THE NONDELEGATION CANON'S NEGLECTED HISTORY AND UNDERESTIMATED LEGACY

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INTRODUCTION

The conventional account of the nondelegation doctrine goes roughly like this: in 1935, a reactionary Supreme Court fighting a losing war against President Roosevelt struck down two New Deal statutes for unconstitutionally delegating unlimited power to federal agencies.[1] The two cases were the last gasps of early twentieth century anti-progressive judicial activism,[2] and once the Court finally yielded to President Roosevelt,[3] "the nondelegation doctrine receded into the dustbin of *Lochner* Era jurisprudence,"[4] along with "a myriad other constitutional eccentricities that few now bother remembering."[5] Sixty-five years later, conservative legal activists reached back into the dustbin, brushed a half-century's dust off the doctrine, and succeeded in convincing the D.C. Circuit to nullify aspects of the Environmental Protection Agency ("EPA")'s standard-setting under the

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[1] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 433 (1935).

[2] Cass Sunstein, for example, asserted "a connection between the era of substantive due process represented by *Lochner* and the nondelegation doctrine." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 482 n.298 (1987).

[3] Or, as it's often said, once Justice Owen Roberts's "switch in time saved nine," in W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[4] Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 943 (2000); *see also* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 107 (5th ed. 2010) ("For four decades following *Schechter* and *Panama Refining*, courts consistently declined to apply the nondelegation doctrine, and commentators pronounced it moribund.").

[5] Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722-23 (2002).

Clean Air Act.[6] But their victory in restoring this part of their "Constitution in Exile"[7] appeared to be short-lived. In *Whitman v. American Trucking Ass'ns* ("*American Trucking*"),[8] the Supreme Court—in an opinion written by conservative Justice Scalia, no less—promptly overturned the D.C. Circuit's decision, driving what looked like a final stake through the heart of the nondelegation doctrine,[9] confirming Professor Cass Sunstein's memorable remark from the year before that the "conventional" version of the nondelegation doctrine "has had one good year, and 211 bad ones (and counting)."[10] Permanently discredited as a tool for striking down statutes, the nondelegation doctrine today is characterized as merely a canon of construction, capable only of trimming broad statutes at the edges—if that.[11]

This account may accurately describe conventional wisdom, but it does not accurately describe history. Rather, it understates the history of the nondelegation doctrine leading up to *American Trucking*; it overstates the arguments made in *American Trucking*; it overstates the Court's rejection of the doctrine in *American Trucking*; and, as a result, it understates the viability of the nondelegation canon after *American Trucking*.

Correcting those misconceptions is crucial, not just for abstract constitutional debate, but more importantly, for the regulatory policy choices the United States government now faces. *American Trucking* reaffirmed the principle that regulatory statutes must not be construed as allowing agencies to impose substantial regulations absent evidence that the regulations prevent "significant" dangers.[12] This forgotten holding casts substantial doubt upon recent efforts by the new Financial Stability Oversight Council to heavily regulate mutual funds, insurance companies, and other nonbank financial companies that do not pose significant threats to financial stabil-

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6 Linda Greenhouse, *Court Question: Is Congress Forsaking Authority?*, N.Y. TIMES (May 14, 2000), http://www.nytimes.com/2000/05/14/us/court-question-is-congress-forsaking-authority.html ("That was in 1935, and since then, the doctrine of 'nondelegation' . . . has appeared little more than a historical footnote . . . a quaint reminder of a formalistic approach to the constitutional separation of powers . . . .") (discussing Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)).

7 *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES 205 (2005) ("Fundamentalists like to point out, with some distress, that the Supreme Court last invalidated a statute on nondelegation grounds in 1935. They imply that this aspect of the Constitution in Exile was alive and well from the founding period until then."); Marcilynn A. Burke, *Much Ado About Nothing:* Kelo v. City of New London, Babbitt v. Sweet Home, *and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663, 703 n.288 (2006) ("[F]or 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile . . . .").

8 581 U.S. 457 (2001).

9 *Id.* at 486.

10 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

11 *See generally id.*; *see also, e.g.*, David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 73 (2002); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 277.

12 *Am. Trucking*, 531 U.S. at 486.

ity.[13] It also raises substantial questions regarding the EPA's latest greenhouse gas regulations and upcoming ozone rule, as well as more fundamental questions about the relationship between nondelegation and *Chevron* deference.

Part I of this Article examines the cases leading up to the *American Trucking* decision in 2001. In turn, Part II of this Article discusses the *American Trucking* case—in particular, the parties' arguments and the Court's ultimate decision. Finally, Part III of this Article looks at the effects of the *American Trucking* decision and the future of nondelegation, including its relationship to the doctrines of deference.

I. THE ROAD TO *AMERICAN TRUCKING*

As noted above, the conventional account of nondelegation tends to begin with *A.L.A. Schechter Poultry Corp. v. United States* ("*Schechter Poultry*")[14] and *Panama Refining Co. v. Ryan* ("*Panama Refining*")[15] in 1935, and end with *American Trucking* in 2001—with little or nothing in between. But in fact, much happened in between. The Court created a body of case law that made the requirements of the nondelegation canon of construction clear—a body of law too often overlooked in the analysis of *American Trucking*'s implications.[16]

This is not to say that *Schechter Poultry* and *Panama Refining* are themselves unimportant, of course. First, in *Panama Refining*, the Court struck down a provision of the National Industrial Recovery Act ("NIRA") authorizing the president to restrict the interstate shipment of "hot oil" (that is, volumes produced in violation of state-imposed limits).[17] The statute enumerated various "policies" that Congress intended to vindicate (e.g., "to eliminate unfair competitive practices," "to reduce and relieve unemployment," or "otherwise to rehabilitate industry and to conserve natural resources"); but such a "general outline of policy" included "nothing as to the circumstances or conditions in which" the president should actually exercise his powers, and thus the Court found "nothing . . . which limits or controls the authority conferred by [the hot oil provision]."[18] Looking back to its own previous indication in *J.W. Hampton, Jr., & Co. v. United States*[19] that an act of Congress "is not a forbidden delegation of legislative power"

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13 *See Financial Stability Oversight Council Committee Structure*, U.S. DEP'T OF TREASURY, *available at* http://www.treasury.gov/initiatives/Documents/X%20-%20Committee%20Structure%20111910.pdf (last visited Mar. 27, 2015).

14 295 U.S. 495 (1935).

15 293 U.S. 388 (1935).

16 *See generally* Sunstein, *supra* note 10.

17 *Pan. Ref.*, 293 U.S. at 433; *id.* at 436 (Cardozo, J., dissenting).

18 *Id.* at 417, 419 (majority opinion); *see generally id.* at 416-20.

19 276 U.S. 394 (1928).

if the act "lay[s] down . . . an intelligible principle to which the [administrator] is directed to conform,"[20] the Court found no such limiting principle in the NIRA's hot oil provision.[21] The Court added that if the hot oil provision "were held valid" despite the lack of a limiting principle, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function."[22]

Four months later, the Court decided *Schechter Poultry* in a similar fashion.[23] Another section of the NIRA authorized the president to promulgate "codes of fair competition" but failed to provide any further direction as to what might constitute "fair competition."[24] While "unfair competition" was "a limited concept" well rooted in the common law,[25] and "unfair methods of competition" was a broader term adopted in the Federal Trade Commission ("FTC") Act and intended by Congress to be adjudicated on a case-by-case basis by the "quasi-judicial" FTC,[26] the NIRA's term "fair competition" boasted neither the FTC Act's terminological specificity nor its procedural rigor.[27] As such, the Court found the NIRA provision to be "a sweeping delegation of legislative power [which] finds no support in the" Court's precedents.[28] "In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered," and thus it "is an unconstitutional delegation of legislative power."[29] Even Justice Cardozo, who dissented in *Panama Refining*, joined the majority in *Schechter Poultry*: "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing," he wrote in concurrence.[30] "It is unconfined and vagrant . . . ."[31]

Of course, as scholars note, *Schechter Poultry* marked the last time the Court would invoke the nondelegation doctrine as grounds for striking down a delegation of power to the executive branch.[32] Indeed, the Court

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20 *Pan. Ref.*, 293 U.S. at 429-30 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (internal quotation marks omitted).

21 *See id.* at 419.

22 *Id.* at 430.

23 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

24 *Id.* at 530-31.

25 *Id.* at 531.

26 *Id.* at 533.

27 *Id.*

28 *Id.* at 539.

29 *Schechter Poultry*, 295 U.S. at 541-42.

30 *Id.* at 551 (Cardozo, J., concurring).

31 *Id.*

32 But a year later the Court did invoke the doctrine to strike down a delegation of legislative power to a *private* entity. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) ("This is legislative dele-

affirmed a variety of broadly worded statutes, finding in each at least some limit on agency discretion.[33] In one such case, for example, the Court held that a statute directing the government to recover "excessive profits" from contractors was not an unconstitutional delegation of legislative power, because the Act's "purpose" and "factual background" sufficed to "establish a sufficient meaning for 'excessive profits' as those words are used in practice."[34] In another, the Court held the Federal Radio Commission's authority to grant licenses "as public convenience, interest or necessity requires" was sufficiently limited and could not "be interpreted as setting up a standard so indefinite as to confer an unlimited power," in light of the surrounding context of the radio industry.[35]

But that is not to say that the nondelegation doctrine ceased to play any further role whatsoever in the courts—to the contrary, the Supreme Court has applied the doctrine repeatedly as a canon of construction, interpreting statutes narrowly when necessary to avoid outright violations of the intelligible principle doctrine.[36] In *Kent v. Dulles*,[37] the Court rejected the secretary of state's assertion that the federal statute delegating him power to issue passports gave him broad discretion to deny passports to communists and communist sympathizers.[38] Citing *Panama Refining*, the Court noted that the broadly worded statute's "standards must be adequate to pass scrutiny by the accepted tests," and it construed the statute narrowly to deny the

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gation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."), *quoted in* Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080).

33 *See, e.g.*, Lichter v. United States, 334 U.S. 742, 785-86 (1948); Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 285 (1933).

34 *Lichter*, 334 U.S. at 785-86.

35 *Fed. Radio Comm'n*, 289 U.S. at 285. *See also, e.g.*, N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 25 (1932) (holding that "the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred").

36 *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.") As described in Part II of this Article, some of the cases cited in the discussion that follows were highlighted in the briefs that this Article's author and his colleagues filed in the *Whitman* litigation. *See, e.g.*, Brief. of Amici Curiae Senator Orrin Hatch & Representative Tom Bliley in Support of Respondents at 8-10, Browner v. Am. Trucking Ass'ns, 529 U.S. 1129 (2000) (No. 99-1257), 2000 WL 1299009 (discussing nondelegation doctrine as canon of construction).

37 357 U.S. 116 (1958).

38 *Id.* at 116, 129 (citing, *inter alia*, Pan. Ref. Co. v. Ryan, 293 U.S. 388, 420-30 (1935)). The statute in question read, "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." *Id.* at 123.

secretary power to unilaterally control communists' freedom of movement.[39]

The Court took similar action in *National Cable Television Ass'n v. United States*,[40] a case challenging the Federal Communications Commission ("FCC")'s authority to impose fees on cable television companies.[41] The statute in question authorized agencies to levy fees on regulated entities to cover the direct and indirect government costs of providing benefits to those entities.[42] The FCC construed that statute as authorizing it to levy fees on companies to cover all of the FCC's activities supervising the companies—including not merely benefits enjoyed by the cable companies, but also FCC actions benefitting the public at large.[43] The Court recognized that the statute, "if read literally," would raise substantial questions under *Schechter Poultry* and *Panama Refining*.[44] But the Court expressly avoided reaching the question of whether to strike down the statute, by instead "read[ing] the Act narrowly to avoid constitutional problems."[45]

The Court's practice of interpreting statues narrowly to avoid nondelegation problems reached its apex in 1980, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* ("*Benzene Case*").[46] The Occupational Health and Safety Act's Section 3(8) delegated to the labor secretary authority to promulgate standards "which require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[47] And regarding "toxic materials or harmful physical agents," the Occupational Health and Safety Act's Section 6(b)(5) directed the secretary to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity."[48] Pursuant to these provisions, the secretary concluded that "no safe exposure level can be determined" for any carcinogen, and thus set for benzene an exposure limit of one part benzene per million parts of air (1 ppm).[49]

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39 *Id.* at 129.

40 415 U.S. 336 (1974).

41 *Id.* at 340.

42 *Id.* at 336; *see also* Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 345 (1974) (companion case regarding Federal Power Commission fees).

43 Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 343-44 (1974).

44 *Id.* at 341-42 (emphasis omitted).

45 *Id.* at 342.

46 448 U.S. 607 (1980) (plurality opinion).

47 *Id.* at 612 (quoting OSHA Act § 3(8), 29 U.S.C. § 652(8) (2012)) (internal quotation marks omitted).

48 *Id.* (quoting OSHA Act § 6(b)(5)) (internal quotation marks omitted).

49 *Id.* at 613.

The labor secretary's administration of the Act met sharp resistance on the Court.[50] A four-justice plurality, led by Justice Stevens, rejected the labor secretary's argument that Sections 3(8) and 6(b)(5) effectively imposed no minimum thresholds governing the secretary's exercise of regulatory power: "Under the Government's view," Section 3(8) "imposes no limits on the Agency's power, and thus would not prevent it from requiring employers to do whatever would be 'reasonably necessary' to eliminate all risks of any harm from their workplaces."[51] As for Section 6(b)(5), "the Government [took] an even more extreme position," claiming authority to "impose standards that either guarantee workplaces that are free from any risk of material health impairment, however small, or that come as close as possible to doing so without ruining entire industries."[52]

The Court's plurality disagreed with this as matter of statutory interpretation, holding that the Act's text, structure, and legislative history "indicate that it was intended to require the elimination, as far as feasible, of *significant* risks of harm."[53] Because "a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm," the secretary "is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices."[54]

If the plurality's analysis had been limited merely to statutory interpretation, then the *Benzene Case* would be of little broader consequence today. But, crucially, the justices went a step further, rooting their interpretation in the nondelegation doctrine:

> If the Government was correct in arguing that [neither OSHA Act provision requires the Secretary to make a showing of significant risk], the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A. L. A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.[55]

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50 *See generally id.* at 640-43.

51 *Id.* at 640-41.

52 *Indus. Union Dep't*, 448 U.S. at 641 (plurality opinion).

53 *Id.* (emphasis added).

54 *Id.* at 642.

55 *Id.* at 646 (citations omitted). As noted, this was the opinion of the four-justice plurality. The fifth, Justice Rehnquist, concurred with their judgment but wrote separately. He signaled agreement with the majority's position that the secretary should not have power to "eliminate marginal or insignificant risks of material harm right down to an industry's breaking point." *Id.* at 683 (Rehnquist, J., concurring). But his preferred remedy would be to strike down part of Section 6(b)(5), to prevent the secretary from setting a standard without first identifying the "safe" level of exposure. *Id.* at 687-88. Justice Rehnquist's focus on "ensuring that Congress itself [rather than agencies] make the critical policy decisions" ultimately came to be shared by a Court majority (albeit without express citation) in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). *Id.* at 687.

In short, the justices construed the Occupational Health and Safety Act narrowly not just because of the Act's particular purpose and legislative history, but because to read it otherwise—and thus to assume that Congress authorized the agency to impose substantial regulations on insignificant risks of harm—would directly implicate the nondelegation doctrine.[56] The D.C. Circuit reiterated this approach a decade later in *International Union v. OSHA*,[57] in which it rejected a construction of the Occupational Health and Safety Act that would have placed no substantive constraints on the secretary's authority to regulate matters other than those involving toxic materials (specifically, "lockout/tagout" regulations regarding safety devices on industrial machines).[58] The D.C. Circuit recognized the *Benzene Case*—including its identification of "significant risk" as an appropriate "threshold requirement" implied by the statute—as "a manifestation of the Court's general practice of applying the nondelegation doctrine mainly in the form of 'giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'"[59] Accordingly, the D.C. Circuit held that the statute could be saved from unconstitutionality only by giving it a narrowing construction, such as an implicit cost-benefit standard for regulation.[60]

But the Supreme Court's approach in the *Benzene Case* had effects far beyond *International Union v. OSHA*. For it was ultimately the *Benzene Case*'s analysis, more so than the long distant holdings in *Schechter Poultry* and *Panama Refining*, that gave rise to *American Trucking* just a few years later.

II. *AMERICAN TRUCKING*: WHAT WAS ARGUED, AND WHAT WAS DECIDED

The story of *American Trucking* has been told at length before,[61] but such accounts too often gloss over the specific legal issues raised in the case, particularly the nondelegation arguments and the nuances of the Court's resolution of the case.

In the Clean Air Act Amendments of 1970,[62] Congress directed the EPA to promulgate National Ambient Air Quality Standards ("NAAQS") for each "criteria pollutant," to review those standards every five years, and to "make such revisions in such criteria and standards and promulgate such

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56 *Indus. Union Dep't*, 448 U.S. at 646 (plurality opinion).

57 938 F.2d 1310 (D.C. Cir. 1991).

58 *Id.* at 1316.

59 *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989)).

60 *Id.* at 1321.

61 *See especially* Craig N. Oren, Whitman v. American Trucking Associations—*The Ghost of Delegation Revived . . . and Exorcised*, *in* ADMINISTRATIVE LAW STORIES 7 (Peter L. Strauss ed. 2006).

62 Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1679 (1970).

new standards as may be appropriate."[63] In July 1997, the EPA published NAAQS revisions for "particulate matter" and ozone.[64] Industry groups and certain states filed petitions with the D.C. Circuit arguing that the standards were too strict, while environmental groups filed petitions arguing that the standards were too lenient.[65] The key to the consolidated case, from all parties' perspectives, was what constituted an "appropriate" NAAQS revision.[66]

Section A of this Part discusses the D.C. Circuit's decision, while Section B examines the Supreme Court's decision.

A. *In the D.C. Circuit: For Nondelegation Doctrine, "Significant Risk" Retains Its Significance*

As Professor Oren notes in his own study of *American Trucking*, the various petitioners did not make nondelegation the central focus of their challenges to the NAAQS revisions; instead, "the briefs largely focused on whether EPA's explanation showed reasoned decision-making, and on whether the agency had violated any of the 'regulatory reform' statutes of the 1980s and 1990s."[67]

But some petitioners did raise the nondelegation issue in the D.C. Circuit—not as an argument to strike down the statute altogether, but rather as a constitutional principle demanding a narrowing interpretation of the broad statute, just as in the *Benzene Case*.[68] According to the non-state petitioners, the EPA administrator's insistence upon promulgating new ozone standards despite the lack of scientific certainty regarding the new standards' public health impacts risked violating *Panama Refining*'s instruction that statutes must confine agencies to "making . . . subordinate rules within prescribed limits."[69] Instead, these petitioners argued that the statute should be construed as providing intelligible criteria for what constitutes an appropriate

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63 42 U.S.C. § 7409 (2012); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001) (citing 42 U.S.C. § 7409(a)).

64 *See Whitman*, 531 U.S. at 463 (citing National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997)). For ozone, EPA set an "8-hour" standard at 0.08 parts per million (ppm); for particular matter, EPA set a variety of new standards. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,856.

65 Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

66 *See infra* notes 70-85.

67 Oren, *supra* note 61, at 27.

68 Brief of Non-State Clean Air Act Petitioners & Interveners at 47, *Am. Trucking Ass'ns*, 175 F.3d 1027 (No. 97-1441), 1998 WL 35240573.

69 *Id.* (quoting Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421(1935)) (internal quotation marks omitted).

NAAQS revision, consistent with the *Benzene Case* and the D.C. Circuit's *International Union* case.[70] Allowing the EPA to impose regulations without such limits would be to interpret the Act as "a standardless delegation of legislative authority."[71] The state petitioners raised a similar nondelegation argument, albeit briefly, asserting that to approve the EPA's imposition of the new ozone standards despite the surrounding scientific uncertainty would be to allow the EPA to regulate "without meaningful constraints on its authority and in contravention of the constitutional nondelegation doctrine."[72] The states made a similar argument in their challenge to the EPA's particulate matter rules.[73]

Ultimately, in the D.C. Circuit appeal, the nondelegation arguments were set forth most expansively in the amicus briefs of Senator Orrin Hatch and Congressman Tom Bliley.[74] After initially tracing the doctrine's origins in nineteenth century case law to the nondelegation doctrine's "high-water mark" in *Schechter Poultry* and *Panama Refining*, Representative Bliley cautioned that "it would be a mistake to say that the doctrine lost vitality" after those two cases, for "the doctrine survives, as a crucial canon of statutory construction and administrative restraint."[75] Instead, in cases where a broad interpretation of the statute would lack the requisite intelligible principle from Congress to cabin the agency's authority, the courts "will labor to infer 'intelligible principles' from the purposes that Congress has expressed in enacting the statute."[76]

In this case, he further argued, the Clean Air Act's failure to bind the EPA by an intelligible principle was plainly evidenced by the agency's insistence upon imposing substantial new regulations despite failing to demonstrate a significant risk that the agency would alleviate through the new regulations: "As in *Benzene* and *International Union* [(i.e., lockout/tagout)], this Court should interpret the Clean Air Act to require that any new NAAQS be targeted to the reduction of a significant health risk."[77] Absent such a statutory constraint, the EPA "would be free to impose a NAAQS for any reason whatsoever, regardless of its medical or scientific

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70 *Id.* at 48 (citing Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 645 (1980)).

71 *Id.* at 46 (capitalization modified).

72 State Petitioners' Final Merit Brief at 17, *Am. Trucking Ass'ns*, 175 F.3d 1027 (No. 97-1441), 1998 WL 35239901 (citing *Indus. Union*, 448 U.S. at 646).

73 Brief of Non-State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards at 48, *American Trucking Ass'ns*, 175 F.3d 1027 (No. 97-1440), 1998 WL 35240563 ("EPA's interpretation would allow the Agency, by simply asserting its decision, to set any standards it wished for which a modicum of health evidence could be offered. Such an unconfined range of choice would offend the non-delegation doctrine." (citing *Pan. Ref.*, 293 U.S. at 421)).

74 The briefs were co-written by Alan Raul, Nathan Forrester, and the author of this Article.

75 Brief of Amicus Curiae Congressman Tom Bliley at 19, *Am. Trucking Ass'ns*, 175 F.3d 1027 (No. 97-1441), 1998 WL 35240577.

76 *Id.* at 21.

77 *Id.* at 27.

justification. In light of the non-delegation doctrine, any doubts about the scope of the Clean Air Act should be resolved against such an expansive interpretation."[78] Representative Bliley added that in addition to the implicit "significant risk" constraint, it might be necessary for the Court to interpret the statute as requiring cost-benefit analysis, a constraint that the Occupational Safety and Health Administration ("OSHA") itself had adopted on remand after the lockout/tagout case.[79]

Senator Hatch made similar points against the EPA's particulate matter NAAQS.[80] While "it will be the rare case, to be sure, in which a statute will be declared unconstitutional because it sought to delegate too much power to an agency . . . the non-delegation doctrine remains critically important as a tool of statutory interpretation."[81] Thus, in cases where the statute's language "is elastic, the agency—and the reviewing court—must search for intelligible principles in the purposes and logic of the statute, so as to bring the exercise of rule-making authority within discernible constraints."[82] But instead of premising its rulemaking upon statutory limits on its discretion, the EPA chose instead to promulgate the particulate matter NAAQS "without any direct evidence of the health effects of [particulate matter] itself"—a choice that was, in Senator Hatch's judgment, "nothing but a policy choice—a belief that, in the face of substantial uncertainty, it is better to go ahead and regulate."[83]

Invoking the *Benzene Case* once again, Senator Hatch noted that the plurality of justices in that case struck down the labor secretary's own regulation not just because it violated the Occupational Safety and Health Act, but also because the rulemaking, which lacked a finding of significant risk, violated the nondelegation doctrine.[84] Similarly, Senator Hatch concluded that the EPA's rulemaking violated the nondelegation doctrine because it interpreted the Clean Air Act as a statute empowering the agency not to merely judge facts in light of Congress's policy, but instead empowering the agency to both define the policy (namely, to decide the circumstances in which to regulate) and then applying its policy to the facts at hand.[85]

The EPA only cursorily responded to these arguments, asserting that an intelligible principle was found in the statute's delegation of power to promulgate NAAQS that are "requisite to protect the public health" with

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78 *Id.* at 28.

79 *See id.* at 29 (citing Int'l Union v. OSHA, 37 F.3d 665 (D.C. Cir. 1994)).

80 *See generally* Brief of Amicus Curiae Senator Orrin Hatch, *Am. Trucking Ass'ns*, 175 F.3d 1027 (No. 97-1440), 1998 WL 35240572.

81 *Id.* at 16-17.

82 *Id.* at 17 (citing Int'l Union v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991)).

83 *Id.* at 20.

84 *Id.* at 21-22 (citing Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 646 (1980)).

85 *Id.* at 22.

"an adequate margin of safety."[86] The EPA further contested the amici's interpretation of the *Benzene Case*, arguing that the Court's analysis in that case was rooted only in the Occupational Safety and Health Act's particular text and history, not in broader constitutional principles of nondelegation[87]—notwithstanding the fact that the Court specifically said in the *Benzene Case* that its narrowing construction was owed to *both* the Act *and* the nondelegation doctrine.[88]

The EPA's decision not to fully grapple with the challengers' arguments and the underlying case law proved costly when the D.C. Circuit struck down the EPA's particulate matter and ozone NAAQS for violating the nondelegation doctrine.[89] The court noted that the EPA's grounds for deciding to tighten the NAAQS, "that it is 'possible, but not certain' that health effects exist at that level, could as easily, for any nonthreshold pollutant, justify a standard of zero. The same indeterminacy prevails in EPA's decisions *not* to pick a still more stringent level."[90] In other words, the agency was operating as though it were utterly free to choose the governing policy: for the same set of facts, it could regulate more stringently, less stringently, or leave things unchanged.[91] The agency "offers no intelligible principle by which to identify a stopping point."[92]

Comparing the case at bar with the previous lockout/tagout case (a case familiar to Judge Williams, author of the majority opinion in *American Trucking*, since he had written that opinion too), the D.C. Circuit held that the EPA's interpretation of the Clean Air Act violated the nondelegation doctrine, but that the proper remedy would be to remand the matter to the EPA so that the agency could try its hand at identifying and honoring the Act's intelligible principles, as the Labor Department had done on remand in the lockout/tagout case.[93] Or, if the agency ultimately found no such controlling principles in the Act, "it [could] report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying

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86 Brief for the Petitioners at 23, Browner v. Am. Trucking Ass'ns, 529 U.S. 1129 (2000) (No. 99-1257), 2000 WL 1010083.

87 *Id.* at 22-25.

88 *Indus. Union Dep't*, 448 U.S. at 646 (1980) (plurality opinion) ("If the Government were correct in arguing that neither § 3 (8) nor § 6 (b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Corp. v. United States* . . . and *Panama Refining Co. v. Ryan*." (citations omitted)).

89 Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

90 *Id.* at 1036 (citation omitted).

91 *Id.*

92 *Id.* at 1037.

93 *Id.* at 1037-38.

its choice."[94] But to promulgate new standards consistent with the Constitution, the agency would need to "adopt standards that leave non-zero residual risk"—that is, it would have to adopt a standard more significant than zero-risk.[95]

The D.C. Circuit's opinion sent shock waves through the White House and administration.[96] But in hindsight, it is remarkable how mild the court's opinion, and the parties' arguments giving rise to the opinion, were in comparison to the next stage of litigation. The D.C. Circuit did not strike down the statute altogether—it did not even humor the possibility of striking down the statute.[97] Instead, it treated the nondelegation doctrine strictly as a canon of construction guiding both the agencies and the courts, encouraging both to search for intelligible principles to cabin the agency's discretion.[98] Furthermore, the D.C. Circuit was searching for a very specific type of intelligible principle—namely, a threshold level of public harm sufficient under the statute to justify the agency's action.[99] In these respects, the D.C. Circuit's decision was not a reiteration of *Schechter Poultry* or *Panama Refining*'s harsh medicine, but rather an application of the much more limited and specific nondelegation canon arguments of the post-*Schechter Poultry* era—especially those of the *Benzene Case*.

B. *In the Supreme Court: Nondelegation, "Necessary" Regulations, and Significant Risk*

The D.C. Circuit's approach had effectively teed up three interrelated issues for Supreme Court review: first, whether the Clean Air Act's NAAQS provision contained an intelligible principle sufficient to satisfy nondelegation concerns; second, whether the Act's terms allowed the agency to use cost-benefit analysis (which could then *itself* be an intelligible principle cabining the agency's discretion) as the basis for setting standards;[100] and third, whether the search for intelligible principles should be left, at least initially, to the agency on remand, or whether the task instead

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94 *Id.* at 1040.

95 *Am. Trucking Ass'ns*, 175 F.3d at 1038.

96 *See generally* Oren, *supra* note 61.

97 *Am. Trucking Ass'ns*, 175 F.3d at 1038.

98 *Id.*

99 *Id.* at 1034.

100 Because the D.C. Circuit had ruled against the use of cost-benefit analysis pursuant to well-established circuit precedent, see Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1148, 1153-54 (D.C. Cir. 1980), cross-petitions for certiorari were filed in the Supreme Court by both sets of non-state challengers: a group of business interests led by American Trucking Associations, Inc., and a group of utility interests led by Appalachian Power Company. But the Court granted only one of the cross-petitions for certiorari—namely, American Trucking's petition. *See* Oren, *supra* note 61, at 34 (offering possible explanations for the Court's disparate treatment of the two cross-petitions).

falls to courts alone.[101] Furthermore, the case's ascension from the D.C. Circuit to the Supreme Court attracted myriad more amicus briefs, which varied widely in tone and substance.[102]

One of the briefs on behalf of the respondent was filed by a group of general business interests led by American Trucking Associations and the U.S. Chamber of Commerce.[103] This brief argued that the nondelegation problem could be solved by simply directing the EPA to use cost-benefit analysis as the intelligible principle cabining the agency's discretion—that is, to overrule the D.C. Circuit's decision in *Lead Industries Ass'n v. EPA* ("*Lead Industries*"),[104] which prohibited such use of cost-benefit analysis under the Act.[105] The other non-state respondents' brief, filed by a group of utility interests led by Appalachian Power, did not specify an intelligible principle mandated by the Act itself, but instead argued that the EPA's NAAQS rules must be vacated and the matter remanded to the EPA to "explain the statutory principle that constrains its exercise of discretion."[106]

Neither of those two major party briefs specifically championed the significant risk standard identified in the *Benzene Case*.[107] Instead, that position was advocated once again by amici Senator Hatch and Congressman Bliley, who stressed that significant risk was the indispensable intelligible principle.[108]

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101 *See* Oren, *supra* note 61, at 33-39 (describing the respective strategies of the government, and of various groups of petitioners).

102 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 461-62 (2000) (listing the amicus briefs filed).

103 Brief for the Respondents American Trucking Ass'ns, Inc., Chamber of Commerce of the United States, et al. at ii, Browner v. Am. Trucking Ass'ns, 529 U.S. 1129 (2000) (No. 99-1257), 2000 WL 1299500.

104 *Id.* at 7.

105 *See id.* at 21-25; *see also Lead Indus. Ass'n*, 647 F.2d at 1148. The timing of the D.C. Circuit's decision in *Lead Industries*, just days before the Supreme Court's decision in the *Benzene Case*, is itself noteworthy. The Supreme Court justices held their *Benzene* oral arguments in early October 1979, but the Court did not issue its decision—affirming the use of significant risk as a constitutional narrowing principle—until the very last day of the Term, July 2, 1980. Weeks after the Court's *Benzene* oral arguments, the D.C. Circuit panel heard oral arguments in *Lead Industries*. That D.C. Circuit panel, led by the court's sharp and politically savvy chief judge, Skelly Wright, managed to publish its own opinion striking down cost-benefit analysis just days before the end of the Supreme Court's term. One wonders whether Chief Judge Wright and his colleagues intentionally raced to publish their own decision before the end of the Supreme Court term, in the hopes of getting its decision on the books before the Supreme Court's contrary ruling in *Benzene* would have dictated a different decision in *Lead Industries*. Indeed, if the Supreme Court had decided the *Benzene Case* before the D.C. Circuit issued its ruling in *Lead Industries*, the change in D.C. Circuit precedent could even have obviated the need to revisit significant-risk issues in *Whitman*.

106 Brief for Respondents Appalachian Power Company, et al., at 31-33, *Browner*, 529 U.S. 1129 (No. 99-1257), 2000 WL 1299500.

107 Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 652 (1980) (plurality opinion).

108 Brief of Amici Curiae Senator Orrin Hatch & Representative Tom Bliley in Support of Respondents, *supra* note 36, at 19 ("Thus, scientific evidence of a significant risk of danger to the public

The EPA, by contrast, defended its analysis under the nondelegation doctrine by arguing that the Court's precedents approving broad delegations set a very low bar for the government to clear.[109] And it further argued that the statute cleared the nondelegation doctrine's low bar because the Clean Air Act's direction to the EPA to set NAAQS at a level "requisite to protect the public health with an adequate margin of safety," combined with the Act's instruction that the EPA base its standards on "air quality criteria that reflect the latest scientific knowledge," constituted sufficiently intelligible principles.[110] Thus, the EPA argued, when the D.C. Circuit held that the EPA failed to recognize meaningful statutory constraints upon its discretion, that the court had simply (in the EPA's words) "failed to appreciate the record before it."[111]

Reviewing its own analysis in the NAAQS rulemakings, the EPA argued that it had been constrained at both the high and low ends of possible exposure limits.[112] In the ozone rule, the EPA found not only that "a standard of 0.09 ppm would not protect public health with an adequate margin of safety," but also that "its mandate is not to set standards more stringent than requisite to protect against health effects of public health significance."[113]

That latter concession, regarding the lower bounds of EPA's regulatory authority, was understated in the brief but took on much greater importance at oral argument.[114] From the outset of his remarks, Solicitor General Waxman stressed much more emphatically than in the briefs that "requisite," as used in the Clean Air Act, "means sufficient, but not more than necessary to protect public health with an adequate margin of safety."[115] Justices Scalia and Souter both pressed the point.[116] When asked by Justice Scalia whether Congress itself had defined "requisite," Waxman reiterated,

> Well, requisite has been defined by the Agency, and it's supported both by the legislative history and the D.C. Circuit, to mean sufficient, but not more than necessary. That is, the Congress could not have been clearer that zero risk or background levels of a pollutant, that

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health, and, to the extent science is uncertain, the cost-effectiveness of alternative standards, are the intelligible principles that constrain the Administrator's discretion."). This Article's author was co-counsel to the amici, once again with Alan Raul and Nathan Forrester, joined in the Supreme Court with Lloyd Cutler and Carter Phillips.

109 Brief for the Petitioners, *supra* note 86, at 25 n.19 (describing examples).

110 *Id.* at 23 (internal quotation marks omitted).

111 *Id.* at 33.

112 *Id.* at 31.

113 *Id.* at 33.

114 Transcript of Oral Argument at 14-15, Browner v. Am. Trucking Ass'ns, 529 U.S. 1129 (2000) (No. 99-1257).

115 *Id.* at 4.

116 *Id.* at 7-8.

> is levels that exist in the ambient air without man-made activity, is not what the administrator is aiming for or what the Act is designed to protect.[117]

Justice Scalia replied, after a brief colloquy with Justice Souter, "It's something above zero, but what is it to decide whether the risk is too much risk?"[118] Waxman ventured a long explanation, which was eventually derailed by other justices' questions.[119] Justice Scalia took care to bring him back to the point, noting that the solicitor general kept explaining what would prevent the EPA from making its standards more lenient, but not what would prevent the EPA from making its standards more strict: "But all you are telling me, General, is that . . . there are reasons why one would pick the higher levels and not pick the lower levels. It makes more sense to pick the higher levels, but you still haven't given me a criterion of where you stop. Why not go lower?"[120] Waxman's ultimate answer returned to the notion of significant risk: "anything that does not rise to the level of a medically significant health effect does not count."[121]

That answer did not appear to convince Justice Scalia at the time,[122] but when the Court issued its decision four months later, Justice Scalia's majority opinion cited directly to the solicitor general's own explanation at oral argument of how the statute limited the EPA: the Act requires the EPA to set NAAQS "at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air," and "[r]equisite, in turn, 'means sufficient, but not more than necessary.'"[123]

But the Court took one step further. While Solicitor General Waxman's justifications for this standard focused primarily on the EPA's own past practices, the Court tied the standard to the *Benzene Case*, noting that Waxman's "not more than necessary" threshold was "strikingly similar" to the standard construed in the Occupational Safety and Health Act by the Court in the *Benzene Case*.[124] The Court also compared the "not more than necessary" threshold to the Controlled Substance Act's provision allowing the Attorney General to criminalize drugs when "necessary to avoid an imminent hazard to the public safety."[125]

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117 *Id.* at 7.

118 *Id.*

119 *Id.* at 7-8.

120 Transcript of Oral Argument, *supra* note 114, at 17.

121 *Id.* at 18.

122 Scalia's immediate response to Waxman was, "That's circular. What is a medically significant health effect?" *Id.*

123 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001) (quoting Transcript of Oral Argument, *supra* note 114, at 5, 7) (brackets omitted).

124 *Id.* at 473-74.

125 *Id.* at 473 (quoting Touby v. United States, 500 U.S. 160, 163 (1991)) (internal quotation marks omitted).

As a whole, the Court's opinion was generally regarded as an overwhelming rejection of the D.C. Circuit's decision, and of the Clean Air Act's critics in general: the Court reversed the lower court; it held that the EPA's rule was not invalid under the nondelegation doctrine; and it further held that the D.C. Circuit's basic premise—that the agency itself, rather than the courts, was tasked with finding the statute's intelligible principle—was fundamentally misguided.[126] And furthermore, the Court agreed with the D.C. Circuit that the Clean Air Act prohibited the EPA from using cost-benefit analysis in setting the NAAQS (but, crucially, the Court recognized that cost-benefit analysis would be appropriate in later *implementing* those NAAQS).[127] Those holdings overshadowed the limits that the Court (following Waxman's lead) had incorporated into the statute.[128] Perhaps this was best exemplified by the New York Times' coverage of the decision: the news story began by announcing that "[t]he Supreme Court today unanimously and decisively rejected an industry attack on the Clean Air Act in one of the court's most important environmental rulings in years."[129] Then the article observed that the Court's nondelegation analysis "rejected a ruling by a federal appeals court here that was widely viewed as one of the most powerful judicial attacks since the New Deal on the legal foundations of the modern administrative state."[130] Buried far below these rhetorical flourishes, was the case's turning point: "Justice Scalia quoted with approval the definition of 'requisite' that Solicitor General Seth P. Waxman offered when the case was argued in November, 'sufficient, but not more than necessary.'"[131]

Simply put, both the immediate reaction to the Court's decision, and even subsequent scholarly analysis of the case, focused overwhelmingly on what the EPA (and critics of the nondelegation doctrine more generally) had won. But they paid far too little attention to the price that the EPA had paid to avoid *vacatur* of its ozone and particulate matter NAAQS—namely, they had fended off the nondelegation challenge largely by arguing the case within the terms set by previous nondelegation cases, and the Court readily

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126 *Id.* at 472-73 ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

127 *Id.* at 470-71.

128 *See* Linda Greenhouse, *E.P.A.'s Right to Set Air Rules Wins Supreme Court Backing*, N.Y. TIMES, Feb. 28, 2001, at A1.

129 *Id.*

130 *Id.*

131 *Id.*

defined its own opinion in those terms.[132] The EPA had managed to succeed in convincing Justice Scalia that the agency lacked carte blanche to tighten the NAAQS indefinitely, but only by conceding, consistent with the *Benzene Case*, that the Act authorized the EPA to tighten NAAQS only when necessary to prevent public health risks that were significant or substantial.[133]

III. AFTER *AMERICAN TRUCKING*, THE ROAD AHEAD

The specific details of *American Trucking*, as outlined above, are important not simply as a matter of historical interest, but also because this aspect of *American Trucking* is of central relevance to some of the major regulatory disputes now occurring in Washington. At first glance, that might surprise the reader, who might ask, how often do agencies commit their scarce resources to regulating activities that do *not* pose a significant or substantial threat to the public?[134] The answer is, *more often than you might think, and at great cost*.

This point is explained in the following Part. Section A discusses significant risks and Systematically Important Financial Institutions ("SIFI"s), Section B analyzes the EPA's co-benefits, and Section C examines the tensions between deference and delegation.

A. *Significant Risks and "SIFIs"*

The Dodd-Frank Act created, among other things, the Financial Stability Oversight Council ("FSOC"), an interagency council empowered to designate nonbank financial companies as "systemically important."[135] The FSOC's stated purpose is to improve the government's oversight of big banks and other financial institutions that are "too big to fail" before such institutions trigger or exacerbate another financial crisis.[136]

The FSOC has few analogues among the federal regulatory agencies: it is not a traditional department, commission, or agency per se, but rather an inter-agency body chaired by the treasury secretary, and comprised of

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132 Transcript of Oral Argument, *supra* note 114, at 21-23.

133 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

134 *Cf.* Ala. Power Co. v. Costle, 636 F.3d 323, 360 (1979) (recognizing "agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*. It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort." (footnotes omitted)).

135 The Act's full title is the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). Dodd-Frank's FSOC provisions are found in Title I of the Act.

136 *Id.* at 1394-95 (codified at 12 U.S.C. § 5322 (2012)).

ten other voting members (including the chairmen of the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Reserve, and the Federal Deposit Insurance Corporation, as well as the comptroller of the currency), plus five nonvoting members drawn from federal and state regulatory agencies.[137] Yet, unlike most other inter-agency bodies, the FSOC is empowered by statute not only to advise the president, but to make binding regulatory decisions greatly impacting the regulated parties and others.[138]

Dodd-Frank created the FSOC to, inter alia, identify nonbank financial companies that "could pose a threat to the financial stability of the United States," in light of their susceptibility to material financial distress, or in light of their general "nature, scope, size, scale, concentration, interconnectedness, or mix of the activities."[139] The FSOC makes these designations—known generally as "SIFI designations"—by a two-thirds vote of the FSOC's voting members, including an affirmative vote by the treasury secretary.[140]

Such designations can result in the newly designated SIFI shouldering heavy new regulatory burdens, or enjoying generous new regulatory subsidies, or both.[141] On the burden side of the equation, the FSOC's SIFI designation triggers substantially intensified regulation of companies by the Federal Reserve, including (but not limited to) risk-based capital requirements; leverage limits; liquidity requirements; resolution plan and credit exposure report requirements; heightened public disclosure requirements; short-term debt limits; and overall risk management requirements.[142] On the benefit side of the equation, a SIFI designation also signals that the federal government sees the company as "too big to fail," a status that traditionally

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137 12 U.S.C. § 5321(b).

138 The closest analogue might by the Committee on Foreign Relations in the United States, or CFIUS. *See* Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296, 301-02 (D.C. Cir. 2014).

139 12 U.S.C. § 5323(a). A "U.S. nonbank financial company" is any "company" that is (1) incorporated under U.S. or state law and (2) "predominantly engaged" in "financial activities" (as defined in 12 U.S.C. § 5311(a)(6)). *See id.* § 5311(a)(4)(B). The term "predominantly engaged" is defined at § 5311(a)(6), and it relies on a threshold of 85 percent of the company's (and subsidiaries') annual gross revenues or consolidated assets. Furthermore, the Act exempts from that definition any "bank holding company" (as defined in Section 2 of the Bank Holding Act, 12 U.S.C. § 1841), as well as any "Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), or a national securities exchange (or parent thereof), clearing agency (or parent thereof, unless the parent is a bank holding company), security-based swap execution facility, or a security-based swap data depository registered with the [SEC], or a board of trade designated as a contract market (or parent thereof), or a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility or a swap data repository registered with the [CFTC] . . . ." 12 U.S.C. § 5311(a)(4)(B).

140 12 U.S.C. § 5323(a)(1).

141 *Id.* § 5325(b)(1).

142 *Id.* § 5325.

carries with it a significant cost of capital advantage—the company can attract investment capital at a much lower cost than before, simply because the company appears to have the government's implicit protection and is therefore a less risky investment.[143]

Whether a SIFI designation's countervailing costs and benefits are ultimately a net benefit or detriment to the designated company likely depends on the type of company at issue.[144] For financial companies already subject to close scrutiny by federal regulators, additional regulation by the Federal Reserve would not appear to be particularly daunting; for such companies, the benefits of a FSOC SIFI subsidy would outweigh the costs.[145] On the other hand, financial companies not already subject to thorough prudential federal regulation might see the benefits of the SIFI subsidy outweighed by the new costs of regulation.[146]

But setting aside the implications of the FSOC's SIFI designations, as well as constitutional concerns regarding the structure of the agency itself,[147] there remains the question of precisely which standards the FSOC should apply in designating nonbank financial companies as SIFIs.

The Dodd-Frank Act itself lists ten factors that the FSOC must consider in making its designations.[148] The factors include the company's leverage; its transactions and relationships with other significant financial companies; its importance as a source of credit to private and public borrowers; and other considerations.[149] But the Act does not indicate what relative

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143 *See, e.g.*, Zan Li et al., *Quantifying the Value of Implicit Government Guarantees for Large Financial Institutions*, MOODY'S ANALYTICS (Jan. 2011); Kenichi Ueda & Beatrice Weder di Mauro, *Quantifying Structural Subsidy Values for Systemically Important Financial Institutions* (IMF Working Paper No. 12/128, 2012), *available at* https://www.imf.org/external/pubs/ft/wp/2012/wp12128.pdf; *Global Financial Stability Report: Moving from Liquidity- to Growth-Driven Markets*, INT'L MONETARY FUND (Apr. 2014), http://www.imf.org/External/Pubs/FT/GFSR/2014/01/pdf/text.pdf; Joseph Noss & Rhiannon Sowerbutts, *The Implicit Subsidy of Banks*, BANK OF ENG. (May 2012), http://www.bankofengland.co.uk/research/Documents/fspapers/fs_paper15.pdf; João Santos, *Evidence from the Bond Market on Banks' "Too-Big-to-Fail" Subsidy*, FED. RESERVE BANK OF N.Y. (Mar. 2014), http://www.ny.frb.org/research/epr/2014/1403sant.pdf .

144 *See* Melanie Fein, *Why Nonbank SIFI Designations Put the Cart Before the Horse*, AM. BANKER (May 8, 2014), http://www.americanbanker.com/bankthink/why-nonbank-sifi-designations-put-the-cart-before-the-horse-1067341-1.html (suggesting the FSOC's analysis for SIFI designation should take into account the type of organization and other regulations it may be subject to).

145 One such example would appear to be GE Capital. When the FSOC designated it as a "SIFI" in 2013, its stock price immediately jumped. Ian Katz & Zachary Tracer, *AIG, Prudential Named Systemically Important by Panel*, BLOOMBERG NEWS (June 4, 2013), http://www.bloomberg.com/news/2013-06-03/u-s-regulators-vote-to-label-some-non-banks-systemically-risky.html.

146 *See supra* notes 144-45.

147 This Article's author is co-counsel to a community bank and other private plaintiffs bringing a constitutional challenge to the FSOC's structure. Opening Brief of Private Plaintiffs-Appellants, State Nat'l Bank of Big Spring v. Lew, (D.C. Cir. Feb. 11, 2014) (Nos. 13-5247, 13-5248).

148 12 U.S.C. § 5325(b)(1) (2012).

149 *Id.* § 5323(a)(2).

weight the FSOC should place on each factor—indeed, the Act authorizes the FSOC to take into consideration "any other risk-related factors that the [FSOC] deems appropriate,"[150] thus rendering the factors wholly open-ended and indeterminate.[151]

Finally, the lack of statutory specificity is compounded by the fact that the Act authorizes the FSOC to make its SIFI designations based, not on a substantial *likelihood* that the company in question poses a threat to the nation's financial stability, but rather on the idea that the company merely "*could* pose a threat to the financial stability of the United States."[152]

This lack of statutory specificity raises a number of questions, beginning with the basic question of what constitutes financial stability. The Dodd-Frank Act does not define it, nor has the FSOC proffered a formal definition. Even casual explanations offered by the FSOC tend to be largely circular, as exemplified in the FSOC's first annual report: "Although there is no one way to define systemic risk, all definitions attempt to capture risks to the stability of the financial system as a whole, as opposed to the risk facing individual financial institutions or market participants."[153] Nor does the academic community offer anything approaching a coherent definition of the term—as one article notes, "[l]egal scholars have been content to define the term 'systemic risk' in platitudes."[154]

But even if the Dodd-Frank Act had offered something approaching a workable definition of financial stability, there would remain the question of what circumstances would justify the FSOC's determination that a given nonbank financial company could pose a threat to financial stability.[155] How likely is "could"? What is a "threat"?[156]

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150 *Id.* § 5323(a)(2)(K).

151 *Id.* at § 5323(a)(1).

152 *Id.* (emphasis added). The Act goes on to effectively expand the FSOC's discretion still further, by limiting judicial review merely to the question of whether the FSOC's final determination "was arbitrary and capricious," *id.* § 5323(h), and thus seeming to prevent judicial review of whether the FSOC's determination was (in APA parlance) "otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations," *id.* § 706(2)(C). Furthermore, the Act appears to prohibit altogether any appeal brought by third parties affected by the SIFI designation. *See* 12 U.S.C. § 5323(h) (providing only for appeals by the designated nonbank financial company).

153 FIN. STABILITY OVERSIGHT COUNCIL, DEP'T OF TREASURY, 2011 ANNUAL REPORT 132 (2011), *available at* http://www.treasury.gov/initiatives/fsoc/Documents/FSOCAR2011.pdf.

154 Brent J. Horton, *When Does a Non-Bank Financial Company Pose a "Systemic Risk"? A Proposal for Clarifying Dodd-Frank*, 37 J. CORP. L. 815, 817 (2012). *See also* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 193 (2008) ("There is widespread confusion, though, about the causes and even the definition of systemic risk, and uncertainty about how to control it.").

155 12 U.S.C. § 5323(a)(1).

156 The FSOC has at least ventured a description of what constitutes such a "threat": "The Council will consider a 'threat to the financial stability of the United States' to exist if there would be an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy." Authority to Require Supervision & Regulation

The first companies to face these questions have been insurance companies.[157] Among the FSOC's first three SIFI designations were Prudential Financial Inc. ("Prudential") and American International Group ("AIG").[158] Setting aside AIG in light of its particular role in the 2007 to 2008 crisis and bailout, the designation of Prudential raised substantial questions in the financial and legal communities.[159] The FSOC justified its designation of Prudential through a cursory twelve-page document offering only minimal descriptions of either Prudential's activities or the FSOC's connection of those activities to the statutory standards—indeed, while the FSOC listed the ten statutory factors that it may consider, it said little more than that the council "considered each of the statutory considerations" before making its final decision.[160]

In December 2014, the FSOC made a similar SIFI designation for another insurance company, MetLife.[161] This designation was long-awaited,[162] and MetLife responded by filing a lawsuit challenging the FSOC's decision, raising arguments ranging from the Constitution's separation of powers and Fifth Amendment Due Process to the Administrative Procedure Act.[163] The FSOC's SIFI designations of insurance companies have attracted substantial criticism from those who observe that traditional insurance companies' basic premise—to bring in steady revenues for sporadic and largely predictable payouts—renders them highly unlikely to cause serious harm to financial stability. Such points were made by one of the FSOC's own members—indeed, by the member seated, per statutory requirement, precisely because of his experience and expertise in insurance regulation.[164] FSOC Member Roy Woodall wrote in dissent from the Prudential designation, "[t]he underlying analysis utilizes scenarios that are antithetical to a fundamental and seasoned understanding of the business of insurance, the

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of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637, 21,657 (Apr. 11, 2012) (to be codified at 12 C.F.R. pt. 1310).

157 *See, e.g.*, Fin. Stability Oversight Council, *Basis for the Financial Stability Oversight Council's Final Determination Regarding Prudential Financial, Inc.*, DEP'T TREASURY 6-7 (Sept. 19, 2013), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Prudential%20Financial%20Inc.pdf.

158 *Id.*

159 *See id.*

160 *Id.* The FSOC's findings were not challenged in court, because Prudential chose not to appeal to the courts. AIG, meanwhile, did not even request administrative reconsideration by FSOC.

161 *See* Fin. Stability Oversight Council, *Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc.*, DEP'T TREASURY (Dec. 18, 2014), http://www.treasury.gov/initiatives/fsoc/designations/Documents/MetLife%20Public%20Basis.pdf.

162 *See, e.g.*, Victoria McGrane & Leslie Scism, *MetLife Is Closer to "Systemically Important" Tag After Vote*, WALL ST. J. (Sept. 4, 2014), http://www.wsj.com/articles/fsoc-proposes-naming-metlife-systemically-important-1409862057.

163 MetLife, Inc. v. FSOC, No. 1:15-cv-45 (D.D.C. filed Jan. 13, 2015).

164 *See* 12 U.S.C. § 5321(b)(1)(J) (2012) (requiring among the FSOC's members "an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise").

insurance regulatory environment, and the state insurance company resolution and guaranty fund systems."[165] Woodall also dissented from the MetLife designation, urging that the FSOC analysis "relies on implausible, contrived scenarios as well as failures to appreciate fundamental aspects of insurance and annuity products, and, importantly, State insurance regulation and the framework of the McCarran-Ferguson Act [which reserves to the States primary authority to regulate insurance companies]."[166]

The FSOC may also take similar steps with mutual funds. Last year, the Treasury Department's Office of Financial Research published a study of the threats to financial stability allegedly posed by mutual funds, seen as a precursor to FSOC action.[167] The report's release sparked fierce criticism,[168] and the FSOC has yet to take any formal action to designate asset managers as SIFIs, although reports indicate that two prominent funds (BlackRock and Fidelity) have undergone "initial risk studies."[169] There has been some indication that the FSOC may designate some mutual funds as SIFIs based solely on their size, a factor that has not significantly correlated to any substantial threat of systemic harm.

Regulation of mutual funds and insurance companies as SIFIs raises a host of practical problems, as the tools generally used by regulators for prudential supervision of banks—including capital, leverage, or liquidity requirements—are uneasy fits for financial institutions far removed from traditional bank activities.

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165 *See* Fin. Stability Oversight Council, *Views of the Council's Independent Member Having Insurance Expertise*, DEP'T TREASURY (Sept. 19, 2013), http://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/September%2019%202013%20Notational%20Vote.pdf ("As presented, therefore, the analysis makes it impossible for me to concur because the grounds for the Final Determination are simply not reasonable or defensible, and provide no basis for me to concur.").

166 *See* Fin. Stability Oversight Council, *Views of the Council's Independent Member Having Insurance Expertise*, DEP'T TREASURY (Dec. 18, 2014), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Dissenting%20and%20Minority%20Views.pdf.

167 OFFICE OF FIN. RESEARCH, DEP'T OF TREASURY, ASSET MANAGEMENT AND FINANCIAL STABILITY 1-3 (2013), *available at* http://financialresearch.gov/reports/files/ofr_asset_management_and_financial_stability.pdf.

168 *See, e.g.*, Ryan Tracy, *Treasury Arm Gets Earful from Asset Managers*, WALL ST. J. (Nov. 17, 2013), http://www.wsj.com/articles/SB10001424052702303755504579204111242005806; Letter from Fin. Servs. Roundtable to Elizabeth M. Murphy, Sec'y, SEC (Nov. 1, 2013), *available at* http://floodthehill.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs13/FSRCommentsOFRStudyonAssetManagement1Nov13.pdf.

169 Ian Katz & Jesse Hamilton, *BlackRock, Fidelity Face Initial Risk Study by Regulators*, BLOOMBERG NEWS (Nov. 6, 2013), http://www.bloomberg.com/news/articles/2013-11-05/blackrock-fidelity-face-initial-risk-study-by-u-s-regulators; Ryan Tracy, *Regulators Study Risk at Fidelity, BlackRock*, WALL ST. J. (Nov. 6, 2013), http://www.wsj.com/articles/SB10001424052702304672404579182330277485234.

But before the FSOC and courts even reach those questions, they must grapple with the much more fundamental constitutional questions of delegation. If the nondelegation doctrine or canon of construction, after *American Trucking* and the *Benzene Case*, requires Congress to include in the statute an intelligible principle to cabin the agency's discretion, then the FSOC's open-ended portfolio of nonbinding factors offers little to satisfy that requirement. In fact, the FSOC's administration of that statute has exhibited even less restraint than the EPA did in the *American Trucking* litigation, for it concedes no basic level of significant risk justifying the agency's exercise of authority.[170]

Simply put, the FSOC has yet to demonstrate that its regulatory burdens on the economy will be "sufficient, but not more than necessary" to protect the public from financial crisis.[171] If the day should come that an FSOC designation is actually challenged in court, we may expect to see the judges confronting these basic constitutional questions once more—either in applying the nondelegation canon of construction to narrow the statute's broad terms, or in applying the doctrine to strike down the statutory provision altogether.

B. *The EPA's Co-Benefits—or No Benefits?*

This Article's focus on the FSOC is not meant to imply that there are no other significant examples of agencies invoking broad statutory powers in an effort to regulate insignificant threats. Indeed, the EPA itself continues to undertake substantial regulatory programs despite its own admitted lack of evidence that the regulation is demonstrably necessary to solve a significant public health problem.

Its latest greenhouse gas regulation proposal, known colloquially as the "Section 111(d) rule,"[172] is an important example. In arguing that the rule's benefits would outweigh its costs, the EPA relied heavily on "co-benefits"—benefits allegedly obtained by the rule's collateral reduction of pollutants other than greenhouse gases.[173]

Specifically, the EPA claimed that its greenhouse gas rule would create public benefits by every reduction in particulate matter, all the way down to zero, even in areas that already satisfy EPA standards for air quali-

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170 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

171 *Id.* (quoting Transcript of Oral Argument, *supra* note 114, at 7) (internal quotation marks omitted).

172 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,853 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

173 *See* EPA, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED CARBON POLLUTION GUIDELINES FOR EXISTING POWER PLANTS AND EMISSION STANDARDS FOR MODIFIED AND RECONSTRUCTED POWER PLANTS, pp. ES-16-ES-17 (2014), *available at* http://www2.epa.gov/sites/production/files/2014-06/documents/20140602ria-clean-power-plan.pdf.

ty (that is, areas that are "in attainment").[174] But the EPA is already on record as acknowledging (in its latest particulate matter NAAQS) that the benefits of further particulate-matter reductions in attainment areas are utterly *speculative*.[175] When the agency itself recognizes that the alleged benefits of a rule—that is, the harms avoided by the rule—are speculative, then it would seem impossible to conclude that the regulatory standards imposed in the rule are, in any real sense, necessary to protect the public health.[176]

Similar questions surround the EPA's upcoming "ozone rule." In 2011, the EPA proposed to intensify federal regulation of ground-level ozone: in 2008 the agency had set the NAAQS at 0.075 ppm, but the agency was now proposing to further reduce the NAAQS to "the range of 0.060 to 0.070" ppm.[177] The EPA candidly acknowledged that there were "significant uncertainties" regarding the agency's estimates of costs and benefits,[178] and that the costs and benefits of reducing the NAAQS to levels below 0.060 ppm were "highly speculative."[179] The White House rejected this rulemaking proposal in 2011, directing the EPA to wait for the statutory five-year review in 2013.[180] A federal court ordered the EPA to promulgate a revised standard by December 1, 2014, and to finalize those standards by October 1, 2015.[181] If the standards ultimately proposed by the EPA fall within the range for which benefits are, by the agency's own admission, "highly speculative" or comparably uncertain, then it would implicate the same nondelegation problems as EPA's 111(d) rules.

C. *Defining Deference Down*

The courts will have no choice but to confront these questions of regulatory necessity, risk significance, and other aspects of the nondelegation

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174 *Id.*

175 National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086, 3162 (Jan. 15, 2013) (to be codified at 40 C.F.R. pts. 50-53, 58).

176 *Whitman*, 531 U.S. at 473 ("sufficient, but no more than necessary" (quoting Transcript of Oral Argument, *supra* note 114, at 7) (internal quotation marks omitted)).

177 National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 2938 (proposed Jan. 19, 2010) (to be codified at 40 C.F.R. pts. 50, 58).

178 EPA, SUMMARY OF THE UPDATED REGULATORY IMPACT ANALYSIS (RIA) FOR THE RECONSIDERATION OF THE 2008 OZONE NATIONAL AMBIENT AIR QUALITY STANDARD (NAAQS) p. S-10 (2010), *available at* http://www.epa.gov/ttn/ecas/regdata/RIAs/s1-supplemental_analysis_full.pdf.

179 *Id*. at p. S-9.

180 *See* Letter from Cass R. Sunstein, Adm'r, OIRA, to Lis Jackson, Adm'r, EPA (Sept. 2, 2011), *available at* http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf; *see also* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1876-78 (2013) (reprinting OIRA's letter).

181 Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, Sierra Club v. EPA, No.: 13-cv-2809-YGR (N.D. Cal. Apr. 30, 2014), *available at* http://earthjustice.org/sites/default/files/files/Ozone-Motion-Summary-Judgment.pdf.

doctrine, so long as we remain in an era in which policy is decided primarily by agencies under pre-existing, broadly worded statutes, rather than under new statutes speaking directly to the present regulatory question at hand.[182]

Indeed, the courts are already grappling with these issues, and even when the issue is not phrased in terms of nondelegation, such familiar themes seem to resonate. Such themes can be found in many of the cases in which the Supreme Court has rejected the Executive Branch's arguments in favor of expanded federal power.[183]

But in all of this, it is important to keep in mind the basic point, stressed above, that nondelegation is not merely a question of striking down statutes. The doctrine's long history has primarily been a discussion of statutory *construction*—both in the aftermath of *American Trucking* and in the many decades that preceded it. Certain cases may justify striking down statutes, but many other cases can be decided simply through statutory construction.

And for that very reason, the most important fights will be the ones that test the boundaries, tensions, and relationship between *Chevron* and *American Trucking*—that is, between deference and delegation. The challenge has been evident for years, even before *American Trucking* returned the nondelegation doctrine to national prominence,[184] but it is now coming plainly into view.

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182 *See, e.g.*, EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting) ("Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."). *See also* Robert V. Percival, *Presidential Power to Address Climate Change in an Era of Legislative Gridlock*, 32 VA. ENVTL. L.J. 134, 136 (2014) ("President Obama has properly exercised his executive powers, particularly in light of Congress's failure to enact legislation to control GHG emissions and the Supreme Court's displacement of federal nuisance law in favor of executive action."); Emmarie Huetteman, *Aides Say Obama Is Willing to Work With or Without Congress to Meet Goals*, N.Y. TIMES (Jan. 26, 2014), http://www.nytimes.com/2014/01/27/us/politics/aides-say-obama-willing-to-work-with-or-without-congress-to-meet-goals.html?_r=0 ("Aides to President Obama on Sunday offered a preview of the strategy of the president's State of the Union address, emphasizing Mr. Obama's willingness to bypass a gridlocked Congress to achieve his goals.").

183 Senator Cruz's office argues that the Supreme Court has rejected the Administration's arguments for more federal power on twenty occasions. *See* TED CRUZ, THE LEGAL LIMIT: THE OBAMA ADMINISTRATION'S ATTEMPTS TO EXPAND FEDERAL POWER (2014), *available at* http://www.cruz.senate.gov/?p=blog&id=1201.

184 *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 241 ("[A] nondelegation principle offers itself as a potential key to the *Chevron* question."); Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the* Chevron *and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 951 (2006) ("[T]he *Chevron* and nondelegation doctrines are often depicted as being at odds, since the former's presumption of discretion 'runs against the grain of legislative delegation doctrine.'" (quoting Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 779 (1991))); C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 TEX. REV. L. & POL. 1, 46 (2000) ("*American Trucking* is forcing a reconsideration of the

In *American Trucking*, for example, Justice Scalia's opinion for the Court emphatically refused to allow the agency itself to "solve" the delegation issue through a narrowing interpretation of the broad statute.[185] While Judge Williams's opinion for the D.C. Circuit would have remanded the delegation question to the EPA to solve in the first instance.[186] Justice Scalia's opinion for the Supreme Court rejected the notion that agencies could play any role in discerning the textual limits on their own authority, for purposes of the nondelegation inquiry.[187]

A more recent example is found in the Supreme Court's recent decision in *Utility Air Regulatory Group v. EPA*.[188] There, the Court refused to defer to the EPA's interpretation of the Clean Air Act's "prevention of significant deterioration" and Title V permitting programs, in which the EPA had claimed authority to unilaterally ratchet the Clean Air Act's unambiguous requirements upward or downward to suit the agency's enforcement priorities.[189] Nondelegation themes echoed throughout the Court's opinion, written by the very justice who authored *American Trucking*: "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery."[190]

Ultimately, going forward, the question will not be how interpretive deference should trump nondelegation concerns, but rather how the nondelegation principles inform statutory interpretation.

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interplay between the [Clean Air Act], *Chevron* and the nondelegation doctrine."); John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1562-66 (2008) (on "the *Chevron* twist" to nondelegation questions); *see generally* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988).

185 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-73 (2001).

186 *See supra* Part II.A.

187 As the Court explained,

> We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

Whitman, 531 U.S. at 472-73. Of course, while the Court claimed not to defer to the agency, the Court's own "de novo" analysis simply agreed with the limiting construction offered by Solicitor General Waxman at oral argument. *See id.* at 473.

188 134 S. Ct. 2427 (2014).

189 *See generally id.*

190 *Id.* at 2446.

CONCLUSION

In *American Trucking*, the Supreme Court declined to strike down a statute under the nondelegation doctrine.[191] But the Court did not renounce the nondelegation doctrine altogether—it remains a crucial canon of construction, empowering courts to rein in agency overreach through limiting constructions of broad statutes.

And, as the Court's approving citations emphasized, agencies remain obligated to demonstrate that their legislative regulations actually respond to "significant" risks of harm. To allow otherwise would be to assume that Congress gave the agencies carte blanche to impose regulatory burdens for no reason at all—the epitome of unbounded delegations of legislative power.

In other words, the Court left untouched the nondelegation doctrine as it was applied for decades, in the long stretch after *Panama Refining* and *Schechter Poultry*, up to *American Trucking*. As William Faulkner wrote, the past is not dead—"It's not even past."[192] The only question is how the courts will apply those doctrines going forward, amid an unprecedented expansion of the administrative state.

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191 *Whitman*, 531 U.S. at 486

192 WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (Vintage Books 2011) (1951).