AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

Briefs in Whitman v. American Trucking Associations, Inc., et al., 531 U.S. 457 (2001)

*Sections 108 and 109 of the Clean Air Act requires the Environmental Protection Agency (EPA) to issue and revise national ambient air quality standards (NAAQS) for each pollutant identified by the agency as requiring regulation under the statute as necessary "to protect the public health." In 1997, under these provisions, the EPA issued widely anticipated and controversial rules for particulate matter and ozone. Unsurprisingly, a large number of petitions were filed with the United States Court of Appeals for the District of Columbia to review the EPA's rulemaking. What was unusual, however, was that a number of those petitioners not only challenged the particular rule that the EPA had established but the constitutionality the congressional delegation of that rulemaking authority to the EPA. A divided three-judge panel agreed with that challenge, for the first time since the New Deal striking down a federal statutory provision as violating the nondelegation doctrine (*American Trucking Associations, Inc. v. EPA, *175 F.3d 1027 (C.A.D.C. 1999)). Notably, the two Reagan appointees in the majority (a Clinton appointee dissented) included Judge Douglas Ginsburg, who had been on track for a Supreme Court nomination in 1987 that later went to his circuit court colleague, Judge Robert Bork, and a public critic of the Supreme Court's lax approach to the nondelegation doctrine.*

Given the circuit court's actions, the case attracted even greater attention, raising the possibility that the conservatives on the Supreme Court might follow the lead of the conservatives on the D.C. circuit and revive the nondelegation doctrine (perhaps as they had revived federalism doctrines in the late 1990s). The justices did not prove receptive. The Supreme Court unanimously overruled the circuit court, with Justice Scalia writing for the Court. Emphasizing that the Court had only struck down statutes on nondelegation grounds twice in its history, Scalia concluded that the Clean Air Act "fits comfortably within the scope of discretion permitted by our precedent." Whitman v. American Trucking Associations, Inc., et al. *(2001). On remand in the D.C. Circuit, Judge Tatel, the dissenter in the original case, wrote for the court in upholding the EPA's rules against the remaining legal challenges.*

The challenge to the EPA's regulations attracted the participation of a large number of amici curiae, or "friends of the court," who submitted legal briefs seeking to influence how the justices decided the case. Particularly notable were the amici briefs submitted on behalf of conservative Republican Senator Orrin Hatch and Representative Tom Bliley and the libertarian Institute for Justice (IJ) and the Cato Institute. The Hatch brief, written by a legal team lead by C. Boyden Gray, former White House counsel of the George H. W. Bush administration, took a relatively moderate approach, arguing that the Clean Air Act was unconstitutional on its face in light of New Deal doctrines but could be made constitutional if interpreted to include a requirement that the EPA explicitly engage in economic cost-benefit analysis when formulating regulations. By contrast, the IJ and Cato brief, written by their staff lawyers, reflected a purer ideological position, arguing that New Deal doctrine be significantly revised and that Congress be forced to make fundamental policy choices – or not legislate at all. The Supreme Court heard the case in the final months of the Clinton administration (though the decision was issued after Christine Todd Whitman had become the administrator of the EPA under President George W. Bush), and the EPA's rules and the constitutionality of the Clean Air Act was defended by Clinton's Solicitor General Seth Waxman.

Brief of Amici Curiae Senator Orrin Hatch and Representative Tom Bliley in Support of Respondents, by C. Boyden Gray, Alan Charles Raul, et al.

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Article I, section 1 of the Constitution grants "[a]ll legislative Powers" exclusively to Congress. . . . "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark* (1892). This principle "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.* (1980) (Rehnquist, J., concurring in the judgment). . . . The nondelegation doctrine thus "prevent[s] Congress from forsaking its duties," even when it does not encroach upon the prerogatives or impair the functioning of a coordinate branch. "Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York* (1998) (Kennedy, J., concurring).

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The essential inquiry in this Court's nondelegation jurisprudence is to ascertain when the executive discretion granted by Congress is arbitrary. Delegation of discretionary authority has long been recognized as a legitimate attribute of legislative power . . . and this Court has not hesitated to approve even "'broad' standards for administrative action" that are "a reflection of the necessities of modern legislation dealing with complex economic and social problems." . . . In this Court's classic formulation, "[s]o long as Congress 'lays 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.'" . . .

Although this Court has struck down statutes as violating the nondelegation doctrine only in two 1935 decisions, *Panama Refining Co. v. Ryan* (1935) and *A.L.A. Schechter Poultry Corp. v. United States* (1935), the doctrine remains an important canon of interpretation employed to give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." . . . [I]n *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (1980), a case strikingly parallel to this one, the Occupational Safety and Health Administration (OSHA) had interpreted its organic statute to permit it to promulgate workplace standards to regulate any health risks from dangerous substances. Noting that OSHA's construction suggested a grant of "unprecedented power over American industry" to an administrative agency to engage in "pervasive regulation limited only by the constraint of feasibility," a plurality of this Court narrowed the statute to empower OSHA to regulate only "significant" risks to health and safety. Otherwise, this Court held, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the [nondelegation doctrine]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." . . . see also id. at 672-76 (Rehnquist, J., concurring in the judgment) (voting to invalidate the statute as an unconstitutional delegation of legislative power).

. . . . The intelligible-principle rule is always the same, but the sufficiency of a given standard under that rule turns not just on the bare language of the statute, but on numerous factors specific to the statutory scheme. . . .

The Government and its supporters disregard the crucial element of context by mechanically citing broad language of delegation in statutes that have been upheld by this Court; they argue that, even under *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), the detailed prescriptions of section 109 cannot be unconstitutional in light of past decisions of this Court upholding standards such as the "public interest," "public convenience," justice and equity, and reasonableness. . . .

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. . . [T]he nondelegation doctrine requires this Court, if possible, to adopt a constitutional construction of section 109 of the Clean Air Act that ensures that the EPA's discretion is not arbitrary, given the statutory context of deep scientific uncertainty about health effects and unparalleled administrative power over the States and the national economy. *Lead Industries* cannot fit that bill: it authorizes the Administrator to rely solely upon scientific evidence even when science is indeterminate, thus leaving the Administrator free to set risk levels without any constraining principle.

Properly interpreted, section 109 of the Clean Air Act is clearly constitutional. . . .

. . . . Recognizing the inherent indeterminacy of science about public health risks from pollution, and intending standards that would be "preventative or precautionary," . . . Congress directed the Administrator to "allow[] an adequate margin of safety" to account for scientific uncertainty in making a

"judgment" about what is "requisite to protect the public health." . . . Congress did not forbid the Administrator to consider any factor relevant to inform her judgment as to what was "adequate" or "requisite"--and certainly did not preclude consideration of cost/benefit balancing, which is fundamental to traditional concepts of environmental risk management . . . . The interpretation discussed above is not only the most natural reading of the Act's text, structure, and history, but it is also compelled by the doctrine of avoidance of constitutional questions: only cost-effectiveness and the balancing of benefits and costs are intelligible principles to guide the Administrator in choosing among alternatives that protect the public in varying degrees.

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Brief of Amici Curiae Institute for Justice and the Cato Institute in Support of Respondents, by William H. Mellor, Roger Pilon, et al.

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Although many aspects of the Constitution are premised on the importance of checks and balances, central to the Framers' design was the distribution of the federal government's power among three coordinate branches, with legislative powers vested in Congress, executive powers vested in the President, and judicial powers vested in this Court as well as such inferior courts as Congress would establish. . . . This arrangement is not designed to secure efficiency or to promote administrative convenience; rather, "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." . . . Accordingly, this Court often has rejected efforts by Congress and the President to rearrange power in a manner hostile to our constitutional framework. In no less than six cases over the last 25 years, this Court has struck down congressional enactments as contrary to the constitutionally mandated separation of powers. In these cases, this Court reached the same conclusion whether Congress had aggressively encroached on another branch's power or had instead chosen to voluntarily cede its own power. Compare *Bowsher v. Synar* (1986) (striking down attempt by Congress to assign executive powers to officer under its control) with *Clinton v. City of New York* (1998) (invalidating congressional attempt to delegate to the President the power to amend Acts of Congress). This is because the separation of powers is not designed to safeguard the interests of those occupying public office; rather, its purpose is to protect the liberty of the American people.

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It has long been established, therefore, that Congress may not freely delegate its legislative powers. This principle, commonly referred to as the nondelegation doctrine, traces its roots back to two of Europe's most distinguished and influential political philosophers. John Locke, writing in 1690, stated that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." . . . Montesquieu, furthermore, warned of the dangers that would result from allowing legislative and executive powers to be joined together . . . .

This sentiment had a marked impact on the Framers of the Constitution. . . .

It is not surprising, therefore, that the nondelegation doctrine emerged early in this Court's jurisprudence. . . . The doctrine, however, did not figure prominently in this Court's nineteenth-century jurisprudence for congressional delegations in that era were few and far between. . . .

Near the end of the century, Congress began to delegate authority more frequently, and as a result more cases involving delegation began to reach this Court. In some of these cases, congressional attempts to relinquish legislative powers were struck down. . . . In the 65 years since *Schechter*, however, this Court has largely abdicated its responsibility of ensuring that congressional delegations of authority are accompanied by intelligible principles. See *Industrial Union Dep't v. American Petroleum Inst.* (1980) (Rehnquist, J., concurring) ("[T]he principle that Congress could not simply transfer its legislative authority to the Executive fell under a cloud"). As a result, it has upheld numerous delegations of open-ended authority against nondelegation doctrine challenges. . . . Crucially, though, this Court has never overruled the *J.W. Hampton, Jr., Co.* "intelligible principle" test, ostensibly continuing to apply it even in cases affirming the constitutionality of seemingly unbounded delegated discretion. See, e.g., *Mistretta v.*

United States (1989). Moreover, despite the general trend, various Justices, from time to time, have called for exhuming the nondelegation doctrine from this Court's jurisprudential graveyard.

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The instant case provides this Court with an important opportunity to reinvigorate the nondelegation doctrine by meaningfully applying the intelligible principle test set forth in *J.W. Hampton, Jr., & Co.* . . . Congress' failure to provide an intelligible principle here was neither borne of necessity nor practicality. It instead resulted from a misunderstanding about the effects of air pollutants. And while Congress recognized its mistake over two decades ago, it consciously chose to ignore the conundrum its prior directive had created for EPA, thus abdicating its constitutional responsibility to provide meaningful guidance to the agency.

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In asking this Court to invalidate Section 109(b)(1) as applied to non-threshold pollutants, amici recognize that we are asking this Court to take a significant step, but it is an appropriate one under the circumstances.

The decision as to what principle should be used to set air quality standards is "quintessentially one of legislative policy," *Industrial Union Dep't*, at 686 (Rehnquist, J., concurring), and one with enormous impact on the health of the American people and the vitality of the nation's economy. It involves no subject, such as foreign affairs or Indian affairs, where the executive branch possesses "residual authority," nor any power, such as the management of public property, that is not legislative.

Furthermore, Congress' failure to provide an intelligible principle here is not justified by the "'inherent necessities' of the situation." In a variety of other statutes regulating pollutants and hazardous substances, Congress has expressly set forth intelligible principles, such as cost-benefit analysis and technological feasibility, to guide agency discretion. . . .

. . . . As no intelligible principle is "apparent from the statute," or the legislative history, the appropriate remedy here is to hold Section 109(b)(1) unconstitutional as applied to non-threshold pollutants.

The underlying purpose of the nondelegation doctrine is not vindicated by a remedy ordering that "EPA in effect draft a different, narrower version of the Clean Air Act." . . . The constitutional basis of the nondelegation doctrine is that Congress, not executive agencies, must make important policy choices, which form the core of the legislative power.

Though the precedent set here may contradict recent jurisprudential trends, the rule of law is really a modest one: Congress is free to legislate or not, or to delegate its authority or not, as it sees fit; all it may not do is to effectuate a wholesale transfer of the legislative power to the executive. That is the essence of the separation of powers. The crucial limiting factor is the requirement of an intelligible principle. Accordingly, this Court should require Congress to fulfill its constitutional responsibility to set forth an intelligible principle by which EPA is to set air quality standards for non-threshold pollutants by holding Section 109(b)(1) unconstitutional as applied to non-threshold pollutants.

Reply Brief for the Petitioners, by Seth Waxman (U.S. Solicitor General) and Gary Guzy (General Counsel, EPA)

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The initial issue before this Court is whether Section 109 of the CAA violates the nondelegation doctrine. This Court has articulated and reaffirmed the basic rule: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Panama Refining Co. v. Ryan* (1935). Accordingly, this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." . . .

The Court's oft-repeated statement resolves the nondelegation issue here. Section 109 of the CAA states that EPA shall set NAAQS at levels that are "requisite" to protect "public health" and "public welfare." . . . Thus, Congress has clearly delineated "the general policy" and "the public agency which is to apply it." *Mistretta*, at 373. In addition, Congress has set out, in extraordinary detail, "the boundaries of

this delegated authority" (ibid.) by specifying the factors that EPA must consider, a body of experts that it must consult, and a rigorous set of procedures that EPA must follow in setting the NAAQS. . . .[1]

Accordingly, Section 109, by its plain terms, amply satisfies nondelegation requirements. Congress has fulfilled its legislative function by making the fundamental policy choice to set NAAQS at a level requisite to protect public health and public welfare. Congress has properly assigned to EPA the executive responsibility to determine, based on current scientific knowledge and extensive public input, the specific numerical values. There is, accordingly, no sound basis for asserting that Section 109 is unconstitutional under this Court's established nondelegation jurisprudence.[2]

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. . . [T]his case does not present a "nondelegation problem." Congress has satisfied the nondelegation doctrine by providing intelligible principles in the CAA--such as requiring that NAAQS be set, based on the Section 108 "criteria," at levels "requisite" to protect public health and public welfare--that constrain EPA's exercise of discretion. What ATA posits as "nondelegation problems" are simply its disagreements with judgments that EPA has made in exercising its statutory discretion. ATA may raise such objections in the rulemaking process, and it may seek judicial review of EPA's final rules on the basis of properly preserved objections under the CAA's "arbitrary or capricious standard." . . . But ATA's objections are not matters of constitutional character. Hence, even if Section 109's plain language were ambiguous, there would be no need to adopt a narrowing construction to avoid confronting a nondelegation problem. . . .

. . . [E]ven if Section 109 were ambiguous and it legitimately presented "nondelegation problems," ATA's proposed construction would exacerbate, rather than ameliorate, those problems. [Various] cases hold that Congress made a policy choice to cabin EPA's discretion by requiring the agency to set NAAQS on the basis of a specific body of information: the latest scientific knowledge on the public health and welfare effects caused by the presence of criteria pollutants in the ambient air. Under ATA's construction, EPA's Administrator would be "constrained only by the requirement that she overtly and systematically consider all logically relevant factors in setting those standards." . . . That construction broadens--rather than constrains--EPA's discretion. . . .

There is no need for this Court to revise its nondelegation jurisprudence. . . . Those amici implicitly acknowledge that Section 109, which has been in place for 30 years, could be invalidated only if the Court radically altered nondelegation principles that have been in place for more than 60 years. . . . There is clearly no warrant for doing so, and particularly not here, where Congress has not only carefully specified EPA's responsibilities, but has also carefully monitored EPA's actions. As Massachusetts and New Jersey chronicle in their brief, Congress and the Executive Branch have engaged in a decades-long collaborative effort to protect the public from air pollution, and that collaboration has led to ongoing legislative refinements based on the federal and state experience in formulating and implementing the NAAQS. The CAA illustrates how "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a

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[1] The nondelegation doctrine does not prevent Congress from directing an agency to make scientific inquiries and to exercise judgment in the face of scientific uncertainty. See, e.g., *Yakus*, 321 U.S. at 425 ("It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.") . . .

[2] Several amici . . . argue that this case is similar to the only two cases in which the Court has invalidated federal legislation on nondelegation grounds. See *A.L.A. Schechter Poultry Corp. v. United States* (1935) (fair competition provisions of the National Industrial Recovery Act (NIRA)); *Panama Refining* ("hot oil" provisions of the NIRA). Those comparisons are preposterous. In *Schechter*, Congress had delegated rulemaking power to private parties. See also *Carter v. Carter Coal Co.* (1936) (invalidating provisions of the Bituminous Coal Conservation Act on similar substantive due process grounds). And in both *Schechter* and *Panama Refining*, "Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*. Section 109 possesses none of those characteristics and, indeed, illustrates the very type of legislative authorization the Court considered permissible. See *Schechter*, at 530 (Congress may "perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.").

lawful objective through its own processes." That cooperative effort has produced consistent improvements in air quality and, in turn, unquestioned public health and public welfare benefits. . . . . . .