American Trucking Ass'ns, Inc. v. EPA

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The Court of Appeals for the District of Columbia Circuit held the Environmental Protection Agency in violation of the long-defunct nondelegation doctrine for failing to limit its own discretion under Section 109 of the Clean Air Act—without striking down the Act itself. The court thus transferred the requirement of limited delegation from Congress to regulatory agencies, effectively creating an entirely new agency limitation that has vast and long-lasting implications for administrative law and environmental protection. This new limitation purports to extend the traditional nondelegation doctrine, but it lacks the constitutional and philosophical foundations of the earlier principle, and vests substantial, unrestrained power in the judiciary.

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In the most dramatic and controversial environmental decision of 1999, the Court of Appeals for the District of Columbia Circuit appeared to breathe new life into the previously defunct nondelegation doctrine, abruptly rejecting efforts by the Environmental Protection Agency (EPA) to tighten air quality standards for ozone and particulate matter (PM). A closer examination of the decision in American Trucking Ass'ns, Inc. v. EPA, however, reveals not a principled resurrection of the traditional nondelegation doctrine but a novel misappropriation of case law and the creation of an entirely new limitation on administrative agencies. The decision has been described as "ingenious [...] but... fundamentally unsound" by one conservative D.C. Circuit court judge, and has been attacked as "extreme, illogical, and bizarre" by the EPA administrator. It also raises serious new questions about the future of administrative and environmental law in America.

The Supreme Court has granted review over American Trucking and the case could swing in several directions after arguments are heard in October 2000. The Court could agree that EPA's standards go too far and either overturn the Clean Air Act (CAA) or uphold the D.C. Circuit's substantial new check on regulatory behavior. The Court has already given strong indications that it may instead read a cost-benefit analysis requirement into the CAA and remand the case to EPA. But if

1. This rarely used doctrine requires Congress to state an "intelligible principle" to guide and limit the powers it delegates to executive branch agencies. See Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 MICH. L. REV. 303, 330 (1999). If Congress gives the Executive a "blank check," it has arguably violated Article I, Section 1 of the Constitution, which vests legislative power in the legislative branch and, by inference, bars Congress from waiving that power. Under traditional doctrines, statutes granting too much authority are invalid. See, e.g., Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 537-38 (1935).


3. American Trucking II, 195 F.3d at 14 (Silberman, J., dissenting).


5. On May 30, 2000, the Court expanded its review by accepting a cross appeal by industry representatives challenging lower federal court decisions that have
the Court follows its strong, recent case law refusing either to revive the nondelegation doctrine\(^6\) or to force the EPA to consider compliance costs when setting national health and welfare standards,\(^7\) *American Trucking* may end up as little more than a footnote—an intriguing bit of judicial activism by four conservative judges\(^8\) determined to rein in an agency action they considered an excessive burden on industrial interests.

I

**BACKGROUND**

The Clean Air Act\(^9\) gives EPA broad discretion to promulgate and revise national ambient air quality standards (NAAQS) for air pollutants including ozone and particulate matter.\(^10\) Since repeatedly held that the CAA does not permit EPA to consider cost and other nonhealth factors in setting national ambient air quality standards. See John J. Fialka, *Regulation of Pollution by EPA to Come Under Justices' Review*, WALL ST. J., May 23, 2000, at A6.

6. See, e.g., Loving v. United States, 517 U.S. 748, 768-69 (1996) (upholding a delegation to the President to define the "aggravating factors" that permit imposition of the death penalty in a court martial); Touby v. United States, 500 U.S. 160, 167 (1991) (upholding a delegation to the Attorney General to criminalize the possession or sale of drugs not listed in the statute, on the basis of standards that authorize the Attorney General to consider the level of use of a particular drug and its impact on public health); Mistretta v. United States, 488 U.S. 361, 371-72 (1989) (upholding a delegation to the Sentencing Commission to "promulgate sentencing guidelines for every federal criminal offense"); see also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1405 (2000) (supporting greater restraints on agency discretion but noting that these cases "plainly demonstrate the Court's unwillingness to enforce the nondelegation doctrine"); George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Nondelegation Doctrine*, 17 CONST. COMMENT. 79, 79-80 (2000) (stating that "The Supreme Court has shown little sustained inclination toward reviving the doctrine.").

7. The high court has declined to read cost considerations into the statute at least four times since the law was passed in 1970. See John J. Fialka, *Stage Set for Review of EPA's Clean-Air Powers*, WALL ST. J., May 31, 2000, at A2.

8. Only four judges of the D.C. Circuit—Judges Williams, Ginsburg, Randolph, and Sentelle—approved the holding in *American Trucking*. Judges Williams and Ginsburg made up the majority in the initial three-judge panel, and all four voted to deny *en banc* review. Although five judges voted to approve *en banc* review, they did not constitute a majority of the eleven-member court, thus leaving the prior decision in place.


10. 42 U.S.C. § 7409. Ozone, the prime ingredient of smog, is the product of a chemical reaction of nitrogen oxides, organic compounds, oxygen, and sunlight. When inhaled, even at very low levels, ground-level ozone can cause acute respiratory problems and significant temporary decreases in lung capacity and can lead to hospital admissions and emergency room visits. Ground-level ozone also compromises plant growth and reproduction and reduces agricultural yields for many economically important crops. See U.S. EPA Office of Air & Radiation, Office of Air Quality Planning & Standards, *Fact Sheet: Health and Environmental Effects of*
1970, the CAA has required EPA to establish and, if appropriate, revise both "primary" and "secondary" standards to protect the public health and welfare from outside air pollutants. NAAQS embody national goals for health and welfare protection and represent one of the few instances under the CAA in which EPA is not required to consider the financial costs and benefits of regulation. The standards drive much of the regulatory structure of the CAA—the tougher the air quality standards, the more demanding the emissions control measures required of cars, industry, and other air pollution sources.

The CAA obligates EPA to set primary standards at concentration levels "requisite to protect the public health" with an "adequate margin of safety." Secondary standards must be set at levels "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such pollutants in the ambient air." The CAA directs EPA to base standards on "air quality criteria" that "accurately reflect the latest scientific knowledge" regarding

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Ground-Level Ozone (visited July 17, 1997)

"Particulate matter" refers to a mixture of solid particles and liquid droplets found in the air which can cause respiratory-related hospital admissions and emergency room visits as well as acute respiratory symptoms including aggravated coughing, painful breathing, and chronic bronchitis, particularly among the elderly and children. See U.S. EPA Office of Air & Radiation, Office of Air Quality Planning & Standards, Fact Sheet: Health and Environmental Effects of Particulate Matter (visited July 17, 1997).

One study estimates that the health effects of particulate exposure in the Los Angeles basin cost 1,600 lives annually, while the health benefits from meeting the NAAQS for ozone in the basin would range from $1.2 to $5.8 billion. See J. V. Hall, et al., Valuing the Health Benefits of Clean Air, 255 Sci. 812, 812 (1992).

"Welfare" is defined to include "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. § 7602(h).

See 42 U.S.C. §§ 7408-7409. These provisions were originally added by the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1678-80.

Lower court rulings dating back to 1980 have held that EPA is barred from considering compliance costs when setting NAAQS. Costs are routinely considered later in the process, when implementation plans are formed. See J. Rec., 2000 WL 14295747, May 31, 2000 (page numbers unavailable).


42 U.S.C. § 7409(b)(2). These are also the criteria EPA must use to determine whether to revise existing NAAQS. See 42 U.S.C. § 7409(d)(1) (EPA shall "promulgate such new standards as may be appropriate in accordance with . . . [§ 7409(b)].")
pollutant effects.\textsuperscript{17} EPA developed criteria expanding on these requirements, stating that when setting standards, the agency will consider "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed."\textsuperscript{18} The D.C. Circuit has expressly held that these criteria are constitutional.\textsuperscript{19}

In accordance with this broad authority to set \textit{NAAQS} standards, EPA issued final rules in July 1997 revising the primary and secondary \textit{NAAQS} for both \textit{PM} and 	extit{ozone}.\textsuperscript{20} EPA proposed replacing the current one-hour primary and secondary ozone standards of 0.12 parts per million (ppm) with eight-hour standards of 0.08 ppm.\textsuperscript{21} The agency also issued final rules adding new primary standards for particulate matter below 2.5 micrometers in size (PM\textsubscript{2.5}), and reducing current limits for particulate matter up to ten micrometers in size (PM\textsubscript{10}).\textsuperscript{22} Although the \textit{CAA} commands that ambient standards be reviewed every five years, the proposed revisions represented only the second alteration since the ozone and particulate matter standards were originally set in 1971, and even this set of revisions only came about after environmental groups filed suit.\textsuperscript{23} Industry groups nevertheless fiercely contested the proposed

\textsuperscript{17} 42 U.S.C. § 7408(a)(2).


\textsuperscript{19} See Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1161-62 (D.C. Cir. 1980) (\textit{Lead Indus.}) (holding that adoption of these criteria "is a policy choice of the type that Congress specifically left to the Administrator's judgment. This court must allow him the discretion to determine which approach will best fulfill the goals of the Act.").

\textsuperscript{20} See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) [hereinafter \textit{NAAQS for PM}]; \textit{NAAQS for Ozone}, supra note 18, at 38,856. The EPA considered more than 100 recent studies of the relationships among particulates, ozone, and human health, and received more 100,000 public comments on the proposed rules. See \textit{NAAQS for PM}, 62 Fed. Reg. at 38,654, 38,709-11; \textit{NAAQS for Ozone}, supra note 18, at 38,858, 38,894. Many industry groups had urged EPA to adopt 0.09 standards, while most environmental groups had advocated 0.07 standards. See \textit{NAAQS for PM}, 62 Fed. Reg. at 38,870.

\textsuperscript{21} See \textit{NAAQS for Ozone}, supra note 18, at 38,856-57.

\textsuperscript{22} EPA specifically proposed setting primary PM\textsubscript{2.5} standards at 15 milligrams per cubic meter (mg/m\textsuperscript{3}) averaged over three hours and 65 mg/m\textsuperscript{3} averaged over twenty-four hours and replacing the current twenty-four hour PM\textsubscript{10} standard of 150 mg/m\textsuperscript{3} with a limit based on the 99th percentile of twenty-four hour PM\textsubscript{10} concentrations at single or multiple community-oriented monitors. See \textit{NAAQS for PM}, supra note 20, at 38,652-53.

\textsuperscript{23} See Oren, supra note 14.
standards and eventually sued over EPA's decision to adopt them.24

II
THE DECISIONS

A. Decision of the Three-Judge Panel (American Trucking I)

In a 2-1 per curiam decision25 issued May 14, 1999, the D.C. Circuit held that both standards effect "an unconstitutional delegation of legislative power," and remanded them to EPA to "develop a construction of the act that satisfies this constitutional requirement."26 In Part I of the opinion, Judge Williams held that although EPA had not acted arbitrarily or capriciously under the Administrative Procedures Act (APA), the agency had failed to justify its selection of the permitted pollution levels over all those higher and lower on the spectrum.27 Noting that EPA regulates both ozone and PM as "non-threshold pollutants"—pollutants that have some possibility of adverse health impacts at any exposure and are only completely risk-free at zero concentration28—the court held that:

For EPA to pick any non-zero [pollution] level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.29

The court objected not to the new NAAQS themselves or even to EPA's analysis supporting the standards, but to the agency's failure to isolate an "intelligible principle by which to identify a stopping point."30 Invoking only the 1928 J.W. Hampton, Jr. & Co. v. United States31 decision, the court held that neither the

24. In addition to the American Trucking Association, petitioners included the U.S. Chamber of Commerce, the National Coalition of Petroleum Retailers, and three trucking companies. See Court of Appeals Docket 97-1440 & 97-1441 (D.C. Cir. 1997) (consolidating several dozen cases and listing many intervenors and amicus curiae).
25. Judge Williams wrote Parts I and III.B; Judge Ginsburg wrote Parts II, III.A, and IV.D; Judge Tatel dissented from Part I and wrote Parts IV.A-C.
27. See id. at 1034.
28. See id.
29. Id.
30. Id. at 1037.
31. 276 U.S. 394 (1928). In Hampton, the Court upheld the Tariff Act of 1922,
statute nor EPA had articulated a sufficiently intelligible principle to limit the agency's authority under the CAA. Rather than overturning the CAA or EPA's standards, the court held that its precedent in *International Union, UAW v. OSHA (Lockout/Tagout I)* required it to remand the case to EPA to develop an intelligible principle and, if appropriate, to modify the disputed NAAQS accordingly.

The court summarily rejected several EPA explanations in defense of its decision not to set the ozone and PM standards at higher or lower concentrations. The majority first dismissed EPA's argument—endorsed by the Clean Air Scientific Advisory Committee (CASAC)—that lower standards could not be

which authorized the President to modify customs duties "when he determines that it is shown that the differences in costs of production have changed or no longer exist." *Id.* at 402. The Court deemed this delegation (coupled with the creation of a purely advisory Tariff Commission) constitutional, holding: "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." *Id.* at 409.

32. *See American Trucking I*, 175 F.3d at 1034.
33. 938 F.2d 1310, 1313 (D.C. Cir. 1991). In *Lockout/Tagout I*, the D.C. Circuit court remanded OSHA regulations limiting industry's operation of equipment undergoing maintenance. OSHA had interpreted the relevant portion of the Occupational Safety and Health Act to allow the agency, upon finding that a workplace practice posed a "significant risk," to require steps to minimize the risk (so long as the steps were economically and technologically feasible). *See id.* at 1317. The court held that this reading of the statute gave the agency unfettered discretion in deciding how strictly to regulate and therefore raised a "serious nondelegation issue." *Id.* Rather than striking down the relevant portions of the statute, however, the court remanded the rules so that OSHA could develop a new interpretation. The court subsequently approved the delegation after the agency returned and argued that its reading of the statute required it to identify "significant" safety risks, and to enact safety standards providing "a high degree of worker protection," a definition bounded by maximum feasible stringency and some "modest" departure from that level. *International Union, UAW v. OSHA*, 37 F.3d 665, 669 (D.C. Cir. 1994) (Lockout/Tagout II).

34. *See American Trucking I*, 175 F.3d at 1034. The court held that:

Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. *Id.* at 1038.

35. CASAC is an independent scientific advisory committee created under Section 109 of the Clean Air Act and consists of at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies. In the present case, the CASAC also included medical doctors, epidemiologists, toxicologists, and environmental scientists from several leading research universities and institutions. In setting ambient standards, "EPA must explain any departures from CASAC's recommendations [42 U.S.C. § 7607(d)(3)]." *American Trucking I*, 175 F.3d at 1059 (Tatel, J., dissenting).
justified because of substantial scientific uncertainty regarding the extent and potential health impacts of exposure to pollution levels below the proposed standards.\(^{36}\) The majority refused to defer to CASAC\(^{37}\) and disregarded EPA's scientific findings, stating that:

In other words, effects are less certain and less severe at lower levels of exposure. This seems to be nothing more than a statement that lower exposure levels are associated with lower risk to public health. . . . [T]he increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does.\(^{38}\)

Judge Williams' opinion insisted that the marshalling of all of EPA's scientific evidence only amounted to an agency assertion that standards should be adjusted whenever health effects are "possible, but not certain" at the new level—a principle that could justify a standard of zero as easily as a refusal to lower PM levels below those associated with London's "Killer Fog" of 1952.\(^{39}\)

Judge Williams' negative characterization of the scientific evidence allowed the court to dismiss several other justifications asserted by the agency. The court rejected the argument that health effects occurring below an ozone level of 0.08 ppm are "transient and reversible" and thus qualitatively different from those above the limit. The majority held that EPA's proposed ozone standard "does not make the categorical distinction . . . and it is far from apparent that any health effects existing above the limit are permanent or irreversible."\(^{40}\) Finally, the court rejected EPA's argument that an ozone standard below 0.08 ppm would be inappropriate since some areas already exceed that limit strictly through background, nonanthropogenic sources.\(^{41}\)

The majority held that this argument "may well be a sound

\(^{36}\) See NAAQS for Ozone, supra note 18, at 38,868.

\(^{37}\) See American Trucking I, 175 F.3d at 1035-36 ("That body gave no specific reasons for its recommendations, so the appeal to its authority . . . adds no enlightenment.").

\(^{38}\) Id. at 1035-36.

\(^{39}\) Id. at 1036. The calamity in question featured very high PM levels (up to 2,500 Sg/m\(^3\)) and is believed to have led to more than 4,000 deaths in one week. See id.; see also W.D. Logan, Mortality in the London Fog Incident, 1952, THE LANCET, Feb. 4, 1953, at 336-38. It is not clear why Judge Williams felt the need to write the "Killer Fog" into United States constitutional jurisprudence, except perhaps to emphasize how far he feels the EPA has strayed from traditional nuisance law.

\(^{40}\) American Trucking I, 175 F.3d at 1035; see also NAAQS for Ozone, supra note 18, at 38,868.

\(^{41}\) See NAAQS for Ozone, supra note 18 at 38,868.
reading of the statute," but found it inapplicable since "EPA has not explicitly adopted it."\textsuperscript{42}

In the most "ambitious" part of the opinion,\textsuperscript{43} the majority then offered EPA a chilling insight into the agency's future under the court's new doctrine. After reluctantly reiterating\textsuperscript{44} that several D.C. Circuit decisions preclude EPA from using cost-benefit analysis\textsuperscript{45} and then engaging in an extended discussion of the negative environmental consequences of de-industrialization,\textsuperscript{46} the court outlined one "intelligible principle" available to EPA. Judge Williams recommended that EPA develop a massive health benefits formula—comprised of the severity of pollution effects, the size of affected populations, and the probability of impacts— for deciding the level of the standards.\textsuperscript{47} To judge the severity of effects, the court advised EPA to follow an approach used by Oregon in devising a health plan for the poor, by calculating the consequences that a NAAQS change would have on national "Quality Adjusted Life Years."\textsuperscript{48} Given the

\textsuperscript{42} American Trucking I, 175 F.3d at 1036.
\textsuperscript{43} See Sunstein, supra note 1, at 347.
\textsuperscript{44} Professor Richard J. Pierce, Jr., has stated that there "is no doubt . . . that the judges who comprised the majority in [American Trucking] would like the EPA to adopt a statutory construction that permits, or requires, [cost-benefit analysis]. Both judges are economically oriented former academics who were appointed by President Reagan, and the author of the opinion has urged agency use of [cost-benefit analysis] in similar contexts." Richard J. Pierce, Jr., The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine, 52 ADMIN. L. REV. 63, 80-81 (2000).
\textsuperscript{45} See NRDC v. EPA, 902 F.2d 962, 973 (D.C. Cir. 1990); see also Lead Indus., 647 F.2d at 1148; American Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998); American Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981). In fact, the EPA did prepare a 718-page cost-benefit analysis of the proposed rules, which estimated that the new rules would:

1. reduce the "number of deaths attributable to exposure to particulates and ozone by 3,700 to 17,900 per year";
2. "cost an estimated $46.6 billion per year"; and
3. "would yield monetary benefits in the range of $21.5 billion to $118 billion per year."

Pierce, supra note 44, at 74 n.67, 86 n.126 (citing EPA Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule ES-1222 (1997)).

\textsuperscript{46} Even while admitting that "[n]o party here appears to advocate" de-industrialization, the court described with particular relish the ways in which industrial "progress" is actually better for air quality than a "pastoral life" powered by biomass energy sources. American Trucking I, 175 F.3d at 1038.

\textsuperscript{47} See id. at 1039; see also Oren, supra note 14.

\textsuperscript{48} American Trucking I, 175 F.3d at 1039. Quality Adjusted Life Years ("QALYs") are measures of health based on people's attitudes toward various conditions. They focus on how people value various health states and seek to generate a means of comparing various states of health through a single metric so that rational
statutory requirements and "the power over American life possessed by EPA," the court noted that a health-benefits matrix would certainly need to be "comprehensive." If EPA could not develop such an analysis, the court stated, the agency should then report to Congress and seek legislation ratifying its revised standards.

comparisons and trade-offs can be made for public purposes. See Sunstein, supra note 1, at 366.

The court fortunately did not require EPA to develop the system, because as Rutgers University Professor of Law Craig Oren recently noted, "the Oregon technique does not seem to be workable." Oren, supra note 14. The United States Department of Health and Human Services (HHS) has twice forced Oregon to revise the system in question because the program undervalued the lives of persons with disabilities in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000). The difficulties associated with valuing the lives of children, the elderly, and sensitive populations would almost certainly dog any large-scale NAAQS calculation. Moreover, one study of the Oregon system has discovered that the program has not facilitated more "rational" health care allocations based on cost-benefit calculations, but has instead merely increased public debate and led to decisions influenced by political pressure and administrative value judgments—the polar opposite of the scientific certainty and standards required by the D.C. Circuit majority. See Lawrence Jacobs et al., The Oregon Health Plan and the Political Paradox of Rationing: What Advocates and Critics Have Claimed and What Oregon Did, 24 J. HEALTH POL. POLY & L. 161, 164 (1999); see generally Harold M. Leichter, Oregon's Bold Experiment: Whatever Became of Rationing?, 24 J. HEALTH POL. POLY & L. 147 (1999).

49. American Trucking I, 175 F.3d at 1039.

50. See id. In Part II of the opinion, Judge Ginsburg, writing for the majority, upheld EPA against the primary claims advanced by the petitioners. The court held that:

- EPA is not permitted to consider the costs of implementing the standards. See Lead Indus., 647 F.2d at 1148 (D.C. Cir. 1980). The majority rejected four attempts to distinguish Lead Industries and its progeny.

- EPA is not required "to consider the environmental consequences resulting from the financial impact" of the revised standards, such as the "health consequences of unemployment." See NRDC v. EPA, 902 F.2d 962, 972-73 (D.C. Cir. 1990) (EPA may only consider the impacts resulting directly from the pollutants and not those indirectly resulting from the cost of compliance).

- EPA had complied with the National Environmental Policy Act (NEPA) to the extent required by 15 U.S.C. § 793(c)(1) ("No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the [NEPA]").

- EPA's failure to prepare a Regulatory Impact Statement (RIS) under the Unfunded Mandates Reform Act, 2 U.S.C. § 1501 et seq. (2000), did not render the NAAQS arbitrary and capricious.

- EPA properly certified that its NAAQS would not have a substantial impact upon a substantial number of small businesses and thus did not violate the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2000).

In Part III.A, Judge Ginsburg issued a second major blow to EPA, finding that
B. Judge Tatel's Dissent

Judge Tatel's dissenting opinion castigated the panel majority for reinvigorating the nondelegation doctrine despite a half-century of Supreme Court decisions limiting its applicability and for threatening to strike down Section 109 of the CAA unless EPA can articulate an intelligible principle limiting its discretion. Judge Tatel concisely pointed to seven separate cases upholding Congressional authorizations far broader than the "requisite to protect the public health" delegation challenged here. After determining that the principles constraining EPA

Congress' 1990 inclusion of Subpart 2 of Part D of the Act (42 U.S.C. §§ 7511-7511(f)) precludes EPA from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2. See American Trucking I, 175 F.3d at 1049 ("Because the 1990 amendments extended the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS, they must preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS."). Thus, even if EPA can explain its revised ambient ozone standard to the court's satisfaction, the agency cannot implement the new standard without new legislation from Congress. See Oren, supra note 14. The court also concluded that EPA may not require a state to comply with a revised secondary ozone NAAQS in any area that has yet to attain the 0.12 ppm primary standard. See American Trucking I, 175 F.3d at 1046.

In Part III.B, Judge Williams resumed authorship of the opinion and held that EPA must address the potential health benefits of tropospheric ozone in setting and revising ozone NAAQS. See 42 U.S.C. § 7408(a)(2) (ambient standards must be based on criteria encompassing "the kind and extent of all identifiable effects on public health or welfare . . ."). The court rejected EPA's reliance on the fact that two of the three specified considerations under Section 108(a)(2)'s general mandate refer to "adverse effects" as well as the agency's arguments that Title VI's measures to preserve stratospheric ozone represent a complete consideration of ozone's beneficial role, and that the studies relied on by the petitioners failed to demonstrate that the health benefits would be significant or quantifiable. American Trucking I, 175 F.3d at 1051-53.

Finally, in Part IV, Judge Tatel upheld EPA's new, separate standard for particulate matter of 2.5 microns or less ("PM$_{2.5}$") but held that the agency acted arbitrarily and capriciously in not modifying its previous PM$_{10}$ standard to PM$_{10-25}$. See id. at 1053-55. Since the original PM$_{10}$ standard includes all particles up to ten microns, a separate standard for the smallest particles represents "double regulation" of the PM$_{2.5}$ component. See id. at 1054.

51. See id. at 1057 (Tatel, J., dissenting). Judge Tatel noted that: "The Clean Air Act has been on the books for decades, has been amended by Congress numerous times, and has been the subject of regular Congressional oversight hearings. The Act has been parsed by this circuit no fewer than ten times in published opinions delineating EPA authority in the NAAQS setting process." Id.

discretion are at least as limiting as those upheld by the D.C. Circuit in *Lockout/Tagout II*, Judge Tatel emphasized that the agency "gave two perfectly rational explanations" for the selected ozone level and offered similarly justifiable explanations regarding particulate matter. Finally, Judge Tatel noted that courts have less reason to second-guess the specificity of Congressional delegations where, as in the present case, politically accountable state governments are given primary responsibility for distributing the burdens of a proposed rule and may at any time turn to Congress for assistance.

591, 600 (1944) (reinforcing the Federal Power Commission's authority to determine "just and reasonable" rates); Lichter v. United States, 334 U.S. 742, 777-78 (1948) (sustaining the War Department's authority to recover "excessive profits" earned on military contracts); *Touby*, 500 U.S. at 165 (upholding the Attorney General's authority to regulate new drugs that pose an "imminent hazard to public safety"). Judge Tatel also noted that, in 1998, the circuit court upheld a delegation to the Secretary of Agriculture to approve interstate compacts upon a finding of "compelling public interest." *See* Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1476 (D.C. Cir. 1998).

53. 37 F.3d 665; *see also supra* note 33.
55. *See id.* at 1061 (Tatel, J., dissenting) ("[T]he Agency 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.")
56. *See id.* Bills were in fact introduced in both the Senate and House of Representatives to overturn or delay by four years the NAAQS in question. *See S. 1084, 105th Cong. (1997)* (sponsored by James Inhofe (R-OK) and John Breaux (D-LA); H.R.1984, 105th Cong. (1997) (sponsored by Ron Klink (D-PA), Rick Boucher (D-VA), and Fred Upton (R-MI)). The bills were abandoned in committee after an agreement was reached as part of the multi-year reauthorization of federal surface transportation programs known as the "Transportation Equity Act for the 21st Century," or "TEA-21." This agreement, formalized in an amendment to TEA-21 sponsored by Inhofe does the following:

- "guarantees that PM_{2.5} designations will not occur until at least 2004, instead of July 2000 as proposed by EPA";
- "guarantees that ozone designations will not occur until July 2000, instead of July 1999 as set in the Clean Air Act";
- "guarantees that regional haze state implementation plans (SIPs) are not due until 2005 for PM_{2.5} attainment areas and 2007 for PM_{2.5} nonattainment areas";
- directs EPA to fully fund the PM_{2.5} monitoring network and requires the agency to prepare a report on the field operation of PM_{2.5} monitors; and
- "eliminates the possibility of citizen suits to accelerate the proposed implementation schedule."

C. En Banc Decision (American Trucking II)

Given the range of options left to it by the panel’s decision, EPA immediately requested en banc review from the entire D.C. circuit. On October 29, 1999, in a 4-5-2 per curiam decision, the full court denied rehearing of the substantive portions of the decision but nevertheless issued a separate opinion recasting the major holding of the case. The en banc court first noted that EPA had in fact responded, as the initial panel had requested, with what the agency deemed to be intelligible principles guiding its statutory interpretation. For particulate matter, EPA stated that its decision was determined by the norm of “the 95 percent confidence level to separate results that could be the product of chance from more convincing evidence of causation.” For ozone, the agency followed the scientific conclusion that any health effects resulting from a level below 0.08 ppm are “transient and reversible.” Despite the fact that EPA appeared to have “extract[ed] a determinate standard on its own,” as the initial panel requested, the en banc panel appeared to treat EPA’s argument as a post-hoc rationalization, stating that, “only after the EPA itself has applied it in setting a NAAQS can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine.”

The en banc court articulated one final word about nondelegation. The court noted that the Supreme Court and the D.C. Circuit have long held that legislative purpose, factual background, and statutory context, can give an ambiguous delegation “meaningful content.” This line of reasoning culminated in the Benzene case, in which the Supreme Court itself identified an intelligible principle in an ambiguous

57. Judges Williams, Ginsburg, Randolph, and Sentelle voted to deny the rehearing. Chief Judge Edwards and Judges Silberman, Rogers, Tatel, and Garland voted to grant the rehearing. Judges Wald and Henderson did not participate. Although the four prevailing judges constituted a minority of those judges participating, en banc review is granted only upon the recommendation of a majority of all the circuit judges. The two non-participating judges thus essentially constituted “No” votes for the petitioners.

58. The en banc court also upheld the original panel’s rulings regarding EPA’s lack of authority to enforce a revised ozone standard under Subpart 2, as well as the possible beneficial health effects of tropospheric ozone. See American Trucking II, 195 F.3d at 10.

59. See id. at 7.
60. Id. at 6 n.1 (quoting EPA’s petition for panel rehearing at 15).
61. Id. (quoting EPA’s petition for panel rehearing at 16).
62. Id. at 1038.
63. Id. at 7 (citing Yakus v. United States, 321 U.S. 414, 424-26 (1944)).
64. See id. (citing American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946)).
statute. The en banc court stated, however, that this line of inquiry has “given way” to the approach of *Chevron U.S.A. Inc. v. NRDC*, leaving the court with the ability to defer to reasonable interpretations of ambiguous statutes, but not to come to the aid of questionable delegations. Curtly noting the Supreme Court’s determination in *Chevron* that “[t]he responsibilities for assessing the wisdom of [agency] policy choices . . . are not judicial ones,” the en banc court essentially stripped itself of any authority to come to the aid of an administrative agency.

D. Judge Silberman’s and Judge Tatel’s Dissents

Judge Silberman, one of the circuit court’s most conservative judges and an outspoken proponent of the nondelegation doctrine, nevertheless dissented from the en banc decision, deriding his colleagues’ interpretation of Section 109 as “rather ingenious” but “fundamentally unsound.” Judge Silberman noted that the nondelegation doctrine “is at this stage of constitutional ‘evolution’ not in particularly robust health” and submitted that the language of Section 109 does not come so close to the “dimly perceptible” boundaries of Congressional delegation to raise a serious constitutional problem. The dissenting opinion also rebuked the court’s remand to EPA, noting that if the panel believed that “there are no intelligible principles ‘apparent from the statute,’” it should have held the statute unconstitutional. By refusing to do so, Judge Silberman concluded, the panel undermined the purposes of the nondelegation doctrine by granting Congress the power “to delegate almost limitless policymaking authority to an agency, so long as the agency provides and consistently applies an ‘intelligible principle.’”

Judge Tatel’s dissenting opinion, like his dissent in

67. See American Trucking II, 195 F.3d at 8.
68. Id. (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)).
69. See *id.* at 14 (Silberman, J., dissenting) (noting that Justice Rehnquist “heroically attempted to inject vitality into the doctrine” in the *Benzene* case).
70. Id.
71. Id.
72. Id. at 15 (quoting *American Trucking I*, 175 F.3d at 1034).
73. Id.
74. Judge Tatel also issued an opinion concurring in part and dissenting from
American Trucking I, noted that the discretion at issue is "far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years" and stated that "[u]nless petitioners can persuade the Supreme Court to return to the days of Schechter Poultry, this 'inferior' court has no authority to demand anything more from either EPA or Congress."76

Facing a potentially onerous administrative assignment and a circuit apparently unwilling to give it any significant deference, EPA chose to file for certiorari.77 The Supreme Court granted EPA's petition for review on May 22, 2000,78 prompting some commentators to predict that the Court would adhere to its clear line of cases rejecting efforts to revive the nondelegation doctrine79 and rule in EPA's favor.80 But on May 30, 2000, the Court shocked legal observers and expanded its review by accepting a cross appeal by industry representatives81 asking the Court to find that Congress intended EPA to weigh economic factors (such as the financial cost and benefit of the regulations) along with the health and welfare effects.82 The Court is slated to hear arguments regarding the D.C. Circuit decision in tandem with the cost-benefit issue this fall.

the panel's rulings regarding EPA's authority to enforce a revised ozone standard under Subpart 2.

75. See A.L.A. Schechter Poultry Corp., 295 U.S. at 537-38, the landmark Supreme Court case invalidating parts of the National Industrial Recovery Act as an unconstitutionally open-ended delegation of Congressional power over the entire economy to private groups with no public accountability.

76. American Trucking II, 195 F.3d at 16 (Tatel, J., dissenting).

77. Following the en banc decision, EPA also proposed to reinstate its one-hour ozone standard in 3,000 counties—it had previously revoked this standard after adopting the eight-hour standard overturned by American Trucking. See D.C. Circuit Rejects EPA's Appeal of Ruling That Clean Air Standards Are Unconstitutional: Agency Proposes to Retimpose 1-Hour Ozone Standard, FOSTER ELEC. REP. 17 (Nov. 3, 1999).


79. See cases cited supra note 6.

80. See Pierce, supra note 44, at 64 (the decision "is a good candidate for reversal by the Supreme Court.").

81. American Trucking Assn's v. Browner, 120 S. Ct. 2193 (2000). The industry groups, which include the United States Chamber of Commerce and the National Association of Manufacturers, were joined by the industrial states of Ohio, Michigan, and West Virginia. See Fialka, supra note 7, at A2.

82. See Fialka, supra note 7, at A2. As previously noted, the Court has repeatedly refused to overturn lower federal courts' rulings holding that EPA is barred from considering compliance costs when setting NAAQS. See supra notes 7, 13.
Lost in the majority’s lengthy discussion of the nondelegation doctrine is the fact that American Trucking is not really a nondelegation case at all—at least, not as the doctrine has traditionally been articulated. The nondelegation doctrine, as enunciated in Hampton and applied in Panama Refining Co. v. Ryan and Schechter Poultry, checks the legislative delegation of authority, not the executive agencies’ implementation of that authority. In the present case, the D.C. Circuit never held that Congress had violated the traditional nondelegation doctrine, a ruling which would have forced the court to take the drastic step of overturning Section 109 of the CAA. Instead, the court borrowed the “intelligible principle” idea created in Hampton and used it to assert an entirely new limitation on agency decisionmaking. Under this new doctrine, the court will invalidate open-ended statutory terms unless agencies are themselves able to specify the governing legal criteria—to circumscribe their own authority through narrowing interpretations.

There are at least five fundamental problems with the court’s conversion of the nondelegation doctrine into a general requirement of administrative restraint. First, no matter what one’s policy preference about agency accountability, the court’s new doctrine lacks any foundation in the Constitution. Second, the court need not have relied on the nondelegation doctrine; EPA’s standards could have been more easily overturned as arbitrary and capricious under ordinary judicial review. Third, the court’s new doctrine ironically eliminates any need for Congressional clarity—counter to the purposes of the original doctrine. Fourth, the proposals at issue were formed under significant Presidential oversight and accountability, obviating the need for the creation of an entirely new limit on agency behavior. Finally, and perhaps most importantly, the court has

83. 276 U.S. at 409.
84. 293 U.S. at 421.
85. 295 U.S. at 537-38.
86. At least one commentator has chalked up this aspect of the majority’s decision to a simple “lack of chutzpah.” Lovell, supra note 6, at 87 n.16.
87. See Bressman, supra note 6, at 1402 (stating that American Trucking “confirms[ ] the emergence of a new delegation doctrine that . . . fundamentally alters the traditional scope of delegation review.”
88. See Sunstein, supra note 1, at 310.
89. See id. at 350-56.
set a precedent for wholesale judicial policymaking that may extend far beyond this particular case and set of circumstances.

A. Constitutional Foundation of the New Doctrine

The courts and later commentators have mischaracterized American Trucking as a simple revival of the conventional nondelegation doctrine.90 As discussed above, the original court majority expressly employed Hampton to prop up its new doctrine and the en banc court did not discourage that approach. The constitutionality of American Trucking is thus grounded in the traditional nondelegation doctrine and the asserted need to extend that doctrine to more directly limit agency discretion.

Neither the nondelegation doctrine nor the court’s appropriation of it in this instance sits on particularly solid ground. The nondelegation doctrine itself has been repeatedly characterized as “dead,”91 “dormant,”92 or, more politely, the subject of “extremely infrequent use.”93 Indeed, after its “one good year” in 1935,94 the doctrine has never been employed by the Supreme Court to invalidate a federal statute.95 The Court

92. Schapiro, supra note 90, at 658.
93. Sunstein, supra note 1, at 330.
94. Id. In 1935, the nondelegation doctrine was first invoked to overturn sections of, and then the entire National Industrial Recovery Act as unconstitutional. See Panama Refining Co., 293 U.S. at 421; A.L.A. Schechter Poultry Corp., 295 U.S. at 537-38.
95. Reports of the doctrine’s demise have not sated members of the academic community who have spun out a vast and interesting discourse through endless books and law review articles. The Court’s reluctance to enforce the nondelegation doctrine has been criticized by Theodore Lowi, John Hart Ely, and David Schoenbrod. Although the authors attack delegation for their own reasons, each basically argues that delegation violates principles of democratic governance by transferring the hard choices from “the people” (via Congress) to unaccountable bureaucrats. See, e.g., Theodore J. Lowi, The End of Liberalism: Ideology, Policy and the Crisis of Public Authority 125-26 (1969); John Harte Ely, Democracy and Distrust: A Theory of Judicial Review 133-34 (1980); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation 10 (1993); David Schoenbrod, Delegation and Democracy: A Reply to My Critics, 20 Cardozo L. Rev.
has instead spent much of the last six decades upholding increasingly broad delegations of power to federal agencies. As even the initial panel acknowledged, the Supreme Court's most recent decisions on the subject clearly do not support a major revival of the doctrine.

Moreover, the D.C. Circuit can not claim support from lower court precedents. The court, in fact, misconstrued a number of prior circuit court rulings on the way to invoking the nondelegation doctrine in American Trucking. The court began by distinguishing Lockout/Tagout II, the one recent nondelegation case directly on point. Although EPA's authority to revise NAAQS is arguably far narrower than OSHA's mandate to set "reasonable" standards, the majority maintained that the word "moderate" fettered OSHA's discretion, while EPA remains free to allow "Killer Fog"-type particulate levels. The majority then distinguished South Terminal Corp. v. EPA, a First Circuit case, even less convincingly. In rejecting a similar nondelegation challenge to the CAA's "requisite to protect the public health" language, the First Circuit court held:

The power granted to EPA is not 'unconfined and vagrant.' [Schechter Poultry, 295 U.S. at 551 (Cardozo, J., concurring).]

The Agency has been given a well defined task by Congress—to reduce pollution to levels 'requisite to protect the public health', in the case of primary standards. The Clean Air Act


The other side of the debate, represented by Jerry Mashaw and Peter Schuck, among others, argues that delegation reinforces democracy by lowering the cost and effectiveness of public participation while retaining agency responsiveness through Presidential oversight. See, e.g., Jerry H. Mashaw, GREED, CHAOS, AND GOVERNANCE 107 (1997); Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 CARDOZO L. REV. 775 (1999).

96. See Mistretta, 488 U.S. at 371-72. In upholding Congress' delegation of "legislative discretion" to the United States Sentencing Commission, the Court noted that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Id. at 372. See also cases cited supra notes 6, 52 (describing cases upholding broad delegations of legislative authority).

97. See American Trucking I, 175 F.3d at 1038 ("[W]e do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine . . .") (citing Mistretta, 488 U.S. at 377-79 (1989)).

98. 37 F.2d 609.


100. Id. at 1037; see also Lockout/Tagout II, 37 F.2d 609. If the EPA allows itself to set only standards falling somewhere between maximum feasible stringency and some "moderate" departure from that level, as OSHA did, Lockout/Tagout II would appear to establish its constitutionality.

101. 504 F.2d 646 (1st Cir. 1974).
AMERICAN TRUCKING

outlines the approach to be followed by the Agency and describes in detail many of its powers.... Yet there are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers, not the least of which is that the rationality of the means can be tested against goals capable of fairly precise definition in the language of science.\footnote{102. Id. at 677. The court further held that:

Administrative agencies are created by Congress because it is impossible for the Legislature to acquire sufficient information to manage each detail in the long process of extirpating the abuses identified by the legislation; the Agency must have flexibility to implement the congressional mandate. Therefore, although the delegation to EPA was a broad one, ... we have little difficulty concluding that the delegation was not excessive.

Id.}

The D.C. Circuit had echoed South Terminal Corp. in three decisions holding that EPA may use its discretion to make the "policy judgment" to set pollution standards at one point rather than another, even when confronted by scientific uncertainty about the health effects of pollutant concentrations.\footnote{103. See NRDC v. EPA, 902 F.2d at 969; American Petroleum Inst. v. Costle, at 1185; Lead Indus., 647 F.2d at 1161.}

The American Trucking court found those decisions inapplicable since none of the panels addressed a delegation claim and distinguished South Terminal Corp. because it dealt with "already-established NAAQS, not [the] promulgation of the NAAQS themselves."\footnote{104. American Trucking I, 175 F.3d at 1037. South Terminal Corp. concerned EPA's adoption of a plan for ending or preventing violations in Boston of already-established NAAQS, not the promulgation of the NAAQS themselves. The South Terminal Corp. court upheld the delegation in part because "the rationality of the means can be tested against goals capable of fairly precise definition in the language of science." South Terminal Corp., 504 F.2d at 677. The American Trucking majority held that this language could be distinguished because the "means" were the Boston plan's provisions and the "fairly precisely defined" goals were the NAAQS themselves." American Trucking I, 175 F.3d at 1037.} It thus appears that, at least in the D.C. Circuit, EPA is entitled to "policy" deference only when adopting plans related to \textit{existing} NAAQS and only when the agency is not challenged on delegation grounds.

The court's legal justification for its new doctrine therefore rests on a constitutionally-suspect doctrine that has lain dormant for the last sixty-four years coupled with a tendentious reinterpretation of a half dozen D.C. Circuit cases directly on point. Whatever the merits of this new restraint on agency discretion, it is clear that the court did not build its doctrine on a particularly solid legal foundation.

In fact, as University of Chicago Law Professor Cass R.
Sunstein correctly points out, the real foundation of the new
doctrine exists in a clairvoyant 1969 law review article and two
court cases.\footnote{105} The article, Kenneth Culp Davis’ A New Approach
to Delegation,\footnote{106} pronounced the traditional nondelegation
doctrine dead and proposed an entirely new approach to curtailing the alleged problem of excessive agency discretion.
Davis argued that “[t]he key should no longer be statutory words;
it should be the protections that administrators in fact provide,
irrespective of what the statutes say or fail to say,” and urged “a
much broader requirement, judicially enforced, that as far as is
practicable administrators must structure their discretionary
power through appropriate safeguards and must confine and
guide their discretionary power through standards, principles,
and rules.”\footnote{107} As Sunstein admits, Davis failed to identify any
legal source or justification for his proposed innovation.\footnote{108} He did
not indicate whether courts should act pursuant to the Due
Process Clause, Article I, the APA, or the common law, instead
stating only that “[p]erhaps the non-delegation doctrine will
gradually turn into a facet of due process . . . . But in the longer
term, perhaps the constitutional base will give way to a common-
law base.”\footnote{109} Less than a decade later, of course, the Supreme
Court ruled in \textit{Vermont Yankee Nuclear Power Corp. v. NRC}\footnote{110}
that there is no common law of administrative law,\footnote{111} truly
detaching Davis’ idea from any constitutional moorings.

Despite its doubtful legal foundation, Davis’ idea surfaced in
Judge Leventhal’s opinion in \textit{Amalgamated Meat Cutters v. Connally},
the celebrated 1971 case upholding the Economic Stabilization Act of 1970,\footnote{112} which authorized the President to
“issue such orders and regulations as he may deem appropriate
to stabilize prices, rents, wage and salaries.”\footnote{113} Despite this
remarkably broad delegation, the court upheld the statute
largely because the Executive would be bound by an implicit
requirement to develop and follow “subsidiary” administrative
law.\footnote{114} Judge Leventhal emphasized the “requirement of

\footnote{105}{See Sunstein, supra note 1, at 340-46.}
\footnote{106}{36 U. CHI. L. REV. 713 (1969).}
\footnote{107}{Id. at 713.}
\footnote{108}{See Sunstein, supra note 1, at 341.}
\footnote{109}{Davis, supra note 106, at 733.}
\footnote{110}{435 U.S. 519 (1978).}
\footnote{111}{See \textit{id.} at 543.}
\footnote{113}{Pub. L. No. 91-379 § 202, 84 Stat. 799 (1970).}
\footnote{114}{\textit{Amalgamated Meat Cutters}, 337 F. Supp. at 758-59. Relying on \textit{Yakus}, 321
subsidiary administrative policy, enabling Congress, the courts, and the public to access the Executive's adherence to the ultimate legislative standard," which he deemed "corollary to and implementing of the legislature's ultimate standard and objective." Although the court used this new "subsidiary" administrative policy requirement as a shield to protect a vulnerable statute rather than as a sword to strike it down, Judge Leventhal's language appears to require, on nonconstitutional grounds, at least some of what Davis proposed—a clear articulation of regulatory policy choices and supplementary standards allowing objective determinations of agency adherence.

Judge Leventhal's subsidiary policy shield became a sword in *Lockout/Tagout I*, discussed above. *Lockout/Tagout I* involved an OSHA regulation requiring employers to place "lockouts" or informational "tags" on equipment posing a threat of dangerous energy release. The statutory language was again remarkably brief (requiring OSHA to issue regulations "reasonably necessary or appropriate" to provide safe or healthful employment), so the court borrowed from *Amalgamated Meat Cutters* and again looked to the agency's "subsidiary administrative policy." Unlike in *Amalgamated Meat Cutters*, however, the *Lockout/Tagout I* court found OSHA's explanation of the statutory language (requiring the agency to regulate (a) any "significant risk" to (b) the point of "feasibility") potentially unconstitutional under the nondelegation doctrine. The court remanded the case to OSHA to allow the agency to develop a more reasonable and consistent explanation. After OSHA subsequently argued that the statute allowed it to set standards only between maximum feasible stringency and some "moderate" departure from that level, the *Lockout/Tagout II* court reluctantly concluded that this was sufficient to satisfy the

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115. *Id.* at 425.
116. *See* Sunstein, supra note 1, at 344.
117. *See* supra note 33.
118. *See* *Lockout/Tagout I*, 938 F.2d at 1312.
120. *See* *Lockout/Tagout I*, 938 F.2d at 1313.
nondelegation doctrine.\textsuperscript{121} The case thus disappeared without answering whether the court's "invocation of the nondelegation doctrine was a kind of sport, or whether it signaled a broader development in administrative law."\textsuperscript{122}

\textit{American Trucking} makes an unlikely visionary of Kenneth Culp Davis and demonstrates that the decision in \textit{Lockout/Tagout I} was more than mere sport. One law review article and two circuit court cases are not typically sufficient to announce a new and expansive limit on administrative agencies, however, and the D.C. Circuit has still failed to enunciate any constitutionally-sanctioned justification for its new doctrine. Neither Davis nor the circuit court ever cited any authority for the "subsidiary administrative policy" proposition, perhaps in part because \textit{Amalgamated Meat Cutters} and \textit{Lockout/Tagout II} eventually upheld the delegations at issue. \textit{American Trucking} extends this novel line of cases and attempts to ground them in the unstable foundation of nondelegation doctrine law.

\textbf{B. Alternatives Available to the D.C. Circuit}

The result in \textit{American Trucking} may survive if the Supreme Court abandons the nondelegation "foundation" and instead analyzes EPA's actions under more traditional standards of administrative law. At least three separate observers have already questioned why the D.C. Circuit Court insisted on advancing the new nondelegation doctrine when ordinary \textit{Chevron} review could have served the court's function in a much less controversial manner.\textsuperscript{123} Sunstein has stated it best:

\begin{quote}
[T]here is a large puzzle at the heart of \textit{American Trucking}: Why didn't the court simply construe the Act so as to create floors and ceilings, and then hold that the EPA's decision was not adequately justified, and therefore must be remanded, because of the failure to explain why one level rather than another had been chosen?\textsuperscript{124}
\end{quote}

Despite the significant administrative deference accorded by \textit{Chevron}, if the court truly believed that all of EPA's explanations

\begin{itemize}
\item \textsuperscript{121} \textit{See Lockout/Tagout II}, 37 F.3d at 669.
\item \textsuperscript{122} Sunstein, \textit{supra} note 1, at 346.
\item \textsuperscript{123} \textit{See Oren, supra note 14} ("\textit{American Trucking} can readily be explained as deciding that the Agency was arbitrary and capricious in setting the ozone and PM standards in that EPA did not sufficiently explain its decisions."); \textit{American Trucking II}, 195 F.3d at 15 (Silberman, J., dissenting) ("I am quite uncertain whether EPA's regulatory choice meets [the arbitrary and capricious test] . . . . If we were to rehear the case, I would focus on that issue.").
\item \textsuperscript{124} Sunstein, \textit{supra} note 1, at 355.
\end{itemize}
boiled down to a meek assertion that "there is greater uncertainty that health effects exist at lower levels than at the current levels," it clearly could have held that EPA had not offered sufficient proof that reasoned decisionmaking took place.\textsuperscript{125} As Craig N. Oren has stated, "Agency decisions, even in important matters, are struck down as arbitrary often enough that there would have been nothing exceptional about a decision invalidating EPA's standards on this ground."\textsuperscript{126}

The real question, then, is why the majority chose to ignore this obvious and frequently used avenue to overturn an agency action it clearly deemed inappropriate. Oren and Sunstein identify two possible motivations, neither of which cast the court in a particularly sympathetic light. Most cynically, Oren notes that articulating \textit{American Trucking} in terms of delegation rather than the arbitrary and capricious test gave the court an easy way to distinguish earlier cases—the court needed only to say that the nondelegation issue had not been raised in those cases.\textsuperscript{127}

More important than this judicial sleight of hand, Sunstein insists, is the court's apparent desire "not simply to invalidate an inadequately explained regulation, but to send the agency a stronger and more global signal..."\textsuperscript{128} It is not clear what specific signal the court wanted EPA to receive. Oren suggests that the court may have felt it needed to use the nondelegation hammer to get EPA's attention and compel it to do a better job of explaining its policy rationales.\textsuperscript{129} Sunstein suspects that the court may have intended to advise the agency that any regulation must now be "defended, on pain of constitutional invalidity, by reference to a close, quantitative explanation of why it is superior to the alternative."\textsuperscript{130} Finally, perhaps the message is not directed at the agency, but at Congress, who the

\textsuperscript{125} Oren, \textit{supra} note 14.

\textsuperscript{126} \textit{Id.} The Supreme Court has overturned agency regulations on this line of reasoning as recently as 1999. See \textit{AT&T Corp. v. Iowa Util. Bd.}, 525 U.S. 366, 387-89 (1999) (upholding a "promiscuous" delegation to the Federal Communications Commission (FCC), but invalidating agency regulations under the second step of \textit{Chevron} for failing to contain "limiting standard[s]" allowing private parties to fix the content of the proposed rules).

\textsuperscript{127} See Oren, \textit{supra} note 14 (citing \textit{American Petroleum Inst.}, 665 F.2d 1176 (upholding the 1979 revision of the ozone standards); \textit{NRDC v. EPA}, 902 F.2d 962 (upholding the 1987 revision of the PM standard)). As discussed earlier, the court's construction also allowed it to weakly distinguish \textit{South Terminal Corp.} and its progeny in the D.C. Circuit.

\textsuperscript{128} Sunstein, \textit{supra} note 1, at 355.

\textsuperscript{129} See Oren, \textit{supra} note 14.

\textsuperscript{130} Sunstein, \textit{supra} note 1, at 355.
court believes should reevaluate and sharply limit EPA's ability to address environmental problems.\textsuperscript{131}

\section*{C. Philosophical Foundation of the New Doctrine}

Although the \textit{American Trucking} court seemed intent on supporting its new doctrine through an extension of the nondelegation doctrine, even the majority admitted that, at best, the new rule furthers only two of the three essential functions of its progenitor.\textsuperscript{132} The new doctrine fails to advance, and in fact undermines, the central function of the nondelegation doctrine— the assurance that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."\textsuperscript{133} Requiring agencies to develop subsidiary limiting principles inhibits any remaining Congressional incentive to be specific. Rather than engaging in complicated and politically-charged discussions over the precise meaning of its statutes (a process the House and Senate already avoid like London's Killer Fog), Congress can simply delegate the entire mess to administrative agencies, confident that the agency would have to construct meaningful regulatory interpretations to enforce the statute. Ironically, the holding in \textit{American Trucking}
thus deals the final blow to the very purpose for having the nondelegation doctrine at all.

D. EPA's Actions Did Not Warrant Judicial Intervention

The D.C. Circuit has failed to adequately explain why a new, nondelegation-based limitation on agency discretion is needed at all, and why it should be announced and enforced in the present case.

As Professor Richard J. Pierce, Jr. has persuasively argued, pragmatic political considerations bind the EPA in real and fundamental ways, especially when the agency tackles a major regulatory issue like NAAQS revisions. EPA's Administrator is chosen by the President, serves at the executive's pleasure, and is clearly susceptible to Presidential "jawboning," "arm twisting," and other forms of political persuasion. As a result, the EPA is not a politically unresponsive bureaucracy except in the most "narrow, naïve, and formalistic sense."

Once the President is added to the courts as a source of constraint on agency discretion, the court's claim that EPA could have set standards anywhere between zero and "Killer Fog" levels can be properly identified as a "gross exaggeration" if not a patent absurdity. Either extreme—requiring de-industrialization or authorizing the death of 4,000 people per week—would obviously represent political suicide. As Professor Pierce explains, EPA's range of discretion in the ozone context was:

probably no greater than 0.07 to 0.10 ppm . . . . I doubt that anyone who would have any chance of being elected President would be willing to acquiesce in a standard below 0.07 or above 0.10. A standard below 0.07 ppm would be too expensive in dollars for any politician to tolerate, while a standard above 0.10 would be too expensive in lives for any politician to tolerate.

The D.C. Circuit's new doctrine requires EPA to justify, in objective and quantitative terms, why the agency and the President have selected one point on this 0.07-0.10 ppm

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134. See Pierce, supra note 44, at 94.
135. Id.
136. Id.
137. Id. at 68.
138. The "Killer Fog" resulted from pollution levels approximately fifty times higher than the ozone and PM standards in effect before the EPA conducted the rulemakings at issue. See id.
139. Id. at 69-70.
spectrum over another. The court expects to see an explanation based on science—the language of Section 109(b) indicates that Congress believed EPA could:

1. determine through the use of science the concentration of any pollutant at which the pollutant does not kill anyone;
2. set the primary standard a bit below that level; and,
3. set a still lower secondary standard that would avoid other forms of harm.  

Each of these assumptions is false, however. The relationship between concentration and health effects lies not at a single pollution level but on a continuum, and science can only provide rough estimates of the correlation. The D.C. Circuit has demanded, through "intelligible principles" and a "generic unit of harm" approach, a level of objectivity and quantitative precision in a context in which science is incapable of providing either. Science identified points on the continuum, but in the end revising the NAAQS required that somebody choose between saving an additional 10,000 lives a year or avoiding additional costs of about $50 billion a year.

E. Judicial Power Under the New Doctrine

The most fundamental problem with the D.C. Circuit's new doctrine is that it defines that "somebody" as the judicial branch, assigning tremendous decisionmaking power to the courts. As Sunstein has correctly noted, the "notion that open-ended statutes become unconstitutional unless accompanied by agency specification would entail a far larger judicial role" than that envisioned by Judge Leventhal in Amalgamated Meat Cutters. Rather than empowering EPA with a slate of permissible "intelligible principles" to choose from or invalidating the statute and forcing Congress to take up the matter, the D.C. Circuit has left the judicial branch firmly in control of the NAAQS revisions and the fate of its new doctrine. As Professor Pierce has stated, "unelected, life-tenured judges ... are the least politically accountable officials. They are the worst possible choice of

140. See id. at 73.
141. See id. at 73-74.
142. Id. at 91.
144. See Sunstein, supra note 1, at 352.
officials to make such fundamental policy decisions in our system of constitutional democracy."\textsuperscript{145}

If allowed to stand, the potential ramifications of \textit{American Trucking} are staggering:

1. The decision would raise serious constitutional questions about most (and perhaps all) of EPA's remaining primary and secondary standards. None of those standards was issued with a clear statement of the criteria marking the line between permitted and prohibited exposure levels.\textsuperscript{146}

2. It would raise serious constitutional questions about statutes (like the Toxic Substances Control Act\textsuperscript{147} and the Federal Insecticide, Fungicide, and Rodenticide Act\textsuperscript{148}) that require agencies to engage in cost-benefit balancing but do not typically contain an accompanying theory of valuation (like the value of respiratory illness or the present value of a life lost twenty years from now).\textsuperscript{149}

3. It would raise questions about EPA's application of the statutory provisions governing the calculation of natural resource damages if Congress enumerated the factors that EPA must evaluate but failed to give them a specified weight or make them exclusive.\textsuperscript{150}

4. It would implicate the rulemaking authority of a number of other agencies, such as the FCC, that operate pursuant to vague statutory terms.\textsuperscript{151}

Answering all of these serious questions will require the courts to delve frequently and intensively into the specific details of Congressional delegations and the resulting administrative programs. Beyond the obvious questions of judicial accountability and expertise that would necessarily accompany such an expansion of judicial power, the prospect of decades of bitterly-contested suits over various segments of the American administrative state may in itself be enough to motivate the Supreme Court to reverse the D.C. Circuit Court's holdings.

\textsuperscript{145} Pierce, \textit{supra} note 44, at 92; see also \textit{Chevron}, 467 U.S. at 865-66 ("\textit{judges are not experts in the field, and are not part of either political branch of the government}").

\textsuperscript{146} See Sunstein, \textit{supra} note 1, at 352.

\textsuperscript{147} 15 U.S.C. § 2601 \textit{et seq.}

\textsuperscript{148} 7 U.S.C. § 136 \textit{et seq.}

\textsuperscript{149} See Sunstein, \textit{supra} note 1, at 353-54.

\textsuperscript{150} See id. at 354.

\textsuperscript{151} See id. at 352.
CONCLUSION

The D.C. Circuit's opinions in many respects represent an open glass, waiting to be filled by whatever set of doctrines the Supreme Court deems appropriate. The Court could use the case to signal the roaring return of the traditional nondelegation doctrine, or to repudiate all claims against EPA's rulemaking, although both extremes seem unlikely. Perhaps the best hope for American Trucking is a decision that examines, in an open and intellectually honest fashion, all the benefits and shortcomings of administrative delegation and discretion under the current regime. Such a discussion, whatever the eventual result, would represent a remarkable transmutation of a case which currently embodies the paradigm of judicial activism and results-oriented jurisprudence. In the end, the most dramatic and controversial environmental decision of 1999 will likely serve an identical function in 2000, and possibly for years and decades to come.