

Whitman v. American Trucking Associations, Inc.

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The Nondelegation Doctrine has not presented a viable barrier to administrative agency rulemaking in over sixty years. In Whitman v. American Trucking, the Supreme Court ensured that the doctrine will maintain its defunct status when it held that EPA's National Ambient Air Quality Standards did not violate the doctrine. Alternatively, the Court directed lower courts to ground their judicial review of agency actions in more sound principles of administrative law. This holding provides the judiciary with the tools it requires to check agency actions without limiting agencies' necessary flexibility in carrying out their congressional mandates.

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INTRODUCTION

In *Whitman v. American Trucking Ass'ns*,¹ the Supreme Court reversed the D.C. Circuit's controversial resurrection of the Nondelegation Doctrine, which the appellate panel had used to reject EPA's lowered national ambient air quality standards. The Court extinguished most practical uses of the doctrine by reaffirming precedent that found similarly expansive agency power constitutional. On remand, the Court instructed the lower courts to ground their review of any preserved challenges to the national ambient air quality standards in traditional administrative law standards of review. This note argues that this holding safeguards both administrative agencies and the public from unprincipled judicial review while retaining courts' current tools for binding agencies to congressional statutes. In addition, this note examines the proper role of the types of risk assessment procedures EPA used in developing the standards challenged in *American Trucking*.

At present, EPA relies on scientific risk assessments to facilitate their decision-making and to ensure that it comports with Congressional mandates. Critics argue that risk assessments do not sufficiently limit EPA's discretion, but there is little consensus as to the proper solution. Some argue, as *American Trucking* did in this case, that Congress should be required to be more specific in drafting the statutes that govern administrative regulations. Others ask the judiciary to more carefully scrutinize agency decisions or demand that agencies provide more scientific proof to substantiate their decisions. Finally, some would make changes to the risk assessment process, augmenting or supplanting the present scientific criteria with other social factors. This note argues that the present decision-making balance among the branches is effective. Risk assessments, using scientific criteria alone, should remain the primary means to guide agency decision-making. However, streamlining these assessments to facilitate decision making

1. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

would better serve the public interest by alleviating the current deadlock in the bureaucratic process.

I

EPA'S REGULATION OF AIR QUALITY

A. *Setting the National Ambient Air Quality Standards*

Air pollution has been ubiquitous in the American urban landscape since the dawn of the Industrial Revolution.² Beginning in 1881, cities enacted ordinances to deal with the observable problems of smoke caused from burning coal.³ By the 1960s, however, these local ordinances gave way to state control coupled with federal assistance.⁴ Due to slow progress and health catastrophes under these state-led regimes, the federal government promulgated the 1970 Clean Air Act (CAA).⁵ The general framework of the 1970 CAA remains in place today.

The power that the CAA confers on the federal government rests largely in EPA's right to establish uniform national ambient air quality standards [hereinafter NAAQS], which the states could develop regulatory programs to enforce.⁶ The CAA mandates that EPA set the NAAQS at levels necessary "to protect public health."⁷ This unqualified language ensures that the EPA has broad discretion in setting the NAAQS in order to achieve this goal.⁸

Setting the NAAQS is a multi-step process governed by sections 108 and 109 of the CAA.⁹ First, EPA must publish a list of "criteria" pollutants "which may reasonably be anticipated to endanger public health or welfare."¹⁰ Once a criteria pollutant is listed, section 109(b)(1) directs EPA to set a primary ambient air quality standard for the pollutant "allowing an adequate margin

2. See ARNOLD W. REITZE, JR., AIR POLLUTION LAW 20-23 (1995) (describing air pollution and air pollution controls between the late 1800s and World War I).

3. *Id.* at 20 (stating that Chicago enacted the first air pollution ordinance in 1881 prohibiting dense smoke emissions).

4. *Id.* at 25-27.

5. *Id.* at 28-33. Public pressure stemming from the London's "Killer Smog" in 1962 that killed 340 people and New York's similar episode that resulted in 200 deaths in 1963 helped put air pollution on the federal agenda. *Id.* at 29. The Clean Air Act is codified at 42 U.S.C. §§ 7401-7671 (1994).

6. 42 U.S.C. §§ 7408(a), 7409(a) (1994).

7. *See id.*

8. *See id.*

9. *Id.*

10. 42 U.S.C. § 7408(a)(1) (1994) (listing characteristics of air pollutants that must be classified as "criteria" pollutants).

of safety. . . requisite to *protect the public health*.”¹¹ This public health criterion for primary standards takes into account the protection of “sensitive” populations such as asthmatics, children, and the elderly.¹² In addition, EPA must set secondary ambient air quality standards “requisite to *protect the public welfare* from any known or anticipated adverse affects.”¹³ Effects adverse to public welfare include damage to visibility, animals, vegetation, agriculture, and buildings.¹⁴ EPA supplements these statutory principles with its own more refined requisites for assessments.¹⁵

Section 109(d) of the CAA requires EPA to review and, where necessary, to revise primary and secondary air quality standards at five-year intervals.¹⁶ To determine whether a revision to a national standard is necessary, EPA conducts a scientific assessment using the best available scientific knowledge.¹⁷ This comprehensive scientific assessment process consists of multiple steps intended to ensure its accuracy. First, the agency develops a “criteria document,” which is a scientific assessment of all health and welfare information collected for a pollutant.¹⁸ Then, EPA’s technical staff prepares a “staff paper” that translates the science into policy terms.¹⁹ The Clean Air Scientific Advisory Committee, an independent group comprised of scientific and technical field experts, reviews both the “criteria document” and the “staff paper” and offers recommendations.²⁰ Finally, the

11. 42 U.S.C. § 7409(b)(1) (1994) (emphasis added).

12. EPA, *Air Quality Where You Live: What are Six Common Air Pollutants?*, at <http://www.epa.gov/air/urbanair/6poll.html> (last updated March 29, 2002) (EPA website describing criteria pollutants and NAAQS).

13. 42 U.S.C. § 7409(b)(2) (1994) (emphasis added).

14. See *supra* note 12.

15. These include “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.” EPA, REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION: OAQPS STAFF PAPER, II-2 (1996).

16. 42 U.S.C. § 7409(d)(1) (1994). According the statute’s mandates, The Clean Air Scientific Review committee reviews the published criteria under section 108 at five-year intervals. 42 U.S.C. § 7409(d)(2)(B) (1994). However, the Act does not prohibit EPA from reviewing, revising, and promulgating NAAQS “earlier or more frequently than required.” 42 U.S.C. § 7409(d)(1) (1994).

17. EPA, *Fact Sheet: EPA’s Revised Ozone Standard 1-3*, (July 17, 1997), available at http://www.epa.gov/ttn/oarpg/t1/fact_sheets/o3fact.pdf.

18. *Id.* at 1.

19. *Id.*

20. *Id.* at 2.

Administrator weighs all of the information and decides whether to propose a revised standard.²¹

B. The 1990 CAA Amendments

Once the NAAQS were initially set, the 1970 CAA amendments required states to meet these health-based limits within five years.²² When the original deadline passed in 1975, many districts had not yet met the standards.²³ The 1977 Clean Air Act Amendments responded to this widespread problem by requiring areas not in attainment of the national standards to adopt detailed programs to meet those standards within an extended timeframe.²⁴ The 1977 Amendments set the attainment date as 1987,²⁵ but as the deadline approached, many regions had still failed to comply.²⁶ This prompted Congress to revamp the Act with more explicit demands upon nonattainment areas.²⁷

These efforts culminated in the 1990 Clean Air Act Amendments, which mandated specific attainment dates, classification guidelines, and other obligations for regions in nonattainment of any criteria pollutant.²⁸ Of its six subparts, Subpart 1 (hereinafter "General Nonattainment Provision") covers "Nonattainment Areas in general."²⁹ The General Nonattainment Provision guides EPA in designating, based upon a series of classification factors, "nonattainment" areas for each criteria pollutant.³⁰ However, it is a "default" section that applies only if a pollutant is not addressed in another, more specific subpart.³¹ Since the subsequent sections of the Act provided specific nonattainment regulations for the each of the national

21. *Id.*

22. 42 U.S.C. § 7410(b), (e), (f) (1970).

23. REITZE, *supra* note 2, at 156. "Nonattainment" is the label given to areas that currently exceed the maximum level permitted by the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i) (1994).

24. *Id.* at 157 (listing the relevant non-attainment provisions of the 1977 Clean Air Act amendments).

25. *Id.* at 156. The 1977 amendments required states to meet primary NAAQS by 1982 and standards for automobile pollutants by 1987. *Id.*

26. *Id.* at 158.

27. *Id.*

28. *Id.* at 158-60; 42 U.S.C. §§ 7501-7515 (1994).

29. 42 U.S.C. §§ 7501-7508 (1994).

30. 42 U.S.C. § 7502(a) (1994). In classifying an area, Subpart 1 permits EPA to consider, among other factors, "severity of nonattainment. . . and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area." *Id.*

31. *See id.* at §§ 7502(a)(1)(C) & 7502(a)(2)(D).

air quality standards at that time, the General Nonattainment Provision, it seemed, was effectively defunct.³²

Subpart 2 [hereinafter "0.12 ppm Nonattainment Provision"] is a detailed nonattainment provision for the old 0.12 ppm³³ ozone standard.³⁴ It classifies nonattainment areas from "marginal" to "extreme," depending upon how much their pollution levels exceeded the old 0.12 ppm ozone standard.³⁵ Once nonattainment areas for ozone were classified, the statute mandated that they comply with the national 0.12 ppm ozone standard within a set number of years after 1990 depending upon their classification.³⁶

C. American Trucking

In 1997, EPA determined that the NAAQS for both ozone and particulate matter needed revising because, according to the best scientific knowledge available, they no longer satisfied the statutory mandate to "protect public health."³⁷The Administrator advanced the proposed revisions through a rulemaking procedure, and on July 17, 1997 EPA promulgated the final revisions of the ozone and particulate matter NAAQS.³⁸ It lowered the permissible ozone level from 0.12 ppm to only 0.08 ppm.³⁹

32. 42 U.S.C. §§7511-7512(a) (1994) applies to ozone. The other criteria pollutants have additional provisions for areas in nonattainment. Subpart 3 applies to carbon monoxide, Subpart 4 to particulate matter, and Subpart 5 to sulfur dioxides, nitrogen dioxide, and lead. 42 U.S.C. §§ 7512-7515 (1994). However, none are as detailed and specific as that for ozone.

33. The abbreviation "ppm" stands for parts of pollutant per million parts ambient air.

34. 42 U.S.C. § 7511 (1994).

35. *Id.*

36. *Id.*

37. See *Fact Sheet: EPA's Revised Ozone Standard*, *supra* note 17.

38. National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R §§ 50.9 (1-hour NAAQS for Ozone), 50.10 (8-hour NAAQS for Ozone), 50.6 (NAAQS for PM sub10), 50.7 (NAAQS for PM) (2001). Promulgation followed the procedures required by the Administrative Procedure Act, which includes public comment and agency response. See *National Ambient Air Quality Standards for Ozone*, 62 Fed. Reg. 38,856, 38,884-85 (July 18, 1997).

39. See *National Ambient Air Quality Standards for Ozone*, 62 Fed. Reg. at 38,856-57. Since ozone levels fluctuate with automobile traffic and other factors, these standards are measured by averaging those ozone levels over a certain period of time. See REITZE, *supra* note 2, at 66 (noting that ambient air standards may be expressed either an arithmetic or geometric mean depending upon the "type of atmospheric distribution normally found for the chemical."). The old standard was an average of ozone levels for each hour. *Id.* at 62-63. The first NAAQS set an hourly average of 0.08 ppm not to be exceeded more than one hour per year. *Id.* Under the new standard, air quality districts had to maintain an average of 0.08 ppm ozone

For particulate matter, the Administrator added a standard to regulate particles the size of 2.5 micrometers and below in addition to the pre-existing standard that regulates particles 10 micrometers in size.⁴⁰ Additionally, the existing levels for the 10-micrometer standard were reduced.⁴¹

Industry groups, states, and one public interest group [collectively referred to hereinafter as "American Trucking"] strongly opposed EPA's proposals for more stringent NAAQS and filed suit requesting enjoinder of EPA's revised NAAQS for ozone and particulate matter.⁴² American Trucking posited three arguments in an effort to invalidate these national standards. First, it argued that the "public health" standard under section 109 of the CAA authorizing the setting of NAAQS was so open-ended that it constituted an unlawful delegation of Congressional lawmaking authority under the Nondelegation Doctrine.⁴³ Since ozone and particulate matter are "non-threshold" pollutants⁴⁴ that pose risks to human health at any level, EPA could not conclusively set the pollution standards at a level "requisite to protect public health" unless they set it at zero.⁴⁵ American Trucking argued that this rendered section 109 unconstitutional because it gave EPA boundless discretion in setting the NAAQS.⁴⁶ Second, in a related argument, American Trucking urged the court to read a cost-benefit criterion into the meaning of "public health" to limit agency discretion to standards that are economically efficient, arguing that this standard would save the statute from unconstitutionality.⁴⁷

Third, American Trucking argued that the 1990 Clean Air Act Amendments, with their detailed nonattainment provisions for the old 0.12 ppm ozone standard, precluded EPA from

averaged over the course of eight hours. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,856-57.

40. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1996).

41. *Id.* at 38,653.

42. See Opening Brief for American Trucking, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1426).

43. See *Whitman v. American Trucking Ass'ns*, 531 U.S. at 472-77.

44. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999). EPA views ozone, and possibly particulate matter, as a non-threshold pollutant. *Id.* (citing 62 Fed. Reg. 38,863 (July 18, 1997) and 61 Fed. Reg. 65,637, 65,651 (1996)).

45. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475-76 (2001). This argument is ironic in that EPA could only avoid nondelegation by setting the NAAQS at 0.00, but industry groups wanted to avoid lowering the standard at all.

46. *American Trucking Ass'ns v. EPA*, 175 F.3d at 1034 (D.C. Cir. 1999).

47. See Opening Brief for American Trucking, *supra* note 42, at 32-43.

revising that standard.⁴⁸ It contended lowering 0.12 ppm standard would render its nonattainment provisions and their specific demands upon the states meaningless because the original standard would no longer apply, and that such a result was unreasonable even under *Chevron* analysis.⁴⁹ It questioned why Congress would have promulgated these lengthy and much-debated 1990 amendments if EPA could ignore or reject their classifications, attainment dates, and control measures in a matter of years.⁵⁰

In response to these arguments, EPA disputed the assertion that the Nondelegation Doctrine requires the CAA to include a "determinate criterion" or a stopping point at which EPA must set or revise the NAAQS.⁵¹ It pointed out the myriad of statutes that allow such indeterminacy. Many of these statutes contained less explicit congressional demands and involved far greater regulatory power on the part of the agency.⁵² EPA then claimed that its discretion in determining the appropriate NAAQS for protecting public health was "bound" by comprehensive and in-depth scientific assessments.⁵³ These scientific assessments and reviews allowed EPA to follow the congressional mandate within the statute to set the standard at a level "requisite to protect public health" with an "adequate margin of safety."⁵⁴

In addition, EPA contended that it is not bound by the "0.12 ppm Nonattainment Provision" when implementing the revised 0.08 ppm ozone standard.⁵⁵ It reasoned that the discrepancies between the "0.12 ppm Nonattainment Provision" and the revised 0.08 ppm standard, such as already-passed attainment dates and higher classification levels, indicated that the provision did not apply.⁵⁶ Instead, it asserted that the previously dormant "General Nonattainment Provision" would guide classification efforts for the revised 0.08 ppm ozone standard.⁵⁷

48. *Id.* at 1046.

49. *American Trucking*, 531 U.S. at 485.

50. *Id.*

51. EPA Brief, 1999 U.S. Briefs 1257, 25-26 (1999)

52. Opening Brief for EPA at 25-26, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1426); *American Trucking*, 531 U.S. at 474.

53. *Id.* at 23-24.

54. 42 U.S.C. § 7409(b)(1) (1994).

55. EPA Brief, 1999 U.S. Briefs at 47.

56. *Id.*

57. *Id.* at 48.

II

THE D.C. CIRCUIT DECISION

In a 2-1 decision, which was later upheld en banc, the D.C. Circuit found EPA's construction of sections 108 and 109 in promulgating the NAAQS was an unconstitutional exercise of legislative power and therefore violated the Nondelegation Doctrine.⁵⁸ The court went on to hold that the Nondelegation Doctrine requires EPA to stipulate an "intelligible principle" in order for its interpretation of the CAA to be a constitutional delegation of power.⁵⁹ To support this controversial holding, it reasoned that while EPA's standard-setting factors themselves "posed no inherent nondelegation problem," the agency "failed to state intelligibly how much is too much."⁶⁰

This holding shocked commentators⁶¹ because it ran afoul of the traditional understanding of the Nondelegation Doctrine and its purpose. First articulated in *J.W. Hampton, Jr. & Co. v. United States*,⁶² the Nondelegation Doctrine required Congress to set down an "intelligible principle" to bind agency decision-making in order to ensure that only Congress has the power to legislate.⁶³ Under the D.C. Circuit's version of the doctrine, an agency must prevent unconstitutional delegations of legislative power by providing itself with an intelligible principle to bind its decision-making.⁶⁴

After straying from accepted legal principles, the D.C. Circuit relied on more traditional canons of adjudication in response to American Trucking's contention that the "public health" standard for revising the NAAQS under section 109(d) of the CAA grants the EPA discretion to consider costs.⁶⁵ The court

58. See *American Trucking Ass'ns v. EPA*, 175 F.3d at 1034.

59. *Id.* (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

60. *Id.*

61. See, e.g., Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999) [hereinafter Sunstein I]; 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 (2000) [hereinafter Zellmer I]; Jeff Brax, Note, *American Trucking Ass'ns, Inc. v. EPA*, 27 ECOLOGY L.Q. 549 (2000) (each provides a thorough critique of the D.C. Circuit's opinion).

62. 276 U.S. 394 (1928).

63. *Id.* at 409.

64. See *American Trucking Ass'ns v. EPA*, 175 F.3d at 1034. For a discussion of this "new" Nondelegation Doctrine and to understand how it breaks from precedent, see Sunstein I, *supra* note 61, at 303.

65. *American Trucking Ass'ns v. EPA*, 175 F.3d at 1040. American Trucking contended that cost consideration could solve the nondelegation problem because an efficiency analysis would provide an appropriate stopping point in revising the

reaffirmed its holding in *Lead Industries* that "EPA may not consider the cost of implementing [NAAQS]."⁶⁶ Revising the NAAQS, just like setting the NAAQS, does not permit consideration of regulatory cost.⁶⁷

In addition, the court rejected American Trucking's argument that the "0.12 ppm Ozone Nonattainment Provision" precluded revision of ozone NAAQS.⁶⁸ However, it also rejected EPA's claim that the "General Nonattainment Provision" applied to revised NAAQS.⁶⁹ Evaluating the regulations under the *Chevron* doctrine,⁷⁰ the D.C. Circuit held that while the "0.12 Nonattainment Provision" did not prevent EPA from revising the ozone standard, this revised standard must comply with the ill-fitted 1990 enforcement scheme, including exact classification levels built around the 0.12 ppm standard and attainment milestones set forth in the 1990 Act.⁷¹

III

A PARTIAL RESTORATION OF AGENCY DISCRETION: THE SUPREME COURT'S DECISION

A. *Nondelegation*

The Supreme Court flatly rejected the D.C. Circuit's resurrection and expansion of the Nondelegation Doctrine. The Court first addressed whether the "public health" principle of CAA section 109(b)(1) violated Art. I section 1 of the Constitution, which "vests all legislative Powers herein granted . . . in a

NAAQS. The court agreed that cost-benefit analysis could provide an "intelligible principle," but held that the statute clearly forbids this option. *Id.* at 1038.

66. *Id.* at 1040. The court relied on its earlier interpretation of § 109(b)(1) in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1040-41 (D.C. Cir. 1980) (holding that "the statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109"). Furthermore, this salient decision had not resulted in a Congressional amendment for two decades, signaling Congressional acquiescence.

67. *American Trucking Ass'ns v. EPA*, 175 F.3d at 1040 (referring to its decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)).

68. *Id.* at 1046.

69. *Id.* at 1048.

70. *Chevron v. National Resources Defense Council*, 467 U.S. 837, 842-843 (1984). The D.C. Circuit developed a two-part test for courts to use in reviewing an agency's interpretation of a statute. First, if Congress has spoken clearly, that is the end of the matter. *Id.* Where, however, the statutory text is "silent or ambiguous . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

71. *Id.* at 1046.

Congress of the United States.”⁷² According to the Nondelegation Doctrine, this clause requires Congress to “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”⁷³ Justice Scalia, writing for the majority, found the scope of EPA’s discretion in NAAQS-setting under section 109(b)(1) to be “well within the outer limits of our nondelegation precedents.”⁷⁴ He reasoned that the CAA’s air quality criteria supply “intelligible principle(s) strikingly similar to the ones we approved in *Touby v. United States*.”⁷⁵ Moreover, the court noted that in no case is Congress required to provide “‘determinate criterion’ saying ‘how much [of the regulated harm] is too much.’”⁷⁶

Justice Scalia also rejected the Court of Appeals’ novel attempt to place the burden of solving a delegation problem upon the agency.⁷⁷ The Court rejected the D.C. Circuit’s holding that an agency may cure a statute that fails the constitutional nondelegation standard merely by articulating a more restrictive interpretation of that statute.⁷⁸ Justice Scalia called into question the logic of this “internally contradictory” concept because the agency’s “choice of which portion of power to exercise . . . would itself be an exercise of the forbidden legislative authority.”⁷⁹

72. *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 472-77 (2001). For a discussion of the historical and legal underpinnings of nondelegation doctrine, See Zellmer I, *supra* note 61. In brief, Article I of the Constitution provides checks and balances among the three branches of government: executive, legislative, and judiciary. Congress often legislates in broad terms, allowing agencies to fill in the details. Courts keep the agencies in check through the mechanisms of judicial review. See *id.* The purpose and history of the nondelegation doctrine are discussed in greater detail below.

73. *Whitman v. American Trucking Ass’ns*, 531 U.S. at 472 (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

74. *Id.* at 473-74. The Court cites a host of cases in which it found constitutionally acceptable “intelligible principles” in statutory provisions that resemble section 109(b)(1). See *Touby v. United States*, 500 U.S. 160 (1991); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *National Broad. Co. v. United States*, 319 U.S. 190 (1943); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *Mistretta v. United States*, 488 U.S. 361 (1989).

75. *Whitman v. American Trucking Ass’ns*, 531 U.S. at 473. In *Touby v. United States*, the court permitted the Attorney General to classify drugs as controlled substances if “necessary to avoid an imminent hazard to the public safety.” 500 U.S. 106, 163 (1991).

76. *Whitman v. American Trucking Ass’ns*, 531 U.S. at 475.

77. *Id.* at 476.

78. *Id.* at 473, 476.

79. *Id.* at 473 For a more detailed study of the D.C. Circuit’s confused interpretation of the Nondelegation doctrine, see Sunstein I, *supra* note 61.

The Court also addressed whether implementation costs can be factored into revising the NAAQS under section 109(d).⁸⁰ After analyzing many “lengthy, spirited, but ultimately unsuccessful” arguments, the Court held they could not.⁸¹ The Court relied on the plain meaning of the statute to conclude that public health clearly meant “the health of the public.”⁸² In response to the claim that economic factors affect public health, the Court noted that where Congress wanted economic costs to be weighed, it specifically provided for their consideration in other provisions of the Act.⁸³ Therefore, for American Trucking to succeed, it had to point to a “textual commitment of authority to the EPA to consider costs in setting NAAQS under section 109(b)(1).”⁸⁴ If Congress desired EPA to weigh these factors in setting NAAQS, it would not “hide elephants in mouseholes.”⁸⁵

80. *Whitman v. American Trucking Ass'ns*, 531 U.S. at 464-71.

81. *Id.* at 465, 471 (holding that § 109(b) “unambiguously bars cost considerations from the NAAQS-setting process”).

82. *Id.* at 466.

83. *Id.* at 466-67. American Trucking offered additional theories as to why costs should be considered. It claimed the terms “adequate margin” and “requisite” leave room to address cost concerns within the criteria for health effects. *Id.* at 469. Alternatively, it argued that the public health criteria documents established pursuant to section 108 do not provide the only criteria that could affect the Administrator’s determination regarding public health. *Id.* Finally, it pointed to provisions that do require costs to be determined and provided to the States and argue these become meaningless if costs cannot simultaneously be factored into the NAAQS. See *id.* at 469-70. Such factors, it argued, might include health losses caused by poverty resulting from job losses from extremely strict ambient air quality standards. *Id.* at 466. While the court found this argument “unquestionably true,” it nevertheless does not change Congress’ explicit directive. *Id.*

The Court rejected these arguments. As to the first, Justice Scalia noted that Congress would not expand EPA’s authority so substantially as to consider costs in such an indirect manner. *Id.* at 469. It also declined to adopt the second line of reasoning because the costs of NAAQS implementation are too too tenuously related to public health to be considered a factor in the absence of express wording from Congress. *Id.* The Court rejected the third contention on the ground that such provisions are meant for the benefit of States in implementing the standards, not EPA in setting them. *Id.* at 470.

84. *Id.* at 468.

85. *Id.* Justice Breyer concurred with this section of the majority’s opinion. Rather than requiring a clear, textual commitment to permit cost consideration in regulatory decision-making, Justice Breyer would hold that silence and ambiguity in the language permit this “rational regulation.” *Id.* at 490 (Breyer, J. concurring). He reasoned, however, that this particular case did not lend itself to such an interpretation based upon the statute’s legislative history, its structure, and section 109’s language. *Id.*

B. 1990 CAA Amendments

The Court next considered whether the 1990 CAA Amendments precluded EPA from revising ozone standards.⁸⁶ It agreed with the D.C. Circuit that the 1990 Amendments, and in particular the 0.12 ppm Ozone Nonattainment Provision, did not preclude EPA from revising the NAAQS for ozone.⁸⁷ However, the Supreme Court declined to adopt the circuit court's finding that the 0.12 ppm Ozone Nonattainment Provision *clearly* controls the implementation of the revised 0.08 ppm ozone standard.⁸⁸ Using the familiar *Chevron* test, Justice Scalia found the statute's governance of the lower 0.08 standard "to some extent ambiguous,"⁸⁹ noting that some of its provisions are "ill fitted to implementation of the revised standard."⁹⁰ However, the Court held that these gaps did not render the section's "carefully designed restrictions on EPA discretion utterly nugatory."⁹¹ The Court explained that an agency cannot construe a statute in a way that "nullifies" text designed to limit its discretion.⁹² Accordingly, the Court held that EPA must adopt an implementation plan that adapts the 0.12 ppm Nonattainment Provision to the lower 0.08 ppm ozone standard rather than discard it altogether.⁹³

IV

ANALYSIS

By returning the Nondelegation Doctrine to dormancy, the Supreme Court allayed fears that the modern administrative state would be significantly destabilized. The Court recognized that the concerns associated with the Nondelegation Doctrine are

86. Subpart 1 states that the broad authority it grants the Administrator in classifying nonattainment areas and determining schedules for reaching attainment does not apply where the statute specifically provides such information in other sections. See 42 U.S.C. §§7502(a)(1)(C) & 7502(a)(2)(D) (1994). As a result, this issue turned on whether Subpart 2, which specifically addresses nonattainment classifications for ozone for the old 1-hour standard, also applied to the revised 8-hour standard.

87. *Whitman v. American Trucking Ass'ns*, 531 U.S. at 481..

88. *Id.*

89. *Id.*

90. *Id.* at 483. Justice Scalia acknowledged that Subpart 2 uses the old 1-hour averages, so its classifications are inexact estimates for the new 8-hour standard. Moreover, the dates from which to calculate nonattainment deadlines begin with November 15, 1990, so many of the deadlines would have already expired by the time of the revision in 1997. *Id.*

91. *Id.*

92. *Id.* at 485.

93. *Id.* at 484-85.

more readily and safely resolved through other review mechanisms.⁹⁴ By using the *Chevron* doctrine, courts can oversee an agency's actions in a moderate, principled, and case-specific manner without the risk of unchecked judicial discretion.⁹⁵ In this part, I argue that this existing decision-making balance between the branches is appropriate. Sections A and B involve a brief discussion of the role of judicial review in this balance. Section A demonstrates that the Nondelegation Doctrine is an inappropriate tool for limiting agency discretion. Section B examines traditional administrative law doctrine as a means to reign in agency discretion and notes an unfortunate trend towards declining deference to agencies.

Finally, Section C discusses EPA's use of risk assessments and advocates for a serious revision in this area. First, it explains how risk assessments successfully bind agencies to congressional policy. However, this note argues that risk assessments are too restrictive in their attempts to limit EPA's discretion. We now have Byzantine procedures that might actually prevent the agency from making timely adjustments to regulations or from promulgating new rules where necessary to protect the public health.⁹⁶ As a solution, this article advocates a streamlining of EPA's present risk assessment system. Streamlined risk assessments would better serve the public and the environment by allowing agencies to make decisions in a more reasonable time frame than is currently possible.

A. *The Nondelegation Doctrine*

Prior to the late 1930s, *Lochner*-type jurisprudence was frequently used to check expansive agency discretion and the broad-sweeping federal regulatory programs.⁹⁷ The Nondelegation Doctrine was one judicial mechanism used to achieve this goal.⁹⁸

94. *Id.* at 476.

95. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318 (2000) [hereinafter Sunstein II]. Traditional judicial construction of statutes serves the purposes of significant and principled judicial review "without risking law-free judicial enforcement and without endangering the operation of modern government" that the nondelegation "intelligible" principle test risks. *Id.* It is easier for judges to apply and for the legislature to understand. *Id.*

96. Bernard D. Goldstein, *Risk Assessment as an Indicator for Decision Making, in RISKS, COSTS, AND LIVES SAVED 77-78* (Robert W. Hahn ed., 1996) (discussing the complexity of risk assessment).

97. Zellmer I, *supra* note 61, at 942-43 (discussing the historical role of the nondelegation doctrine and other forms of judicial review).

98. *Id.* Other constitutional avenues to check agency discretion at that time included substantive due process and federalism.

The doctrine requires Congress to supply an “intelligible principle” to direct agency discretion so that the agency itself does not legislate in violation of Constitutional separation of powers principles.⁹⁹ However, the doctrine’s popularity was short-lived. It was only used in two decisions, both in 1935, to invalidate agency rules.¹⁰⁰ Prior to the D.C. Circuit’s controversial ruling, the legal community’s awareness that agencies require broad discretion to effectively implement and enforce congressional mandates rendered revival of this doctrine extremely unlikely.¹⁰¹

Nor would such a revival have been advisable. Proponents of the doctrine claim that it promotes political accountability, ties agency regulations to the public values, and proscribes agency manipulation by special interest groups.¹⁰² Whether the doctrine actually serves those purposes is questionable, however, and it functions at the expense of governmental efficiency.¹⁰³ Agencies were developed to provide technical expertise, allowing the federal government to regulate vast and disparate areas of the economy, the environment, and beyond.¹⁰⁴ Some agency discretion is an inherent part of exercising this expertise. Without being able to rely on agency expertise, Congress would be crippled in its attempts to draft broad legislation.

Furthermore, the doctrine creates new procedural problems to replace the perceived problem of agency discretion. Cass Sunstein has observed that the Nondelegation Doctrine requires the court to make a quantitative judgment to determine how

99. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

100. Sunstein II, *supra* note 95, at 315 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

101. Sandra B. Zellmer, *The Nondelegation Doctrine: Fledgling Phoenix or Ill-Fated Albatross?*, 31 ENVTL. L. REP. 11151 (2001) [hereinafter Zellmer II]. Professor Zellmer explains that the nondelegation doctrine receded in importance when society realized that delegating the “details” of regulation to agencies promoted efficient government. *Id.* at 11151.

102. Sunstein II, *supra* note 95, at 319-321. Proponents of the doctrine believe that Congress’s bicameral system promotes democratic political accountability. *Id.* at 319.

103. *Id.* at 324-325. Opponents of the doctrine argue that agencies are politically accountable by virtue of the President. *Id.* at 324. Conceding that Congress is more procedurally accountable, they alternatively offer that Congress must delegate to agencies due to lack of expertise. *Id.* Lastly there is no evidence that links agency performance to statutory clarity. *Id.* Furthermore, they argue that the “intelligible principles” test of the nondelegation doctrine is too unprincipled to achieve those objectives the doctrine’s beneficial objectives. Zellmer II, *supra* note 101, at 11152.

104. Sunstein II, *supra* note 95, at 324-25.

much agency discretion is too much.¹⁰⁵ Unfortunately, no transparent metric exists to constrain the judge's own discretion.¹⁰⁶ This threatens "ad hoc, highly discretionary rulings" without providing Congress with principles to avoid similar future results.¹⁰⁷

Fortunately, the Supreme Court found this harmful doctrine inapplicable in the *Whitman* context. It eliminated the vast majority of future uses of the Nondelegation Doctrine when it declared section 109(b)(1) of the CAA to be "well within the outer limits of our nondelegation precedents."¹⁰⁸

B. *The Chevron Doctrine as a Desirable Alternative to Nondelegation Jurisprudence*

Rather than completely stripping courts of the ability to limit agency discretion, the *Whitman* decision directs them towards traditional tools of administrative law when binding agencies to congressional directives. Although some of Justice Scalia's language suggests an ill-advised intent to chip away at such deference, the Court's general protection of deference to agency expertise was wise. Typically, judicial review of agency regulations begins with the *Chevron* doctrine.¹⁰⁹ The doctrine requires courts to be deferential to agency interpretations of their governing statutes where Congress has been silent or ambiguous.¹¹⁰ This deference is justified partly by the reality that agencies hold the technical expertise to make such determinations and courts often do not. However, there are certain instances, such as when the court sees a constitutional problem, in which the court will refuse to find an implicit delegation of constitutional authority even in the face of statutory silence or ambiguity.¹¹¹ In these instances, the court

105. *Id.* at 327.

106. *Id.*

107. *Id.*

108. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

109. *Chevron v. National Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

110. *Id.*

111. Sunstein II, *supra* note 95, at 330-333. Professor Sunstein persuasively argues that judicial nondelegation canons of construction supplant the formal Constitutional doctrine. His theory posits that a court will not defer to an agency's interpretation, even where mandated under *Chevron*, if the statute falls into one of the three nondelegation categories *Id.* Based on empirical evidence from caselaw, Sunstein believes these categories include constitutionally-inspired canons, sovereignty-inspired canons, and canons inspired by perceived public policy. *Id.* Where the subject matter of the agency's interpretation falls into these categories, a court may choose to interpret the text itself rather than defer to the agency.

rather than the agency appropriately retains full discretion to interpret the statute.

As a means to check agency discretion, *Chevron* is preferable to the Nondelegation Doctrine. Its deference respects the agency's unique understanding of the law governing their area of expertise and allows the agency to effectively regulate within this area. Nevertheless, it also effectively supplies outer bounds, requiring courts to ensure that agency interpretations are "permissible" and to strike down those constructions that are "contrary to clear congressional intent."¹¹²

Although *Chevron* deference may preserve a good balance between agencies and the courts, the Supreme Court's endorsement of such deference was slightly qualified. It instructed lower courts that the breadth of agency discretion "varies according to the scope of the power congressionally conferred."¹¹³ This affords a test for more or less rigorous judicial review "depending on the context or nature of power."¹¹⁴ As a result, some circumstances might cause courts to closely examine agency decisions. The Court also stated that there are instances in which an agency loses its interpretive discretion altogether. Justice Scalia wrote that where the textual provisions concern the power to determine the agency's own discretionary scope, the agency may not interpret the relevant text so as to nullify those provisions.¹¹⁵

Chevron's unqualified mandate to defer to an agency's interpretation now appears dependent on the substance of that text. Congressional language intended to limit an agency's discretion may create one category of circumstances where an agency's permissible interpretation is limited. It is unclear whether the Court will further erode *Chevron* by creating additional categories in which a court does not have to defer to an agency's interpretation or where the court may harness the scope of the agency's interpretation. In any event, this categorical exclusion from *Chevron* indicates an unfortunate step towards reduced judicial deference to agencies.

112. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

113. *Whitman v. American Trucking Ass'ns*, 531 U.S. at 475.

114. Zellmer II, *supra* note 101, at 11152. Professor Zellmer opines that this test is probative of Sunstein's theory of nondelegation canons of construction. *Id.*

115. *Whitman v. American Trucking Ass'ns*, 531 U.S. at 485.

C. *Assessing Risk: The Controversy Surrounding Risk Assessments*

After *American Trucking*, risk assessments remain the key ingredient in the governmental recipe for constraining agency discretion. Nevertheless, risk assessments continue to be a hotbed of contention. First, some argue, as did *American Trucking*, that risk assessments permit too much agency discretion. Another concern is that the present complexity of risk assessments actually hinders the regulatory process. Risk assessments serve a valuable role in ensuring that regulatory decisions are consistent with contemporary scientific knowledge, but their procedures have become so complex¹¹⁶ that they significantly delay regulatory decision-making. Rather than replace the system, it should be mended to increase its efficiency in responding to health and environmental problems with the appropriate regulations.

In the 1970s, health-based standards grew out of public distrust of other quantitative methods for evaluating risk, particularly those involving cost-benefit or risk-benefit analysis.¹¹⁷ The 1970 CAA Amendments reflected this distrust by restricting agency decision-making to health-based factors.¹¹⁸ To accomplish this, Congress detailed agency obligations, mandated strict deadlines for the issuance of the NAAQS, and included a citizen suit provision to compel nondiscretionary action.¹¹⁹ By the

116. See Goldstein, *supra* note 96, at 77-78 (discussing the complexity of risk assessment).

117. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 408-409 (3d ed. 2000) (citing a House subcommittee report critical of risk-benefit and cost-benefit analyses that states: "The limitations on the usefulness of benefit/cost analysis in the context of health, safety, and environmental regulatory decisionmaking are so severe that they militate against its use altogether." SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM., 94TH CONG., REPORT ON INTERSTATE AND FOREIGN COMMERCE 515 (1976)).

118. RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 340-341 (2d ed. 1978). The authors provide several reasons for this. First, Congress felt "dissatisfaction with the lack of tangible achievement in federal air pollution control programs over the previous decade." *Id.* at 340. Second, Congress found the National Air Pollution Control Administration (NAPCA) as "lacking in zeal." *Id.* Third, the Democratic Congress might have had political motives to undermine the Republican Nixon administration by enacting a statute with mandates that were impossible to achieve. *Id.* at 341. Lastly, Congress increasingly felt that agencies were "captured" by private interest groups. *Id.*

119. John Dwyer, *Environmental Law & Policy*, Ch. 4, at 4 (2001) (unpublished manuscript, on file with author). Dwyer explains this intrusive legislation was also a reaction to a "deep distrust of states' willingness or ability to regulate the environment." *Id.*; see also John P. Dwyer, *The Practice of Federalism under the Clean Air Act*, 54 MD. L. REV. 1183, 1195 (1995).

1980's, however, the government recognized the need to quantify health impacts and embraced risk assessment as a legitimate tool for policy-making.¹²⁰ EPA now employs risk assessments to determine the safe level at which to set the NAAQS.¹²¹

Many scholars argue that risk assessments have such a high degree of scientific uncertainty that they give agencies unfettered discretion to reach any conclusion they desire.¹²² While science clearly involves uncertainty, this uncertainty should not undermine the value of scientific quantifications and judgments. Courts have long understood the dilemma agencies face when trying to regulate risks "on the frontiers of knowledge."¹²³ As a solution, the "science policy paradigm," articulated largely in *Ethyl Corp. v. EPA*,¹²⁴ asks courts to grant agencies deference to evaluate these risks.¹²⁵ Today, the combination of judicial review coupled with the agency's own structured and formalized system of scientific review work to limit agency discretion prior to any rulemaking.¹²⁶ Both combine to ensure that agency decisions adhere to congressional policy objectives.¹²⁷ With these procedural mechanisms to ensure that risk assessments accord with political will, the inherent discretion involved in the scientific process poses no threat to our participatory democracy.

120. Professor Hornstein suggests risk assessment was borne out of EPA's need to survive the "hard look" doctrine of judicial review. It became a means by which government officials could avoid political questions by claiming those problems were being solved "scientifically." Its legitimacy stems from a belief that all environmental problems share the common denominator of "risk." Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 565-567 (1992).

121. Paul R. Portney, *Air Pollution Policy*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION (Paul R. Portney ed., 1990).

122. Hornstein, *supra* note 120, at 571-72. Proponents and critics debate the degree of subjectivity. Subjectivity enters when experts decide which risk to evaluate and how to estimate the probabilities and magnitudes of those risks. *Id.* at 572 (citing Professor Mary Lyndon's article, which recognized the National Academy of Science's study that marked 50 points where scientists were required to exercise scientific judgment in conducting a risk assessment. Mary L. Lyndon, *Risk Assessment, Risk Communication, and Legitimacy: An Introduction to the Symposium*, 14 COLUM. J. ENVTL. L. 289, 296 (1989)); *see also* SHEILA JASANOFF, *SCIENCE AT THE BAR: LAW, SCIENCE AND TECHNOLOGY IN AMERICA*, 50-53 (1995).

123. JASANOFF, *supra* note 122, at 50-53.

124. *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (holding that protection against "endangering" public health did not require proof of actual harm).

125. *Id.* The paradigm involves three premises: (1) decisions can be made upon suggestive rather than actual proof; (2) interpretations do not require unanimity to be valid; and (3) the administrator had authority to choose among methodologies and results debated among experts. *See* JASANOFF, *supra* note 122, at 78.

126. JASANOFF, *supra* note 122, at 81-90.

127. *Id.*

Despite their ability to prudently bind agency discretion, risk assessments have become disruptively slow.¹²⁸ This delay is epitomized by EPA's rulemaking timetable under the CAA, which has a goal of five years between initiating the process and adopting a rule.¹²⁹ Moreover, EPA has not adopted additional primary pollutants since the 1970s.¹³⁰ The complicated procedural requirements and political controversy surrounding the promulgation of rules under conditions of scientific uncertainty lead to failure to protect the public and the environment sufficiently.¹³¹

The merits of health-based standards warrant retaining risk assessments, albeit in a modified form. Risk assessments could be tailored to the nature of risk subject of analysis.¹³² For example, agencies could interpret legislative policies to classify risks from moderate to extreme depending on statutory language.¹³³ They can also factor in the level of scientific uncertainty present while assessing the risk and adjust their risk estimate accordingly.¹³⁴ Agencies could streamline risk assessment procedures for easily detectable and obvious risks while retaining more complex analysis for risks with complicated causal mechanisms. Once risk assessments are streamlined, the public will no longer have to endure years without protection in order to benefit from a studied and deliberate response.

128. *Id.* at 87. Mr. Portney acknowledges that the ambient air has improved since the advent of the CAA. However, he maintains that vast amounts of research demonstrate that these levels could be met or improved at drastically lower prices than what is currently spent.

129. Dwyer, *supra* note 119, at 75. Professor Dwyer enumerates various reasons for EPA's inaction. They include the "hard look" doctrine of judicial review, increased statutory procedures including consultation with advisory committees, and greater political "importance and controversy of standard-setting." *Id.*

130. For a list of the National Ambient Air Quality Standards, pollutants, standard values, and standard types, see EPA Office of Air Quality Planning and Standards, National Ambient Air Quality Standards, at <http://www.epa.gov/airs/criteria.html> (last updated Nov. 19, 2001).

131. JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS* 24-29 (1990). Professor Jasanoff notes that the slow risk analysis procedure permits only a minute percentage of commercially important chemicals to be studied at a sufficient level. *Id.*

132. Goldstein, *supra* note 96, at 78. Goldstein believes that risk assessments could be more effective if they were adjusted to the qualitative goal the policy-maker seeks to achieve: some goals requiring a more complex analysis, others a more streamlined one. In its present Byzantine form, it denies both the public and the government much of its usefulness. *See id.*

133. Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 *YALE J. ON REG.* 89, 135-43 (1988).

134. *Id.*

CONCLUSION

As a result of *American Trucking*, Congress can continue to delegate broad rulemaking authority to agencies with little threat of violating the Nondelegation doctrine. Risk assessments appropriately remain the principle mechanism for guiding agency discretion, and providing a structured and thorough scientific approach for promulgating rules in accordance with congressional policies. However, their growing complexity lengthens rulemaking time and sometimes prevents EPA from fulfilling its mandate to protect the public health. The public and the environment do not need alternatives to these assessments, however; merely streamlining the procedures could facilitate a more efficient regulatory decisionmaking process.

