicates Congress' intent to preclude regulation of tobacco by the FDA). This focus lessens somewhat the applicability of this holding to *American Trucking*, but the Court did state that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress" and that there had been no such grant. *Id.* at 1315. Perhaps more important

V. CONCLUSION

Congress often delegates broad policymaking powers to agencies. Strong nondelegation limits Congress' ability to make such delegations. Weak nondelegation, on the other hand, requires an agency receiving such a delegation to articulate an intelligible principle to guide its exercise of discretion. Because courts refuse to apply strong nondelegation, agencies that receive broad statutory mandates are able to exercise nearly unlimited discretion. Courts should therefore limit agencies' discretion by applying weak nondelegation.

Weak nondelegation is a workable and desirable option both to nondelegation and to the status quo. Weak nondelegation does not accomplish all of the objectives of strong nondelegation, but weak nondelegation is more workable and may provide a step toward eventual application of a constitutionally consistent doctrine, possibly a doctrine that actually prohibits many or all delegations of legislative power. Weak nondelegation seeks greater administrative accountability and better administrative decision making. It is likely that neither strong nondelegation supporters nor nondelegation critics will be completely satisfied with weak nondelegation. Nonetheless, because Congress will not stop delegating and courts will not apply strong nondelegation, courts should adopt the weak nondelegation doctrine. It is the best option because it is better to control agencies' discretion than to insist on a doctrine that courts do not and possibly will never apply.

Gabriel Clark[*]

to the *American Trucking* debate is the majority's rejection of the dissent's argument. The dissent's argument is framed much like older nondelegation cases. For instance, the dissent cited cases in which the Court had upheld broad delegations. *See id.* at 1318 (citing United States v. Southwestern Cable Co., 392 U.S. 157 (1968) and Permian Basin Area Rate Cases, 390 U.S. 747 (1968)). The dissent also argued that the FDCA should be interpreted broadly because broad delegations are necessary in order to give agencies the flexibility they need to accomplish goals that they see fit. *See id.* at 1325-26. Thus, the fact that the majority did not adopt such a prodelegation stance in *Brown & Williamson* indicates that the Court may not uphold the broad delegations at issue in *American Trucking*, but the fact that the Court was able to base its decision on the presence of an entire congressional regulatory scheme means that *Brown & Williamson* is probably not a completely accurate predictor of how the Court would decide *American Trucking*.

* The author would like to thank Bryan Elwood for his help on drafts of this Note and Steve Christiansen and Baruch Fellner for their helpful insights on this topic.