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DISCIPLINING DELEGATION AFTER *WHITMAN V. AMERICAN TRUCKING ASS'NS*

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INTRODUCTION

In the administrative state, *some* governmental actor must take responsibility for the hard choices of regulatory policy. The problem is that congressional delegation of policymaking authority to administrative agencies not only allows Congress to avoid such responsibility; it allows agencies to do so as well. The proper response to this problem—often ignored by the current scholarly debate on delegation—is not to prohibit or restrict Congress from delegating broad policymak-

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ing authority. Rather, it is to require agencies themselves to supply the standards guiding and limiting their own policymaking discretion.

The idea that agencies and not Congress should supply the standards that constrain their discretion has not received much play in the delegation literature. Although Professor Kenneth Culp Davis made the point in 1969,[1] it attracted almost no scholarly attention until 1999, when the D.C. Circuit adopted it as a strategy for disciplining delegation in *American Trucking Ass'ns v. EPA*,[2] now known as *Whitman v. American Trucking Ass'ns*.[3] In a previous article, I argued that the practice of requiring agencies to supply standards constraining their own discretion serves democracy as well as or better than requiring Congress to supply comparable standards.[4] But I did not address the question whether courts should use constitutional law or administrative law to require agencies to supply such standards. Courts might revive the nondelegation doctrine to achieve this result under constitutional law, as the D.C. Circuit did in *American Trucking*.[5] Or courts might instead rely on the "hard look" doctrine to achieve it under administrative law, as part of either arbitrary and capricious review[6] or *Chevron* review.[7]

The Supreme Court's recent reversal of the D.C. Circuit's decision in *American Trucking* brings the unanswered question to center stage: Should courts use constitutional law or administrative law for requiring administrative standards? In theory, these two distinct means for requiring administrative standards could coexist. That is, courts might invoke constitutional law or administrative law interchangeably depending on the particular statute or the particular regulation at issue in a case.

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1 KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 55–57, 219–20 (1969).

2 Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir.) (invalidating regulation and remanding for administrative standards under the nondelegation doctrine), *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *and rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

3 531 U.S. 457 (2001).

4 *See* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1422–31 (2000) (arguing that administrative standards improve accountability through enhanced political oversight, promote the rule of law, and inhibit the transfer of lawmaking authority to private parties); *see also* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999) (defending the use of administrative standards to constrain administrative discretion); *cf.* Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 ADMIN. L. REV. 63, 92–95 (2000) (arguing that administrative standards disserve democracy); Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1 (2000) (same).

5 175 F.3d at 1034–40.

6 *See, e.g.*, Pearson v. Shalala, 164 F.3d 650, 660 (D.C. Cir. 1999).

7 *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388 (1999).

But another principle in the law counsels otherwise. In *Ashwander v. TVA*,[8] Justice Brandeis advised courts to refrain from deciding constitutional questions unless absolutely necessary to decide a particular case.[9] Following Justice Brandeis's now-famous teaching, courts should refrain from using constitutional law to require agency-generated standards because administrative law—an adequate nonconstitutional law ground—exists for this purpose. Deferring to administrative law avoids the need to revive the constitutional nondelegation doctrine or impugn the constitutionality of a statutory delegation. Moreover, administrative law offers a theoretical foundation and a practical framework for imposing an administrative-standards requirement.

The *Ashwander* principle also begins to explain and justify the Supreme Court's decision in *American Trucking*. The Supreme Court held in *American Trucking* that agencies lack the power to supply the standards that would render their delegated lawmaking authority constitutional.[10] Although some might read this case as foreclosing the possibility of relying on agency-made standards to discipline delegation on any theory, a narrower (and better) interpretation is available. In *American Trucking*, the Supreme Court rebuked the D.C. Circuit for applying constitutional doctrine to require an agency to supply limiting standards where Congress had not.[11] It also denied the D.C. Circuit the power to decide that agencies rather than courts (indeed, *the* Court) could supply narrowing constructions of statutory delegations when constitutionally required.[12] This reading brings *American Trucking* in line with other recent cases in which the Court has corrected other governmental actors for exceeding the limits of their assigned roles.[13]

But *American Trucking* did not foreclose the possibility of requiring administrative standards under *administrative law*. The Court did not pretend that the nondelegation doctrine actually forces Congress to provide standards that meaningfully guide and limit administrative discretion.[14] Moreover, the Court hinted to Judge Williams, the author of the D.C. Circuit's per curiam opinion, that the proper way to require supplemental administrative standards was under administrative law rather than constitutional law.[15] Viewed this way, the Court

8 297 U.S. 288 (1936).

9 *See id.* at 346 (Brandeis, J., concurring).

10 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–73 (2001).

11 *See id.* at 472–76.

12 *See id.* at 472.

13 *See infra* notes 177–85 and accompanying text.

14 *See infra* notes 140–44 and accompanying text.

15 *See Am. Trucking*, 531 U.S. at 474–76.

accepted the learning of *Ashwander*, guided by the additional impulse of wanting the last word on matters of constitutional interpretation.

This Article proceeds in three parts. In the first Part, I examine the use of constitutional law and administrative law to require administrative standards, applying *Ashwander* to evaluate and select between the two approaches. In the second Part, I read *American Trucking* in a way that avoids the conclusion that the Court has rejected the notion of agency self-discipline altogether, arguing instead that the Court has shifted the focus from constitutional law to administrative law as a basis for requiring administrative standards. In the course of this discussion, I sketch some broader theories about the Court's recent jurisprudence on the constitutional limits of other governmental actors' lawmaking authority, as well as its cases on the constitutional avoidance canon of statutory construction. In the final Part, I consider some implications of this reading for the current scholarly debate on delegation.

I
CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND *ASHWANDER*

A. Constitutional Law: The Nondelegation Doctrine

The nondelegation doctrine as it is traditionally understood requires Congress to supply an "intelligible principle" in its statutory delegations that constrains administrative discretion and facilitates judicial review.[16] The doctrine emanates from Article I of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[17] The Supreme Court has applied the nondelegation doctrine to invalidate a statutory delegation for failure to contain an adequate intelligible principle only twice, both times in 1935.[18] Since then, courts and commentators have viewed the doctrine as dead or at least dormant.[19]

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16 *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

17 U.S. CONST. art. I, § 1. *See generally* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478–88 (1989) (discussing the evolution of the nondelegation doctrine).

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

19 *Cf.* Bressman, *supra* note 4, at 1408–15 (noting the conventional view but arguing that the nondelegation doctrine has been merely relocated to interpretive norms); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322, 328 (2000) (same).

In *American Trucking*, the D.C. Circuit revived a version of the nondelegation doctrine to require the Environmental Protection Agency (EPA) rather than Congress to supply the standards that guide and limit that agency's delegated lawmaking authority under the Clean Air Act.[20] Section 109(b)(1) of the Act directed the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [published air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health."[21] The EPA revised the national ambient air quality standards (NAAQS) for ozone under section 109(b)(1) without ever revealing precisely how it arrived at its conclusion.[22] Although the EPA had considered various factors in the course of the rulemaking process—including the number of people exposed to serious health effects and the certainty that those effects would occur—the agency did not articulate a metric for determining the point below which the number was too small or the health effects too uncertain to justify regulation.[23]

The D.C. Circuit, Judge Stephen F. Williams writing for a per curiam panel, held that the EPA had promulgated the ozone regulation pursuant to a standardless delegation of lawmaking authority in violation of the nondelegation doctrine.[24] But the court did not invalidate the statute containing the unconstitutional delegation. Rather, the court invalidated the regulation and remanded it to the EPA for articulation of "determinate criteri[a] for drawing lines" between permissible and impermissible levels of air pollution.[25]

Judge Williams seemed to acknowledge that the application of the nondelegation doctrine to invalidate a regulation and remand it to the agency was unconventional.[26] However, he stated, the Supreme Court no longer insists on the "strong" form of nondelegation review that requires invalidation of standardless statutes.[27] Rather, he explained, the Supreme Court only demands an intelligible principle to set limits on the exercise of administrative discretion and facilitate judicial review.[28] Although Congress ordinarily supplies the requisite principle, Judge Williams commented, the agency, in the exercise of

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20 Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir.) (invalidating regulation and remanding for administrative standards under the nondelegation doctrine), *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *and rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

21 42 U.S.C. § 7409(b)(1) (1994).

22 *See Am. Trucking*, 175 F.3d at 1033, 1035–36.

23 *See id.* at 1036.

24 *See id.* at 1034–38.

25 *Id.* at 1034; *see id.* at 1038.

26 *See id.* at 1037–38.

27 *Id.* at 1038.

28 *See id.* at 1034, 1038.

its expert judgment, instead could limit its own discretion.[29] This approach, he later observed, fits better with modern doctrines of deference to administrative decisions applied in cases like *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[30]

B. Administrative Law: The Arbitrary and Capricious Test and the *Chevron* Test

At about the same time as the D.C. Circuit applied the nondelegation doctrine to demand administrative standards in *American Trucking*, another panel of that court as well as the Supreme Court itself applied principles of administrative law effectively to achieve the same result in different ways. The D.C. Circuit used the arbitrary and capricious test of the Administrative Procedure Act (APA)[31] to demand administrative standards.[32] The Supreme Court used the second step or "reasonableness" prong of the *Chevron* test[33] for that purpose.[34] Although these cases went relatively unnoticed (at least as to these legal issues), they made 1999 an even more significant year for the delegation issue than most scholars supposed—perhaps the most significant year since 1935 when the original nondelegation doctrine apparently rose and fell.[35]

1. *The Arbitrary and Capricious Test*

In *Pearson v. Shalala*,[36] the D.C. Circuit held that the failure of the Food and Drug Administration (FDA) to define the statutory phrase "significant scientific agreement" in its regulation governing authorization of health claims violated the arbitrary and capricious test.[37] The FDA regulation required marketers of dietary supplements to obtain its approval before claiming on a label that their product had health-related effects.[38] The FDA provided such pre-approval only if it found "significant scientific agreement" that the available evidence supported the claim.[39] Pearson asked the FDA, among other things, to approve his claim that dietary supplements containing a higher

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29 *See id.* at 1038.

30 467 U.S. 837 (1984); *see* Am. Trucking Ass'ns v. EPA, 195 F.3d 4, 8 (D.C. Cir. 1999), *rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

31 *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994).

32 Pearson v. Shalala, 164 F.3d 650, 660 (D.C. Cir. 1999).

33 *Chevron*, 467 U.S. at 843–44 (establishing a two-step test directing courts to determine whether Congress has left a gap for an agency to fill through statutory interpretation, and, if so, whether the agency has issued a "reasonable" interpretation).

34 AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392 (1999).

35 *See supra* text accompanying notes 18–19.

36 164 F.3d 650 (D.C. Cir. 1999).

37 *See id.* at 660.

38 *Id.* at 651.

39 *Id.*

amount of folic acid than commonly found in foods delivers a more effective dose.[40] The FDA refused to approve this claim.[41]

According to the court, the agency had rejected Pearson's claim without ever "explain[ing] just how it measured 'significant' or otherwise defined the phrase."[42] The court stated that "[i]t simply will not do for a government agency to declare—without explanation—that a proposed course of private action is not approved"[43] and that "[t]o refuse to define the criteria it is applying is equivalent to simply saying no without explanation."[44] The court therefore remanded the issue to the FDA for articulation of criteria guiding its "significant scientific agreement" determination.[45]

2. *The* Chevron *Test*

In *AT&T Corp. v. Iowa Utilities Board*,[46] the Supreme Court found "unreasonable" a Federal Communications Commission (FCC) interpretation that failed to contain any administrative "limiting standard, rationally related to the goals of the [Telecommunications Act of 1996]"[47] and that effectively allowed one interested party to define regulatory requirements.[48] The Act required incumbent local exchange carriers to share certain elements of their networks with new entrants: both those proprietary elements "necessary" to the new entrants' ability to provide local telephone service and those nonproprietary elements without which the new entrants' ability to provide service would be impaired.[49] The FCC issued a rule that specified a list of elements—in particular, the very elements that the new entrants had requested in the rulemaking process.[50] But the agency never defined the words "necessary" and "impair" to contain any "limiting standard" that would prevent new entrants from simply obtaining any element they requested.[51] The Court therefore invalidated the regulation and remanded it to the FCC.

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40 *Id.* at 651–52.

41 *Id.* at 653.

42 *Id.* at 653–54.

43 *Id.* at 660 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

44 *Id.*

45 *Id.* at 661.

46 525 U.S. 366 (1999).

47 *Id.* at 388. Although the Court held the interpretation unreasonable, it never expressly stated that the interpretation was unreasonable under *Chevron* Step Two. For a discussion of Step Two, see *infra* notes 93–95 and accompanying text.

48 *See Iowa Utils. Bd.*, 525 U.S. at 388–89.

49 *See id.* at 388.

50 *Id.* at 387–88.

51 *Id.* For a more detailed discussion of this case, see Bressman, *supra* note 4, at 1431–38.

C. *Ashwander*: Selecting Between Constitutional Law and Administrative Law

In *Ashwander v. TVA*, Justice Brandeis identified a "series of rules" that the Court had developed "for its own governance in the cases confessedly within its jurisdiction . . . under which it ha[d] avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[52] Perhaps the most prominent of these rules is the prohibition on construing statutes as unconstitutional or as raising a constitutional question. Those rules also include the refusal to decide constitutional questions in the absence of a concrete dispute between parties, in an advisory opinion, in a manner broader than necessary, or in the presence of an adequate nonconstitutional ground.[53] The rules of judicial restraint primarily recognize the Court's reluctance to invalidate congressional statutes unless absolutely necessary to decide a case.[54] They apply as much in the law now as when Justice Brandeis described them.[55]

These rules of judicial restraint support a shift from constitutional law to administrative law to require administrative standards. In a sense, administrative law provides an adequate nonconstitutional ground for addressing the delegation issue. It avoids the need to revise constitutional doctrine or implicate the constitutionality of a statutory delegation in the course of seeking an administrative cure to the problem of ungnided administrative discretion. But administrative law is an adequate nonconstitutional ground not simply because it is a more restrained tool for addressing the delegation issue. Existing principles of administrative law provide a theoretical foundation and a practical framework for the application of an administrative-standards

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52 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

53 *Id.* at 346–47.

54 *Id.*

55 This is particularly true of the constitutional avoidance canon. *See, e.g.*, INS v. St. Cyr, 121 S. Ct. 2271, 2279 & n.12 (2001) (embracing the constitutional avoidance canon and citing *Ashwander*); Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001); *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997) (collecting cases). The Supreme Court has even applied the constitutional avoidance canon in a nondelegation case. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion) (interpreting Occupational Safety and Health Act to require a showing of significant risk prior to regulation in order to avoid a nondelegation problem); *see also* Sunstein, *supra* note 4, at 340–41, 344–50 (encouraging courts to allow agencies to "discipline their own discretion" to avoid nondelegation problems in lieu of invalidating statutes). *But see* Bressman, *supra* note 4, at 1414–15 (arguing that the constitutional avoidance canon has limited utility with respect to the majority of statutory delegations because those delegations fairly reflect all the limits that Congress intended to provide); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001) (arguing that the constitutional avoidance canon often conflicts with legislative supremacy and executive interpretive authority); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71 (arguing that the Court should abandon the constitutional avoidance canon).

requirement. Administrative law is a more effective tool for addressing the delegation issue.

1. *A Theoretical Foundation*

The democratic values that an administrative-standards requirement would serve—including accountability, fairness, rationality, and regularity—are important to administrative lawmaking as a general matter.[56] Administrative procedures, particularly those procedures meant to generate policy that carries the force of law, are intended to promote fairness and deliberation[57] and enhance oversight.[58] A bedrock principle of judicial review directs courts to uphold agency action only on the actual rationale rather than one supplied by the court or by the agency after the fact.[59] The arbitrary and capricious test itself requires agencies to explain the basis for their rules.[60] It is difficult to imagine that some of the hardest choices in law—like selecting a method for measuring quality-of-life effects—would support an exception to these foundational principles. Requiring administrative standards under administrative law would ensure that they do not.

But there is an even more specific relationship between administrative standards and administrative law. An administrative-standards requirement resonates with and rounds out modern administrative law principles governing judicial review of administrative action. This

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56 For a detailed discussion of the democratic values that an administrative standards requirement would serve, see Bressman, *supra* note 4, at 1422–31.

57 *See* United States v. Mead Corp., 121 S. Ct. 2164, 2172 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996) (stating that "notice-and-comment procedures of the Administrative Procedure Act [are] designed to assure due deliberation"); *see also* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 79 nn.226–27 (1998) (noting that the APA facilitates deliberative agency decisions); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 660–62 (1996) (noting that the APA's procedural safegnards serve as a substitute for structural protections of legislative process and promote fair and informed administrative decisionmaking); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975) (noting that APA procedures are "designed to promote the accuracy, rationality, and reviewability of agency application of legislative directives").

58 *See, e.g.*, Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 274 (1987) (noting that administrative procedures improve political oversight and thus prevent agency officials from making self-interested decisions); *cf.* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 28–53 (2000) (argning that the APA insulates agencies from congressional oversight and enables them to regulate in the public interest).

59 *See* SEC v. Chenery Corp., 318 U.S. 80, 87–88 (1943).

60 *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must . . . articulate a satisfactory explanation for its action . . . .").

relationship becomes clear when the administrative-standards requirement is understood specifically in terms of judicial review. Put simply, an administrative-standards requirement recognizes that courts owe Congress a greater degree of leeway to formulate delegations under constitutional law than they owe agencies to exercise those delegations under administrative law. This conclusion proceeds directly from the practical recognition, acknowledged most fully by Justice Scalia in *Mistretta v. United States*,[61] that Congress needs room to fix the limits of delegation "'according to common sense and the inherent necessities of [government].'"[62] Once courts permit Congress some latitude to write vague delegations, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."[63] Courts should not "second-gness" Congress on an issue that involves consideration of factors "both multifarious and (in the nonpartisan sense) highly political."[64] That is not to say that Congress always has good motives for delegating. But courts must give Congress the benefit of the doubt if we are to have modern government. Thus, they should respect Congress's determination and relinquishment of authority.[65]

At the same time, courts must insist that *some* governmental actor take responsibility for the hard choices of regulatory policy. Responsibility in this context means articulating the standards that direct and cabin administrative discretion. In a sense, Congress implicitly delegates that responsibility to agencies as part of their broader regulatory authority.[66] If courts allow Congress implicitly to delegate such re-

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61 488 U.S. 361 (1989).

62 *Id.* at 416 (Scalia, J., dissenting) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (Taft, C.J.)); *see also id.* at 372 (Blackmun, J.) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 725–26 (1997) ("No legislator, however prescient, can predict all the twists and turns that lie ahead for his or her handiwork. The path of a law depends on diverse and unknowable factors, and no one seriously argues the regulation of social problems can be reduced to a pellucid and all-encompassing code."); Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 118 (1994) (observing that "members of Congress cannot possibly envision the myriad of real-world situations to which the statute might apply").

63 *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

64 *Id.* at 416 (Scalia, J., dissenting).

65 *Cf.* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 496 (stating that "Justice Scalia accepts broad delegations only because he cannot imagine a judicially manageable standard for telling the good from the bad").

66 Although the Supreme Court's decision in *American Trucking* deprives Congress of the ability to delegate authority for specifying the constitutionally requisite intelligible principle, as explained *infra* Part II.A, it leaves much room for Congress to delegate authority to set the standards that do the real work in guiding and limiting administrative discretion.

sponsibility, they must require agencies expressly to assume it. Otherwise, there is no assurance of accountable, fair, and rational lawmaking at any level of government.

This understanding of agency self-discipline connects it to some of administrative law's most important cases. Perhaps the first such case is *Citizens to Preserve Overton Park, Inc. v. Volpe*,[67] in which the Court adopted the so-called "hard-look" doctrine for reviewing administrative policy decisions. *Overton Park* directs courts to consider, as part of arbitrary and capricious review, whether administrative policy decisions are "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[68] The case concerned a decision by the Secretary of Transportation to authorize federal funding for construction of a highway through a public park.[69] The Secretary approved the funding without providing a statement of his actual findings on "why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park."[70] The lower court upheld the Secretary's action on the basis of litigation affidavits explaining his reasoning, but the Court remanded for review of the whole administrative record.[71]

The Court later expanded the language in *Overton Park* into a full-blown requirement of an administrative explanation for notice and comment rulemaking. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[72] the Court instructed reviewing courts to consider whether

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[73]

In order for the reviewing court to make such determinations, an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[74] *State Farm* concerned a National Highway Traffic Safety Ad-

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67 401 U.S. 402 (1971).

68 *Id.* at 416.

69 *Id.* at 406.

70 *Id.* at 408.

71 *Id.* at 419–20.

72 463 U.S. 29 (1983).

73 *Id.* at 43.

74 *Id.* (quotations omitted). A reviewing court "should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (citing SEC v. Chenery Corp., 322 U.S. 194, 196 (1947)). Agencies should not attempt to make up for such deficiencies in post hoc litigating state-

ministration regulation rescinding a prior rule that required automobile manufacturers to install either passive seat belts or air bags in cars.[75] The Court held that the agency had failed to adequately explain why it dismissed the passive-belt requirement and why it failed to consider an air-bags-only requirement.[76]

Overton Park and *State Farm* speak to the relationship between congressional delegation and agency discretion. The cases require agencies exercising broad grants of policymaking power to show that they have used their power in an open, regular, and rational fashion.[77] Otherwise, there is no protection (or recourse) against "arbitrary and capricious" lawmaking. Indeed, the Court in both of the cases intimated a concern that the lawmaking reflected ideological or private interests at public expense—one of the central concerns that an administrative standards requirement would address.[78] In *Overton Park*, the agency's interest was in promoting rapid transit while the public's interest was in preserving environmental quality.[79] In *State Farm*, the

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ments. *See Overton Park*, 401 U.S. at 419 (rejecting litigation affidavits as "'post hoc' rationalizations . . . which have traditionally been found to be an inadequate basis for review") (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962), and citing SEC v. Chenery Corp., 318 U.S. 80, 87 (1943)).

75 *See State Farm*, 463 U.S. at 37–38.

76 *See id.* at 46–57.

77 *See* Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 270–72 (arguing that hard-look judicial review strengthens democratic process and encourages agency accountability); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 811–26 (arguing that hard-look review encourages deliberation among political branches and democratic participation of citizenry); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 629–35 (1997) (arguing that hard-look doctrine "requires the reasoned elaboration of regulatory decisions" and thus provides valuable check on administrative decisionmaking process); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 514, 520–22 (1997) (arguing that searching judicial review ensures a thoughtful and reasoned administrative decisionmaking process); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 763 (1977) (arguing that judicial review serves an important "corrective role" and encourages reasoned examination in administrative decisionmaking); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985) (noting that "without the procedural and substantive requirements of the hard-look doctrine, the governing values may be subverted in the enforcement process through the domination of powerful private groups").

78 *See* Bressman, *supra* note 4, at 1427–31.

79 *See* Peter L. Strauss, *Revisiting* Overton Park: *Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1261–1319 (1992) (challenging the conventional view that *Overton Park* involved a competition between pro-highway ideology, on the one hand, and environmental integrity, on the other, and describing this view as an unduly constrained understanding of the complex interests at stake).

automobile industry's interest was in protecting itself while the public's interest was in increasing highway safety.[80]

An administrative-standards requirement fits naturally with *Overton Park* and *State Farm*. The requirement directs courts to consider under administrative law whether agencies have adequately articulated the standards that limit and guide their policy choices. In the absence of such standards, agency rules are arbitrary and capricious because they lack a demonstrable connection to some determinate theory of the statutes they implement. Put differently, standardless agency rules do not reflect the agency's entire regulatory rationale or chain of logic. They are "fatally incomplete."[81] In this sense, the requirement that agencies articulate standards may be viewed as a subset of the requirement that agencies explain the basis of their decisions.[82] This is how the D.C. Circuit in *Pearson v. Shalala* appears to have understood the requirement.[83]

An administrative-standards requirement is also consistent with *Chevron*.[84] In *Chevron*, the Court recognized the ability of Congress to delegate policymaking authority implicitly as well as explicitly—that is, by writing ambiguous statutory language.[85] It also held that courts should respect "reasonable" exercises of that authority—in other words, "reasonable" administrative interpretations of ambiguous statutory provisions.[86] The Court wrote:

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular

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80 *See* Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 206 (identifying the concern that the agency rescinded its passive restraints rule simply because the industry chose an ineffective means of compliance, and the more general concern that "in the implementation process, the regulated industries will be permitted to obtain a victory in the administrative process that could not be won in the legislative process").

81 Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir.), *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *and rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

82 This characterization rescues the administrative standards requirement from the charge that it constitutes an additional procedural requirement in violation of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

83 Pearson v. Shalala, 164 F.3d 650, 653–54 (D.C. Cir. 1999).

84 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

85 *See id.* at 843–44.

86 *Id.* at 844.

> question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[87]

Thus, *Chevron* established a two-step test for reviewing agency interpretations of statutory provisions. Courts first must determine whether Congress has left the provision at issue ambiguous—that is, whether it has left a gap for the agency to fill. If so, courts must defer to any "reasonable" administrative construction.[88] The case concerned an EPA interpretation of the phrase "stationary source" in the Clean Air Act.[89] The Act required "nonattainment" states "to establish a permit program regulating 'new or modified major stationary sources' of air pollution."[90] The agency interpreted "stationary source" to mean an entire pollution-emitting plant rather than individual pollution sources within a plant.[91] Finding the statutory phrase ambiguous, the Court deferred to the agency's interpretation.[92]

An administrative-standards requirement is consistent with *Chevron*, although not in an entirely obvious fashion. At first glance, the requirement actually seems to conflict with *Chevron*. *Chevron* addresses the relationship between (implicit) congressional delegations of policymaking authority and administrative exercises of that authority, but suggests deference rather than hard-look scrutiny. *Chevron* deference, however, is not always as deferential as it might appear. While far from a "doctrine of desperation,"[93] it has certain limitations. Relevant to the present discussion, some lower courts and commentators have interpreted the "reasonableness" requirement of *Chevron* Step Two to encompass or mirror the *Overton Park/State Farm* explanation requirement—that is, an interpretation is not "reasonable" under Step Two unless well explained.[94]

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87 *Id.* at 843–44 (citation and footnote omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1994)).

88 *Id.*

89 *Id.* at 840.

90 *Id.* (quoting Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 129(b), § 172(b)(6), 91 Stat. 685, 747).

91 *Id.*

92 *Id.* at 865–66.

93 INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring).

94 *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1263–66 (1997) (collecting and analyzing D.C. Circuit cases); Seidenfeld, *supra* note 62, at 96 (noting that deferential and active courts alike rarely hold agency decisions unreasonable under Step Two); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2104–05 (1990) (recognizing latitude on the question of reasonableness); *see also* Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1378–79 (1997) (describing Professor Levin's reconceptualized *Chevron* test as asking: "is the agency's interpretation reasonable, taking into account everything that is relevant to statutory interpretation in the modern administrative state?").

The Supreme Court, for its part, has not had much to say about the "reasonableness" requirement of Step Two. Indeed, it had never found an agency interpretation "unreasonable" under that step until recently.[95] But what little the Court has said can be understood to suggest a link between *Chevron* and an administrative-standards requirement. As described above,[96] the Court in *Iowa Utilities Board* found "unreasonable" an agency interpretation that failed to contain any administrative "limiting standard, rationally related to the goals of the Act,"[97] and that effectively allowed one interested party to define regulatory requirements.[98]

Iowa Utilities Board and cases like *Pearson v. Shalala* effectively are counterparts. Both require administrative standards to constrain broad delegations of administrative discretion. While *Iowa Utilities Board* demands them for agency interpretations of ambiguous statutory language,[99] *Pearson* demands them for freestanding policy decisions.[100] While the former requires them under the *Chevron* test,[101] the latter requires them under the arbitrary and capricious test.[102] Together they speak to the necessity of administrative standards to render agency lawmaking, whether interpreting an ambiguous statutory phrase or issuing freestanding policy, reasonable under administrative law. Together with *Overton Park*, *State Farm*, and *Chevron*, they require agencies to make law, whether interpreting ambiguous statutory provisions or issuing freestanding policies, in a responsible and rational fashion.

2. *Practical Guidance*

Once administrative standards are understood exclusively in terms of administrative discretion and divorced from issues of constitutional responsibility for lawmaking, it is possible to describe them more precisely. Administrative standards serve three discretion-related functions. First, they "confine" the scope of administrative dis-

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95 In all prior cases reaching *Chevron* Step Two, the Supreme Court has deferred to the agency interpretation. *See* Levin, *supra* note 94, at 1261 (noting that the Court had never invalidated an agency interpretation under *Chevron* Step Two); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 361 (1994) (finding an increased tendency by the Court to affirm under Step Two rather than Step One).

96 *See supra* notes 46–51 and accompanying text.

97 AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388 (1999). Although the Court held the interpretation unreasonable and relied on *Chevron* in its opinion, it never expressly stated that the interpretation was unreasonable under *Chevron* Step Two.

98 *See id.* at 388–89.

99 *See id.*

100 *See* Pearson v. Shalala, 164 F.3d 650, 660 (D.C. Cir. 1999); *supra* notes 42–44 and accompanying text.

101 *See Iowa Utils. Bd.*, 525 U.S. at 388–89.

102 *See Pearson*, 164 F.3d at 660.

cretion within finite boundaries.[103] They discourage agencies from arbitrarily straying outside the parameters they set for themselves. Second, administrative standards "structure" the operation of administrative discretion within those parameters.[104] They prevent agencies from acting inconsistently and irrationally across subjects in their reach. Third, and most substantively, administrative standards can be said to rationalize the broad public purposes of the statutes they implement. They translate vague expressions of congressional intent into concrete principles for determining regulatory policy.

Administrative standards may come in a variety of forms, but two types can be discerned from the functions they serve and the administrative law cases in which courts have found them missing. One might be called "decision rules" and the other "operating rules." Decision rules prescribe the criteria or formula that an agency considers in setting health and safety standards, for example, or otherwise regulating risk. Operating rules define the factors that an agency considers in awarding benefits, imposing burdens, or providing exemptions under a regulatory scheme.

The need for decision rules might be understood to arise when Congress fails to resolve the issue of how to measure health or safety effects, including the particularly contentious issue of whether cost-benefit analysis is appropriate. *American Trucking* itself is an example.[105] Consider also then-Justice Rehnquist's observation in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* ("*Benzene Case*") that in writing the Occupational Safety and Health Act, Congress delegated to the Secretary of Labor the "most difficult" question of "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths."[106] There was no doubt that this question required some resolution. In the *Benzene Case*, the plurality itself supplied the missing policy[107]—a strategy of questionable validity with respect to many (perhaps most) delegations.[108] The administrative agency instead could be required to do the same under administrative law.

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103 *See* DAVIS, *supra* note 1, at 55 ("By confining is meant fixing the boundaries and keeping discretion within them.").

104 *Id.* at 97 ("The purpose of structuring is to control the manner of the exercise of discretionary power . . . .").

105 In *American Trucking*, Congress had not resolved the issue of how to measure air pollution effects, although it had ruled out cost-benefit analysis. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 464–69 (2001).

106 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring).

107 *See id.* (Rehnquist, J., concurring).

108 *See* Bressman, *supra* note 4, at 1414–15 (arguing that most delegations fairly reflect all of the limits that Congress intended to provide, and therefore courts act beyond the bounds of their legitimate interpretive authority when supplying more limits); Kelley, *supra* note 55, at 896–98 (arguing on separation-of-powers grounds that courts should require

The need for operating rules might be understood to arise when Congress establishes a regulatory regime without defining the key terms for imposing burdens, awarding benefits, or providing exemptions, such as in *Iowa Utilities Board* and *Pearson*.[109] But a qualification is necessary: agencies are not required to specify every vague directive or define every vague term but only those that confer enough discretion to raise cause for concern. This is an admittedly murky line and not one the Court is willing to draw at the congressional level. But the difficulty of line-drawing cannot be an acceptable excuse for abdication at the administrative level because the consequence would be undemocratic governance. Agencies (and courts) must make a decision and, to do so, must resort to common sense. As a general matter, the "degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[110] Thus, it might be said that while the EPA need not specify "the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators [under the Clean Air Act], it must provide substantial guidance on setting air standards that affect the entire national economy."[111]

Several other qualifications can be seen to flow from the arbitrary and capricious test itself. First, agencies need not issue standards in an initial general regulation. That is, agencies need not produce standards in advance of their substantive policy decisions. The touchstone of the arbitrary and capricious test is rationality.[112] An agency would enable parties (and courts) to judge the rationality of a policy decision as long as that agency issued standards simultaneously with its decision—for example, in the course of setting air quality standards or listing network elements. Second, agencies need not provide standards in a one-size-fits-all fashion. Under the arbitrary and capricious test,[113] an agency could apply different standards to different problems that a statute addresses if it explained its decision to do so. Indeed, an agency might open itself to charges of arbitrariness if it failed to tailor its standards to particular problems where appropri-

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agencies to supply narrowing constructions of broad delegations rather than providing their own). *But see* Sunstein, *supra* note 4, at 380 (encouraging courts as well as the EPA to narrowly construe broad delegations to avoid a nondelegation problem rather than invalidate statutes).

109 *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388 (1999); Pearson v. Shalala, 164 F.3d 650, 653–54 (D.C. Cir. 1999).

110 *Am. Trucking*, 531 U.S. at 475.

111 *Id.* (citation omitted).

112 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).

113 *Id.* at 41–42 (holding that the arbitrary and capricious test permits an agency to depart from settled policy by amending or rescinding a rule if the agency provides an explicit justification for the change).

ate.[114] Finally, agencies could amend particular standards as circumstances warrant. The arbitrary and capricious test permits an agency to alter its policies and the criteria on which those policies are based provided it adequately explains the change.[115]

II
AMERICAN TRUCKING

Although many will read *American Trucking* to preclude the possibility of requiring administrative standards to discipline delegation, the case is better understood as an application of *Ashwander* with a twist. The Court reprimanded Judge Williams for reinterpreting constitutional law to require administrative standards but hinted that the lower court could rely on administrative law for that purpose. Thus, the Court should be understood as shifting the delegation inquiry from constitutional law to administrative law—consistent with *Ashwander*, but also fulfilling its own need to lecture other governmental actors on the proper interpretation of constitutional law.

A. The Case

To recount briefly, the Clean Air Act directed the EPA to set NAAQS at the level that, with "an adequate margin of safety,"[116] are "requisite to protect the public health."[117] The EPA revised the NAAQS for ozone without ever articulating the exact factors on which it based its decision.[118] The D.C. Circuit held that the EPA had promulgated the ozone NAAQS pursuant to a standardless delegation of lawmaking authority in violation of the nondelegation doctrine.[119] The court invalidated the regulation and remanded it to the EPA for articulation of "determinate criteri[a] for drawing lines"[120] between permissible and impermissible levels of air pollution.

The Supreme Court reversed in an opinion written by Justice Scalia.[121] The Court rejected the lower court's revision of the

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114 *See, e.g.*, Leather Indus., Inc. v. EPA, 40 F.3d 392, 402–05 (D.C. Cir. 1994) (holding that arbitrary and capricious review prevents agencies from relying on models or tests that lack a rational relationship to their specific applications).

115 *Id.*

116 Clean Air Act, 42 U.S.C. § 7409(b)(1) (1994).

117 *Id.*

118 *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1036 (D.C. Cir.), *modified in part and reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), *and rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

119 *Id.* at 1038.

120 *Id.* at 1034.

121 The Court first affirmed the D.C. Circuit's determination that the Clean Air Act prohibits the EPA from considering compliance costs because "the first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001). Noting that it has

nondelegation doctrine to require the EPA to supply criteria constraining its discretion.[122] The Court began its analysis with the text of Article I, Section 1 of the Constitution, which vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States."[123] The Court stated that "[t]his text permits no delegation of those powers,"[124] and for this reason, "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"[125] Thus, the Court continued, an agency cannot "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[126] Moreover, the Court reasoned that "[t]he 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."[127] According to the Court, "[t]he 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."[128] The Court added that "[w]hether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer."[129]

Having denied agencies the power to cure deficiencies in delegating statutes, the Court nevertheless determined that the Clean Air Act was *not* unconstitutional because Congress in fact had inserted an "intelligible principle" limiting the EPA's discretion.[130] The Clean Air Act employed the word "requisite," which "mean[s] sufficient, but not more than necessary."[131] The Court found this principle "strikingly similar" to the ones that the Court had approved in two previous cases.[132] In *Touby v. United States*, the Court upheld a statute authorizing the Attorney General to designate a drug as a controlled substance

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"refused to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted," *id.* at 467, the Court looked for a clear "textual commitment" of authorization to consider costs in setting the NAAQS and found none, *id.* at 468. The only language arguably supporting consideration of costs would have been too modest a way for Congress to "alter the fundamental details of a regulatory scheme." *Id.* Congress, the Court commented, "does not hide elephants in mouseholes." *Id.*

122 *Id.* at 472.

123 *Id.* (quoting U.S. CONST. art. I, § 1).

124 *Id.* (citing Loving v. United States, 517 U.S. 748, 771 (1996)).

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

126 *Id.*

127 *Id.* at 473.

128 *Id.*

129 *Id.*

130 *Id.* at 474.

131 *Id.* at 473.

132 *Id.*

as "'necessary to avoid an imminent hazard to the public safety.'"[133] In the *Benzene Case*, the Court upheld a statute authorizing the Occupational Safety and Health Administration 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.'"[134]

Indeed, the Court determined that the Clean Air Act principles were "well within the outer limits of our nondelegation precedents."[135] As the Court noted, it had only twice found an intelligible principle lacking in a statutory delegation: one of those delegations contained "literally no guidance for the exercise of discretion,"[136] and the other "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"[137] On the other side, the Court upheld numerous delegations authorizing regulations that are "fair and equitable" or "in the public interest."[138] "In short," the Court observed, "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[139]

The Court conceded that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred" and that the Clean Air Act confers sweeping authority to set air quality standards.[140] The Court stated, however, that it had never insisted, "as the Court of Appeals did here, that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[141] For example, the Court in *Touby* "did not require the statute to decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or even—most relevant here—how 'hazardous' was too hazardous."[142] The reality, the Court noted, is that "'a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.'"[143] It concluded that the

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133 Touby v. United States, 500 U.S. 160, 163 (1991) (quoting Controlled Substances Act § 201(h), 21 U.S.C. § 811(h) (1994)).

134 Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 612 (1980) (quoting Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b)(5) (1994)).

135 *Am. Trucking*, 531 U.S. at 474.

136 *Id.* (referring to Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935)).

137 *Id.* (referring to A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

138 *Id.* (discussing Yakus v. United States, 321 U.S. 414, 420 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932)).

139 *Id.* at 474–75 (quoting Mistretta v. United States, 448 U.S. 361, 416 (1989)).

140 *Id.* at 475.

141 *Id.* (quoting Am. Trucking Ass'n v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

142 *Id.* (citing Touby v. United States, 500 U.S. 160, 165–67 (1991)).

143 *Id.* (quoting Mistretta v. United States, 448 U.S. 361, 417 (1989)).

NAAQS delegation "fits comfortably within the scope of discretion permitted by our precedent."[144]

The Court therefore reversed "the judgment of the Court of Appeals remanding for reinterpretation that would avoid a supposed delegation of legislative power."[145] At the same time, the Court stated that "[i]t will remain for the Court of Appeals—on the remand that we direct for other reasons—to dispose of any other preserved challenge to the NAAQS under the judicial-review provisions contained in 42 U.S.C. § 7607(d)(9)."[146] The Court went on to invalidate and remand the revised ozone NAAQS because it contained an unlawful policy concerning implementation.[147]

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144 *Id.* at 476.

145 *Id.*

146 *Id.*

147 *See id.* at 481–86. The Court held that the implementation policy constituted an unlawful interpretation of the statutory nonattainment implementation provisions under *Chevron*. *Id.* at 481. Although the Court found the two statutory subparts pertaining to ozone nonattainment implementation "to some extent ambiguous," it refused to defer to the EPA's interpretation. *Id.* at 481, 484. According to the Court, the EPA's interpretation "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear," *id.* at 481, because it rendered nugatory the restrictions in one of the subparts, *see id.* at 481–86. It remanded the policy to the EPA for "a reasonable interpretation of the nonattainment implementation provisions insofar as they apply to revised ozone NAAQS." *Id.* at 486.

Before addressing the lawfulness of the implementation policy, the Court first had determined that the court of appeals had jurisdiction to reach that issue. *See id.* at 477–80. The justiciability issue arose because the EPA originally proposed the policy on a preliminary basis when it proposed the revised ozone NAAQS. *See id.* at 477. In response to comments on the preliminary interpretation and a presidential memorandum prescribing implementation procedures, the EPA then revised its policy and published it in the explanatory preamble to the final ozone NAAQS under the heading "Final decision on the primary standard." *Id.* at 477–80. The Court held that the policy constituted final agency action. *See id.* at 480.

Two Justices filed concurring statements on the delegation issue. Justice Thomas agreed with the majority that the Clean Air Act's "directive to the agency is no less an 'intelligible principle' than a host of other directives that we have approved." *Id.* at 486 (Thomas, J., concurring). Nonetheless, he recorded his willingness "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.* at 487 (Thomas, J., concurring). "I am not convinced," he offered, "that the intelligible principle doctrine serves to prevent all cessions of legislative power," which, in his view, the text of Article I demands. *Id.* (Thomas, J., concurring). Justice Stevens (with whom Justice Souter joined), agreed with the majority's result but took issue with the majority's analysis of whether the EPA had exercised "legislative power." *Id.* at 487–88 (Stevens, J., concurring in part and concurring in the judgment). In his view, it would have been "wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power,'" *id.* at 488 (Stevens, J., concurring in part and concurring in the judgment), rather than "pretend[ing]" that such rulemaking is not, *id.* (Stevens, J., concurring in part and concurring in the judgment). Thus, he would have conceded that the EPA exercised "legislative power" but that the agency had sufficient statutory constraints on that power to preclude a nondelegation problem. *Id.* at 488–89 (Stevens, J., concurring in part and concurring in the judgment).

B. The Case in Context

One reading of the Court's opinion is that it precludes reliance on administrative standards to do the work of congressional standards for constitutional purposes. In other words, it holds that administrative standards cannot serve in place of congressional standards. The difficulty with this reading is that the opinion holds no such thing: the Court's discussion of administrative standards is dictum. The opinion merely holds that the Clean Air Act is not unconstitutional because it contains the requisite intelligible principles, and that Judge Williams therefore was wrong to seek any constitutional fix.

A more significant difficulty with a strong reading of the discussion on administrative standards is that such a reading, by implication, tends to overstate the utility of congressional standards. Congressional standards, even if constitutionally sufficient, are not adequate to confine administrative discretion. Nor are they able to promote congressional accountability on the hard choices in the statutes they implement because they do not actually make those choices. The Court did not disagree. Despite its insistence that Congress provide some intelligible principle in delegating statutes, the Court conceded that the intelligible principles Congress had included in the Clean Air Act were no better (though no worse) than the anemic, but constitutionally acceptable, standards that Congress had included in other statutes.

There is a better way to read the case, one that avoids these difficulties. The Court's dictum can be understood as a warning to lower courts on the limits of their authority to revise Supreme Court precedent—that is, as imparting a constitutional law lesson rather than a substantive rejection of administrative standards. The Court's holding, while upholding the purported congressional standards under constitutional law, can be viewed as allowing room for supplemental administrative standards under administrative law—that is, as shifting from constitutional law to administrative law rather than as resting content with constitutional law for addressing the problem of administrative discretion.

Justice Breyer agreed with the majority on the delegation issue but disagreed with its reasoning on the cost consideration issue. *See id.* at 490–96 (Breyer, J., concurring in part and concurring in the judgment). He would not have required a clear statement from Congress authorizing the agency to consider costs. Rather, he stated, "we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation." *Id.* at 490 (Breyer, J., concurring in part and concurring in the judgment).

1. *The Constitutional Law Lesson*

The Court's odd invocation of "legislative power" is the first indication that it was more interested in tutoring or lecturing Judge Williams on the proper understanding of constitutional law than in formulating a constitutional holding.[148] The Court's approach resembles a law professor's effort to identify an inconsistency in a student's reasoning. The Court noted that Judge Williams had committed a logical error in asserting that an agency has the power to make its own power constitutional. In the absence of a constitutional transfer of authority, the agency simply possesses no authority at all.[149]

The Court's invocation of legislative power also recalls other cases that contain basic civics lessons on the scope of congressional authority. In cases like *INS v. Chadha*[150] (the legislative veto case) and *Clinton v. City of New York*[151] (the line-item veto case), the Court also relied on notions of legislative power. Those cases prohibit Congress from delegating law-"repealing" or law-"amending" power to a subset of itself or the executive branch. To delegate such power would violate the constitutional lawmaking requirements of bicameralism and presentment. Similarly, Congress cannot delegate a kind of law-"ratifying" power to an agency.[152] Nor, the Court instructed Judge Williams, can a judge require an agency to assume this power.

The Court's statement that agencies lack the power to determine for themselves whether a statute delegates "legislative power"[153] is further evidence that the Court was rebuffing Judge Williams for exceeding his role by directing agencies to exceed theirs. That statement invokes cases in which the Court lectured other governmental actors

148 Rather than pedagogy, the Court's formalism might be viewed as hegemony. *See* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 70 (describing *Dickerson v. United States*, 530 U.S. 428 (2000), as "a relatively small step in the Court's recent insistence on judicial hegemony with regard to constitutional interpretation"); Laura S. Fitzgerald, *Beyond* Marbury*: Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407, 408–10 (1999) (noting the Court's self-aggrandizing tendency in constitutional interpretation).

149 By contrast, courts always have jurisdiction to determine their own jurisdiction.

150 462 U.S. 919 (1983) (invalidating statute authorizing one House of Congress, by resolution, to invalidate executive branch deportation decisions, reasoning that the action of a House is "legislative" and thus subject to the constitutional requirements of bicameralism and presentment).

151 524 U.S. 417 (1998) (invalidating Line Item Veto Act, which authorized the President to "cancel" certain items in certain bills as a violation of the Presentment Clause).

152 On this reading, the power to ratify law—that is, the power to make law exist—would be different than the power to make law operational or effective by determining, for example, whether a factual contingency exists. The contingency theory of delegation was one of the earliest theories approved by the Court. *See, e.g.*, Field v. Clark, 143 U.S. 649 (1892) (upholding delegation to the President to suspend favorable tariff treatment for nations that imposed duties on American products if he determined that those duties were "unequal and reasonable").

153 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

for usurping its authority to interpret the Constitution. In cases like *City of Boerne v. Flores*[154] and *Dickerson v. United States*,[155] the Court invalidated congressional efforts to encroach on the Court's *Marbury v. Madison* prerogative to say what the law is. *Boerne* involved Congress's attempt to reinstate the compelling-interest test for generally applicable laws that substantially burden religious exercise.[156] The Court had previously rejected that test as an interpretation of the Free Exercise Clause in *Employment Division, Department of Human Services v. Smith*.[157] *Dickerson* involved Congress's attempt to make voluntariness the test for admissibility of custodial confessions.[158] The Court had previously rejected that test as an interpretation of the Fifth Amendment in *Miranda v. Arizona*.[159]

Of course, there is a difference that seems to undercut the analogy. *Boerne* and *Dickerson* involved what the Court perceived as deliberate attempts to undo its constitutional interpretations. In this case, Judge Williams was directing the agency to do what the Court instead might have done: provide a narrowing construction of the statute to avoid a nondelegation problem.[160] But the very act of supplying a narrowing construction in such circumstances—even a construction that is consistent with one that the Court itself would have chosen—nonetheless could be seen as an encroachment on judicial interpretive authority. It would be *Chevron* with a vengeance.

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154 521 U.S. 507 (1997).

155 530 U.S. 428 (2000).

156 *See Boerne*, 521 U.S. at 514–16 (invalidating the Religious Freedom Restoration Act of 1993 (RFRA), which required federal and state governments to show a compelling interest for generally applicable laws that substantially burden religious exercise, as unnecessary and disproportionate to remedy or prevent violations of the Free Exercise Clause under Section 5 of the Fourteenth Amendment, and thus as an impermissible attempt effectively to overrule *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), in which the Court held that the Free Exercise Clause does not require any such compelling interest).

157 *See id.* at 514 (citing Employment Div., Dept. of Human Servs. v. Smith, 494 U.S. 872, 884–85 (1990)).

158 *Dickerson*, 530 U.S. at 432 (invalidating 18 U.S.C. § 3501, under which a suspect's statements made during a custodial investigation were admissible in evidence so long as they were made voluntarily, as an impermissible attempt to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in which the Court held that certain warnings must be given before such statements could be admitted in evidence).

159 *Id.* at 433–37. Other cases that exhibit a similar chastising of encroachment on judicial power include *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), striking down a retroactive congressional correction of a judicial interpretation of a federal statute's statute of limitations, and *Agostini v. Felton*, 521 U.S. 203, 237 (1997), scolding a lower court for construing Supreme Court cases as implicitly overruling precedent. This by no means is an exhaustive list.

160 *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) (plurality opinion) (applying a narrowing construction of the Occupational Safety and Health Act to require a showing of significant risk prior to regulation in order to avoid a nondelegation problem).

In *Chevron*, the Court held that agencies and not courts possess the power to interpret ambiguous language in regulatory statutes.[161] Judge Williams relied on *Chevron* in concluding that agencies may use their interpretive power to narrow a statutory delegation in order to avoid unconstitutionality.[162] Justice Scalia, for one, views *Chevron* as a departure from the general rule that courts interpret statutes.[163] He would not suffer lightly the further suggestion that agencies possess the power to interpret statutes to avoid unconstitutionality. Judge Williams, then, was wrong: courts—and not agencies—should be the ones to adopt narrowing interpretations of regulatory statutes when such interpretations are required to avoid unconstitutionality.

Further indication of the concern for usurpation of judicial interpretive authority comes through an issue the Court did not discuss—how *American Trucking* fits with the line of cases in which the Court held that agencies *must* interpret their authority narrowly to avoid raising siguificant constitutional questions.[164] For example, the Court recently invalidated the United States Army Corps's interpretation extending the Clean Water Act to purely intrastate waters used as habitat for migratory birds, because that interpretation pushed the limits of congressional authority under the Commerce Clause.[165] Although the Court is willing to acknowledge that Congress implicitly delegates the power to fill in the gaps of complex regulatory provisions when it writes such provisions ambiguously, the Court is unwilling to find that Congress so casually delegates the power to push constitutional boundaries.[166] The *American Trucking* Court did not explain why agencies have an obligation to interpret their authority narrowly to avoid raising constitutional questions, but lack a similar

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161 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

162 *See* Am. Trucking Ass'ns v. EPA, 195 F.3d 4, 8 (D.C. Cir. 1999), *aff'd in part and rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

163 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513–16; *see also* Manning, *supra* note 62, at 700–01, 711–14 (describing the use of textualism to constrain the delegation of interpretive authority to administrative agencies).

164 The Court repeatedly has held that, without express congressional authorization, agencies may not interpret their authority expansively so as to raise constitutional questions. *See, e.g.*, Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 172 (2001) (rejecting agency rule invoking the outer limits of Congress's power under the Commerce Clause); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (rejecting agency interpretation raising First Amendment issue); NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979) (rejecting agency's exercise of jurisdiction implicating the Religion Clauses); Kent v. Dulles, 357 U.S. 116, 129–30 (1958) (rejecting Secretary of State's denial of certain passports implicating the right to travel).

165 *Solid Waste Agency*, 531 U.S. at 171–73.

166 *Id.* at 172; *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

obligation to interpret their authority narrowly to avoid raising the particular question of unconstitutional delegation.[167]

One answer is that, as a practical matter, agencies *do* have an obligation to adopt a narrowing construction when necessary to avoid raising a nondelegation problem (as they do to avoid raising, say, a Commerce Clause problem), but receive *no deference* (*Chevron* style) on the construction. They have an obligation to adopt a narrowing construction when they regulate because otherwise they will lose in court. If an agency exercises its discretion in an unconstitutional manner, a court will invalidate its regulation.[168] In a "clear statement" case, the agency will lose just for having taken action that raised the constitutional question without clear congressional authorization. Consequently, the agency must anticipate the constitutional boundaries of its authority and attempt to regulate within them. The agency does not possess final say on the precise location of such boundaries, however. Only a court—in fact, only *the* Court—does. Regardless of whether Congress can be said to have authorized an agency to raise a constitutional question, it cannot authorize the agency to definitively resolve that question. That power is not Congress's to delegate. Thus, the agency is not entitled to judicial deference. A court may decide that the agency incorrectly interpreted the constitutional line.

By contrast, the answer cannot be that agencies simply lack any authority whatsoever to adopt narrowing constructions in the delegation situation. In other words, the answer cannot be the one that the Court gave in the first part of its delegation discussion—that invalid delegations confer no power of any kind on agencies.[169] Delegations susceptible to narrowing constructions are not invalid *ab initio*. (If they were, how could courts—any more than agencies—revive them through statutory construction?) Rather, these delegations enjoy a presumption of validity but require the articulation of certain limits to assure that result.[170] All of this is to say that the Court is concerned about further erosions of its interpretive authority. A bonus point is

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167 The canon directing courts (and agencies) to avoid unconstitutional statutory interpretations is different from the one directing them to avoid interpretations that raise constitutional questions, although the Court has not always clearly distinguished them. *See* Vermeule, *supra* note 55, at 1945, 1948–49. Note, however, that providing a narrowing construction both prevents an unconstitutional delegation and avoids raising the question of unconstitutional delegation.

168 *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 914 (2001) ("[T]here can be no doubt that *Chevron* deference must give way when the agency's policy, although consistent with the statute and otherwise permissible in light of the statutory language and purpose, impinges upon principles that the Court has discerned in the Constitution.").

169 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001).

170 As the Court recently stated in *INS v. St. Cyr*, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to

to show that the Court seems to have a more particular view of the constitutional avoidance canons than previously revealed.

Another example of the need for interpretive control is the *American Trucking* Court's treatment of its nondelegation precedent. Rather than candidly acknowledging its inability to require meaningful (or virtually any) congressional standards, or simply approving the delegation with a perfunctory string cite,[171] the Court took pains to digest its precedent for the court of appeals. It compared section 109(b)(1) to statutes found constitutional in other cases, declaring the language of section 109(b)(1) "strikingly similar" to the language in those statutes.[172] It added that it has never demanded a "determinate criterion,"[173] expressly correcting Judge William's misreading of the nondelegation case law.

But the Court seems to have ignored apparent differences between this case and other cases, as well as its own past admonitions, suggesting a stronger interest by the Court in reading the cases for the court of appeals than in reading them (or heeding them) well. For example, the Court failed to acknowledge that the statute in *Touby* conferred a relatively narrow grant of authority—namely, the authority to issue drug scheduling orders on a temporary basis.[174] Nor did the Court point out that the statute in the *Benzene Case* had been limited by a Supreme Court narrowing construction.[175] Emphasizing that it had never asked how "imminent" is too imminent or how "necessary" is too necessary, the *American Trucking* Court disregarded its own warning that Congress "must provide *substantial guidance* on setting air standards that affect the entire national economy."[176]

The purpose of highlighting the Court's use of formal constitutional analysis is not to criticize that use, however. It is to analogize the case to previous cases, some old and some new, which could be

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avoid such problems." 121 S. Ct. 2271, 2279 (2001) (citation omitted). The Court also noted:

> As was stated in *Hooper v. California*, '[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' [155 U.S. 648, 657 (1895).] This approach . . . also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Id. at 2279 n.12 (alterations in original) (citation omitted) (quoting *Edward J. DeBartolo Corp.*, 485 U.S. at 575).

171 *See, e.g.*, Touby v. United States, 500 U.S. 160, 165 (1991).

172 *Am. Trucking*, 531 U.S. at 473.

173 *Id.* at 475.

174 *See id.* at 473; *Touby*, 500 U.S. at 164.

175 *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion) (reading the Occupational Safety and Health Act to require a showing of significant health risk prior to regnlation).

176 *See Am. Trucking*, 531 U.S. at 475 (emphasis added).

understood as invoking similar analyses to educate Congress on the limits of its role. Congress, lower courts, and local governments do not get to rewrite constitutional doctrine—and neither does Judge Williams. But the *American Trucking* Court should not be understood as unsympathetic to the problem that Judge Williams identified of unguided administrative discretion. The Court should be viewed as suggesting a more appropriate solution—requiring administrative standards under administrative law rather than constitutional law.

2. *The Shift from Constitutional Law to Administrative Law*

To appreciate this reading, consider *American Trucking* again in relation to other cases in which the Court used formal constitutional analysis to deprive other governmental actors of authority. In cases such as *United States v. Lopez*,[177] *City of Boerne v. Flores*,[178] and *Dickerson v. United States*,[179] the Court was responding to what it perceived were bad reasons for asserting that authority—for example, to circumvent the Court's authority[180] or to claim credit for symbolic responses to public problems.[181] *Boerne* can be seen as an example of both phenomena. In *Boerne*, the Court invalidated the Religious Freedom Restoration Act (RFRA) as beyond Congress's authority under Section 5 of the Fourteenth Amendment.[182] The RFRA was an extraordinarily popular statute that reinstated the compelling interest test for generally applicable laws that substantially burden religious exercise, a test the Court had rejected as inapplicable under the Free Exercise Clause

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177 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990 as beyond the limits of the Commerce Clause).

178 521 U.S. 507 (1997). See *supra* note 156 for a summary of *Boerne*.

179 530 U.S. 428 (2000). See *supra* note 158 for a summary of *Dickerson*.

180 *See, e.g., Dickerson*, 530 U.S. at 437 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); *Boerne*, 521 U.S. at 519 ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308–09 (2000) (invalidating school's policy of permitting prayer at football games under the Establishment Clause in part because evidence revealed that the policy was a deliberate effort to circumvent the Court's prohibition of prayer at school-sponsored events).

181 *See, e.g., Boerne*, 521 U.S. at 530–31 (invalidating the RFRA as unnecessary to remedy or prevent violations of the Free Exercise Clause under Section 5 of the Fourteenth Amendment in the absence of any legislative findings that states enact generally applicable laws to discriminate against religion); *Lopez*, 514 U.S. at 562–63 (noting the absence of legislative findings documenting the effect of gun possession near schools on interstate commerce in striking down the Gun-Free School Zones Act of 1990). *But see* United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act as beyond the limits of the Commerce Clause and Section 5 of the Fourteenth Amendment despite ample legislative findings concerning the effect of violence against women on interstate commerce and the inability of the states adequately to respond). For another view of the problem with symbolic legislation, see Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. (forthcoming March 2002).

182 521 U.S. 507 (1997).

in *Employment Division, Department of Human Resources v. Smith.*[183] The Court held that Congress lacked authority to enact the RFRA under Section 5. Interpreting Section 5 rigidly to extend only to remedial and preventive action and to contain a proportionality requirement, it found that Congress had not demonstrated that the statute was a proportionate response to any actual constitutional problem it had identified.[184] The Court therefore concluded that the statute really was an impermissible attempt to reverse its own interpretation of the Free Exercise Clause.[185]

American Trucking is different from *Boerne* in an important respect. While Congress in *Boerne* was attempting to address a small (or maybe even imaginary) problem with a sweeping solution, Judge Williams was trying to address a problem that the Court itself had found significant and seemed unable to address with any solution. The existing nondelegation doctrine, with its minimal requirement of an intelligible principle, does not require Congress to make the hard choices in a manner that meaningfully constrains broad delegation. Congressional standards, however technically sufficient, do little to guide and limit administrative discretion. Thus, the principal tool on which the Court has relied (at least in theory) for discipling delegation is ineffective.

Furthermore, the other tool to which the Court increasingly has resorted—the avoidance canon—does not apply in many cases. When a statute contains a minimally intelligible principle (as the *American Trucking* Court conceded that most statutes do), courts cannot use the avoidance canon to supplement that principle in the service of congressional intent. The statute fairly reflects all the limits (i.e., virtually none) that Congress intended to provide. Under such circumstances, judicial supplementation of those limits actually would frustrate congressional intent and exceed the bounds of legitimate interpretive authority.

Because Judge Williams was responding to a real problem, one might have expected the Court to have been more solicitous of him than of Congress in *Boerne.* Yet the Court still had cause to find fault with Judge Williams. Although Judge Williams may have had good reasons for seeking administrative standards, he failed to demonstrate any good reasons for seeking them under constitutional law when a more modest approach existed—an approach that did not require the revision of or even the application of constitutional doctrine. The Court itself flagged that approach in the conspicuous concluding sentence of its delegation discussion. The Court stated that the court of

183 494 U.S. 872 (1990).
184 *Boerne,* 521 U.S. at 530–532.
185 *Id.* at 532.

appeals could resolve challenges to the NAAQS under the arbitrary and capricious provision of the Clean Air Act.[186] Thus, the Court suggested to Judge Williams that the appropriate means for remedying the problem of unguided administrative discretion would be to examine the ozone regulation under the arbitrary and capricious test of the Clean Air Act. It seems, then, that very much like Congress in *Boerne*, Judge Williams had failed to choose a measured response to the problem he sought to remedy. On remand, the Court intimated, Judge Williams could correct his overreaching by determining that the EPA acted *arbitrarily* rather than *unconstitutionally* in not issuing standards guilding its discretion.

In sum, *American Trucking* should be understood to invite rather than preclude the possibility of an administrative-standards requirement as a means of disciplining broad delegation. It simply shifts the source of authority for that requirement from constitutional law to administrative law in a manner consistent with the lesson in *Ashwander* about judicial restraint, but also with the lesson in its own case law about the limits of other governmental actors' authority to reinterpret constitutional doctrine. Moreover, it shifts the focus of the entire delegation inquiry from constitutional law to administrative law. Courts now should look to administrative law rather than to constitutional law (and, of course, to administrative agencies rather than to Congress) to obtain appropriate limits on administrative discretion.

III

THE DELEGATION DOCTRINE AND THE DELEGATION DEBATE

If *American Trucking* shifts the focus of the delegation inquiry from constitutional law to administrative law, a final issue is how the case affects the focus of the scholarly discourse on delegation. For years, public choice theory has set the terms of the debate over the relationship between delegation and democracy. It now is evident that public choice theory, or at least public choice scholarship, has missed a central point. While public choice scholars can tell us, as a general matter, whether we should prefer the administrative state, they have not told us how to improve it—for example, by requiring agencies to issue standards constraining their discretion when Congress fails to supply any.

A. The Delegation Debate

Public choice scholars reach two divergent conclusions regarding delegation. The cynics argue that delegation violates principles of democratic governance because it allows Congress to avoid responsi-

186 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 476 (2001).

bility for the hard policy choices underlying law.[187] They complain that delegation allows Congress to abdicate its constitutional duty to make law. More to the point, they complain that Congress fools the public by claiming credit for popular statutes without making the unpopular decisions necessary to implement them and then shifts responsibility for those unpopular decisions to administrative agencies.[188] In leaving the difficult decisions for later agency resolution, Congress deprives the public of determinate legislation on which to base expectations and plans. Worse, it facilitates interest group pressure at the administrative level while remaining secure in the knowledge that voters will mistakenly blame the agency for that result.[189]

The optimists argue that delegation promotes democracy because it transfers policymaking authority to governmental actors—agency officials—who are more publicly responsive than Congress. Scholars make many arguments in support of this claim. Agencies are more responsive than Congress, they suggest, because they are more accessible.[190] The costs of participating in administrative proceedings are lower than the costs of lobbying Congress,[191] and are more likely to pay off because agencies are legally required to consider the relevant comments and arguments of affected parties, while members of Congress are not. Agencies also are more responsive because they are better able than Congress to hammer out regulatory details as information and policy stakes emerge.[192] Furthermore, agencies are more responsive because they are more resistant than Congress to interest group influence. Agencies also answer to the President, who is less likely than Congress to accommodate narrow interests because he has a national constituency to satisfy.[193] In addition, agencies are more responsive than Congress because they are more likely to select a policy consistent with the one that voters would select if well informed.[194]

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187 *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 807 (1999); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 740–41 (1999).

188 SCHOENBROD, *supra* note 187, at 10.

189 *Id.* at 9–12.

190 *See* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781 (1999).

191 *See id.*

192 *See id.* at 781–82.

193 *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 132–36 (1997).

194 *See* David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 432 (2002); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000).

B. A Shift in Focus

The reading of *American Trucking* urged above reflects the influence of this debate. It makes sense to require administrative standards under administrative law if you believe—as we all do—that *some* governmental actor, if not Congress, then agencies, must take responsibility for the hard choices underlying law. But the reading also reveals the limits of the public choice debate. That is not to deny the contributions that both sides have made to the delegation issue. The cynics have alerted us to the possible pathologies of congressional delegation; the optimists have identified the potential advantages of administrative lawmaking. But both sides have failed to acknowledge certain practical realities that I have read *American Trucking* to emphasize.

The cynics have failed to accept that their account of congressional motives has not persuaded the Court to reconsider the demise of the nondelegation doctrine or the rise of the administrative state. *Some* delegation, if not desirable, is unavoidable. And the Court has not demonstrated a willingness to police congressional motives to separate the good from the bad in the delegation context, as it recently has in other contexts.[195] Arguments in this regard are, in all senses of the word, academic.

The optimists, in turn, have failed to recognize that their account of administrative motives is not enough to move the judiciary (or the public) beyond cynicism about government. Arguments that delegation is democratic because it transfers lawmaking authority to the most responsive governmental actors beg the question. If we all agreed that agencies *could be trusted* to act in the public interest most of the time, there would be no need to discuss delegation at all—except in the most theoretical and least productive sense of whether Congress abdicates its constitutional duty to make law. The practical and pressing concern about delegation flows from mistrust, perhaps justified, of administrative discretion. Ungnided administrative discretion is a threat to democratic values, even if delegation itself is not.

Thus, *American Trucking* should be understood not only to offer a lesson to Judge Williams but to public choice scholars. These scholars should broaden or shift the focus of their inquiry from the locus of lawmaking authority to the exercise of that authority. We cannot evaluate whether delegation serves democracy until we discuss the issue of how agencies should make law. Moreover, we cannot ensure that delegation serves democracy until we recognize that some governmental actor—if not Congress, then administrative agencies—must take re-

195 *See supra* notes 177–85 and accompanying text.

sponsibility for the hard choices underlying law and reduce the likelihood of politics as usual.

CONCLUSION

For many administrative law scholars, the most awaited case of the year turned out to be the most disappointing. After the D.C. Circuit revived a version of the nondelegation doctrine and imposed a constitutional obligation on administrative agencies to discipline the exercise of their own authority, many hoped (or feared) that the Supreme Court would follow suit. In *American Trucking*, the Court instead upheld the statutory delegation and simultaneously rejected the D.C. Circuit's attempt to rewrite the nondelegation doctrine as a constitutional directive to agencies.

It is tempting to read this decision as foreclosing the possibility of requiring administrative standards to ease the antidemocratic concerns about broad delegation. This, however, would be a misreading. On my reading, the Court simply found that the D.C. Circuit lacked the power to redefine the nondelegation doctrine to give agencies the power to supply the standards that constrain broad delegation. That doctrine always has required Congress to enact some intelligible principle (however minimal or virtually nonexistent), and Judge Williams was not free to say otherwise.

But the Court did not pretend that the nondelegation doctrine actually forces Congress to take responsibility for the hard choices in a way that meaningfully guides and limits administrative discretion. Moreover, the Court should be understood as recognizing the need for more robust limits on administrative discretion than Congress is willing to provide or than the Court can ascertain through statutory construction. And it should be seen as signaling the D.C. Circuit to pursue those limits on remand but in a less audacious manner—perhaps, as I suggest, by requiring the agency to issue them as a matter of administrative law. This reading aligns *American Trucking* with recent cases in which the Court has lectured other governmental actors for exceeding the limits of their designated roles. Of more enduring significance, it also accords with *Ashwander* in which Justice Brandeis directed courts to refuse to decide a case on constitutional grounds if adequate nonconstitutional ones exist.

Indeed, I argue, *Ashwander* generally justifies a shift from constitutional law to administrative law for addressing the delegation issue. Using administrative law as a delegation doctrine obviously avoids revising constitutional doctrine or questioning the validity of a congressional statute. In addition, it provides theoretical grounding and practical guidance for requiring administrative standards. As a theoretical matter, administrative law already contains principles that fit

comfortably with an administrative-standards requirement. These principles, together with an administrative-standards requirement, require agencies, in exchange for broad grants of policymaking authority, to demonstrate that they have used their authority in an open, regular, and rational fashion. They require agencies in general to articulate a basis for their policy determinations and, in particular, to articulate the standards for those determinations. In the absence of these principles, there is no protection (or recourse) against arbitrary lawmaking at any level of government. These principles also help to define administrative standards and suggest when they are missing.

But, I argue, a shift from constitutional law to administrative law will change the face and force of the delegation inquiry, and will call into question the focus of the current public choice delegation debate. The cynical side of that debate argues that delegation disserves democracy because it allows Congress to avoid responsibility for the hard choices underlying law; the optimistic side contends that delegation serves democracy because it transfers responsibility for those choices to the governmental actor—administrative agencies—best able to make them. Administrative law enables us to see that both sides have constructed the delegation problem too narrowly. They have framed the issue as a choice between congressional lawmaking and administrative lawmaking, rather than as a choice between undisciplined lawmaking and disciplined lawmaking. In so doing, they have obscured the implicit problem of administrative discretion. Unrestrained delegation not only permits Congress to avoid responsibility for the hard choices, it allows agencies to do so as well. Until the public choice debate confronts that problem, it cannot evaluate whether delegation serves or disserves democracy. Furthermore, it cannot comprehend the solution of requiring administrative standards to ensure that *some* governmental actor—if not Congress, then administrative agencies—takes responsibility for the hard choices underlying law. Yet this solution is the keystone of the theory that finally will democratize delegation.