2000

The Devil, the Details, and the Dawn of the 21st-Century Administrative State: Beyond the New Deal

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THE DEVIL, THE DETAILS, AND THE DAWN OF THE 21ST CENTURY ADMINISTRATIVE STATE: Beyond the New Deal

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Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution.

—Thomas Jefferson[1]

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1. Loving v. United States, 517 U.S. 748, 758 (1996) (quoting 5 WORKS OF THOMAS JEFFERSON 319 (P. Ford ed. 1904) (letter to E. Carrington, Aug. 4, 1787)). A common aphorism, though lacking Jefferson's cachet, is equally apropos: "the devil is in the details."

I. INTRODUCTION

More than half a century has passed since the New Deal, the era known for ushering in the modern administrative state, where broad-sweeping regulatory powers were delegated to over a dozen new executive agencies pursuant to a raft of social legislation. Until the later years of the New Deal, courts were highly suspicious of socially progressive legislation, and, for that matter, any legislation that upset common law systems supporting private property rights and freedom of contract. Regulatory enactments were especially vulnerable to invalidation for delegating policy-making authority to an executive agency or other non-legislative entity. Such delegations were considered a constitutional offense under the nondelegation principle of separation of powers.

As the regulatory state grew, fueled by increasingly complex societal needs and technological advances, standards of judicial review were

developed to curtail abuses of agency discretion. Meanwhile, the nondelegation doctrine receded into the dustbin of *Lochner* Era jurisprudence.[2] Since the New Deal, the nondelegation doctrine has been, for all practical purposes, a dead letter. The delegation of regulatory details to executive agencies, far from impairing the constitutional prerogatives of Congress, is now generally recognized as promoting efficient and effective government. So long as Congress provides policy objectives and some standards to guide the agency, along with procedural safeguards to ensure due process and unbiased decision-making, delegations have not triggered constitutional concerns. Contemporary courts have rarely questioned even the most extensive grants of power to federal executive agencies, viewing nondelegation arguments as "barely worthy of a footnote."[3]

Yet just last year, the U.S. Court of Appeals for the D.C. Circuit, a court widely recognized as the veritable hub of administrative law jurisprudence, opened a new chapter in the post-New Deal era by breathing life into the nondelegation doctrine. In *American Trucking Ass'ns v. EPA*,[4] the court held that the Environmental Protection Agency ("EPA") had overstepped its constitutional boundaries and usurped legislative prerogatives in issuing national ambient air quality standards ("NAAQS") for ground-level ozone and particulate matter under the Clean Air Act.[5] According to the court, the decision was unconstrained by any "intelligible principle," even though the EPA had considered a full range of data regarding the air quality level "requisite to protect public health" with an "adequate margin of safety," as directed by this detailed and comprehensive statute.[6]

At the heart of the *American Trucking* decision lies the court's belief that, absent clear congressional parameters, an executive agency like the EPA would have unbridled power to send entire industries hurtling over the brink of economic ruin. Although the court couched its decision in terms of a search for intelligible principles, upon closer scrutiny, the opinion seems to have little to do with a lack of legislative or administrative standards.

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2. *See* Lochner v. New York, 198 U.S. 45 (1904); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 78-81, 132 (1985). During the *Lochner* Era (circa 1905-1937), redistributive laws, such as legislation regulating hours of employment and the use of child labor, were routinely invalidated as interfering with the freedom to contract and substantive due process guaranteed by the Fourteenth Amendment. *See infra* note 56 and accompanying text.

3. Stupak-Thrall v. United States, 89 F.3d 1269, 1283 n.17 (6th Cir. 1996) (Boggs, J., dissenting) (citing United States v. Brown, 552 F.2d 817, 823 n.8 (8th Cir. 1977).

4. 175 F.3d 1027 (D.C. Cir. 1999), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000); 120 S. Ct. 2193 (2000).

5. *Id.* at 1033-34.

6. *Id.* at 1034-35; *see* Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (1994).

Instead, the opinion implicitly rests on dual themes, both of which were commonly found in pre- and early New Deal cases.

The first theme views regulatory legislation effectuated by agency delegatees as too likely to upset settled expectations based on common law property and contract doctrines, adversely and arbitrarily affecting state and private interests and potentially tearing the fabric of the entire American economy. Although this concern was prevalent during the *Lochner* years, the D.C. Circuit failed to take note of the dramatic change in administrative ground rules, and the advent of procedural safeguards against arbitrary executive action, dictated by the Administrative Procedure Act of 1946.[7] Judicial review of executive decisions was not a particularly meaningful alternative when the early nondelegation decisions were handed down. The Administrative Procedure Act's safeguards promote agency accountability and reasoned decision-making by providing a more regular and effective role for both the public and the judiciary.

The second judicial motif is more subtle, though it too is reminiscent of an earlier line of jurisprudence. The *American Trucking* court scrutinized the Clean Air Act with what appears to be an especially acute sensitivity to the broad and pervasive federal role fostered by laws enacted under the auspices of the Commerce Clause. A restrictive view of Commerce Clause power enjoyed its heyday in the federal courts throughout the *Lochner* Era. But, like *Lochner* and the nondelegation doctrine, this approach had been dormant, if not defunct, until the mid-1990s, when the Supreme Court lent its imprimatur to a resurgence. In the past five years, several congressional enactments have been struck down as beyond the scope of the Commerce Clause powers,[8] and for a variety of related federalism concerns.[9]

Both doctrinal threads woven through the *American Trucking* decision are consistent with a developing pattern where the judiciary more frequently, and in a wide range of contexts, reins in federal regulatory programs that affect the economic and sovereign interests of the states and the bottom line of business concerns. Whether the trend is characterized as the resurrection of federalism or of nondelegation, "history seems to be recycling," to borrow a

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7. 5 U.S.C. §§ 551—559 (1994 & Supp. IV 1998), *amended by* 5 U.S.C. §§ 701—706 (1994).

8. *E.g.*, United States v. Morrison, 120 S. Ct. 1740, 1759 (2000) (invalidating the Violence Against Women Act); United States v. Lopez, 514 U.S. 549, 561 (1995) (invalidating the Gun-Free School Zones Act).

9. *E.g.*, Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 649-50 (2000) (concluding that Congress could not abrogate states' Eleventh Amendment immunity from suit under Age Discrimination in Employment Act); Printz v. United States, 521 U.S. 898, 905-22 (1997) (invalidating a provision of the Brady Act on grounds that it imposed unconstitutional obligations on state officers to execute federal laws).

phrase from Justice Souter.[10] Seen in this light, *American Trucking* may be but another example of a conservative backlash against redistributive legislation, and more generally, big government. If so, perhaps the decision can be limited in scope to regulatory statutes like the Clean Air Act, enacted pursuant to the Commerce Clause, with pervasive effects on the entire American economy. While this leaves numerous environmental and social welfare statutes open to attack, it may effectively insulate other important governmental programs from challenges of this sort.

This article has two objectives. First, it attempts to get to the bottom of the concerns voiced in *American Trucking* and determine whether a strict nondelegation principle, or some other principle of constitutional or administrative law, best satisfies those concerns. This analysis examines the parameters of a reinvigorated nondelegation doctrine in order to identify those statutes most vulnerable to challenge and to assess whether those statutes really do present a dilemma of constitutional dimension. The inquiry focuses on legislative semantics (are there intelligible principles to confine the agency's discretion?) as well as constitutional context (are certain kinds of constitutional powers more likely to raise nondelegation concerns than others?).

The second goal is to suggest a normative alternative for the review of congressional delegations to executive branch entities. This proposal draws upon well-known canons of administrative law, fashioning them into a two-tiered analysis. Under the first prong, a court faced with an ambiguous statutory provision should apply the presumption of implied delegation handed down in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*,[11] unless, given the overall context and subject matter of the statute at issue, it is unlikely that Congress would have granted broad-sweeping powers to the executive branch. If delegation can be implied, which it should be in the majority of cases, the court must reject nondelegation challenges, unless the delegation results in actual infringement of the core prerogatives of another branch of government. Once this constitutional threshold is met, the second prong of the proposal calls upon the court to give heightened scrutiny to the agency's implementation of vague statutory mandates to better ensure reasoned and unbiased decision-making and accountability. In short, the proposed analytical framework attempts to synthesize two fundamental principles of judicial review—*Chevron* deference and *Overton Park* "hard look" review.[12]

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10. *Morrison*, 120 S. Ct. at 1768.
11. 467 U.S. 837, 843 (1984).
12 *Id.* at 842-43; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

The article explores the historical and legal underpinnings of the nondelegation doctrine before, during, and after the New Deal, along with the rise of the administrative state and the role of executive agencies within the constitutional framework, in Section II. Section III reviews the Supreme Court's application of nondelegation, Commerce Clause, and federalism jurisprudence over the years, and assesses the D.C. Circuit's opinion in *American Trucking* against this backdrop. These first two sections demonstrate that, although the nondelegation doctrine itself is an example of anachronistic legal dogma, its objectives—safeguarding the separation of powers and enhancing governmental accountability—are alive and well today, and worthy of judicial attention, albeit through other legal mechanisms.

The dangers of "strict" nondelegation review, based on a search for intelligible principles as employed in the early New Deal cases and resurrected in *American Trucking*, are highlighted in Section IV. Regulatory statutes are loosely categorized and placed in a spectrum, ranging from least to most discretionary, based on their legislative language. The spectrum illustrates that, for the vast majority of regulatory provisions, whether the standards expressed by Congress are intelligible is largely in the eyes of the beholder. Section IV predicts that, if strict nondelegation review were to become the law of the land, Congress may respond with a variety of tactics to avoid the ambiguities and trade-offs that often result from the normal legislative process. One such tactic may be to tack detailed legislative riders onto appropriations bills, a practice which itself diminishes legislative accountability and fosters a governmental imbalance of power. The potential for such a response, along with the ad hoc nature of a nondelegation test based on a "judicial fetish for legislative language,"[13] set the stage for the alternative proffered in the final two sections of the article.

Section V introduces the contextual *Chevron*-based alternative, and examines it in light of two recent Supreme Court opinions, *FDA v. Brown & Williamson Tobacco Corp.*[14] and *AT&T Corp. v. Iowa Utilities Board.*[15] Both of these cases involved regulatory statutes that grant broad discretionary powers to administrative agencies. Although the agency actions at issue were invalidated, the Court's decisions rested on the bedrock tenets of administrative law formulated in *Chevron* and *Overton Park*, indicating that the Court has little interest in reviving the nondelegation doctrine as a ground

13. Warren v. Marion County, 353 P.2d 257, 261 (Or. 1960).
14. 120 S. Ct. 1291, 1297 (2000).
15. 119 S. Ct. 721, 738 (1999).

for striking down congressional enactments.[16] These opinions support the article's central thrust: judicial review of an agency's statutory interpretations and its ultimate decision can do more towards holding the three branches of government to their constitutional duties and requiring agencies to make fair, well-reasoned decisions based on intelligible legislative objectives than does the nondelegation doctrine as resurrected by the D.C. Circuit.[17]

The final section of the article tests the proposal by examining executive implementation of statutes enacted through constitutional powers other than the Commerce Clause. Specifically, Section VI applies the alternative approach to President Clinton's exercise of Property Clause powers in designating the Grand Staircase-Escalante National Monument and the Grand Canyon-Parashant National Monument. Several lawsuits have been filed to challenge the designations and, according to the state representatives, county officials, and ranchers who are acting as plaintiffs, the President's decisions are but an egregious display of executive discretion run rampant.[18] Their overarching legal theory is that the executive branch, in issuing these decisions under the Antiquities Act of 1906,[19] has usurped legislative prerogatives in violation of the nondelegation doctrine.

Section VI concludes that, even if the dubious trend toward strict nondelegation review continues in the Commerce Clause context, it should not become a significant restraint on the exercise of Property Clause powers.

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16. In *Brown & Williamson Tobacco*, 120 S. Ct. at 1297, the Court found that Congress had imposed unambiguous limitations on the Food and Drug Administration ("FDA"), such that no deference need be given the agency's decision to regulate cigarettes under *Chevron* step one. *See Chevron*, 467 U.S. at 842. In *Iowa Utilities*, 119 S. Ct. at 738, the Court held that the regulations at issue were an unreasonable interpretation of statutory mandates governing local telephone services, thereby failing *Chevron* step two. *See Chevron*, 467 U.S. at 842-43. The step two analysis in *Iowa Utilities* appeared to be a version of "hard look" review, although it was not explicitly characterized as such by the Court.

17. A few days after the Court granted certiorari in *American Trucking* on the nondelegation issue, it issued a second order granting certiorari on an issue raised by the industry—that the EPA had incorrectly construed the Clean Air Act as prohibiting a consideration of costs in setting the NAAQS. *See* Browner v. Am. Trucking Ass'ns, 120 S. Ct. 2003 (2000) (mem.) (regarding the nondelegation issue); Am. Trucking Ass'ns v. Browner, 120 S. Ct. 2193 (2000) (mem.) (regarding the cost issue). This second order gives the Court a vehicle to sidestep the constitutional issue while still addressing concerns about the economic implications of regulatory statutes, using administrative law principles and, more specifically, the interpretive standards of *Chevron*.

18. *E.g.*, Compl. for Declaratory J. and Injunctive Relief and Deprivations of Federal Constitutional Rights ¶¶ 112-29, Esplin v. Clinton (D. Ariz. filed Jan. 26, 2000) (No. CIV 00 0148 PCT PGR); Compl. for Injuctive and Declaratory Relief ¶¶ 88-94, Utah Ass'n of Counties v. Clinton (D. Utah filed June 23, 1997) (No. 2:97CV-0479B); First Am. Compl. ¶¶ 38-44, Mountain States Legal Fnd. v. Clinton, (D. Utah filed Dec. 15, 1997) (No. 2:97CV-0863G).

19. *See* 16 U.S.C. §§ 431—433 (1994 & Supp. IV 1998).

Decisions issued under the Property Clause are less likely to have pervasive economic effects than Commerce Clause programs such as the Clean Air Act. Moreover, the Property Clause is broader in nature with respect to the discrete category of activities it governs than is the Commerce Clause, in that it provides dual proprietary and sovereign powers over federal public lands and resources. At the same time, this broad-sweeping power is counterbalanced and perhaps even canalized by trust-like duties to protect public resources. Congress presumptively delegated extensive powers to the executive branch to accomplish preservation-oriented objectives through the Antiquities Act, satisfying the first step of the proposed *Chevron*-based alternative.

However, while the Antiquities Act is an extremely important preservation tool, national monument designations are distinct from other public lands decisions in that no procedural safeguards are required prior to designation. The Act gives the President unilateral power to designate national monuments without public input or consideration of environmental effects or alternatives. In addition, presidential decisions are insulated from the Administrative Procedure Act's provisions for judicial review. As a result, courts have no means of testing designations for arbitrariness. Although the Clinton Administration has reached out to the affected public prior to many of its designations, those efforts were voluntary and largely ad hoc. Because neither the public nor the courts is allowed a meaningful and regular role in the decision-making process, the second prong of the proposed alternative cannot be satisfied. Without formalized procedural safeguards to ensure against biased and arbitrary action, Antiquities Act withdrawals, unlike most other public lands management decisions, may raise concerns rooted in due process and fundamental fairness, but not separation of powers.

II. THE EVILS OF DELEGATING THOSE DEVILISH DETAILS

Thanks to *Schoolhouse Rock*, an entire generation of Americans grew up secure in the knowledge that the United States government is divided into three branches, each of which plays a role in a democratic society.[20] Article

20. *See Schoolhouse Rock: Three Ring Government* (ABC television broadcast, 1979); *America Rock—Three Ring Government*, Schoolhouse Rock, ABC Television, http://www.genxtvland.simplenet.com/SchoolHouseRock/song.hts?lo+threering (visited Oct. 24, 1999). *Schoolhouse Rock* first aired in 1973, and lasted for thirteen years. Although the *Schoolhouse Rock* phenomenon faded away in the mid-1980's, it has been revived recently, see Sean Powell, *Schoolhouse Rock Creators, at* http://genxtvland.simplenet.com/

I of the Constitution specifically provides that "[a]ll legislative powers . . . shall be vested in a Congress of the United States."[21] In other words, elected representatives in Congress have the power to make laws of general applicability.[22] Meanwhile, executive power—the power to implement the law—is held by the President,[23] and the power to review the activities of the other branches, in the context of cases or controversies, is vested in the judiciary.[24]

A primary reason for the constitutional separation of powers between the legislative, executive and judicial branches is to provide checks and balances against the capture of any one branch by another.[25] Separation of powers deters government excesses through arbitrary or tyrannical rule and promotes accountability. It also minimizes the potential for manipulation of governmental processes by special interest groups and protects individual citizens from the effects of factionalism.[26]

Although the doctrine forbids any branch from interfering with the central constitutional "prerogatives of another" branch,[27] it does not require that legislative, executive and judicial functions "be entirely separate and distinct."[28] For a tripartite government to be workable, Congress cannot be the only entity allowed to "make a rule of prospective force. . . . Congress must be permitted to delegate to others at least some authority it could

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SchoolHouseRock/creators.hts?lo (last modified Nov. 16, 1997), and has played a role in the early education of several generations of Americans.

21. U.S. CONST. art. I, § 1.

22. Field v. Clark, 143 U.S. 649, 694 (1892).

23. U.S. CONST. art. II, § 1; U.S. CONST. art. II, § 3 (directing the executive branch to "take care that the Laws be faithfully executed ").

24. U.S. CONST. art. III, §§ 1—2; Friends of the Earth v. Laidlaw, 120 S. Ct. 693, 708 n.6 (2000) (finding that environmental plaintiffs had Article III standing to bring a citizens' suit to redress Clean Water Act violations which had been ongoing at the time suit was filed).

25. Mistretta v. United States, 488 U.S. 361, 380-82 (1989) ("[T]he Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another . . . .'" (discussing THE FEDERALIST 47 (Madison) and quoting Buckley v. Valeo, 424 U.S. 1, 122 (1975))). The Framers provided checks and balances so that each branch remains free from the undue control or coercive influence of the others. *Id.*; *see also* Sandra B. Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 521-22 (1997).

26. CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION 15-17 (1990) [hereinafter SUNSTEIN, RIGHTS REVOLUTION].

27. Loving v. United States, 517 U.S. 748, 757 (1996).

28. *Mistretta*, 488 U.S. at 380. In *Mistretta*, the Court lauded Madison's flexible approach to the separation of powers: "the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a heretic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Id.* at 381 (citing THE FEDERALIST 51 (Madison)).

exercise itself."[29] In practice, Congress frequently legislates its policies and objectives in broad-brush terms, leaving the details of execution to the executive branch, with judicial review as a safeguard against abusive or arbitrary action.

A. The Role of Administrative Agencies Within the Constitutional Framework

Administrative agencies are sometimes characterized, usually in derogatory fashion, as constituting an unauthorized, unconstrained "fourth branch of government."[30] As the federal government is one of enumerated powers, limited to those powers constitutionally granted to it along with those "necessary and proper" to the execution of specified powers,[31] a logical starting point for this section is to shed light on the source of the authority to create administrative agencies and delegate power to them.

The United States Constitution contains no explicit authority to create and delegate powers to agencies.[32] However, in the Necessary and Proper Clause the Framers evidenced their clear intent that the federal government possess the authority to exercise its enumerated powers effectively.[33] The

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29. *Loving*, 517 U.S. at 758 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825)).

30. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 33 (3d ed. 1999) (citing *Report of the Committee with Studies of Administrative Management in the Federal Government* 39-43 (1937)); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 160-61 (1962). The term was likely coined by Justice Jackson, in his dissenting opinion in *FTC v. Ruberoid Co.*: "Administrative bodies . . . have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of Second Best*, 80 CORNELL L. REV. 1, 1 (1994) (citing *Ruberoid*, 343 U.S. 470, 487 (1952)).

31. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers . . . ."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324-25 (1819) (construing Necessary and Proper clause to uphold constitutionality of national bank); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.").

32. *See* Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 491 (1987) ("Ambiguity surrounds the constitutional relationships among the three branches of government, and between the branches and the agencies."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596-605, 609-16 (1984) (noting that the Constitution says little about unelected officials who "necessarily perform the bulk of the government's work," and describing provisions that do touch upon the responsibilities of various government officials).

33. *See* U.S. CONST. art. I, § 8, cl. 18; *see also* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulation but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 29 n.116, 51-55

scope and breadth of the implied powers can be measured in terms of necessity: if the power is "essential to prevent the defeat of the venture at hand," it can be interpolated into the text of the constitution as necessary and proper to effectuate the enumerated powers.[34] Agencies evolved out of necessity—the constitutionally created branches needed agents to perform the vast amount of detail work required to govern a modern society. Each branch has created agencies to oversee federal programs, conduct investigations, and fill in gaps left by broad-brush legislation with detailed regulations and guidelines.[35] The ability to delegate gap-filling power to non-legislative branch entities allows Congress to concentrate on its primary lawmaking duties and attend to the "venture at hand"—enacting laws "to . . . establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."[36] Thus, delegation of power to administrative agencies should be viewed as a "necessary and proper" condition upon the successful operation of a constitutional, tripartite government.[37]

Because agencies are simply agents, their powers flow from, and are subsidiary to, the branch that created them. Accordingly, agency action must be consistent with the Constitution and the authorities granted by

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n.207-29 (1999) (discussing early practices and judicial response as indicia of the Framers' intent that Congress use all power conducive to constitutionally specified ends).

34. LEARNED HAND, THE BILL OF RIGHTS 14 (4th prtg. 1962) (discussing judicial power to review congressional decisions; *see also* Nelson & Pushaw, *supra* note 33, at 56 (discussing Chief Justice Marshall's generous interpretation of the Necessary and Proper Clause in *McCulloch*, 17 U.S. at 406-15).

35. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 378 (2d ed. 1998).

36. U.S. CONST. pmbl.; *see also* Loving v. United States, 517 U.S. 748, 758 (1996); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406-07 (1928); United States v. Romard, 89 F. 156, 156-58 (S.D.N.Y. 1898) (holding that Congress had lawfully exercised its power to prohibit discharges of refuse into navigable waters unless a permit be obtained from the harbor master, who could specify limits and placement of discharges; "such a power cannot be denied . . . as it would defeat the only practicable and available means of protecting from nuisances the waters under [Congress's] jurisdiction, unless maybe, by a sweeping enactment prohibiting all deposits in the harbor").

37. *See* U.S. CONST. art. I, § 8, cl. 18; *Romard*, 89 F. 156 at 158-59. Nonetheless, some jurists and academics have argued that the modern administrative state, with its extensive reliance on executive agencies, is unconstitutional, though they have not gone so far as to advocate revolution or abolition of the current order. *E.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158-69 (1990) (arguing that even though the modern administrative state is unconstitutional, dismantling it would plunge our government into chaos); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-54 (1987) (arguing that New Deal legislation is unconstitutional, but accepting it as the result of "political forces"); McCutchen, *supra* note 30, at 2 (advocating that, although "[t]here is no room for a fourth branch within this tripartite scheme of governance," the Court should adopt a "second best" approach, and tolerate unconstitutional practices that have become institutionalized).

relevant statutes. The "organic act" that creates an executive agency and delegates power to it, along with subsequent enactments providing more detailed direction in specified contexts, set the parameters of the agency's power by providing legislative goals, policies and standards.

A perusal of statutes related to environmental protection and natural resource management will help illustrate this point. In the public lands arena, the Department of Agriculture's Forest Service is instructed by its organic acts to manage forest reserves using multiple-use-sustained-yield principles.[38] Within the Department of Interior, the National Park Service Organic Act directs the Park Service to preserve and protect parks "and the wildlife therein . . . by such means as will leave them unimpaired for the enjoyment of future generations."[39] The Bureau of Land Management operates under a variety of statutes,[40] but its general marching orders are found in the Federal Land Policy and Management Act ("FLPMA"), which, like the Forest Service organic acts, embraces multiple-use principles.[41]

The EPA, generally charged with pollution control, has no true organic act. Unlike agencies found in cabinet-level departments, the EPA was created not by legislation but by executive order.[42] It conducts its affairs according to a variety of statutes scattered throughout the United States Code, including the Clean Water Act,[43] Clean Air Act,[44] Toxic Substances Control Act,[45] and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," or "Superfund").[46]

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38. The Organic Act of 1897, 16 U.S.C. §§ 473—482, 551 (1994 & Supp. IV 1998), directed a sustained yield of timber and protection of water flow. It was amended by the Multiple Use-Sustained Yield Act ("MUSYA") of 1960, 16 U.S.C. §§ 528—531 (1994), which added a multiple-use component to the Forest Service management mandate; and the National Forest Management Act ("NFMA") of 1976, 16 U.S.C. §§ 1600—1604 (1994 & Supp. IV 1998), which retained the multiple-use sustained-yield concept and added detailed requirements for forest planning.

39. 16 U.S.C. §§ 1, 1a-1 (1994 & Supp. IV 1998); *see also* National Park Service, *The National Park Service—Our Mission, at* http://www.nps.gov/legacy/organic-act.htm (last modified Oct. 26, 1999).

40. *E.g.*, 43 U.S.C. §§ 2, 6, 11—18 (1994).

41. *Id.* §§ 1701—1785 (1994 & Supp. IV 1998). Similarly, the Fish and Wildlife Service derives its authorities from several different statutes, most importantly, the Endangered Species Act of 1973, 16 U.S.C. §§ 1531—1544 (1994 & Supp. IV 1998), and the National Wildlife Refuge System Act, 16 U.S.C. §§ 668dd—668jj (1994 & Supp. IV 1998).

42. Reorg. Plan No. 3 of 1970, 3 C.F.R. §§ 199—202 (1971), *reprinted in* 42 U.S.C. § 4321 (1994 & Supp. III 1997), *cited in* Lawrence E. Susskind & Joshua Secunda, *The Risks and the Advantages of Agency Discretion: Evidence from EPA's Project XL*, 17 U.C.L.A. J. ENVTL. L. & POL'Y 67, 71 n.6 (1998-99).

43. 33 U.S.C. §§ 1251—1387 (1994 & Supp. IV 1998).

44. 42 U.S.C. §§ 7401—7671 (1994 & Supp. IV 1998).

45. 15 U.S.C. §§ 2601—2692 (1994 & Supp. IV 1998).

46. 42 U.S.C. §§ 9601—9675 (1994 & Supp. III 1997).

The EPA's programs and initiatives are sometimes criticized as piecemeal and reactionary, with no unifying principle.[47] The lack of an organic act likely contributes to a perception of arbitrariness, and perhaps even heightens the suspicion with which courts review EPA activities. Intuitively, it seems that a cabinet-level agency with a congressionally enacted "mission statement" would be perceived as more credible and more accountable, and would therefore be given more deference by courts. It follows, then, that agencies like the National Park Service and the National Forest Service may be less susceptible to nondelegation challenges than the EPA and other agencies that operate under disjointed statutory directives. This article concludes that the activities of federal land management agencies are less likely to fall to nondelegation attack, not because of the cohesive nature of their legislative mission statements but because of the source of their power—the Property Clause.[48]

B. Separation of Powers, Laissez-faire Capitalism and Nondelegation

The primary criticism of congressional delegations of power to administrative agencies is that such delegations erode the separation of powers among the branches. Agency officials are not elected by the public and are generally viewed as less accountable than the legislative branch, yet they frequently wield policy-setting and rule-making authority.[49] Prior to the

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47. Susskind & Secunda, *supra* note 42, at 69-73 (describing EPA's history, and noting the lack of a clear legislative mission or mechanism for setting long-term priorities).

48. *See infra* Section VI. Professor Cass Sunstein, having surveyed various agencies and their organic acts, concluded that "there seems to be no link between clear statutory terms and agency competence or agency contribution to social well-being." CASS R. SUNSTEIN, IS THE CLEAN AIR ACT UNCONSTITUTIONAL?, 22-23 (AEI-Brookings Joint Center for Reg. Studies, Working Paper 99-7, 1999) [hereinafter SUNSTEIN, AIR I]; Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 339 (1999) [hereinafter Sunstein, *Air II*] (a revised version of SUNSTEIN, AIR I). According to Sunstein, the perception of agencies operating under open-ended mandates ranges from great respect for the Securities and Exchange Commission to near-contempt for the Interstate Commerce Commission ("ICC"). *Id.* at 22-23; *see also Encarta Enclyclopedia, Interstate Commerce Commission, at* http://encarta.msn.com/index/conciseindex/00/00082000.htm (last visited Aug. 26, 2000) (noting that the ICC was abolished in 1995, and its duties transferred to the Surface Transportation Board). Meanwhile, "[t]he Department of Agriculture is one of the least well-regarded agencies, and the statutes it administers are frequently all too clear." SUNSTEIN, AIR I, *supra*, at 22. The Department of Agriculture houses a number of agencies serving myriad functions, from land management (the Forest Service), to inspection and customs (the Animal and Plant Health and Inspection Service), to agricultural services (the Natural Resources Conservation Service). It is not clear which agency among these is the subject of Sunstein's assessment.

49. *See* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 161-62 (1991) ("[A]gencies are not created to be representative bodies, politically

enactment of the Administrative Procedure Act in 1946,[50] unelected agency officials made important decisions largely free from public scrutiny and judicial review, giving rise to separation of powers and due process concerns.[51]

It is therefore not surprising that the courts treated regulatory statutes as something akin to noxious, "foreign substances"[52] when they first appeared on the legislative scene around the turn of the century. In keeping with the tremendous expansion of American industry and commerce, laissez-faire principles, undergirding the common law's bias for private rights and private markets, served as the "norm" or baseline for judicial review.[53] Viewed in this light, regulations that protected workers and consumers were nothing more than "unprincipled interest group transfers."[54] Because such transfers were "in derogation of the common law," regulatory statutes were interpreted very narrowly, often defeating the protections offered to the statutory beneficiaries.[55] The judiciary's reaction was consistent with the

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responsive to an electorate. . . . [Their] decisions are the product of institutional, rather than personal, process.").

50. 5 U.S.C. §§ 551—559 (1994 & Supp. IV 1998).

51. McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 184 (1999); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 655 (1985) [hereinafter Sunstein, *Agency Inaction*]; *see also* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 428 (noting that heightened scrutiny of administrative action is "integrally related" to separation of powers concerns implicated by the delegation of legislative and judicial power to agencies); Cass R. Sunstein, *Factions, Self Interest and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 287 (1986) [hereinafter Sunstein, *Four Lessons*] (stating that judicial scrutiny under the Administrative Procedure Act can "'flush out' impermissible motivations . . . [and] guard against the dangers of self-interested representation and of factional tyranny in the regulatory process").

52. SUNSTEIN, RIGHTS REVOLUTION, *supra* note 26, at 5.

53. Laissez-faire economic theory is premised on the belief that government should not interfere in the marketplace because individual freedom in bargaining will ultimately serve societal needs by allocating resources in a way that promotes the greatest overall satisfaction. William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 7-8 (1995) (citing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 49 (Edward Canaan ed., 1976); and HERBERT SPENCER, THE GREAT POLITICAL SUPERSTITION, *in* MAN VERSUS THE STATE 153-156 (1981)). Justice Holmes, in his famous dissent in *Lochner v. United States*, 198 U.S. 45, 75 (1905), accused the majority of embracing this "economic theory which a large part of the country does not entertain. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." For further discussion of the influences of laissez faire and Social Darwinism on *Lochner* era courts, see Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988).

54. SUNSTEIN, RIGHTS REVOLUTION, *supra* note 26, at 5.

55. *Id.* at 6 (citing, *inter alia*, United States v. Elgin, Joliet & E. Ry. Co., 298 U.S. 492 (1936); FTC v. Eastman Kodak Co., 274 U.S. 619, 623-25 (1927); FTC v. American Tobacco Co., 264 U.S. 298, 305-06 (1924); FTC v. Gratz, 253 U.S. 421, 427 (1920); and Johnson v. Southern Pac. Co., 117 F. 462, 466 (8th Cir. 1902)); *cf.* Standard Oil Co. v. United States, 221

broader sentiments at work during the *Lochner* Era, when redistributive legislation was routinely invalidated as interfering with the freedom to contract and substantive due process guaranteed by the Fourteenth Amendment.[56]

Despite judicial resistance, regulatory programs did not fade quietly into the sunset. Quite to the contrary, governmental involvement in the daily affairs of the citizenry became more prevalent in the Depression years of the 1930's, in light of increasing evidence that the marketplace had failed to address important social needs. In the absence of regulation, unemployment reigned; farmers had no markets for meager crops coaxed from parched and eroded soils; factories exploited child labor and emitted pollution at will.[57] The Franklin D. Roosevelt Administration set out to tip the scales in favor of the public interest with a variety of New Deal programs.[58] Newly enacted economic and social legislation gave regulatory agencies vast powers to vindicate collective rights held by the citizenry at large.[59]

New entities were created to regulate and restore the securities markets, to bolster agriculture, and to safeguard the workplace and the banking system. New Deal agencies included key employment agencies, such as the Works Progress Administration, along with a panoply of regulatory and redistributive agencies, such as the Federal Communications Commission, the Federal Power Commission, the National Labor Relations Board, the Securities and Exchange Commission and the Social Security

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U.S. 1, 58-60 (narrowly construing the Sherman Antitrust Act as prohibiting only unreasonable restraints on trade, so as not to destroy the individual right to contract).

56. *See* Lochner v. United States, 198 U.S. 45, 53 (1905) (striking a New York law limiting employment in bakeries to sixty hours a week and ten hours a day as an arbitrary interference with the freedom to contract guaranteed by the Fourteenth Amendment). *Lochner* was followed by *Hammer v. Dagenhart*, 247 U.S. 251, 268-77 (1918), invalidating a federal law designed to put an end to child labor as beyond the Commerce Clause power; and *Duplex Printing Press v. Deering*, 254 U.S. 443, 464-78 (1921), holding that federal antitrust laws could be used to suppress labor union activities. The *Lochner* Era lasted until the mid-1930's, spanning a period of about thirty years; its demise went hand in hand with the eventual acceptance of New Deal programs. TRIBE, *supra* note 2, at 66-68, 132.

57. *See* SUNSTEIN, RIGHTS REVOLUTION, *supra* note 26, at 21-22.

58. For detailed analysis of New Deal programs and their economic and social origins and social and legal ramifications, see generally 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1995); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR (1955); PETER H. IRONS, THE NEW DEAL LAWYERS (1982); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963); 1 ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER (1957); 3 ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL (1960). For insights into New Deal ideology during the waning years of the Roosevelt administration and World War II, see generally DORIS KEARNS GOODWIN, NO ORDINARY TIME (1994).

59. TRIBE, *supra* note 2, at 78-83.

Administration.[60] Meanwhile, the power of existing agencies, such as the Food and Drug Administration and Federal Trade Commission, was greatly expanded.[61]

In many instances, agencies were given broad policy-making authority, which essentially combined all three governmental powers: legislative, executive and adjudicative.[62] Along with extensive power, early New Deal legislation typically provided little direction to agencies, authorizing them to prevent "unreasonable" behavior or to act "in the public interest."[63] From the executive and legislative perspectives, strict judicial vigilance over the "system of checks and balances no longer appeared to be a necessary safeguard of private property and liberty from factionalism, but instead—and this was the crucial point—a faction-driven obstacle to social change in the public interest."[64] Nonetheless, the judiciary, undaunted during the early years of the New Deal, continued to voice concerns that open-ended delegations and loosely phrased standards had a dangerous tendency to promote self-interest and factionalism, some of the very problems supposedly redressed by New Deal agencies.[65]

Enter the nondelegation doctrine. Although its basis is Article I, there is no explicit barrier to the delegation of legislative power in the constitutional text.[66] Its touchstone is John Locke's oft-repeated statement, that given the principles of a limited federal government, "[t]he power of the legislative, being derived from the people by a positive voluntary grant . . . , can be no other than what the positive grant conveyed, which being only to make laws, and not to make legislators."[67] The limitation on delegation of legislative

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60. SUNSTEIN, RIGHTS REVOLUTION, *supra* note 26, at 23-24.

61. *Id.* at 25, tbl.1.

62. *Id.* at 23.

63. *See, e.g.*, NBC v. United States, 319 U.S. 190, 233 (1943) (upholding the Federal Communication Commission's ("FCC's") regulation of chain broadcasting under the authority granted by the Communication Act of 1934). This provision was examined most recently in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378-79 (1999), but the nondelegation doctrine was not raised in that case. *See also infra* notes 393-405, and accompanying text.

64. SUNSTEIN, RIGHTS REVOLUTION, *supra* note 26, at 23. "The complicated character of modern problems vastly increased the need for technical expertise and specialization in making regulatory decisions." *Id.*

65. *Id.* at 29.

66. Likewise, there is no concrete evidence that the Framers intended a nondelegation doctrine, and early practices demonstrated a willingness to delegate extensive discretionary powers to the President in both military affairs and American Indian relations. Sunstein, *Air II, supra* note 48, at 331-332.

67. JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §§ 141 (C.B. Macpherson ed., 1980) (1690) (emphasis omitted). Professor Theodore Lowi describes the congressional rendering of legislative powers to the President and executive agencies as "legiscide." Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV.

power is meant to promote the balance of powers by ensuring that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[68] In addition, the doctrine is intended to protect against arbitrary action and abuses of governmental power by enhancing political accountability and assuring substantive and procedural safeguards to those who are affected by administrative action.[69]

III. WAXING AND WANING JUDICIAL SCRUTINY OF PRE- AND POST-NEW DEAL DELEGATIONS: FROM "LOOSE" TO "STRICT" REVIEW

Congressional delegations to executive agencies will be invalidated as violating separation of powers if the statute improperly grants authority that is purely legislative or judicial in nature.[70] Chief Justice John Marshall recognized early on that the line between the enactment of the laws, a congressional power, and the execution of those laws, an executive power, is a fine one: "The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[71]

A nondelegation problem arises when Congress fails to give adequate standards to guide the Executive's discretion in implementing a statute, thereby allowing the agency itself to engage in legislative policy-making functions.[72] Because the inquiry turns on whether Congress itself has made the difficult policy choices, the statute has been the focal point. However, the D.C. Circuit has recently taken the doctrine in a new direction, shifting the focus from Congress's statutory directive to the *agency's* construction of it, holding that an agency's interpretation may be so broad as to offend

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295, 299 (1987). "Because the people cede inherent legislative power to their representatives through a democratic process of elections, it is not appropriate for the legislators to cede that power to nonelected officials who will not necessarily reflect the popular will." Robert W. Adler, American Trucking *and the Revival (?) of the Nondelegation Doctrine*, 30 ENVTL. L. REP. 10,233, 10,235-36 (2000).

68. Indus. Union Dep't. v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

69. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (citing Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971)), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.).

70. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952) (holding that a seizure order issued by the President violated separation of powers).

71. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

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

separation of powers by presuming the power to act beyond its authorized executive role.[73]

The Supreme Court's judicial litmus test for reviewing legislative delegations to executive agencies has long been whether the statutory language provides an "intelligible principle" to guide agency action.[74] This test, which turns on legislative semantics, has changed very little over time, but the stringency of its application has waxed and waned significantly, depending on the political and social forces at work. It also appears that heightened scrutiny has been applied to executive action authorized by a certain type of enactment. Statutes issued pursuant to Commerce Clause authority, having a tendency to affect the entire economy, appear to be more closely scrutinized than those that have other constitutional powers as their source.[75]

A. Nondelegation Review Through the New Deal Years

Nondelegation was considered a "principle universally recognized" by the late 1800's,[76] even though at that time the Supreme Court had never actually struck down a statute on nondelegation grounds. When the nondelegation doctrine was first announced, the Court was quite tolerant of congressional grants of authority to executive bodies, upholding legislation so long as there were some standards to define the scope of the agency's power to regulate.[77]

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73. *See Am. Trucking*, 175 F.3d at 1034-40 (Williams, J.); discussion *infra* Part III.B.3. This approach was foreshadowed in an early D.C. Circuit opinion, *International Union, UAW v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991), also issued by Judge Stephen Williams and a few lower court decisions, *see* Sunstein, *Air II*, *supra* note 48, at 310 n.22 (citing cases).

74. *See J.W. Hampton*, 276 U.S. at 409 (upholding delegation based on "intelligible" statutory principle). Prior to *J.W. Hampton*, the Court considered whether the legislature had provided an adequate standard for the delegatee to fill in the gaps left by general statutory provisions. *See Wayman*, 23 U.S. (10 Wheat.) at 43.

75. *See* PIERCE, *supra* note 30, at 50-51; *see also* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1224-25 (1985). For a discussion of challenges outside of the Commerce Clause context, see *infra* Part V.

76. Field v. Clark, 143 U.S. 649, 692 (1892).

77. For the earliest cases to address the nondelegation concept, see *Cargo of Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 387-388 (1813) (recognizing a nondelegation issue, but upholding the enactment in question), and *Wayman*, 23 U.S. (10 Wheat.) at 43 (sustaining a legislative grant of power to federal courts to adopt their own rules of process). In *Field*, the Court upheld a provision of the Tariff Act of 1890 which directed the President to suspend an exemption of import duties "whenever, and so often" as he should be satisfied that the duties imposed on U.S. products by any country producing and exporting certain enumerated commodities were "reciprocally unequal and unreasonable." 143 U.S. at 680. The Court found that the President's power was simply:

For example, in *United States v. Grimaud*,[78] the Court rejected a challenge to the Organic Act of 1897, which directed the Department of Agriculture to protect timber and watersheds within national forest reserves from destruction by regulating "their occupancy and use."[79] The Organic Act, according to the Court, set forth the legislative purposes along with sufficient guidance on how to effectuate those purposes. As such, the Act, in spite of its rather obscure directive, simply provided the agency with the power not to legislate but "to fill up the details."[80]

By the early New Deal years of the 1930's, the political and judicial atmosphere had changed dramatically, and the search for intelligible principles became far more intensive. By then, the judiciary could be counted on as the bastion of the most powerful and resourceful industrialists—those very same entities who had benefited greatly from laissez-faire government and the common law's protections for contract and property rights.[81] The nondelegation doctrine, along with substantive due process and Commerce Clause constraints, emerged as the vehicles of choice for striking down progressive New Deal legislation.[82]

In 1935, for the first time, the Supreme Court struck down two statutory provisions for unlawfully delegating legislative powers. In *A.L.A. Schechter Poultry Corp. v. United States*,[83] the provision in question, the Live Poultry Code, a section of the National Industrial Recovery Act ("NIRA"), allowed firms to agree to codes of fair competition and authorized the President to enforce the codes if, *inter alia*, they did not promote monopolies.[84] The Court found that the provision provided no standards, other than "the general

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> [T]he enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.

Id. at 693. Other early cases upholding broad delegations include *Buttfield v. Stranahan*, 192 U.S. 470, 497-98 (1904) (sustaining delegation of authority to "establish uniform standards" for importing tea), and *J.W. Hampton*, 276 U.S. at 403-04 (upholding delegation of power to President to adjust tariffs when rates failed to "equalize . . . differences in costs of production").

78. 220 U.S. 506 (1911)

79. *Id.* at 509 (citing provisions now codified at 16 U.S.C. §§ 475, 478, 551 (1994 & Supp. IV 1998).

80. *Id.* at 517 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43). For further discussion of the nature of the Property Clause as a source for statutes such as the Organic Act, see discussion *infra* Part VI.A.

81. Nelson & Pushaw, *supra* note 33, at 78 nn.353-55.

82. *See* SUNSTEIN, RIGHTS REVOLUTION, *supra* note 26, at 19-20; *see also supra* notes 52-56 and accompanying text.

83. 295 U.S. 495, 537 (1935).

84. *See id* at 521-23.

aims of rehabilitation, correction and expansion."[85] As a result, it allowed the President vast and unfettered authority to determine what to do "for the betterment of business," constrained only by the extent of the federal commerce power.[86] In turn, the provisions at issue were also found to be beyond the Commerce Clause authority, as the sale of chickens wholly within one state did not directly affect interstate commerce.[87]

That same year, in *Panama Refining Co. v. Ryan*,[88] the Court struck another provision of NIRA that allowed the President to prohibit the transportation of petroleum in interstate commerce in excess of amounts allowed by state law.[89] The petroleum provision was faulted for giving the President "unlimited authority to determine the policy and to lay down the prohibition . . . as he may see fit."[90] One year later, in *Carter v. Carter Coal Co.*,[91] the Coal Conservation Act, which established local boards to set coal prices and authorized collective bargaining over wages and hours, was invalidated on due process grounds as an improper grant of legislative power to private parties.[92] In addition, the Court concluded that coal production did not directly affect interstate commerce, but instead merely preceded commerce, and was therefore local in nature.[93]

In response, FDR proposed a bill that would, in effect, allow him to pack the Court by expanding the bench from nine to fifteen members, presumably so that he could appoint justices more favorable to his policies.[94] Roosevelt dropped his "Court-packing" plan, however, when one Justice "switched" and cast his vote in favor of Washington State's minimum wage law in *West Coast Hotel Co. v. Parrish*[95] in 1937. Supreme Court review of a key New

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85. *Id.* at 541. Congress's stated policies included removing obstructions to the flow of commerce, encouraging the organization of industry and cooperative action among trade groups, advancing united action of labor and management, eradicating unfair competitive practices, and conserving natural resources. *See id.* at 521-36 (citing National Industrial Recovery Act § 3, 48 Stat. 196 (1933)).

86. *Id.* at 553 (Cardozo, J., concurring).

87. *Id.* at 524-550.

88. 293 U.S. 388 (1935).

89. *Id.* at 411, 417-21.

90. *Id.* at 415.

91. 298 U.S. 238 (1936)

92. *Id.* at 311; *see also* United States v. Butler, 297 U.S. 1, 64-68 (1935) (striking the Agricultural Adjustment Act as an invalid exercise of the general welfare clause).

93. *Carter*, 298 U.S. at 301-03; Nelson & Pushaw, *supra* note 33, at 70-71 (discussing *Carter*). For a discussion on the history and trends in Commerce Clause jurisprudence, see *id.* at 56-93; *infra* Part III.B.2.

94. TRIBE, *supra* note 2, at 66-68.

95. 300 U.S. 379, 400 (1937). Justice Owen Roberts, a Hoover appointee, has been dubbed "the switch in time that saved the nine." TRIBE, *supra* note 2, at 66 (quoting future Justice Abe Fortas); *see also* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE

Deal program followed closely on the heels of *Parish*, and in *NLRB v. Jones & Laughlin Steel Corp.*,[96] the National Labor Relations Act was found a valid exercise of Commerce Clause authority.[97] By the early 1940's, legislation providing for unemployment compensation and agricultural support programs, along with the second Coal Conservation Act, had been upheld with minimal judicial resistance.[98]

Professor Bruce Ackerman explains the events of 1935-37, including the Supreme Court's decisions and the re-election of Roosevelt in 1936, as nothing short of a pivotal "constitutional moment" in American legal history.[99] It is by no means universally accepted, however, that Roosevelt's Court-packing plan had the direct effect of eviscerating judicial resistance to New Deal programs, thereby paving the way for a progressive new governmental approach to societal problems.[100] Some commentators believe that individual pieces of early New Deal legislation would have survived had they been as ably drafted and defended as later "Second New Deal" enactments, like the National Labor Relations Act provisions at issue in *Jones & Laughlin Steel*.[101] Although the exact reason may be unclear, without question, 1937 "marked a sharp change in the Supreme Court's habit of striking down New Deal legislation as exceeding the federal commerce power, or violating the due process or equal protection clauses."[102]

In the ensuing years, broad delegations were routinely and universally upheld. Delegations that provided only vague standards have passed muster so long as the scope or degree of the agency's power could be construed as relatively narrow, or adequate procedural protections were given to the

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CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 160-62 (1995) (asserting that the Court-packing plan directly affected the Court's response to New Deal legislation).

96. 301 U.S. 1 (1937).

97. *Id.* at 43.

98. *See* Wickard v. Filburn, 317 U.S. 111, 128-29 (1942); Superior Bath House Co. v. McCarroll, 312 U.S. 176, 179 (1941); Sunshine Anthracite Coal Co. v. Adkins, 31 F. Supp. 125, 128 (E.D. Ark. 1940).

99. Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1053-55 (1984) (explaining that the citizenry, responding to the signals sent by the Supreme Court's decisions, indicated its acceptance of significant new directions in legislative activity, not by attempting a formal constitutional amendment, but by way of the 1936 election); *see also* Daniel J. Hulsebosch, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 1979 n.31 (1990).

100. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 236-37 (1990); G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392, 1407-09 (1996).

101. *E.g.*, Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 249-55 (1994).

102. Daniel A. Crane, *Faith, Reason, and Bare Animosity*, 21 CAMPBELL L. REV. 125, 136 n.56 (1999).

persons subject to regulatory power.[103] Courts have found that even the most ambiguous provisions may gain "meaningful content" from the statute's overall purpose and general philosophy, as well as its legislative history, factual background or historical or social context.[104] For example, statutes authorizing the Federal Communications Commission to regulate broadcast licensing "as the public interest, convenience, or necessity" requires,[105] the Price Administrator to fix "fair and equitable" commodities prices,[106] and the War Department to recover "excessive profits" earned from military contracts,[107] have all withstood delegation challenges.

By the 1970's, the nondelegation doctrine was, for all intents and purposes, defunct. In *Amalgamated Meat Cutters v. Connally*,[108] a remarkably broad provision of the Economic Stabilization Act was upheld, giving the President authority "to issue such orders and regulations [as deemed] appropriate to stabilize prices, rents, wages and salaries" at 1970 levels, with adjustments as "necessary to prevent gross inequities."[109] According to the court, it was enough that the Act provided some limiting language, along with adequate procedural protections, including judicial review.[110]

The notion that procedural safeguards might allow a statute with few explicit guiding principles to dodge the nondelegation bullet finds support in the earlier Supreme Court cases, including *Schechter Poultry*.[111] There, the Court drew a distinction between the offending provision of NIRA and other

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103. *See* PIERCE, *supra* note 30, at 53-55.

104. *E.g.*, Am. Trucking Ass'ns v. EPA, 195 F.3d 4, 7 (D.C. Cir. 1999) (citing Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946)), *modifying on petition for reh'g*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.); *see also* Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (considering banking industry's "well-defined practices" to uphold delegation to Federal Home Loan Bank Board to issue regulations for appointing conservators for savings and loan associations).

105. NBC v. United States, 319 U.S. 190, 214-16 (1943) (quoting 47 U.S.C. § 303).

106. Yakus v. United States, 321 U.S. 414 , 422-26 (1944).

107. Lichter v. United States, 334 U.S. 742, 747, 788-89 (1948).

108. 337 F. Supp. 737 (D.C.C. 1971) (Leventhal, J., for three-judge panel).

109. *Id.* at 745, 764 (quoting Economic Stabilization Act of 1970, § 202, 84 Stat. 799 (amended 1971) (expired 1974)).

110. *Id.* at 746-47.

111. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935); *see also* Arizona v. California, 373 U.S. 546, 583-85 (1963) (upholding delegation to Secretary of Interior where Secretary's power to apportion Colorado River water could be reined in by congressional oversight or judicial review); *NBC*, 319 U.S. at 214, 216 (rejecting a nondelegation challenge to the National Communications Act, which allowed regulation of radio broadcasting as the "public convenience, interest, or necessity requires," because Congress had provided adequate guidance, in light of the Act's stated goals and procedures, when reviewed with the overall context of radio broadcasting in mind).

federal enactments like the Federal Trade Commission Act which, despite its seemingly unconstrained grant of discretion, required the agency-delegatee to utilize special procedures before making a determination of "unfair methods of competition."[112] In *American Power & Light Co. v. SEC*,[113] the Court specifically noted that statutory rulemaking procedures and opportunities for judicial review provided an adequate check against unconstrained delegation of power to executive agencies.[114] Notably, that same year, the Administrative Procedure Act was enacted, requiring federal agencies to engage in specified rulemaking processes with increased opportunities for public involvement.[115] The Act also opened the door for judicial review of agency action, which in many cases had been barred by sovereign immunity.[116]

Thus, in the post-New Deal, post-Administrative Procedure Act era, courts have been far more interested in ensuring that procedural safeguards cabin the exercise of delegated power so that those affected by agency action are protected from arbitrary and abusive decisions. As the Oregon Supreme Court so adroitly observed:

> [T]he requirement of expressed standards has, in most instances, been little more than a judicial fetish for legislative language, the recitation of which provides no additional safeguards to persons affected by the exercise of the delegated authority . . . . [I]t is of little or no significance . . . that the statute . . . stated the

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112. *Schechter Poultry*, 295 U.S. at 532-34. The opinion also distinguished the Interstate Commerce Act and the Federal Radio Act, both of which delegated power to executive agencies who were required to make findings, based upon evidence, before applying the relevant statutory standards. *Id.* at 539-41.

113. 329 U.S. 90 (1946).

114. *Id.* at 105-09; *see also* Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring).

115. *See* 5 U.S.C. §§ 551—559 (1994 & Supp. IV 1998). For a discussion of the Administrative Procedure Act's background and legislative history, see McNollgast, *supra* note 51, at 180-84.

116. *See* 5 U.S.C. § 706 (1994 & Supp IV 1998). "It long has been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . .'" United States v. Testan, 424 U.S. 392, 399 (citing United States v. Sherwood, 312 U.S. 584, 586 (1941)); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (Marshall, C.J.) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States"). However, the Administrative Procedure Act of 1946 indicated that judicial review of administrative action should be available. Richard H. Fallon, Jr., Claims Court at the Crossroads, 40 Cath. U. L. Rev. 517, 522 (1991) (citing ch. 324, Pub.L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of Title 5 of the U.S. Code). To clarify the point, the 1976 amendments to the Administrative Procedure Act explicitly waived the federal government's sovereign immunity from injunctive relief. *Id.* (citing Pub. L. No. 94 -574, 90 Stat. 2721 (1976) (codified at 5 U.S.C. §§ 702-703)); *see also* United States v. Mitchell, 463 U.S. 206, 227 n. 32 (1983).

> permissible limits . . . in terms of such abstractions as "public convenience, interest or necessity" or . . . "for the public health, safety, and morals" and similar phrases accepted as satisfying the standards requirement.[117]

Giving heightened attention to procedural safeguards over linguistics makes sense when viewed in light of the primary functions of the nondelegation doctrine. The noted administrative law scholar Kenneth Culp Davis proposed that the nondelegation doctrine be reformulated to better protect against arbitrary agency action: courts should "look to the totality of legislative and administrative standards and procedural safeguards to determine whether administrative discretion has been confined to the greatest degree practicable."[118] So long as Congress has established the substantive policy choice, procedural requirements enhance judicial review by facilitating a complete administrative record, thereby providing a basis for more thorough inquiry into the agency's conclusions; as a result, regulatory decisions are less likely to be biased or arbitrary. Moreover, if the congressional objective is provided and some guidance is available, either explicitly or otherwise, so that agencies are not making law out of whole cloth and courts are afforded a meaningful oversight role, separation of powers is less likely to be impaired.

B. Judicial Review in Recent Years: Another Swing of the Pendulum

1. Supreme Court Review of Nondelegation Challenges

Although no post-New Deal Supreme Court opinion has invalidated a statute on nondelegation grounds, since 1980 there have been a few signals that the pendulum may be swinging back, under the weight of the most

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117. Warren v. Marion County, 353 P.2d 257, 260-01 (Or. 1960) (en banc) (citing 1 DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 2.03—.05; and FORKOSH, ADMINISTRATIVE LAW, §§ 83—84). Oregon is one of a handful of states that seem to rely solely on procedural safeguards in rejecting nondelegation claims. *See* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 598-99 (1994). Many states have upheld delegations to administrative agencies if the legislature has provided some form of "loose" standards, particularly if the legislation includes procedural safeguards. *Id.* at 574, 588-97.

118. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.3, .15 (2d ed. 1978); *see also* Kenneth C. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969). Davis's proposal gained support in state courts, *see Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1477 (1982), and likely influenced the three-judge panel in *Amalgamated Meat Cutters*, *see supra* notes 108-10 and accompanying text. *See also* SUNSTEIN, RIGHTS REVOLUTION, *supra* note 26, at 24-25.

conservative justices, toward the "strict" nondelegation review seen in the early New Deal cases. That year, in *Industrial Union Department v. American Petroleum Institute*,[119] the Court remanded an Occupational Safety and Health Administration ("OSHA") standard limiting workplace exposure to benzene.[120] The Occupational Safety and Health Act required OSHA to set exposure limits for toxic materials that would "most adequately assure, to the extent feasible . . . that no employee will suffer material impairment" of health.[121] According to the plurality opinion, had "feasibility" been the only limitation on agency discretion, OSHA could impose substantial costs on industry without any risk-based justification.[122] Citing *Schechter Poultry*, the Court surmised that such a "sweeping delegation of legislative power" might violate the nondelegation doctrine.[123] The Court, however, avoided the constitutional issue by finding that OSHA's discretion was adequately curbed by the Act's definition of safety standards as those standards "necessary or appropriate to provide safe or healthful employment."[124] This provision was construed as requiring OSHA to make a threshold determination that a "significant risk of material health impairment" existed at the level of exposure prohibited by its regulation.[125]

Justice Rehnquist, concurring, believed that the statutory provision did in fact violate the nondelegation doctrine because it gave "absolutely no indication where on the continuum of relative safety [the Secretary of Labor] should draw his line."[126] Rehnquist added that, "in the light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power."[127] Justice Scalia, a law professor at the time, praised the possible revival of the nondelegation doctrine: "[E]ven with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice. The

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119. 448 U.S. 607 (1980).

120. *Id.* at 662.

121. 29 U.S.C. § 655(b)(5) (1994).

122. Industrial Union Dep't, 448 U.S. at 640.

123. *Id.* at 646 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935)).

124. *Id.* at 639 (quoting Occupational Safety and Health Act, § 3(8), 29 U.S.C. § 652(8) (1994)).

125. *Id.*

126. *Id.* at 675 (Rehnquist, J., concurring). Justice Rehnquist opined that "the language 'to the extent feasible' . . . render[s] what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory." *Id. at* 681-82.

127. *Id.* at 675.

alternative appears to be a continuation of the widely felt trend toward government by bureaucracy or (what is no better) government by courts."[128]

One year later, in *American Textile Manufacturers Institute, Inc. v. Donovan*,[129] the Court, reviewing the Occupational Safety and Health Act yet again, held that a cost-benefit analysis was not required to support "feasible" exposure standards.[130] It found that the legislative history, though not "crystal clear," provided sufficient evidence that feasible meant "capable of economic and technological accomplishment."[131] In dissent, Justice Rehnquist, joined by Chief Justice Burger, stated that Congress itself was required to make the hard policy decision regarding the role of costs in workplace safety; by evading the issue, it had unlawfully delegated its duties to an executive agency.[132]

A delegation issue was raised again in *Mistretta v. United States*,[133] but was flatly rejected by the Court, which held that Congress had provided sufficient guidance for the Sentencing Commission to develop federal sentencing guidelines.[134] Justice Blackmun, writing for the majority, noted that, although Congress had granted the Commission substantial discretion in formulating guidelines, the congressional directives at issue went beyond mere "intelligible principles."[135] It was sufficient that Congress had legislated "a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories."[136] Indeed, according to the Court, the development of sentencing guidelines "for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an

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128. Antonin Scalia, *A Note on the Benzene Case*, REG. Jul-Aug 1980, at 25, 28; *see also* Andres Snaider, Note, *The Politics and Tension in Deligating [sic] Plenary Power: The Need to Revive Nondelegation Principles in the Field of Immigration*, 6 GEO. IMMIGR. L.J. 107, 111-112 (1992).

129. 452 U.S. 490 (1981).

130. *Id.* at 508-09, 530-36 (quoting 29 U.S.C. § 655(b)(5)).

131. *Id.* at 514.

132. *Id.* at 547-48 (Rehnquist, J., dissenting). The two dissenters stressed the importance of leaving questions of fundamental policy in the hands of "the elected representatives of the people," but conceded that if the delegation had involved a complex technical issue incapable of legislative resolution due to a lack of congressional expertise, rather than a matter of public policy avoided because of a lack of political will, it may have been permissible. *Id.*

133. 488 U.S. 361 (1989).

134. *Id.* at 371-80.

135. *Id.* at 379.

136. *Id.* at 377.

expert body is especially appropriate."[137] The Court made a point of explaining that, in a complex modern society, "Congress simply cannot do its job absent an ability to delegate power under broad general directives,"[138] and that Congress, in enacting regulatory statutes, need not select the method of policy implementation that would result in the most minimal delegation of discretion to administrative officers possible.[139]

After *Mistretta*, all had been relatively quiet on the nondelegation front in Supreme Court jurisprudence until the Court accepted the petitions for certiorari in *American Trucking*.[140] However, during the intervening years, the Court had reined in congressional and executive powers under a variety of other theories, indicating that there may also be renewed interest in nondelegation as a limitation on federal power. In particular, federalism concerns have experienced a resurrection, with a majority of the Court imposing limitations based on states' rights and a restrictive view of the Commerce Clause powers.

2. Supreme Court Review of Commerce Clause and Federalism Challenges

Throughout the post-New Deal era, the scope of the Commerce Clause was viewed as so exceedingly broad that it appeared to be almost limitless. In fact, between 1937 and 1995, the Supreme Court upheld every federal

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137. *Id.* at 379.

138. *Id.* at 372; *see also* Loving v. United States, 517 U.S. 748, 758 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government.").

139. *Id.* at 379 (citing Yakus v. United States, 321 U.S. 414, 425-26 (1994)).

140. Browner v. Am. Trucking Ass'ns, 120 S. Ct. 2003 (2000) (mem.); Am. Trucking Ass'ns v. Browner, 120 S. Ct. 2193 (2000) (mem.). There were only a few cases in the late 1980's and early 1990's that dealt with nondelegation arguments head on. In 1991, the Supreme Court upheld a statute allowing the Attorney General to schedule controlled substances on a temporary basis if they posed an "imminent hazard to the public safety." Touby v. United States, 500 U.S. 160, 166-67 (1991) (quoting 21 U.S.C. § 811(h)(1)) (noting that the statute imposed additional restrictions on the discretion to list substances: such substances must have a "high potential for abuse," with "no currently accepted medical use treatment" and "a lack of accepted safety for use of the drug . . . under medical supervision"). The Court also upheld provisions of the Uniform Code of Military Justice allowing the President to define aggravating factors for imposition of the death penalty in military capital cases, *Loving*, 517 U.S. at 771-774, and to exercise the taxing power, Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 220-21 (1989). Most recently, in reviewing a broad-sweeping grant of authority to the Food and Drug Administration ("FDA") to regulate drugs and drug devices, the Court did not even hint at nondelegation, instead applying routine standards of judicial review under the Administrative Procedure Act. *See* FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1297-1315 (2000); discussion *infra* Part V.B.

statute challenged on Commerce Clause grounds.[141] But Commerce Clause jurisprudence experienced a sea-change in 1995, and the Court has since struck down two high profile federal regulatory programs as beyond interstate commerce, raising themes not seen since the *Lochner* years. In 1995, the Court issued *United States v. Lopez*,[142] invalidating the Gun-Free School Zones Act,[143] which made knowing possession of a firearm in school zones a federal offense.[144] The *Lopez* decision held that the Act "by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise"; thus, possession of a gun in a school zone could not be considered an economic activity that "substantially affect[ed]" interstate commerce.[145] Subsequently, in *United States v. Morrison*,[146] the Court struck down the civil remedy provision of the Violence Against Women Act,[147] finding that gender-motivated crimes of violence did not constitute economic activity within the reach of the federal Commerce Clause power.[148] Most recently, several environmental statutes have come under fire, and the Court has accepted certiorari in a Clean Water Act case challenging the regulation of wetlands as beyond the purview of the Commerce Clause.[149]

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141. *See* Nelson & Pushaw, *supra* note 33, at 1, 4, 13-107 (providing an in-depth assessment of the historic underpinnings of the Commerce Clause and the evolution of Commerce Clause jurisprudence).

142. 514 U.S. 549 (1995).

143. 18 U.S.C. § 922(q) (1994 & Supp. IV 1998).

144. *Lopez*, 514 U.S. at 561-62 (1995). Chief Justice Rehnquist, writing for the majority, stressed that federal legislative authority under the Commerce Clause "is subject to outer limits." *Id.* at 557. He remarked that the scope of the interstate commerce power:

> [M]ust be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Id. (quoting dicta in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

145. *Id.* at 562. The Court noted that:

> Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce . . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

Id. at 562-63 (citations omitted).

146. 120 S. Ct. 1740 (2000).

147. 42 U.S.C. § 13,981 (1994).

148. *Id.* at 1749-52.

149. *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000). Commerce Clause challenges to another far-reaching environmental statute, the Endangered Species Act, 16 U.S.C. §§ 1531—1543 (1994), have also been raised in the circuit courts, so far unsuccessfully. Gibbs v. Babbitt, 214 F.3d 483, 492-94 (4th Cir. 2000) (holding that the Endangered Species Act's prohibition on activities on private

The remarkable nature of the *Lopez* and *Morrison* decisions can best be illustrated with a brief historical overview. During the *Lochner* Era, a restrictive view of Commerce Clause powers prevailed when, for example, federal laws designed to put an end to child labor were struck down as unconstitutional in *Hammer v. Dagenhart*.[150] Under *Hammer*, Congress could regulate only those activities with direct effects on interstate commerce.[151] Two of the cases that brought that era to a close were *United States v. Darby*,[152] which overruled *Hammer*, and *Jones & Laughlin Steel*, which held that activities that individually are intrastate in nature may be regulated if together they have a "substantial relation to interstate commerce."[153] Subsequently, the Court upheld one of the most sweeping assertions of power over commerce ever to come before it in *Wickard v. Filburn*,[154] finding that Congress had a rational basis for believing that the aggregate effects of domestic, noncommercial wheat farming, used largely for home consumption, substantially affected commerce and therefore justified federal regulation.[155] There, the Court noted that a more expansive view of Commerce Clause powers was consistent with the earliest Supreme Court precedent: "At the beginning Chief Justice Marshall described the Federal commerce power with a breadth never yet exceeded."[156]

After *Wickard*, a relaxed view of the Commerce Clause powers prevailed until the 1995 *Lopez* case. The "substantial relation" test is still the present day formulation of federal Commerce Clause powers,[157] but in application

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property that would "take" a red wolf and reintroduce it into its historic range as an experimental population of endangered species, was valid under the Commerce Clause); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1041-57 (D.C. Cir. 1997) (finding the Endangered Species Act's "take" provision, as applied to endangered species of fly found only in California, was a constitutional exercise of the Commerce Clause power), *cert. denied*, 524 U.S. 937 (1998). In *Gibbs*, the court expressly distinguished *Morrison* and *Lopez*, and found that the provision at issue involved economic and commercial activities (tourism, scientific research and commercial trade in animals and pelts), and that takings of red wolves in the aggregate would have a substantial impact on interstate commerce. 214 F.3d at 490-510.

150. 247 U.S. 251, 273-77 (1918).

151. *Id.*

152. 312 U.S. 100, 115-25 (1941). *Darby* also limited *Carter Coal* and, by implication, *Lochner*. For a discussion of the erosion of judicial intolerance for New Deal programs, see *supra* notes 94-102 and accompanying text.

153. 301 U.S. 1, 36-37 (1937).

154. 317 U.S. 111 (1942).

155. *Id.* at 120, 128 ("It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.").

156. *Id.* at 120 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-195 (1824)).

157. The "substantial relation" test is one of three categories within the regulatory scope of the Commerce Clause. Congress may also control "the channels of interstate commerce" to keep them "'free from immoral and injurious uses,'" such as racial discrimination, and "the instrumentalities

the test is becoming far more restrictive, as seen in both *Lopez* and *Morrison*. In *Morrison*, Justice Souter, in dissent, lamented:

> Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB v. Jones & Laughlin Steel Corp.* . . . , which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes.[158]

The Court's efforts to distinguish post-1937 Commerce Clause cases like *Wickard* from *Lochner* Era cases like *Hammer* were not the result of a principled application of constitutional theory or precedent, explained Justice Souter, but "laissez-faire economics, the point of which was to keep government interference to a minimum."[159]

Even beyond the Commerce Clause context, the Court has expressed renewed interest in federalism and states' rights.[160] Up until the early 1990's, federalism challenges to congressional enactments had almost as dismal a track record as did Commerce Clause arguments, with the Court rejecting all but one.[161] Then, in 1992, the Court struck a provision of the

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of interstate commerce," such as navigational channels and railroads, including vehicles traveling wholly within a state. United States v. Lopez, 514 U.S. 549, 558 (1995) (citations omitted).

158. United States v. Morrison, 120 S. Ct. 1740, 1767 (2000). A precursor to this remark can be found in the concurring and dissenting opinions in *Lopez*. There, Souter, in dissent, queried whether the Court's decision "does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago." 514 U.S. at 608. He replied to his own rhetorical question: "[t]he answer is not reassuring." *Id.* Justice Kennedy, concurring, stated that "[t]his case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution." *Id.* at 575.

159. *Morrison*, 120 S. Ct. at 1768 (citing *Lopez*, 514 U.S. at 605-06).

160. Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 741 (2000) (noting that "[t]he most recent Supreme Court term devoted considerable attention to federalism, especially under the Eleventh Amendment, and was perceived to have aggressively advanced the interests of states' rights vis-á- vis federal legislation.").

161. Until 1992, only one federal statute was declared unconstitutional on federalism grounds. That case, *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), was subsequently overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 530-31 (1985). *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 502 (1995); Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1067 (1977). Professor Chemerinsky's article provides an illuminating exposition of Supreme Court federalism jurisprudence and its relationship to the underlying values of federalism, defined, for the purposes of the article, as the

Low-Level Radioactive Waste Policy Act which required states to accept ownership of waste or regulate it according to congressional instructions, reasoning that such requirements lie outside Congress's enumerated powers and were inconsistent with the Tenth Amendment.[162] A few years later, in *Printz v. United States*,[163] the Court found that a provision of the Brady Act[164] requiring states to conduct background checks on prospective handgun purchasers, imposed an unconstitutional obligation on state officers to execute federal laws.[165] The Court's opinion emphasized the vitality of the system of "dual sovereignty" established by the Framers, as well as the express limitation on national power found in the Tenth Amendment's reservation of state power.[166]

State sovereign immunity has likewise been invoked more frequently in recent years to restrict the scope of a variety of federal regulatory statutes, including the Age Discrimination in Employment Act,[167] the Fair Labor Standards Act,[168] and the Indian Gaming Regulatory Act.[169] Even the recent *Morrison* decision, striking the Violence Against Women Act, can be characterized as a blow for federalism. Although the holding is based on Commerce Clause analysis, according to dissenting Justice Souter, it was a

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extent to which state governmental autonomy limits the exercise of federal power. *See generally* Chemerinsky, *supra*.

162. New York v. United States, 505 U.S. 144, 174-88 (1992). Similarly, in Cipollone v. Liggett Group, 505 U.S. 504, 518 (1992), the Court held that the Federal Cigarette Labeling and Advertising Act generally did not preempt actions for damages under state law tort theories. Justice Blackmun attributed the Court's reluctance to find preemption to "the principles of federalism and respect for state sovereignty." *Id.* at 533 (Blackmun, J., concurring in part).

163. 521 U.S. 898 (1997).

164. 18 U.S.C. § 922(s) (1994 & Supp. II 1996).

165. *Printz*, 521 U.S. at 933-35.

166. 521 U.S. at 918-22; *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

167. *See* Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 640-50 (2000) (concluding that Congress had gone beyond its authority by attempting to abrogate states' Eleventh Amendment immunity from suit under the Age Discrimination in Employment Act).

168. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that Congress could not subject state to Fair Labor Standards Act suit in state court without its consent).

169. *See* Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) (finding that Congress lacked authority, in the face of Eleventh Amendment sovereign immunity, to subject states to Indian Gaming Regulatory Act claims in federal court). Another recent Supreme Court case that could be placed in the shadow cast by federalism is *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997), striking down the Religious Freedom Restoration Act of 1993, in part because it undermined the federal-state balance. *Id.* at 2172-74.

product of the majority's interest in the states' long tradition of exercising police powers over violent crimes.[170]

Both the increasing use of states' rights and the judicial curtailment of Commerce Clause powers have closely tracked the renewal of the nondelegation doctrine, with each theory once again becoming viable means of limiting federal regulatory powers in the twenty-first century administrative state. Most susceptible to limitation are those statutes and regulations that have the potential for pervasive economic effects.

3. The D.C. Circuit's Decision in *American Trucking*

Echoing the Commerce Clause and federalism themes of *Printz, Morrison* and *Lopez*, the U.S. Court of Appeals for the D.C. Circuit invalidated the EPA's interpretation of the Clean Air Act in *American Trucking*.[171] The court held that the EPA's regulation of ground-level ozone ("O_3") and particulate matter resulted in an "unconstitutional delegation of legislative power,"[172] reviving a doctrine "dormant since the mushrooming of the regulatory state under the New Deal."[173] Instead of finding the statute unconstitutional and vacating the national ambient air quality standards ("NAAQS") in their entirety, however, the court remanded the regulations to the EPA for an articulation of intelligible principles to constrain the agency's discretion.[174] The EPA's petition for rehearing *en banc* on the nondelegation

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170. United States v. Morrison, 120 S. Ct. 1740, 1768 (1999) (Souter, J., dissenting). However, the Court rejected both Commerce Clause and federalism challenges in one notable case, *Reno v. Condon*, 120 S. Ct. 666, 672 (2000), where it held that Congress could restrict the sale or release of a driver's personal information in the Driver's Privacy Protection Act pursuant to its authority to regulate interstate commerce. Distinguishing *Lopez*, the Court noted that this information was widely "used by insurers, manufacturers, and direct marketers," and that the sale and release of such information as an interstate article of commerce was "sufficient to support congressional regulation." *Id.* at 671. Distinguishing *Printz* and *New York*, the Court held that the Driver's Privacy Protection Act did not offend the Tenth Amendment, as it did "not require the states in their sovereign capacity to regulate their own citizens," but rather "regulate[d] the states as the owners of databases." *Id.* at 672.

171. 175 F.3d 1027, 1033-40 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.).

172. *Id.* at 1034, 1057 (remanding the ozone final rule, 62 Fed. Reg. 38,863 (1997), and the final particulate matter rule, 61 Fed. Reg. 65,637 (1996)).

173. George F. Will, *See You in Congress . . .*, WASH. POST, May 20, 1999, at A29; *see also Am. Trucking*, 175 F.3d at 1057 (Tatel, J., dissenting).

174. *Am. Trucking*, 175 F.3d at 1057 (reserving the question of whether the fine particulate NAAQS should be vacated), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.).

issue was narrowly denied,[175] but the Supreme Court has granted its petition for certiorari.[176]

Pursuant to the Clean Air Act, the EPA must set primary air pollution standards, or NAAQS, for certain criteria pollutants as "requisite to protect the public health" with an "adequate margin of safety."[177] It must review the NAAQS at least every five years and revise them when "appropriate," using the same criteria and processes as it used to set them in the first place.[178] Further, the Act generally requires standards to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities."[179] A key goal of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[180] Largely as a result of the NAAQS, the Act can be credited with tremendous improvements in air quality for all of the criteria pollutants, and is considered a great success story among regulatory programs.[181]

The court engaged in a detailed consideration of the agency's revised ozone and particulate matter NAAQS. In revising its ozone NAAQS, the court noted, the EPA had performed an extensive review of studies on the risks of lung diseases associated with automobile and industrial emissions of ozone precursors and had considered findings by the Clean Air Scientific Advisory Committee ("CASAC"), a scientific body established pursuant to the Act.[182] The EPA focused on the nature and severity of adverse health

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175. Am. Trucking Ass'ns v. EPA, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.). Only four judges voted to deny the petition, while five would have granted a rehearing en banc. Because Judges Wald and Henderson did not participate, the EPA failed to get the vote of a majority of the judges in regular active service. *See* 195 F.3d at 13.

176. *Am. Trucking*, 120 S. Ct. at 2003 (mem.). A few days later, the Court also granted the industry's petition for certiorari to review the EPA's interpretation of the statute as prohibiting a consideration of costs in setting the NAAQS. *Am. Trucking*, 120 S. Ct. at 2193 (mem.).

177. Clean Air Act § 109(b)(1), (d), 42 U.S.C. § 7409(b), (d) (1994). The Act also requires secondary NAAQS to protect the "public welfare," *id.* § 7409 (b)(2) (1994), which generally includes effects on the environment as well as "economic values," 42 U.S.C. § 7602(h) (1994). Criteria pollutants are those air pollutants caused by "numerous or diverse" sources that have an adverse effect on public health or welfare, as listed by the EPA pursuant to section 108, 42 U.S.C. § 7408(a) (1994).

178. Clean Air Act § 109(d)(1), 42 U.S.C. § 7409(d)(1) (1994).

179. Clean Air Act §§ 108, 109, 42 U.S.C. §§ 7408(a)(2), 7409(b)(1) (1994).

180. Clean Air Act § 101(b)(1), 42 U.S.C. § 7401(b)(1) (1994).

181. Sunstein, *Air II*, *supra* note 48, at 323 n.84, tbl. 1.

182. *See* Clean Air Act § 109(d)(2), 42 U.S.C. § 7409(d)(2) (1994). CASAC also peer-reviewed the EPA's staff reports regarding the health effects of ozone and particulate matter. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1035 (D.C. Cir. 1999), *modified on petition for*

effects, the size of the at-risk population, and the degree of scientific uncertainty at various levels of exposure.[183] However, the agency could not pinpoint with precision an ambient concentration level for either ozone or particulate matter "requisite to protect the public health" with an "adequate margin of safety."[184]

Focusing on ozone as representative of the rulemaking at issue, the EPA faced a difficult task because ozone is regarded as a non-threshold pollutant—one which likely causes adverse health affects at any exposure level above zero.[185] EPA Administrator Carol Browner explained that the agency's risk assessment of exposures at levels above zero "indicated differences in risk to the public among various levels . . . but they did not by themselves provide a clear break point for a decision."[186] In the face of scientific uncertainties, the EPA decided to replace the existing 0.12 parts per million ("ppm") standard, based on one-hour average concentration levels, with a new 0.08 ppm eight-hour standard, a level that had been recommended by CASAC.[187] It determined that more people are exposed to more serious and long-term effects at levels above 0.08 ppm.[188] In rejecting a more stringent standard, the EPA explained that 0.07 ppm was closer to peak background levels from non-anthropogenic sources of ozone,[189] and that "[t]he most certain O_3-

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reh'g, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.). Oxides of nitrogen and other pollutants react with sunlight to form ozone, or smog; thus, the effects of these precursors were considered in the rulemaking. *Id.*

183. *See Am. Trucking*, 175 F.3d at 1035 (citing National Ambient Air Quality Standard for Ozone, 62 Fed. Reg. 38,868, 38,883 (Jul. 18, 1997)).

184. Alec C. Zacaroli, *Court Rulings Imperil EPA's Efforts to Clamp Down on Ozone Pollution*, 30 ENV'T REP. 325, 326 (1999).

185. National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,727 (1996) (noting that "it is not possible to select a level below which absolutely no effects are likely to occur"). "O3 may elicit a continuum of biological responses down to background concentrations." *Id.* (quoting G.T. Wolff, Letter from Chairman of Clean Air Scientific Advisory Committee to EPA Administrator (Nov. 30, 1995) (EPA-SAB-CASAC-LTR-96-002)). For a detailed assessment of the particulate matter NAAQS, see Sunstein, *Air II*, *supra* note 48, at 325-330. *See also* Joseph M. Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 Envtl. L. 821, 825 (1991) (concluding "attempts to deal rationally with the problems of air pollution are frustrated because the threshold assumption is built into the Act").

186. *EPA Proposed Clean Air Regulations: Hearing Before the S. Comm. on Env't and Pub. Works*, 105th Cong. (1997) (testimony of Carol M. Browner, Adm'r, EPA).

187. National 8-Hour Primary and Secondary Ambient Air Quality Standards for Ozone, 40 C.F.R. § 50.10; National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997). The new standard is roughly equivalent to a one-hour standard set at 0.09 ppm. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,868.

188. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,868.

189. *Id.* Thus, regulatory efforts in regions that fail to attain 0.08 ppm would more likely reach controllable human activity rather than natural levels of ozone. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1060 (D.C. Cir. 1999) (Tatel, J., dissenting), *modified on petition for reh'g*,

related effects [at 0.07 ppm], while judged to be adverse, are transient and reversible."[190]

The court did not seriously question the science behind the 0.08 ppm standard, noting that the EPA's conclusions were within the range recommended by CASAC and based on hundreds of studies published in peer-reviewed journals on ozone's effects on human respiratory functions.[191] Instead, the court found that the agency had failed to articulate an "intelligible principle" in setting its new standards,[192] stating that "it is as though Congress commanded EPA to select 'big guys,' and EPA announced that it would evaluate candidates based on height and weight, but revealed no cutoff point."[193] While such an approach may seem sensible enough on its face, the court stated, a reasonable person would also ask, "'How tall?' 'How heavy?'"[194]

According to the court, the EPA had examined appropriate factors to focus the inquiry on ozone's effects on public health at various exposure levels—the severity and certainty of adverse health effects, and the size of population affected.[195] Even so, it found that the EPA lacked a "determinate criterion for drawing lines" to justify the selection of any exposure level above zero.[196] The agency's rationale for its choice of revised NAAQS "leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog."[197]

The EPA's interpretation of section 109 was equated with OSHA's efforts to enact standards "reasonably necessary or appropriate to provide safe or healthful employment,"[198] which were invalidated in *International Union,*

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195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.).

190. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,868.

191. *Am. Trucking*, 175 F.3d at 1035-37, 1059-60.

192. *Id.* at 1034. The court found the particulate matter standard deficient on similar grounds. *Id.* at 1036.

193. *Id.* at 1034.

194. *Id.* (citations omitted).

195. *Id.* at 1034-35 (citing National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,883). The three criteria used by the EPA to assess health effects were expressly approved by the court in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1161-62 (D.C. Cir. 1980). There, the court explicitly rejected Lead Industries' argument that the EPA must consider costs and technological feasibility in setting lead NAAQS. *Id.* at 1153.

196. *Am. Trucking*, 175 F.3d at 1034.

197. *Id.* at 1037. In 1952, extremely high particulate matter levels, up to 2,500 g/m3, contributed to 4,000 deaths in one week. *Id.* at 1036 (citing W.P.D. Logan, *Mortality in the London Fog Incident, 1952*, *The Lancet*, Feb. 4, 1953, at 336-38).

198. *Id.* at 1037.

UAW v. OSHA ("Lockout/Tagout I").[199] In that case, a regulation requiring employers to lock or tag energy isolating devices, such as circuit breakers, when maintaining or servicing industrial equipment was remanded for a more precise definition.[200] The D.C. Circuit rejected OSHA's view that it could impose any feasible restriction it chose as unreasonably broad in light of nondelegation principles.[201]

Similarly, in *American Trucking*, the court found that the EPA's interpretation was so broad that it violated the nondelegation doctrine. "EPA's freedom of movement between the poles" is as unconstrained as that asserted by OSHA in *Lockout/Tagout I,* "but the poles are even farther apart—the maximum stringency would send industry not just to the brink of ruin but hurtling over it, while the minimum stringency may be close to doing nothing at all."[202]

Judge Tatel, in dissent, had no difficulty distinguishing *Lockout/Tagout I.* Unlike the Occupational Safey and Health Act:

> The Clean Air Act does not delegate to EPA authority to do whatever is '*reasonably* necessary or appropriate' to protect public health. Instead the statute directs the Agency to fashion standards that are '*requisite*' to protect the public health. In other words, EPA must set pollution standards at levels necessary to protect the public health, whether 'reasonable' or not, whether 'appropriate' or not.[203]

In other words, Congress did not allow the EPA to prioritize economic considerations over health in setting the NAAQS pursuant to the Clean Air Act; Congress itself chose health as its priority by precluding a consideration of costs.[204] As such, the Act's requirement that standards be set as "requisite" for public health, according to Judge Tatel, was far more analogous to the regulation upheld in *International Union, UAW v. OSHA ("Lockout/Tagout II")*,[205] where OSHA identified a "'significant' safety risk, to enact a safety standard that provides a 'high degree of worker

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199. 938 F.2d 1310 (D.C. Cir. 1991) (quoting language on standards from the Occupational Safety and Health Act §3(8), 29 U.S.C. § 652(8) (1994)).

200. *Id.* at 1312-13.

201. *Id.* at 1313. This decision was written by Judge Steven Williams, who also penned the nondelegation part of the *American Trucking* opinion. *Am. Trucking*, 175 F.3d at 1027.

202. *Am. Trucking*, 175 F.3d at 1037.

203. *Id.* at 1058 (Tatel, J., dissenting) (second emphasis added).

204. *See* Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1148-55 (1980) (finding that Congress had prohibited the EPA from considering the economic or technological feasibility of attaining NAAQS); Adler, *supra* note 67, at 10,243 (citing language of § 108(a)(2) and legislative history to support conclusion that Congress made the basic policy choice: health).

205. 37 F.3d 665 (D.C. Cir. 1994).

protection.'"[206] Either way, the agencies are directed to "ensure a high degree of protection."[207]

Judge Tatel also took issue with his colleagues' critique of the EPA's rationale for differentiating between 0.08 ppm and some more stringent regulatory level. "[The] EPA did not find simply that public health risks decrease at lower levels. Instead, it found that public health effects *differ* below 0.08 ppm, i.e., that they are 'transient and reversible,'" and that 0.08 ppm, unlike 0.07 ppm, was distinguishable from background ozone levels.[208] Moreover, the EPA's extensive review of relevant studies, and of CASAC's recommendations, was in line with the Act's requirements that the NAAQS "accurately reflect the latest scientific knowledge" about effects of air pollution on human health.[209] In any event, Judge Tatel pointed out that "[w]hether EPA arbitrarily selected the studies it relied upon or drew mistaken conclusions from those studies . . . has nothing to do with our inquiry under the nondelegation doctrine. *Those issues relate to whether the NAAQS are arbitrary and capricious.*"[210]

Judge Tatel hit the nail on the head. The starting point for analysis of a nondelegation claim should be the congressional directive as set forth in the language of the statute, in view of the statute's purpose, history and context.[211] After all, the focus of the inquiry is whether *Congress* has unlawfully delegated legislative powers and unconstitutionally blurred the lines of power between the branches of government. A central purpose of the nondelegation doctrine is to insure that Congress, a legislative body comprised of diverse representatives from all different geographical areas of the United States, makes the basic policy choices, rather than unelected agency officials.[212] How, then, can the EPA fix the problem of

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206. *Am. Trucking*, 175 F.3d at 1059 (Tatel, J., dissenting) (citing *Lockout/Tagout II*, 37 F.3d at 669). OSHA's second regulatory attempt, after the remand in *Lockout/Tagout I*, was found to satisfy nondelegation concerns because its new interpretation, requiring "a high degree of worker protection" once a "significant" safety risk was identified, would only allow deviation from maximum feasible stringency by a "modest" amount. *Lockout/Tagout II*, 37 F.3d at 669; *see also* Industrial Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (the Benzene case).

207. *Am. Trucking*, 175 F.3d at 1059 (Tatel, J., dissenting).

208. *Id.* at 1059-60 (emphasis added). The majority opinion stated that the EPA's rationale for choosing 0.08 ppm amounted to nothing more than unremarkable assertions "that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm." *Id.* at 1035.

209. *Id.* at 1058 (quoting Clean Air Act § 108, 42 U.S.C. § 7408(a)(2) (1994)).

210. *Id.* at 1061 (emphasis added). *See generally infra* Part IV (discussing judicial review under administrative law principles as a viable alternative to nondelegation analysis).

211. *See* Am. Power & Light, Co. v. SEC, 329 U.S. 90, 104 (1946).

212. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *Am. Trucking*, 175 F.3d at 1038.

congressional abdication if, in fact, abdication is evident in the Act? If the Act is so obscure as to provide no intelligible directives to the agency, surely that would be evidence that Congress intentionally chose to punt on basic policy choices—a course of action forbidden by the nondelegation doctrine and therefore impossible for an agent of the executive branch to fix.

Despite judicial protestations to the contrary, the majority opinion in *American Trucking* seems more in line with the Rehnquistian predilection to subject certain delegations to "strict" review than with any precedent provided by post-New Deal Supreme Court decisions.[213] In support of its decision to invalidate the NAAQS on nondelegation grounds, the court cited only two Supreme Court majority opinions, *Schechter Poultry*[214] and a 1928 case, *J.W. Hampton, Jr., & Co. v. United States*.[215] Ironically, in *J.W. Hampton* the Court found that a law authorizing the President to regulate customs duties was *not* an invalid delegation of legislative power.[216] The Court stated that it was simply a matter of "common sense" that a commission would be endowed with the power to investigate, take evidence from interested parties, and fix rates in accord with general objectives laid down by Congress.[217]

The statute at issue in *Schechter Poultry*, NIRA, delegated legislative power, not to an executive agency like the EPA, but to private groups.[218] In fact, of the few Supreme Court cases to strike down congressional delegations, both *Schechter Poultry* and *Carter Coal* involved delegations to private unions and trade associations.[219] In *Carter Coal*, a statute that allowed a majority of miners to set a minimum wage and limit hours worked during the week was invalidated as "delegation in its most obnoxious

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213. The court protested that it was not reading "current Supreme Court cases as applying the strong form of the nondelegation doctrine" advanced by Chief Justice Rehnquist in, for example, *Industrial Union*, 448 U.S. at 685-86 (Rehnquist, J., concurring), and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting). *Am. Trucking*, 175 F.3d at 1038.

214. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

215. 276 U.S. 394 (1928).

216. *Id.* at 409.

217. *Id.* at 407-08.

218. National Industrial Recovery Act, 15 U.S.C. §§ 702—702f (1964) (repealed 1966); *Schechter Poultry*, 295 U.S. at 536-37.

219. *Id.* at 521-23, 551; *see also* Carter v. Carter Coal, 298 U.S. 238, 311 (1936). Although the Court's decision in *Carter Coal* rested on Fifth Amendment due process concerns, the Court critiqued the Coal Conservation Act in terms of a delegation problem, citing *Schechter Poultry* as precedent. *See id.* Only one Supreme Court case, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 417-19 (1935), actually invalidated a congressional delegation because it lacked standards to adequately inform the exercise of executive branch authority. Jeffrey A. Needelman, *Attacking Federal Restrictions on Noncitizens' Access to Public Benefits on Constitutional Grounds: A Survey of Relevant Doctrines*, 11 GEO. IMMIGR. L.J. 349, 374-75 (1997).

form."[220] The broad-sweeping delegation to private interests, who could then exercise power to promote themselves at the expense of other members of the same trade or industry, was rife with improper factional influences, and therefore highly offensive to separation of powers principles.[221] But a delegation of legislative power to the regulated industry is a far cry from the directive to the EPA to issue NAAQS "requisite to protect public health."[222]

Moreover, both *Carter Coal* and *Schechter Poultry* rested on alternative grounds not explicitly raised in *American Trucking*. The Supreme Court viewed the legislative provisions at issue in those two cases through the lens of *Lochner* and found them to be beyond the Commerce Clause power, which, for a brief period of time, was thought to extend only to activities with "direct effects" on interstate commerce.[223] The subsequent overruling of *Lochner*[224] cast doubt on the enduring precedential value of related cases like *Carter Coal*, *Schechter Poultry*, and even *Panama Refining*, the only Supreme Court case to invalidate a congressional delegation to the executive branch for lack of intelligible standards.[225]

Jurists and scholars alike, with few dissenters, have noted the justifiable demise of the nondelegation doctrine in the modern era.[226] In post-New Deal cases, the Supreme Court has found that broad delegations to executive agencies have not presented separation of powers concerns; to the contrary, such delegations could even be viewed as a proper expression of

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220. 298 U.S. at 311.

221. *See* Sunstein, *Agency Inaction*, *supra* note 51, at 655 n.16. Some state courts have stated, or at least implied, that *any* delegation to private parties is intolerable. *E.g.*, Rogers v. Med. Ass'n, 259 So.2d 85, 87 (Ga. 1979); Gumbhir v. Kan. State Bd. of Pharmacy, 618 P.2d 837, 840-42 (Kan. 1980); Hetherington v. McHale, 329 A.2d 250, 253-54 (Pa. 1974).

222. 42 U.S.C. § 7409(b) (1994).

223. *See Carter Coal*, 298 U.S. at 307-09; *Schechter Poultry*, 295 U.S. at 546-51; Hammer v. Dagenhart, 247 U.S. 251 (1918); *see also* Needelman, *supra* note 219, at 375-76.

224. *See* United States v. Darby, 312 U.S. 100, 116, 123 (1941) (overruling the "direct effects" test of *Hammer*, limiting *Carter Coal*, and, by implication, limiting *Lochner*); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that, activities which, taken singularly, are intrastate in nature, may be regulated if together they have a "substantial relation to interstate commerce").

225. Needelman, *supra* note 219, at 376 (concluding that *Schechter Poultry* and *Carter Coal*, along with *Panama Refining*, "by association," could be considered bad law after *Darby* (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 132-33 (1980))); *see also* United States v. Frank, 864 F.2d 992, 1010 (3rd Cir. 1988) (referring to *Schechter Poultry* as "aberrational"). Professor Sunstein, in contrast, believes that *Schechter Poultry* was correctly decided because "it did not discipline executive authority, and indeed it operated as a grant of lawmaking power to private groups." Sunstein, *Air II*, *supra* note 48, at 356.

226. *See* Needelman, *supra* note 219, at 374-76; Sunstein, *Agency Inaction*, *supra* note 51, at 655 & n.17; *see also* Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring) (stating that the doctrine "has been virtually abandoned by this Court for all practical purposes").

congressional will consistent with Article I, which ought not be disturbed by the courts:[227]

> Only if we could say that there is an *absence of standards* for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . .[228]

It is doubtful that the Clean Air Act could be construed as a complete absence of standards, particularly in light of other delegations which have survived constitutional challenge, e.g., allowing the Federal Communications Commission ("FCC") to regulate broadcasting "in the public interest."[229] If the Supreme Court does adopt the D.C. Circuit's approach to the nondelegation issue in *American Trucking*, it would be a dramatic departure from more than half a century of Supreme Court jurisprudence. In the aftermath of such a decision, establishing a more precise standard could well be an insurmountable task, given the efforts that the EPA has already made in reaching its revised ozone and particulate matter NAAQS.

The D.C. Circuit acknowledged that a more "determinate" approach would be to set the NAAQS at zero and eradicate any hint of direct health risk.[230] It quickly backed away from this option, however, noting that no party advocated such a drastic solution.[231] At the opposite extreme, the court took note of the industry's argument that a consideration of economic costs could curb the EPA's ability to set excessively stringent NAAQS, but the court disposed of this issue in short order, agreeing that the agency cannot consider costs under section 109 of the Clean Air Act.[232] The D.C. Circuit has been steadfast in holding that costs play no role in setting the NAAQS: Congress made a "'deliberate decision . . . to subordinate such concerns to the achievement of health goals.' . . . [T]he 'technology-forcing' requirements of the Act were expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be

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227. *See* Loving v. United States, 517 U.S. 748, 758 (1996); Mistretta v. United States, 488 U.S. 361, 379 (1989).

228. *Mistretta*, 488 U.S. at 378-79 (citing Yakus v. United States, 321 U.S. 414, 425-26 (1944)) (emphasis added).

229. NBC v. United States, 319 U.S. 190, 225-26 (1943).

230. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.).

231. *Id.*

232. *See id.* (citing Natural Res. Def. Council, Inc. v. EPA, 902 F.2d 962, 973 (D.C. Cir.1990), *modified on other grounds*, 921 F.2d 326 (1991)).

economically or technologically infeasible."[233] Nonetheless, the court's resolution of the nondelegation issue in *American Trucking* could be characterized as industry's successful end-run at finally getting costs into the NAAQS-setting process.[234] In any event, the Supreme Court granted the Association's petition for certiorari on the cost issue, providing it with an opportunity to invalidate the NAAQS without reaching the constitutional issue.[235]

The D.C. Circuit did offer some concrete suggestions to guide the EPA on remand. The agency might avoid the nondelegation problem, according to the court, by assigning "weights" to a "range of ailments short of death," using clinical criteria to decide whether an effect counts as an "adverse health effect."[236] This suggestion sounds quite a bit like a remand of arbitrary agency action, rather than a solution for a constitutional problem. Yet, if the statute does in fact improperly delegate legislative power to the EPA, it defies logic to contend that the agency itself can somehow fix the constitutional impairment simply by articulating and applying additional criteria.[237]

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233. Am. Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981) (quoting Lead Indus. Ass'n, v. EPA, 647 F.2d 1130, 1149 (D.C. Cir. 1980)).

234. As Justice Brennan once noted, "candor compels recognition that our cases regarding the delegation by Congress of lawmaking power do not always say what they seem to mean." McGautha v. California, 402 U.S. 183, 273 (1971) (Brennan, J., dissenting).

235. Am. Trucking Ass'ns v. Browner, 120 S. Ct. 2193 (2000) (mem.). Interestingly, the Court denied industry's petitions for certiorari on the same issue in *NRDC v. EPA, Lead Industries*, and *American Petroleum v. Costle*.

236. *Am. Trucking*, 175 F.3d at 1038-39. In its per curiam order denying rehearing on the nondelegation issue, the D.C. Circuit rejected the EPA's arguments that non-transient effects or a ninety-five percent confidence level would serve as an intelligible limiting principle, stating that the court could only decide if the nondelegation doctrine was satisfied "after the EPA itself has applied [these parameters] in setting a NAAQS." Am. Trucking Ass'ns v. EPA, 195 F.3d 4, 6-7 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.).

237. *See Am. Trucking*, 195 F.3d at 14-15 (Silberman, J., dissenting from denial of rehearing); SUNSTEIN, AIR I, *supra* note 48, at 29. Professor Lisa Bressman disagrees, arguing that the D.C. Circuit's "new delegation doctrine," where courts remand suspect provisions to administrative agencies instead of invalidating the statute itself, offers courts a meaningful tool to curtail abuses of discretion while acting in a manner more respectful of administrative expertise. *See generally* Lisa Schultz Bressman, Schechter Poultry *at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1406-42 (2000). This option possesses notable virtues, in that it avoids legislative inability to reenact statutes set aside as unconstitutional, particularly when contentious detail-laden provisions are required; and it accentuates the advantages of administrative rulemaking. But it has a serious downside in that it fails to satisfy the fundamental basis for having a nondelegation doctrine in the first place—ensuring that Congress makes the basic policy choices, and keeping core legislative, executive and judicial powers separate. *See id.* at 1416-1417 (conceding that the "new delegation doctrine" cannot remedy the separation of powers problem). *See also* LOCKE, *supra* note 67, §§ 135—137, 220—222 ("The power of the legislative

In the end, although the court seemed to use the nondelegation doctrine as a rule of statutory construction to curtail the agency's discretion, rather than a constitutional test,[238] it at least recognized that Congress, in enacting the Clean Air Act, may have left the EPA constitutionally vulnerable by failing to articulate an "intelligible principle" on which to base the NAAQS.[239] If the agency is unable to craft "a determinate standard on its own," the court noted, it could ask Congress to fix the problem by legislatively "ratifying its choice" of ozone standards.[240] But this gives small solace to an agency charged with administering the Act and other complex statutes, many of which require extensive fact-finding, technical expertise, and politically charged policy judgments regarding risks and benefits to human health and the environment. The decision arguably provides even less solace for members of the public, who have more reason to trust the EPA's conclusions, resulting from lengthy rulemaking procedures with opportunity for input at various points along the way, than the last minute trade-offs that can result from legislative processes.

IV. THE IMPLICATIONS OF "STRICT" NONDELEGATION REVIEW: THE DEVIL IN THE DETAILS

Strict nondelegation review, as exhibited in *American Trucking,* could actually exacerbate separation of powers concerns. By calling upon the judiciary to distinguish "intelligible" from unintelligible principles based on nuances in legislative nomenclature, the doctrine denies the courts a predictable reviewing role, ultimately undermining the rule of law. Further, a resurrected nondelegation doctrine would inhibit the government's ability to enact and implement even-handed, effective laws and regulations, ultimately making both Congress and executive agencies less responsive to the public will.

A. A Spectrum of Legislative Principles, Dubiously Intelligible

If strict nondelegation review were to become the law of the land, with a "fetish" for legislative semantics as the predominant criterion for testing delegations, a variety of regulatory provisions—many of which are far less

. . . can be no other than what the positive grant [from the people] conveyed, which being only to make laws, and not to make legislators . . . .").

238. *See* Adler, *supra* note 67, at 10,239.

239. *Am. Trucking*, 175 F.3d at 1036-37.

240. *Id.* at 1038, 1040.

detailed than the Clean Air Act—would be vulnerable to attack. Indeed, by some accounts, ninety-nine percent of the regulatory statutes currently found in the United States Code could be struck down.[241] Under the *American Trucking* approach, the greater the discretion granted to an agency via legislative generality or ambiguity, the more likely the statute itself, or the agency's exercise of statutory power, will fall to a nondelegation challenge.

Statutory delegations governing agency action can be loosely categorized into a spectrum, ranging from mandatory duties to wholly discretionary activities. Environmental statutes are used to represent the regulatory array, not only because *American Trucking* focused on the Clean Air Act but, more importantly, because environmental issues tend to be highly visible and often serve as proving grounds for controversial legal theories. While the function of this section is, in part, descriptive, the depiction of a range of representative statutes based on the type of language employed by Congress illustrates that a search for "intelligible" guiding principles, particularly in the vast mid-range of the scale, is at best an elusive undertaking.

At one end of the statutory spectrum are a handful of mandatory or ministerial requirements that are virtually immune to nondelegation claims. Statutory deadlines, for example, are fairly common in environmental law, dictating timeframes for listing endangered species and certain types of pollutants, along with technology-based standards for regulating those pollutants.[242] The timing issue does not present a nondelegation issue; Congress has done the heavy lifting itself by making the decision in the statute. The agency has no wherewithal to avoid meeting the established deadlines, even if it has good reason for delay.[243] Instead, it must simply

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241. *E.g.*, George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMM. 79, 86 (2000) (citing Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 401 (1987)).

242. *See* Endangered Species Act § 4(b)(3), 16 U.S.C. § 1533(b)(3) (1994) (specifying deadlines for responding to petitions to list species as endangered or threatened); Clean Water Act § 303(d)(2), 33 U.S.C. § 1313(d)(2) (1994) (specifying deadlines for total maximum daily loads); Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (1994) (directing that, for those criteria pollutants listed after 1970, the EPA simultaneously propose NAAQS).

243. *See* Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 79 (1975) (holding that, under Clean Air Act § 110(a)(2), the EPA must approve a state implementation plan "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air"); Forest Guardians v. Babbitt, 174 F.3d 1178, 1192-93 (10th Cir. 1999) (holding that "the Secretary violated non-discretionary duty by failing to designate as critical the habitat for the Rio Grande silvery minnow by the statutory deadline"); Oregon Natural Resources Council, Inc. v. Kantor, 99 F.3d 334, 338-39 (9th Cir. 1996) (finding that the Endangered Species Act clearly required the Secretary to publish final regulations listing threatened species of salmon within twelve months of date on which proposed regulation had been published).

"take care" to implement the legislative decision, clearly an executive function under Article II.[244]

Moving along on the spectrum, a few statutory directives can be described as "mixed," making them at least partially subject to nondelegation challenges. These are only discretionary to a point, at which time mandatory duties kick in. For example, in listing criteria air pollutants under section 108 of the Clean Air Act, the EPA Administrator must include those air pollutants caused by "numerous or diverse" sources, that, "in his judgment," have an adverse effect on public health or welfare.[245] Although the statute provides for a fair amount of leeway in making the determination that a pollutant has an adverse effect on health or welfare, once that determination is made, the agency "shall" list the pollutant, and may not consider alternative control strategies.[246]

Similarly, the Secretary of Interior is required to issue patents for mineral deposits on federal public lands under the 1872 Mining Act.[247] Courts have described the issuance of a patent as a nondiscretionary, even ministerial, act.[248] However, before a patent will issue, the Secretary must determine whether the application covers a "valuable mineral deposit."[249] Although the Mining Act does not define "valuable" or provide any standards to guide the inquiry, the Secretary has been allowed great discretion in developing and applying a marketability test for determining which deposits are valuable.[250] The Secretary's factual findings in applying the test are generally upheld if supported by substantial evidence.[251] It is quite possible that this type of

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244. U.S. CONST. art. II, § 3. In contrast, a fair amount of discretion is involved in the substantive component of the decision (e.g., whether a particular pollutant or species meets the criteria for listing; how stringent a pollutant standard should be), which would fall in the mid-range of the spectrum.

245. Clean Air Act § 108(a)(1), 42 U.S.C. § 7408(a)(1) (1994 & Supp. IV 1998). The provision has since been amended to require the listing of pollutants from numerous and diverse sources "which may reasonably be anticipated to endanger public health or welfare." Clean Air Act § 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A).

246. Natural Res. Def. Council, Inc., v. Train, 545 F.2d 320, 324-25 (2d Cir. 1976) (requiring the EPA to list lead as a criteria air pollutant).

247. 30 U.S.C. § 29 (1994).

248. *E.g.*, Cameron v. United States, 252 U.S. 450, 459-60 (1920); Roberts v. United States, 176 U.S. 221, 231 (1900); South Dakota v. Andrus, 614 F.2d 1190, 1193 (citing Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 318-19 (1930)).

249. 30 U.S.C. § 29.

250. *E.g.*, United States v. Coleman, 390 U.S. 599, 601-03 (1968); Converse v. Udall, 399 F.2d 616, 622 (9th Cir. 1968); *In re* Pac. Coast Molybdenum Co., 90 Interior Dec. 352, 361-63 (1983); Castle v. Womble, 19 Pub. Lands Dec. 455 (1894).

251. *See* Wilderness Soc'y v. Dombeck, 168 F.3d 367, 375 (9th Cir. 1999) (finding that substantial evidence supported the determination that a valuable mineral deposit existed based on "geologic inference," i.e., "the reasonable likelihood of the persistence of similar mineralization

threshold determination could fall under the "strict" delegation review exhibited in *American Trucking*.

Most regulatory statutes are mid-range on the discretionary scale, providing overall policy objectives plus some substantive standards to guide the agency. The requirement that the EPA establish national ambient air quality standards ("NAAQS") "requisite to protect public health" with "an adequate margin of safety"[252] would be included in this category, as would the Clean Water Act's requirement for setting technology-based standards for certain pollutants using the "best available technology economically achievable" ("BAT").[253] The Clean Water Act is arguably closer to the "safe" end of the spectrum, as it specifies a number of factors for the EPA to consider in setting BAT, including the costs of achieving effluent reduction, given the processes and "age of equipment and facilities involved."[254] This distinction is merely a matter of degree, more quantitative than qualitative in nature; the Clean Water Act still leaves a fair amount of discretion to the agency, in that it does not direct a specific outcome based on costs, nor does it require cost-benefit analysis. These mid-range provisions are likely to fail strict nondelegation review because they lack precise parameters to confine the agency's discretion, even though they typically include fairly extensive procedural safeguards to protect against arbitrary outcomes.[255]

The Antiquities Act of 1906,[256] an example of a public lands statute mid-range on the "intelligible principles" scale, has been challenged on nondelegation grounds in several recent lawsuits.[257] This statute has fewer substantive standards to constrain agency discretion than does the Clean

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beyond the areas actually sampled or exposed"); Hallenbeck v. Kleppe, 590 F.2d 852, 856-60 (10th Cir. 1979) (upholding the Secretary's decision that no prudent person would develop mining claims without a further showing of marketable discovery; decision was supported by substantial evidence). *But see* Baker v. United States, 613 F.2d 224, 226-30 (9th Cir. 1980) (holding that the Department of the Interior's adoption of a "too much" test, which would deny patents on marketable deposits for those additional claims in excess of the market need for the mineral, was an abuse of discretion).

252. Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (1994) (requiring NAAQS).

253. Clean Water Act §§ 301(b)(2)(A), 304(b)(2); 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(2) (1994).

254. 33 U.S.C. § 1314(b)(2)(B).

255. *See, e.g.*, 33 U.S.C. §§ 1314(b), (m), 1361(a), 1365, 1369 (1994) (Clean Water Act provisions directing publication of regulations in the Federal Register, and procedures for administrative action, citizens suits and judicial review); 42 U.S.C. §§ 7409(a), (d), 7601(a), 7604, 7607 (1994) (Clean Air Act provisions directing publication and review of regulations, and procedures for administrative action, citizens suits and judicial review); *see also* Administrative Procedure Act, 5 U.S.C. § 553 (1994) (requiring informal rulemaking, with publication in Federal Register and opportunities for public participation).

256. 16 U.S.C. §§ 431—433 (1994).

257. For a discussion of these lawsuits, see *infra* notes 439-40 and accompanying text.

Water Act or the Clean Air Act, and, if linguistics were the only consideration, it would probably fail strict nondelegation review. The Antiquities Act gives the President discretion to preserve public lands by declaring "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments."[258] The reservations are to encompass "parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[259] Presidents of both parties have exercised this power extensively throughout the twentieth century, withdrawing millions of acres from extractive activities, like mining and logging, to create the Grand Canyon National Monument,[260] Jackson Hole National Monument,[261] and, most recently, the Grand Staircase-Escalante National Monument and the Grand Canyon—Parashant National Monument.[262] Designation decisions have been challenged on a variety of grounds over the years, including nondelegation, but none have been set aside as yet,[263] quite possibly because, as explained in Section VI, the exercise of power over federal public lands does not raise the same concerns as do other types of executive power.

At the far end of the spectrum, most susceptible to a reinvigorated nondelegation doctrine, are a handful of statutes that provide no substantive standards, much less intelligible principles, to guide the Executive's discretion. Although the Administrative Procedure Act provides that final agency action is subject to judicial review, §701(a)(2) exempts decisions

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258. 16 U.S.C. § 431.

259. *Id.*

260. *See* Proclamation, 35 Stat. 2175 (1908). The Grand Canyon subsequently became a National Park by act of Congress. *See* 16 U.S.C. § 221 (1994). *See generally* Cameron v. United States, 252 U.S. 450, 454-64 (1920) (discussing history of withdrawal and designation).

261. *See* Proclamation No. 2578, 57 Stat. 731 (1943); *see also* 16 U.S.C. § 406d-1 (including portions of the Jackson Hole National Monument within the Grand Teton National Park); *Id.* § 482m (including portions of the Jackson Hole National Monument within the Teton National Forest); Wyoming v. Franke, 58 F. Supp. 890, 895-97 (D. Wyo. 1945).

262. *See* Proclamation No. 7265, 65 Fed. Reg. 2825 (2000) (designating the Grand Canyon-Parashant National Monument); Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996) (designating the Escalante National Monument). Two additional monuments were designated at the same time as the Parashant National Monument. *See* Proclamation No. 7263, 65 Fed. Reg. 2817 (establishing the Agua Fria National Monument); Proclamation No. 7264, 65 Fed. Reg. 2821 (establishing the California Coastal National Monument).

263. *E.g.*, Cappaert v. United States, 426 U.S. 128, 131-32 (1976) (Death Valley); *Cameron*, 252 U.S. at 459-64 (Grand Canyon); Alaska v. Carter, 462 F. Supp. 1155, 1164-65 (D. Alaska 1978) (seventeen monuments in Alaska, totaling fifty-six million acres); *Franke*, 58 F. Supp. at 895-97 (Grand Tetons); Anaconda Copper Co. v. Andrus, 14 E.R.C. (BNA) 1853, 1854 (D. Alaska 1980) (three monuments in Alaska). For a detailed discussion of the nondelegation doctrine as applied to decisions affecting public lands and resources, see *infra* Part VI.

"committed to agency discretion by law."[264] The Act's exception to judicial review applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[265] A prime example is the exercise of prosecutorial discretion or enforcement power. In *Heckler v. Chaney*,[266] the Supreme Court held that the Federal Food, Drug, and Cosmetic Act ("FDCA"), which stated that "[t]he Secretary is authorized to conduct examinations and investigations," provided no standards regarding the prosecution of violations.[267] An executive agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."[268] As a result, the Court determined that the Secretary's refusal to initiate FDCA enforcement action was committed to agency discretion by law.[269]

Although prosecutorial discretion can be thought of as uniquely within the realm of the executive branch, there are a few other types of executive actions that have been exempted from judicial review under § 701. Decisions related to budgetary matters, such as the allocation of general funds, as well as those related to national security, immigration, and deportation status have been found "committed to agency discretion by law."[270] There are also several public lands statutes that arguably provide "no law to apply." The Multiple Use Sustained Yield Act ("MUSYA") of

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264. 5 U.S.C. § 701(a)(2) (1994) (insulating actions "committed to agency discretion by law" from judicial review); *Id.* § 704 (1994) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review.").

265. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)).

266. 470 U.S. 821 (1985).

267. *Id.* at 835-38.

268. *Id.* at 831. In *Heckler*, the Court observed that judicial review of enforcement decisions would raise separation of powers problems because they have the same characteristics as decisions to indict and such decisions are considered the "special province of the executive branch." *Id.* at 832. *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (arguing that independent counsel provisions violate separation of powers because all law enforcement power must be vested wholly within the Executive Branch).

269. Heckler, 470 U.S. at 835-38.

270. *E.g.*, Lincoln v. Vigil, 508 U.S. 182, 192-93 (1993) (denying review of agency's allocation of funds from a lump-sum appropriation as committed to agency discretion to adapt to changing circumstances and meet its statutory responsibilities in the most effective way); Webster v. Doe, 486 U.S. 592, 599-601 (1988) (denying review of the merits of a decision by the Director of the Central Intelligence Agency to terminate an employee in the interests of national security); Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985) (stating that executive decision not to reopen deportation proceedings to adjust deportable alien's status was virtually unreviewable); *see also* ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 276, 278-82 (1987) (holding that, where unions petitioned for review of an administrative order exempting participants in a rail consolidation from protection afforded railroad employees, the agency's refusal to grant reconsideration is committed to agency discretion).

1960[271] is an example of a highly discretionary statute that provides virtually no direction to the agency. MUSYA quite simply and succinctly directs the Forest Service to ensure that forest resources are available for multiple uses and that they maintain sustained yields.[272] Understandably, the statute has been described as "breath[ing] discretion at every pore."[273] MUSYA has since been supplemented with the National Forest Management Act,[274] which constrains the agency's discretion by providing shape and form to the multiple-use sustained-yield concept through detailed planning requirements.[275]

Similarly, the Taylor Grazing Act of 1934[276] provides little guidance to the Bureau of Land Management ("BLM") with regard to grazing on public lands. It allows the Secretary of Interior to regulate the "occupancy and use" of grazing districts, "to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range."[277] Grazing permits are to specify numbers of livestock as well as seasons of use.[278] These provisions, standing alone, have been found to lack "law to apply."[279]

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271. 16 U.S.C. §§ 528–531 (1994).

272. *Id.* §§ 528, 531.

273. Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979) (citing Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975)); *see also* Ness Inv. Corp. v. USDA, 512 F.2d 706, 715, 718 (9th Cir. 1975) (finding that the Secretary of Agriculture's power to grant or deny a special use permit for the construction of a recreational facility for use on national forest land is committed to agency discretion under 16 U.S.C. § 497).

274. 16 U.S.C. §§ 1600–1614 (1994 & Supp. IV 1998).

275. *See id.* § 1604; *see also* Methow Valley Citizens Council v. Reg'l Forester, 833 F.2d 810, 813 (9th Cir. 1987) (finding that Forest Service regulations provided standards for the consideration of special use permits so that permit decisions are reviewable), *rev'd on other grounds sub nom.* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989). As the Supreme Court recently noted, "[a]t the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings." FDA v. Brown & Williamson Tobacco, Corp., 120 S. Ct. 1291, 1306 (2000).

276. 43 U.S.C. §§ 315–315r (1994).

277. *Id.* § 315a.

278. *Id.* § 315b; *see also id.* § 1752(e) (1994) (requiring that permits specify "the numbers of animals to be grazed").

279. *See* Mollohan v. Gray, 413 F.2d 349, 352-53 (9th Cir. 1969); Sellas v. Kirk, 200 F.2d 217, 220 (9th Cir. 1952). Courts have reached similar results regarding the Secretary's implementation of other public lands statutes. *E.g.*, Nelson v. Andrus, 591 F.2d 1265, 1266 (9th Cir. 1978) (holding that the Secretary's decision to classify land as suitable for entry under Desert Land Act, 43 U.S.C. § 321 (1994), was committed to agency discretion); *cf.* City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir. 1978) (finding preference clauses of the Reclamation Act of 1939, 43 U.S.C. § 485h(c) (1994), and the Flood Control Act of 1944, 16 U.S.C. § 825s (1994), provided "no law to apply" to Secretary's denial of allocation of hydroelectric power generated by federal reclamation project).

However, the Federal Land Policy and Management Act ("FLPMA"), enacted in 1976, adds that permits should include "such terms and conditions as [the Secretary] deems appropriate for management of the . . . lands."[280] Further, permits must retain authority to "reexamine the condition of the range at any time and, if . . . the condition of the range requires adjustment in the amount or other aspect of grazing use, that the permittee or lessee shall adjust his use to the extent the Secretary concerned deems necessary."[281] FLPMA also provides that the BLM "shall" take any action needed to prevent "unnecessary or undue degradation" of the lands under its management.[282] These requirements, along with a provision directing that judicial review of public land decisions be provided,[283] supply sufficient legal specifications to allow judicial review of grazing decisions, but the standard of review is highly deferential.[284]

A statutory provision that commits authority entirely to an agency's discretion by providing "no law to apply" would seem a prime target for nondelegation challenges. While § 701(a)(2) precludes judicial review on the merits so that decisions made pursuant to such provisions cannot be attacked as arbitrary under the Administrative Procedure Act, it does not insulate prosecutorial and other wholly discretionary activities from constitutional

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280. 43 U.S.C. §§ 315b, 1752(e).

281. *Id.* § 1752(e). In addition, the Secretary has issued regulations under FLPMA to provide greater specificity for the management of public rangelands. *See* 43 C.F.R. Part 4100; Pub. Lands Council v. Babbitt, 120 S. Ct. 1815, 1821-29 (2000).

282. 43 U.S.C. § 1732(b).

283. *Id.* § 1701(6).

284. *See* Sierra Club v. Clark, 756 F.2d 686, 691 (9th Cir. 1985) (noting that the multiple-use goal vests great discretion in the Secretary to administer forest and range land; thus, the Secretary's determination regarding effects of off-road recreational use "was not arbitrary, capricious, or an abuse of the broad discretion committed to him by an obliging Congress" (citing *Perkins*)); Natural Res. Def. Council, Inc. v. Hodel, 624 F. Supp. 1045, 1058 & n.7 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987) (noting that judicial review is available under FLPMA "under a narrow standard" as the statutory language "breathes discretion at every pore" (citing *Perkins*, 608 F.2d at 806)); *see also* Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 ECOLOGY L.Q. 43, 103-04 (1991) (concluding that § 1732(b) supplies "law to apply," although BLM's interpretation of the scope of its power to prevent degradation, and its conclusions regarding the actual effects of a potentially degrading activity, are generally given great deference by courts). A few courts in the Tenth Circuit, however, continue to find that certain decisions affecting public rangelands are wholly discretionary. *E.g.*, Bischoff v. Glickman, 54 F.Supp.2d 1226, 1230 (D. Wyo. 1999) (dismissing rancher's challenge to Forest Service decision to cancel grazing permits because there was "no law to apply"), *affirmed*, 216 F.3d 1086 (10th Cir. 2000); *see also* Baca v. King, 92 F.3d 1031 (10th Cir. 1996) (dismissing rancher's challenge to land exchange for lack of standing on grounds that whether to designate lands for grazing was "completely within the Secretary of Interior's discretion" and therefore was not redressable by the court).

challenge.[285] A claim that separation of powers had been breached, or that rights secured by the Bill of Rights had been violated, such as the Fifth Amendment's guarantee of due process, may be reviewable regardless of the language of the statute in question.[286] Nonetheless, the Supreme Court has exhibited little if any interest in the nondelegation doctrine in this context, and the Court did not even mention it in the landmark *Heckler* case.[287]

If a nondelegation challenge were asserted, it is plausible that the specific statute in question and § 701(a)(2) itself would be suspect. Congress's attempt to commit a decision entirely to the agency's discretion by failing to include any substantive or intelligible standards, such that agency action is effectively immunized from judicial review, would necessarily constitute an unlawful delegation under *American Trucking*. Of course, Congress can place certain executive actions beyond judicial review altogether by maintaining sovereign immunity or by otherwise explicitly limiting access to the federal courts, which are, after all, courts of limited jurisdiction.[288] But statutory preclusion of judicial review through vague, standardless provisions could render the delegation of power unconstitutional, both because Congress failed to make the appropriate policy choice, leaving the agency to engage in unfettered lawmaking; and because no satisfactory procedural safeguard is

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285. *See* Webster v. Doe, 486 U.S. 592, 599-603 (1985) (stating that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear;" a "heightened showing" is necessary "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *see also* Sunstein, *Agency Inaction*, *supra* note 51, at 658 (noting that there is always "law to apply" to claims that an agency's action is based on constitutionally impermissible factors).

286. *See* Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985) ("Administrators with plenary discretion to do as they will on the merits must still abide by constitutional constraints . . . ."); Shaltry v. United States, 182 B.R. 836, 842 (D. Ariz.) (allowing review of an allegation that the termination of membership in the pool of individuals eligible to be named trustees in Chapter 7 bankruptcy cases deprived plaintiff of property and liberty interests under the Fifth Amendment, although membership determination was otherwise committed to discretion), *aff'd without opinion*, 87 F.3d 1322 (9th Cir. 1996).

287. *See* Heckler v. Chaney, 470 U.S. 821 (1985). In one of the few cases to explore the relationship between nondelegation and § 701, the D.C. Circuit, in a pre-*American Trucking* case, flatly rejected the constitutional argument but found that a decision to close or realign 145 domestic military bases was "committed to agency discretion by law." Nat'l Fed'n of Fed. Employees v. United States, 905 F.2d 400, 404-06 (D.C. Cir. 1990). Judge Wald, writing for the court, concluded that the Base Closure and Realignment Act "easily clears the 'intelligible principle' hurdle; it contains a terse but understandable standard to constrain administrative discretion," centered largely on the military value of the base in question. *Id.* at 404-05. Nonetheless, there were no "judicially manageable standards . . . against which to judge the agency's exercise of discretion" for the purpose of judicial review. *Id.* at 405 (citations omitted). Had *American Trucking* been the law of the land, the outcome of the nondelegation issue may well have been different.

288. *See* U.S. CONST. art. III.

available to confine the agency to its congressional mission (to the extent that a mission can be discerned).[289] Not too surprisingly, calls for the repeal of § 701(a)(2) followed closely on the heels of the *Heckler* decision.[290]

The Eighth Circuit had an opportunity to consider the relationship of § 701 and the nondelegation doctrine in *South Dakota v. United States Department of Interior*.[291] There, the Secretary of Interior asserted that he possessed complete and unreviewable discretion to acquire land in trust for the Lower Brule Tribe under the Indian Reorganization Act of 1934 ("IRA"), which allows the Secretary to "provid[e] land for Indians."[292] The court went along with the Secretary to a point, agreeing that the IRA failed to provide guiding standards:

> By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision or a golf course in trust for an Indian tribe . . . . Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present . . . . It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians.[293]

Turning the Secretary's argument on its head, though, the court concluded that not only was review of constitutional infirmities possible, the nondelegation doctrine invalidated the relevant provision of the IRA and the Secretary's decision.[294] Indeed, the court remarked that the delegation of "wholly discretionary" power requires "a particularly close look" because of

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289. *See* Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 682 n.105 (stating that the nondelegation doctrine may make it "unconstitutional for Congress to commit the exercise of legislative power entirely to agency discretion" through § 701(a)(2)).

290. *E.g.*, Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, and The Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 874; *see also* Kenneth Culp Davis, *No Law to Apply*, 25 SAN DIEGO L. REV. 1, 4-10 (1988) (arguing that *Heckler* was incorrect because even if Congress has not established clear statutory constraints, the Administrative Procedure Act requires a court to apply "such everpresent standards as 'justice,' 'fairness,' and 'reasonableness' that necessarily guide all judicial action" and that "the question whether the agency has abused its discretion is a matter for judicial discretion") (emphasis omitted). Shapiro and Glicksman note that Davis's "interpretation serves the purposes of checks and balances review by requiring that every agency action, unless Congress has expressly immunized it from review, be subject to a requirement of 'reasonableness.'" Shapiro & Glicksman, *supra*, at 874 n.256.

291. 69 F.3d 878 (8th Cir. 1995), *cert. granted, vacated and remanded*, 519 U.S. 919 (1996).

292. 25 U.S.C. § 465 (1994); *see also* 25 C.F.R. § 151.1—.15 (1999) (describing when land may be acquired for the benefit of American Indians).

293. *South Dakota*, 69 F.3d at 882.

294. *Id.* at 884-85. Ironically, the IRA was passed in 1934 by the same Congress that enacted the NIRA provisions invalidated in *Schechter Poultry* and *Panama Refining*. *Id.* at 881. There are signs that the court may have been influenced, at least to some extent, by the perception that this particular Congress was afflicted with poor drafting skills. *See id.* at 884.

the lack of meaningful opportunities for judicial review.[295] In reaching its decision, the court noted that "delegation questions [should be] considered in light of [the] legislative history and context," as well as any narrowing agency interpretation, but that the Secretary's broad interpretation of the IRA provided no constraints.[296] As a result, "[t]here are many opportunities for abuse in a program of this nature;" the Secretary—as head of an "agency fiefdom"—could arbitrarily remove the lands in question from state and local taxation, as well as "zoning ordinances, building codes, health and safety regulations, and other exercises of the police power."[297] The Secretary subsequently issued new regulations requiring notice before taking land into trust and acknowledging that judicial review would be available; consequently, the Eighth Circuit's decision was vacated by the Supreme Court.[298]

As indicated in the *South Dakota* case, the demise of the nondelegation doctrine in the post-New Deal years goes hand in hand with the increasing availability of judicial review through the Administrative Procedure Act.[299]

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295. *Id.* at 881-82. "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Id.* at 881 (quoting Touby v. United States, 500 U.S. 160, 170 (1991)). If meaningful judicial review is available, then that would be "a factor weighing in favor of upholding a statute against a nondelegation challenge." *Id.* at 882 (quoting United States v. Garfinkel, 29 F.3d 451, 459 (8th Cir. 1994) (citations omitted)); *see also* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 219 (1989) (noting that when "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority[,] [p]rivate rights are protected by access to the courts to test the application of policy in light of these legislative declarations") (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

296. *South Dakota*, 69 F.3d at 884 (citing *Garfinkel*, 29 F.3d at 458; and Int'l Union, UAW v. OSHA, 938 F.2d 1310, 1314-15 (D.C. Cir. 1991)). The court acknowledged that delegation questions should be considered in light of the overall statutory context and recognized that Congress's intent, as shown in the legislative history, was probably for trust lands to be used for agrarian purposes. *Id.* at 883. However, because Congress had failed to say so in the statute, and the Secretary had interpreted the language as broadly as possible, the court believed it must "construe the statute literally for purposes of applying the nondelegation doctrine." *Id.* at 884. The court noted that it was bound to do so because it had upheld the Secretary's interpretation of this provision in the past. *Id.*

297. *Id.* at 884.

298. *See* Dep't of the Interior v. South Dakota, 519 U.S. 919 (1996) (citing regulations now codified at 25 C.F.R. § 151.12 (1996)). Justice Scalia, joined in dissent by Justices O'Connor and Thomas, believed that vacating and remanding the decision was inappropriate. *Id.* at 920. He noted that the government had maintained its position that review was unavailable under the Quiet Title Act, 28 U.S.C. § 2409a(a) (1994), once title had passed. *Id.* at 921. In any event, he failed to see how the availability of judicial review had anything to do with the nondelegation question. *Id.* at 922 ("It is inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view, including that of the Court of Appeals.").

299. *See South Dakota*, 69 F.3d at 881-82; *see also* Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its

Although Congress must still make the fundamental policy choice in the form of legislative objectives, broad-brushed though they may be, the possibility of judicial involvement can alleviate the need for more detailed substantive directives.[300] Judicial review protects the integrity of the administrative process by preventing abuses of discretion, favoritism, and ad hoc, irrational decision-making. A statute that provides "no law to apply" lacks guiding principles for either the agency or the court's edification, and therefore would be most vulnerable to challenge as an improper delegation of legislative authority under the *American Trucking* approach.

The spectrum outlined above illustrates that "there is no simple metric to tell how much [delegated] discretion is too much,"[301] particularly in the middle of the spectrum, where most regulatory statutes lie. A resurrection of strict nondelegation review based on the fine distinction between intelligible and less-than-intelligible principles yields a judicial inquiry that can itself be described as unprincipled. A legal formula that gives "controlling force to nomenclature,"[302] as opposed to the actual effects of a delegation in a given context, leaves the judiciary without any means of resolving separation of powers concerns in a predictable, coherent fashion, in effect allowing the judiciary to expand its own constitutional role by intervening in the policy-making process.[303]

B. Subversive Legislative Tactics

Congress often finds itself unable to enact narrow and specific directives, particularly in controversial and complex areas such as environmental law. This is due, in no small measure, to the difficulty of reaching consensus on issues that affect public health and welfare at the same time as jobs and profit margins. Stalemate can also result due to turf wars between the myriad

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legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits . . . .") (footnote omitted).

300. *See* Sunstein, *Agency Inaction*, *supra* note 51, at 655-56.

301. Sunstein, *Air II*, *supra* note 48, at 337.

302. United States v. Lopez, 514 U.S. 549, 628 (1995) (Breyer, J., dissenting) (citation omitted).

303. Even Justice Scalia, who has expressed his support for a revitalized nondelegation doctrine, *see South Dakota*, 519 U.S. at 919-21 (Scalia, J., dissenting); Scalia, *supra* note 128, at 28, believes that the judiciary is ill-equipped to enforce the intelligible principle formula. *See* Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) (stating that this formula lends itself to a debate "not over a point of principle but over a question of degree;" as such, "[Congress is] better equipped to inform itself of the necessities of government," including "the permissible degree of policy judgment that can be left to those executing or applying the law").

committees with overlapping jurisdiction over environmental issues.[304] Perhaps most frequently of all, the legislature articulates general policy objectives and leaves the details to administrative processes because the very complexity of the technical questions accompanying a regulatory decision makes it more efficient and effective to do so.[305] Even congressional members admit that "[f]rom a group of legislators that sometimes has trouble simply producing a budget, . . . micromanagement would be a recipe for disaster."[306]

Congress's inability to enact specific and detailed regulatory directives does not necessarily evidence a defective system. The constitutional process for resolving conflict is designed to accommodate individuals and groups with disparate ideologies. When Congress issues relatively general legislative mandates in response to the range of interests presented to it, "it is operating in the politically rational manner for which it was created."[307] A probable consequence of strict delegation review is that "[u]nless Congress can engage in political compromise by using generalities, it will likely pass less regulatory legislation. Thus, reinvigoration of the nondelegation prohibition would represent a political choice in favor of *less regulation*."[308]

If the Supreme Court affirms the D.C. Circuit on the nondelegation issue in *American Trucking*, the EPA may be unable to craft more determinate standards for itself on remand, and Congress could be immobilized by the inability to articulate precise standards and inhibited from delegating the power to craft such measures to executive agencies. As a result, either the

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304. *See* Zellmer, *supra* note 25, at 501-03.

305. *See* PIERCE, *supra* note 30, at 58; *see also* Jerry A. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 98 (1985) (concluding that broad delegation to agencies counters the "extraordinary delegitimizing effect of rules that are so specific that they cannot be made responsive across either space or time"); Peter Schuck, *Delegation and Democracy: Comments on David Shoenbrod*, 20 CARDOZO L. REV. 775, 781-83 (1999) (concluding that delegation is consistent with democracy, largely because agency decision-making is more responsive to public input than is legislation). The Supreme Court has expressly recognized that "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framer's design of a workable National Government." Loving v. United States, 517 U.S. 748, 758 (1996); *see also Mistretta*, 488 U.S. at 381 (explaining that, without some degree of overlap among the branches, the Nation would be incapable of "governing itself effectively") (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)).

306. Joseph I. Lieberman & Henry A. Waxman, *A New Arena for Attacks on Clean Air: The Courts*, HARTFORD COURANT, Sept. 10, 1999, at A23; *see also Loving*, 517 U.S. at 758 ("Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution.") (citing 5 WORKS OF THOMAS JEFFERSON 319 (P. Ford ed. 1904) (letter to E. Carrington, Aug. 4, 1787)).

307. PIERCE, *supra* note 30, at 59.

308. *Id.* at 58 (emphasis added). *See also* Schuck, *supra* note 305, at 792 (remarking that a robust nondelegation doctrine has the pernicious result of "forcing Congress to bear the burden of inertia, which is always a crucial and often determinative, factor in legislative politics").

status quo—dirty air—will be maintained indefinitely, or frustrated congressional members will turn to alternative legislative processes to take care of business. Congress may attempt to avoid constraints imposed by the other two branches by tacking substantive legislative "riders" onto appropriations bills. Appropriations riders allow their sponsors to side step the difficult process of balancing diverse interests and reaching compromise otherwise necessary for enactment of statutory provisions through normal legislative procedures.[309] The appropriations process could be employed to "fast track" detailed regulatory measures proposed by well-financed industry constituents.[310]

Appropriations riders, far more than broad delegations included in regular substantive enactments, seriously undermine each of the justifications offered by the D.C. Circuit in *American Trucking* for invalidating the EPA's regulations.[311] Although Congress itself does make "important choices of social policy" through riders, riders are passed when Congress is acting in a manner *least* "responsive to the popular will."[312] Riders appended to appropriations bills allow only minimal opportunity for review and assessment by congressional members outside of the appropriations committees, let alone by members of the interested public.[313] The use of riders to legislate important substantive choices, a process often shielded from public review and critique, is especially vulnerable to manipulation by special interests.[314] Meanwhile, congressional members can evade

309. Zellmer, *supra* note 25, at 486-89 (1997); *see also* Lovell, *supra* note 241, at 92 (noting that "[t]he nondelegation doctrine cannot prevent Congress from burying divisive regulatory decisions in the technical details of omnibus [budgetary] bills").

310. *See* Zellmer, *supra* note 25, at 491, 520-21; *see also* Michael Axline, *Forest Health and the Politics of Expediency*, 26 ENVTL L. 613, 637 (1996).

311. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (stating that the doctrine's purposes are to ensure that Congress makes "important choices of social policy" through the legislative process, to ensure that agencies do not exercise authority arbitrarily and to "enhance the likelihood [of] meaningful judicial review"), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.).

312. *Id.* (citing Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring)).

313. Zellmer, *supra* note 25, at 510-11.

314. *See id.* at 491. Forcing Congress to legislate with a high degree of specificity would likely exacerbate the concentration of power in committee and subcommittee chairs, providing ever greater opportunities for factional influence. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 237-238 (1999): Sunstein, *Air II*, *supra* note 48, at 338 (citing BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 26-58 (1981)). Although "special interests may receive protection through favorable agency regulations, is this more widespread or morally more opprobrious than having them protected through a tax loophole or a targeted provision in a bill?" EPSTEIN & O'HALLORAN, *supra*, at 10.

responsibility for unpopular regulatory decisions by highlighting other, more palatable provisions of omnibus budgetary bills, some of which are hundreds of pages long.

In addition, appropriations riders often direct the agency to act in a particular way while insulating that action from complying with otherwise applicable legal standards.[315] As a result, the judiciary's role is impaired, because reviewing courts have virtually no means to assess whether agency action taken pursuant to a rider's directive is arbitrary and capricious. For example, the 1995 Salvage Timber Rider, appended to a bill providing disaster relief for victims of the Oklahoma City bombing, provided that various types of national forest timber sales would proceed notwithstanding any other law.[316] The Ninth Circuit Court of Appeals found that its provisions left it with virtually "no law to apply" with respect to environmental concerns.[317]

Finally, the use of riders undermines executive prerogatives. Substantive riders, like the Salvage Timber Rider, are typically appended to emergency resolutions and omnibus spending bills that provide funding for essential programs, inhibiting the presidential veto authority.[318] The Salvage Timber Rider and others like it also impede the Executive's authority to "take [c]are that the [l]aws" enacted through regular legislative processes "be faithfully executed."[319]

In sum, not only would the revival of strict nondelegation review exacerbate the inefficiencies caused by congressional deadlock, it could also, in and of itself, upset the separation of powers, eroding both the judicial and executive functions and making Congress less accountable to the public it serves. In other words, congressional maneuvering to avoid strict nondelegation constraints could heighten the very concerns cited by the D.C. Circuit in invoking the doctrine.

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315. *See* Zellmer, *supra* note 25, at 473-75, 523-25 (discussing various riders directing the sale of timber from National Forest and BLM lands).

316. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995, Pub. L. No. 104-19, § 2001, 109 Stat. 240 (codified at 16 U.S.C. § 1611 (1994 & Supp. IV 1998).

317. *See* Ore. Natural Res. Council v. Thomas, 92 F.3d 792, 796 (9th Cir. 1996); Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 701 (9th Cir. 1996); *cf.* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (holding that a rider which directed the outcome of two pending cases did not violate separation of powers because it replaced existing law and provided some new requirements applicable to the underlying lawsuits).

318. *See* U.S. CONST. art. I, § 7, cl. 2 (providing for the presidential veto).

319. U.S. CONST. art. II, § 3.

V. JUDICIAL REVIEW AS AN ALTERNATIVE: CAN THE DEVIL BE EXORCISED?

It is a fundamental principle of judicial review that courts should refrain from ruling on the constitutionality of a statute unless "absolutely necessary to the [resolution] of [a] case."[320] The D.C. Circuit could have resolved the American Trucking Association's challenges to the national ambient air quality standards ("NAAQS") on non-constitutional grounds by applying principles of administrative law. Instead of remanding the ozone and particulate matter NAAQS for violating nondelegation principles, the court could have taken a "hard look" at the EPA's decision to determine if it was arbitrary and capricious under the Administrative Procedure Act,[321] an approach commonly attributed to *Citizens to Preserve Overton Park, Inc. v. Volpe*.[322] Alternatively, the court, upon finding the statute itself ambiguous, could have tested the agency's interpretation of the terms "requisite to protect public health" and "adequate margin of safety" for reasonableness under *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*.[323] Either approach would have provided an appropriate means for resolving the case and avoiding the nondelegation doctrine altogether.[324]

The two approaches are not necessarily separate and distinct avenues of judicial review, and the courts have not been entirely consistent in applying

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320. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citing Burton v. United States, 196 U.S. 283, 295 (1905)). "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." Blair v. United States, 250 U.S. 273, 279 (1919); *see also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999) (stating that courts "must 'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'") (citations omitted); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138, 157 (1984) (stating that this is "a fundamental rule of judicial restraint").

321. *See* 5 U.S.C. § 706 (1994).

322. 401 U.S. 402, 415, 420 (1971) (remanding the decision of the Secretary of Transportation to approve the use of parkland for a highway, and directing the district court to review the full administrative record before the Secretary at the time of his determination that no feasible alternative routes were available).

323. 467 U.S. 837, 843 (1984); *see also* Udall v. Tallman, 380 U.S. 1, 16-18 (1965) (deferring to agency's interpretation of its regulations and secretarial orders).

324. In its petition for certiorari, the United States urged the Supreme Court to repudiate the D.C. Circuit's directive that the EPA restrain its interpretation on nondelegation grounds, and take one of these well-established paths of judicial review. *See* Petition for Writ of Certiorari at *27-30, 43 Browner v. Am. Trucking Ass'ns, No. 99-1257, 2000 WL 1010083 (U.S. Jan. 20, 2000) (arguing that both *Chevron* support the NAAQS, and that neither the Constitution, nor the Clean Air Act, require the EPA to supply the "determinate criterion for drawing lines,": instead, EPA must simply "consider the factors that the [Clean Air] Act prescribes and provide a reasoned explanation, based on scientific evidence, for its decision.").

them.[325] Generally speaking, *Chevron* comes into play as an interpretive tool when an issue of statutory construction is raised.[326] *Overton Park* and its progeny are utilized to review informal rulemaking involving an agency's fact-based decision, for example, to issue a regulatory standard, like the NAAQS for ozone and particulate matter, or to grant or deny a permit or otherwise apply a legal requirement to a particular factual setting.[327] The circuit courts occasionally apply both *Chevron* and *Overton Park* when reviewing administrative regulations, but rarely explain why they are invoking both doctrines, or how they fit together in any given case.[328]

By synthesizing the two doctrines, it is possible to lend some clarity to the confusion in the context of broad delegations of authority to executive agencies. A reasoned alternative to strict nondelegation review can be conceptualized and articulated, at least in a tentative form, through a marriage of these bedrock principles of administrative law. The proposed approach involves a two-tier review of broad statutory delegations. First, it calls upon courts to account for contextual differences, particularly those rooted in the constitutional source of the authority in question, by giving heightened scrutiny only to those delegations posing the most danger of overreaching, factionalism or abuse of discretion. A statute would fail this inquiry only in those rare cases where the delegation results in the

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325. *See* Shapiro & Levy, *supra* note 51, at 395-96 (noting that the Supreme Court itself has been "criticized for its failure to articulate a theory of judicial review that" justifies confidence in the administrative process).

326. *See, e.g.*, Babbitt v. Sweet Home Chapter, 515 U.S. 687, 703 (1995) (deferring to agency's interpretation of the term "harm" as used in the Endangered Species Act, 16 U.S.C. § 1532 (1994)).

327. *See, e.g.*, Southwestern Penn. Growth Alliance v. Browner, 121 F.3d 106, 111 (3d Cir. 1997) (upholding the EPA's disapproval of Pennsylvania's request to redesignate air nonattainment area to attainment status for ozone under arbitrary and capricious standard); BP Exploration & Oil, Inc. v. EPA, 66 F.3d 784, 792 (6th Cir. 1995) (reviewing EPA's effluent standards for offshore oil and gas operations under arbitrary and capricious standard).

328. *See, e.g.*, Nat'l Ass'n of Mfrs. v. Dep't. of the Interior, 134 F.3d 1095, 1102 (D.C. Cir. 1998) (applying both *Chevron* deference and the arbitrary and capricious standard to review Interior's procedures for natural resource damage assessments); Mausolf v. Babbitt, 125 F.3d 661, 667 (8th Cir. 1997) (upholding snowmobiling regulations for Voyageurs National Park while citing both *Chevron* and *Overton Park*); Gamboa v. Rubin, 80 F.3d 1338, 1343-44 (9th Cir. 1996) (stating that courts must give "significant deference" to regulations under *Chevron*, but also "searching and careful" review under *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), and *Overton Park*), *vacated on other grounds*, 101 F.3d 90 (9th Cir. 1996); Republican Nat'l Comm. v. Fed. Election Comm'n, 76 F.3d 400, 407 (D.C. Cir. 1996) (acknowledging that the tests sometimes overlap, but that "a permissible statutory construction under *Chevron* is not always reasonable. . . . '[W]e might determine that although [an interpretation is] not barred by statute, an agency's action is arbitrary and capricious because the agency has not considered certain relevant factors or articulated any rationale for its choice'") (citations omitted).

obstruction or abdication of a core prerogative of one of the three branches. If it does not, courts should proceed to the second tier of the proposed approach, and take a hard look at the agency's decision to assure against improper biases and unprincipled results.

A. Hard Look Review: Testing Arbitrary Agency Action

The "hard look" doctrine harkens back to *Overton Park,* where the Court stated that, although an agency's decision is entitled to a "presumption of regularity," it must nevertheless be subjected to "probing, in-depth review."[329] The doctrine has been further refined by the D.C. Circuit, where it is frequently invoked to ensure that the agency has taken a hard look at all relevant factors pertaining to the issue.[330] Over the years, hard look review has evolved into a double-layer of close scrutiny; it is now often described as requiring the court itself to take a hard look at the agency's decision to ensure that it is well-reasoned and supported by the administrative record.[331]

Hard look review does not give reviewing courts carte blanche to second-guess an agency's reasoning, nor does it allow the judiciary to make the ultimate decision. Courts are typically and justifiably more deferential when an agency makes technical or scientific predictions "within its area of special expertise, at the frontiers of science."[332] However, the courts "can and do insist that the agency's reasons and policy choices do 'not deviate from or ignore the ascertainable legislative intent.' Beyond that, . . . [courts] can only require the agency's reasons and policy choices to conform to 'certain

329. Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 415 (1971).

330. *See, e.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970); Pikes Peak Broad. Co. v. FCC, 422 F.2d 671, 682 (D.C. Cir. 1969). The development of "hard look" review is described in detail in *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980).

331. *See, e.g.*, Md. Wildlife Fed'n v. Dole, 747 F.2d 229, 237 (4th Cir. 1984) (upholding agency action, stating that the agency must "take a 'hard look' at all relevant factors," and stating that the court itself must observe "the rule of reason and practicality and take[] a 'hard look' at the relevant factors") (citations omitted); *see also Nat'l Lime Ass'n*, 627 F.2d at 451-52 n.126 (defining and describing the evolution of doctrine).

332. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) (upholding the Nuclear Regulatory Commission's determination that the permanent storage of certain nuclear wastes would have no significant environmental impact as within the bounds of reasoned decision making required by the Administrative Procedure Act).

minimal standards of rationality.'"[333] If so, the rule passes the "arbitrary and capricious" threshold and must be upheld.[334]

Although the circuit courts have employed "hard look" review fairly rigorously,[335] the Supreme Court signaled some disapproval of this approach in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[336] There, the Court found that the D.C. Circuit's probing review of rulemaking regarding nuclear waste disposal, which resulted in a remand for additional agency procedures, had gone too far.[337] Indeed, the circuit court's activist approach, the Supreme Court remarked, "borders on the Kafkaesque."[338] It continued, invoking separation of powers concerns: "[t]ime may prove [the agency's decision] wrong . . . , but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function."[339] That function, according to the Court, does not include a reexamination of fundamental policy questions.[340]

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333. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (citations omitted).

334. *Id.* at 521. The court held that the EPA's lead-content limit for gasoline was reasonable, but remanded other provisions of the rule for lack of notice and, alternatively, for failure to explain the choice of phase-out dates and the belief that most small refiners could meet the standards at a reasonable cost. *Id.*

335. *E.g.*, Am. Lung Ass'n v. EPA, 134 F.3d 388, 392-393 (D.C. Cir. 1998) (remanding the EPA's decision not to issue short term NAAQS for sulfur dioxide when the record showed that even brief "bursts" had significant effects on asthmatics, noting that "[w]here, as here, Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning"); Sierra Club v. Thomas, 105 F.3d 248, 251 (6th Cir. 1997) (finding that the Forest Service's "planning process was improperly predisposed toward clearcutting" and resulting land resource management plan was arbitrary), *vacated on other grounds*, 523 U.S. 726 (1998); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 849-50 (D.C. Cir. 1972) (remanding secondary NAAQS to the EPA for additional rationale); *see also* Ross v. Fed. Highway Admin., 162 F.3d 1046, 1055 (10th Cir. 1998) (finding that, by finishing construction of trafficway prior to completion of supplemental environmental impact statement, the agency failed to take a "hard look" at the effect of its actions, as required by the National Environmental Policy Act ("NEPA")); Blue Mountain Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) (concluding that the Forest Service arbitrarily failed to prepare a single impact statement that addressed cumulative effects of logging projects), *cert. denied*, 527 U.S. 1003 (1999).

336. 435 U.S. 519 (1978); *see also* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 383 (1989); Stanley A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

337. *Vt. Yankee*, 435 U.S. at 558.

338. *Id.* at 557.

339. *Id.* at 558.

340. *Id.* at 558.

Subsequently, the Court has sent conflicting messages regarding the appropriate level of judicial scrutiny to be given agency decisions. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[341] the Court found that the National Highway Traffic Safety Administration's failure to consider passive restraint requirements for automobile manufacturing was arbitrary and capricious.[342] A multi-faceted test was articulated for reviewing the agency's regulatory decision: (1) the agency "relied on factors [that] Congress [did] not intend[] it to consider;" (2) the agency "entirely failed to consider an important aspect of the problem;" or (3) the agency "offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[343] In applying this test, the Court expressly warned that "[t]he scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency."[344] In effect, however, the Court engaged in rather aggressive substantive review of the agency's decision.[345]

Other than the *Motor Vehicle* decision, a basic pattern of judicial restraint seems to have emerged in the years since *Overton Park,* particularly when the agency action at issue is policy-based.[346] A survey of the more recent opinions indicates that the Court has not promoted the *Motor Vehicle* criteria to define the scope of review of agency action.[347] Without some sort of determinate judicial test, it is nearly impossible to predict with any degree of certainty whether a given administrative action will be found arbitrary and capricious. Ironically, as a result, judges are relatively free to engage in ad hoc "result-oriented behavior,"[348] i.e., to replace the agency's judgment with

341. 463 U.S. 29 (1983).

342. *Id.* at 46.

343. *Id.* at 43.

344. *Id.*

345. *See* Shapiro & Levy, *supra* note 336, at 1066-67. The Court has engaged in rigorous review in only a few cases since *Vermont Yankee* was issued. *E.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 658-59 (1980) (plurality) (rejecting the Occupational Safety and Health Administration's ("OSHA") benzene standard after a detailed examination of the administrative record); *cf.* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377-78 (1989) (upholding agency's decision that new information did not require a supplemental environmental impact statement, but acknowledging that the review of agency action, though narrow, must "be searching and careful").

346. *See* Shapiro & Levy, *supra* note 336, at 1066.

347. *See id.* at 1067.

348. *Id.* at 1067-68.

their own—the very thing forbidden by *Vermont Yankee* as contrary to separation of powers principles.[349]

Congress, on the other hand, explicitly approved of "hard look" review as applied to Clean Air Act issues during legislative debate on the 1977 Clean Air Act amendments.[350] Thus, a remand in *American Trucking* for articulation of principled reasons under the hard look doctrine, guided by the *Motor Vehicle* factors, would have been a viable judicial response, true to legislative objectives. In fact, the D.C. Circuit's overriding concern seems to center on the quality of the EPA's explanation for its choice of NAAQS; otherwise, the court would have vacated the NAAQS and found that the Clean Air Act itself was unconstitutional.[351] If rigorous review had been employed in the *American Trucking* case, the court could remand the decision as arbitrary if the EPA had failed to explain the criteria used to determine that 0.08 ppm was an appropriate ozone NAAQS, but 0.09 ppm inadequate and 0.07 ppm more stringent than necessary to protect public health with an adequate margin of safety. Remand would also be in order if the EPA failed to consider factors relevant to the protection of public health, including both the likelihood and magnitude of effects on human health. Finally, if the revised NAAQS were not supported by findings in the administrative record, the court could remand the decision.

Along the same lines, Professor Sunstein has suggested that, on remand, the EPA could survive the D.C. Circuit's scrutiny if it were to perform a detailed analysis of anticipated benefits of its proposed NAAQS and at least two other alternatives, one more strict and one more lenient.[352] He recommends that the agency determine the level of "residual risk" of all

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349. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc. 435 U.S. 519, 558 (1978).

350. *See* National Lime Ass'n v. EPA, 627 F.2d 416, 452 n.127 (D.D.C. 1980) ("[T]he conferees intend that the courts continue their thorough, comprehensive review which has characterized judicial proceedings under the Clean Air Act thus far") (citing H.R.REP. No. 95-564 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1559).

351. "Typically, the D.C. Circuit remands without vacating when the court believes that the agency action is consistent with the statute, but requires a more careful explanation." Craig N. Oren, *Run Over by* American Trucking, 29 ENVTL. L. REP. 10,653, 10,657 (citing Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 638 n.72 (1994)).

352. SUNSTEIN, AIR I, *supra* note 48, at 35. Professor Sunstein concludes that the EPA, in failing to explain how it reached its conclusions and selected the NAAQS, was arbitrary and capricious, particularly as to the ozone standard, where it failed to counter evidence that ground-level ozone could in some ways be beneficial to health. Sunstein, *Air II*, *supra* note 48, at 327-30, 369-70. He would recommend a remand to the EPA for further explanation without invalidation of the NAAQS. *Id.* at 369.

three options before selecting a revised NAAQS.[353] This approach likely goes above and beyond what is needed to survive "hard look" review—rational and balanced decision-making based on a complete administrative record.[354] As such, it would provide "intelligible principles" and then some, alleviating the D.C. Circuit's concerns of unbridled agency discretion run amuck.

B. Reviewing Agency Interpretations of Ambiguous Statutes

Arbitrary and capricious review generally arises in the context of challenges to an agency's decision to apply statutory criteria to a particular issue, based on facts developed in an administrative record. In contrast, facial challenges to an agency's interpretation of statutory directives trigger a two-step analysis under *Chevron*.[355] Step one requires the reviewing court to determine whether Congress directly and unambiguously expressed its intent on the question at hand. If so, the inquiry is over and a court must hold true to congressional intent.[356] If the statute is silent or ambiguous on the issue, a court must proceed to step two and affirm an agency's "permissible" interpretation, even if the court itself would reach a different conclusion.[357]

In *Chevron*, the Court, reviewing the language of the Clean Air Act and its legislative history, found that Congress had not clearly expressed an intent regarding the meaning of the term "stationary source."[358] Although the

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353. SUNSTEIN, AIR I, *supra* note 48, at 35.

354. Professor Sunstein's model approaches the level of analysis required by NEPA, 42 U.S.C. § 4332(2) (1994), which mandates the assessment of environmental effects and alternatives for all major federal actions. However, as the court noted in *American Trucking*, Congress exempted the EPA from preparing NEPA documents when it establishes NAAQS or takes other action under the Clean Air Act. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1041 (D.C. Cir. 1999) (citing 15 U.S.C. § 793(c)(1) (1994)), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.). Even absent a specific statutory exemption, it is relatively well-established that NEPA does not apply to most of EPA's actions under pollution control statutes, on the grounds that these statutes require the "functional equivalent" of environmental assessment or impact statement. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384 (D.C. Cir. 1973). The merits of requiring NEPA or NEPA-like analysis of the EPA, while warranting additional attention, must be left for another day.

355. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

356. *Id.*

357. *Id.* Thus, "*Chevron* presumes the existence of at least one constitutionally permissible interpretation of the relevant statutory language . . . . Where only one constitutionally permissible interpretation of the statute is possible, i.e., where Congress has spoken directly to the precise question at issue, the court must effectuate that interpretation of the law." Adler, *supra* note 67, at 10,244. "Where multiple permissible readings exist," the agency is allowed to choose any reasonable outcome. *Id.*

358. *Chevron*, 467 U.S. at 841, 845.

opinion did not provide explicit guidance as to when a statute should be found ambiguous, it did note that courts should employ "traditional tools of statutory construction" to ascertain whether Congress had a specific intent on the particular provision at issue.[359] The starting point for this inquiry is the plain language of the statute itself. Other tools may include the overall statutory framework, congressional policy and the legislative history.[360]

Moving on to step two, the *Chevron* Court found that the EPA's definition was permissible. The agency allowed a facility to "bubble" multiple emission sources for the purposes of calculating emission rates, so that if the facility were to add a new emission source it could offset that source by reducing emissions elsewhere in its bubble.[361] This interpretation allowed many facilities to avoid the stringent requirements imposed on new or modified major stationary sources.[362] In finding the agency's decision permissible and reasonable, the Court cited the complex and technical nature of the regulatory scheme, the "detailed and reasoned" consideration that the EPA had given to the issue, and the nature of EPA's interpretation as one of policy choice.[363] The Court admonished the reviewing court that it need not find that the agency's interpretation is the most accurate one, or the one the court itself would have chosen, to conclude that the interpretation is permissible.[364]

As in *Vermont Yankee*, the *Chevron* Court invoked separation of powers principles to justify its deferential stance.[365] It explained that the judiciary

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359. *Id.* at 843 n.9; *see also* Shapiro & Levy, *supra* note 336, at 1069 (describing the *Chevron* decision as giving rise to a presumption of ambiguity). There appears to be no precise formula for step one, and it is difficult, if not impossible, to predict when a court will find a statute ambiguous under step one. In application, "disagreement reigns as to the clarity of particular statutes." Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under* Chevron, 6 ADMIN. L.J. AM. U. 187, 205 (1992). Justice Scalia has remarked that it is not necessary for opposing interpretations to be in "absolute equipoise" for ambiguity to exist. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520.

360. FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1301 (2000); *see also* Scalia, *supra* note 359, at 515.

361. *Chevron*, 467 U.S. at 841 (reviewing the EPA's regulatory definition and the language and intent of the Clean Air Act). The new source review program requires the EPA to set uniform standards of performance for emissions from new or modified sources reflecting "the degree of emission limitation achievable through the application of the best system of emission reduction . . . adequately demonstrated." Clean Air Act § 111(a)(1), 42 U.S.C. § 7411(a)(1) (1994).

362. *Chevron*, 467 U.S. at 841.

363. *Id.* at 865.

364. *Id.* at 843 n. 11; *see also* NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 133 (1987) (Scalia, J., concurring).

365. *Chevron*, 467 U.S. at 844, 864-66; Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978); *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).

should not undermine the legislature's decision to entrust regulatory responsibility to executive agencies:

> 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 . . . . Sometimes the legislative delegation to an agency on a particular 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.[366]

The Court castigated the D.C. Circuit for "misconceiv[ing] the nature of its role" and imposing its own belief that bubbling would not advance the Act's overarching goal of improving air quality: "If [EPA's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[367] In essence, *Chevron* assumes that policy choices ought to be made by persons accountable to the political branches—if not by Congress itself, then at least by agency administrators appointed by the President and confirmed by Congress—but *not* by the federal judiciary.

In its initial decision in *American Trucking*, the D.C. Circuit cited *Chevron* step one to support the relatively narrow finding that the EPA was correct in refusing to consider costs, given the plain language of section 109.[368] Curiously, the court did not even mention *Chevron's* deferential standard with respect to the overall integrity of the levels chosen for the NAAQS, instead invoking the nondelegation doctrine. The per curiam opinion on the petition for rehearing gave more consideration to *Chevron*:

> To choose among permissible interpretations of an ambiguous principle, of course, is to make a policy decision, and since *Chevron* it has been clear that "[t]he responsibilities for assessing the wisdom of such policy choices . . . are not judicial ones." Accordingly, just as we must defer to an agency's reasonable

366. *Chevron*, 467 U.S. at 843-44.

367. *Id.* at 845 (citation omitted).

368. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1040 (D.C. Cir. 1999), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.). The role of economic costs as a factor in setting NAAQS is the subject of the Association's petition for certiorari, which was granted by the Court a few days after it granted review on the nondelegation issue. *See Am. Trucking*, 120 S. Ct. at 2193 (mem.) (petition for writ of cert. granted).

> interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority. In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*.[369]

The court indicated that *Chevron* step two is applicable whether the inquiry is characterized as an interpretive matter or as a decision to fill a gap left by Congress to the agency; even so, it denied the petition.[370]

Unlike the "stationary source" definitional issue before the Court in *Chevron*, the ozone "cutoff" at 0.08 ppm did not turn solely on the EPA's definition of an ambiguous term. Instead, it involved the EPA's choice of a specific standard, based on an administrative record, regarding the level of NAAQS necessary to protect health as directed by section 109. To execute the Act's requirements by choosing a standard, the EPA had to make a policy call, guided by scientific data compiled in its administrative record but also involving a fair amount of judgment of an interpretive nature, as to exactly what level would be "requisite" to protect public health with an "adequate" margin of safety.

If in fact *Chevron* is applicable to the EPA's revised NAAQS, it cuts against the D.C. Circuit's decision to set aside the agency's choice of a standard.[371] Under *Chevron* step one, the court would find a lack of clear intent on the stringency of standards necessary to protect public health. It appears that Congress did not express an opinion on the range of permissible standards, and, more likely than not, punted on the question of what to do when adverse health effects might occur at any level above zero. The Clean Air Act is ambiguous on this point, perhaps even intentionally so.[372]

Moving on to step two, the court would defer to the EPA's choice of the appropriate NAAQS, so long as that choice is "permissible." Courts rarely reverse once they reach step two, unless the agency's interpretation is patently unreasonable, unconstitutional, or frustrates discernible statutory goals.[373] An agency's decision is not delegitimized just because it reflects the

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369. *Am. Trucking*, 195 F.3d at 8 (citing Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 642, 646 (1980)) (other citations omitted).

370. *Id.*

371. *See id.* at 11-12 (Tatel, J., dissenting from denial of rehearing).

372. Public choice theorists posit that Congress routinely passes ambiguous provisions to avoid the need to reach consensus or take responsibility for controversial issues. *E.g.*, David Shoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 740 (1999); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 140-42 (1997).

373. Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 96 (1994) (noting that some

political goals of the powers that be in the executive branch if other factors showing "permissibility" are met.[374]

Chevron plainly refutes the position that a broad delegation of standard-setting authority to an executive agency offends separation of powers. The *Chevron* Court recognized that legislative ambiguities, i.e., standards that lack crystal-clear guiding principles, are not at all remarkable or unusual in complex areas like environmental law. As a result, it is perfectly appropriate—and not constitutionally suspect—for the agency to "fill in the blanks" with reasonable details if the statutory directive is broadly or loosely phrased such that several interpretations are possible. Yet, under *American Trucking*, it is hard to imagine a court ever proceeding to *Chevron* step two, because an ambiguous statute would trigger a constitutional delegation problem. The application of *American Trucking* to future cases could effectively eviscerate the *Chevron* doctrine.

There are those who might say "good-bye and good riddance" to *Chevron* deference, on the grounds that *Chevron* itself presents a separation of powers problem. The notion that judges should stand back and let executive agencies interpret statutory provisions may be "quite jarring to those who recall the suggestion, found in *Marbury v. Madison*,[375] and repeated time and again in American public law, that it is for judges, and no one else, to 'say what the law is.'"[376] But the interpretation of ambiguous language in a regulatory statute often boils down to a choice between competing policies, not merely the construction of words, phrases, statutory context and legislative history. This is especially true in those cases where nondelegation arguments are most likely to be raised—where Congress did not make a

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judges uphold the agency under step two unless the agency's decision outright "flunk[s] the laugh test") (quoting Judge Stephen Williams, author of the majority opinion in *American Trucking*). In fact, the Supreme Court had never invalidated an agency's interpretation of a statute within its jurisdiction once it reached step two, *see* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997), until it issued *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

374. Seidenfeld, *supra* note 373, at 100, 103 (noting that the Court in both *Chevron* and later in Rust v. Sullivan, 500 U.S. 173, 187 (1991), "explicitly accepted the agency's assertion that political attitudes had changed" under President Reagan as a legitimate factor and justification for the agency's decisions); *see also* Scalia, *supra* note 359, at 517-18 (stating that step two should allow political flexibility).

375. 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Chief Justice Marshall proclaimed that "[i]t is emphatically the duty of the judicial department to say what the law is." *Id.* at 177.

376. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074 (1990) [hereinafter Sunstein, *After* Chevron]. Professor Sunstein describes *Chevron* as "a kind of *Marbury*, or counter-*Marbury*, for the administrative state." *Id.* at 2075. Prior to *Chevron*, a line of cases had refused to give any deference to agency interpretations of "pure questions of law," but *Chevron* plainly repudiated that approach. *See* Scalia, *supra* note 359, at 513 (citing cases).

choice on a particular issue but delegated that function to the agency. The choice of policy is clearly a function of the elected branches, not the courts.[377]

Two recent Supreme Court decisions clarify the constitutional role of courts, Congress and executive agencies when faced with ambiguous statutory directives. In *FDA v. Brown & Williamson Tobacco Corp.*,[378] the Court held that the Food and Drug Administration ("FDA") lacks authority to regulate nicotine and tobacco products as drugs or devices under the Food, Drug, and Cosmetic Act ("FDCA").[379] Instead of striking down a broadly phrased statute on nondelegation grounds, the Court simply recognized that its role, as a matter of judicial review, was to find the FDA's assertion of jurisdiction impermissible in view of Congress's apparent refusal to delegate the power to regulate tobacco under the FDCA.[380] Far from invoking the separation of powers doctrine or in any way calling into question the constitutional validity of the statute itself or the agency's construction of it, the Court stated that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[381]

The FDA issued the regulations at issue in 1996, defining nicotine as a "drug"[382] and cigarettes and smokeless tobacco as "drug delivery devices,"[383] and asserting jurisdiction to restrict the promotion, labeling and accessibility of tobacco products to adolescents.[384] Under the Court's construction of the FDCA, given the FDA's express finding that cigarettes and other tobacco

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377. Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 YALE J. ON REG. 283, 295 (1986) (noting that the Supreme Court has equally "emphatically stated that it [is] for the agency, not the reviewing court, 'to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved'" (citing *Chevron*, 467 U.S. at 865)).

378. 120 S. Ct. 1291 (2000).

379. 21 U.S.C. §§ 301–397 (1994).

380. *Brown & Williamson Tobacco*, 120 S. Ct. at 1301.

381. *Id.* (citing MCI Telecomm. Corp. v. AT&T Corp., 512 U.S. 218, 231 (1994)).

382. 21 U.S.C. § 321(g)(1)(C) (1994) (providing that drugs include "articles (other than food) intended to affect the structure or any function of the body").

383. *Id.* § 321(h) (1994) (defining device as "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, including any component, part, or accessory, which is . . . intended to affect the structure or any function of the body"); *see also id.* § 353(g)(1) (1994) (granting the FDA authority to regulate "combination products" which "constitute a combination of a drug, device, or biological product"). The FDA found that these provisions gave it discretion to regulate combination products as drugs, devices or both. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,400 (1996).

384. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg.at 44,397, 44,402.

products were unsafe,[385] the Act would require FDA to ban such products entirely—an outcome which Congress had foreclosed in subsequent statutes.[386] Accordingly, the Court invalidated the FDA's regulations, specifically invoking *Chevron* step one:

> Deference . . . to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps . . . . *In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.* . . . This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.[387]

The Court found that deference could not be given the agency's interpretation of the statute because Congress had "repeatedly acted to preclude any agency from exercising significant policymaking authority in the area [of tobacco]."[388] In keeping with *Chevron* step one, the Court concluded:

> Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of "safety" as it is used throughout the Act—a concept central to the FDCA's regulatory scheme—but also ignore the plain implication of Congress' subsequent tobacco-specific legislation. It is therefore clear . . . Congress has directly spoken

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385. *See id.* at 44,398-99.

386. *See Brown & Williamson Tobacco,* 120 S. Ct. at 1301-04. Various provisions of the FDCA require that regulated products be found "safe" before they can be sold or allowed to remain on the market. *Id.* at 1301-05 (citing 21 U.S.C. §§ 360c(a)(2), 352(j), 393(b)(2) (1994 & Supp. IV 1998)). The Court went on to examine a panoply of subsequent enactments and proposed amendments in determining that Congress had forbidden such a ban. *Id.* at 1306-13. It concluded that, "[t]aken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products." *Id.* at 1312.

387. *Id.* at 1314-15 (emphasis added). The Court also noted that, up until 1995, the FDA had consistently denied that it possessed jurisdiction "to regulate tobacco products as customarily marketed." *Id.* at 1307.

388. *Id.* at 1315. The Court added "tobacco has its own unique political history" owing to its "unique place in American history and society." *Id.*

> to the question at issue and precluded the FDA from regulating tobacco products.[389]

Thus, it stated, "we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny FDA this power."[390]

The Court's only direct reference to the separation of powers concerns typically raised by nondelegation challenges was in response to a point raised by dissenting Justice Breyer. Justice Breyer refuted the majority's implication that courts "should assume in close cases that a decision with 'enormous social consequences,' . . . should be made by democratically elected Members of Congress rather than by unelected agency administrators."[391] The majority remarked that, although the public may well hold the executive branch politically accountable for the FDA's decision, given the serious and high-profile nature of the tobacco issue, an "agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[392]

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389. *Id.*

390. *Id.* The Court cited *MCI Telecommunications*, where it had held that the FCC did not have the authority, under a proviso allowing it to "modify any requirement" of the Communications Act of 1934, to convert a mandatory requirement that long distance carriers file their rates into a voluntary activity. *Id.* (citing MCI Telecomm. Corp. v. AT&T Corp., 512 U.S. 218, 225 (1994)). "[F]inding 'not the slightest doubt' that Congress had directly spoken to the question, . . . we concluded that '[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.'" *Id.* (quoting *MCI Telecomm.*, 512 U.S. at 228, 231).

391. *Id.* at 1330 (Breyer, J., dissenting). Justice Breyer noted that the public was quite likely to be aware of the FDA's decision to regulate tobacco products and to hold executive branch officials politically accountable:

> Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude—one that is important, conspicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.

Id. at 1331; *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 323 (2000) [hereinafter Sunstein, *Canons*] (noting that, if the public is angry at Congress for "passing the buck" to the executive branch, voters will react accordingly in the next election; if they don't, it may be because they are content with the operation of government under broad delegations).

392. *Brown & Williamson Tobacco*, 120 S. Ct. at 1315. The Court went on to state, "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Id.* (citations omitted).

The Court took a different tack in *AT&T Corp. v. Iowa Utilities Board*,[393] and, for the first time since *Chevron* was handed down in 1984, invoked *Chevron* step two to invalidate regulations issued by the FCC pursuant to the Telecommunications Act of 1996.[394] The similarity between *Brown & Williamson Tobacco* and *Iowa Utilities* is more striking, though, than is this distinction—once again, principles of administrative law, not constitutional law, were invoked to resolve a difficult regulatory issue.

The Telecommunications Act, designed to introduce competition among providers of local telephone service, allows new entrants to lease certain elements of the existing carriers' network.[395] Section 251(d)(2) directs the FCC to determine which elements would be subject to this "unbundled access" by considering, "at a minimum, whether (A) access to such network elements . . . is necessary; and (B) the failure to provide access to such network elements would impair the [new entrant's] ability . . . to provide the services that it seeks to offer."[396] The FCC's regulations allowed new entrants to meet the "necessary" standard regardless of whether they could obtain the network element from some other source; in other words, if service could be provided at the lowest cost using the incumbent's elements, the standard was met, even if services were otherwise available from other carriers.[397] The FCC's interpretation of "impairment" likewise precluded consideration of opportunities for self-provision or purchase from other providers. New entrants could meet this standard if an incumbent's failure to provide access "would decrease the quality or increase the . . . cost of the service."[398]

The Court found § 251(d) "a model of ambiguity or indeed even self-contradiction,"[399] but nonetheless concluded that the FCC had failed to interpret the statutory terms in a "reasonable fashion," because its rule "is

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393. 525 U.S. 366, 392-93 (1999).

394. *Id.* at 392-93; *see* Bressman, *supra* note 237, at 1399. Justice Souter dissented from this part of the opinion on the grounds that, once ambiguity was detected, "*Chevron* deference surely requires us to respect the Commission's conclusion." *Ia. Utilities*, 525 U.S. at 401 (Souter, J., dissenting in part).

395. 47 U.S.C. § 251(c) (Supp III. 1997).

396. *Id.* § 251(d)(2) (Supp. III 1997). The FCC's general rulemaking authority to "prescribe such rules and regulations as may be necessary in the public interest," provided in the Communications Act of 1934, 47 U.S.C. § 201(b) (1994), extends to its implementation of the 1996 Act. *Ia. Utilities*, 525 U.S. at 377-78.

397. *See Ia. Utilities*, 525 U.S. at 389 (citing *In re* Implementation of the Local Competition Provisions, 11 F.C.C.R. 15,499 (1996) (First Report & Order ¶ 283)).

398. *Id.* (citing First Report & Order ¶ 285).

399. *Id.* at 397. Justice Scalia, writing for the majority, remarked that the lack of clarity "is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars." *Id.*

simply not in accord with the ordinary and fair meanings" of the terms "necessary" and "impairment."[400] Moreover, the agency had failed to take the Act's objectives into account,[401] and had neglected to apply any "limiting standard, rationally related to the goals of the Act."[402] In effect, the FCC had abdicated its regulatory role, delegating almost complete discretion to the aspiring carriers themselves to determine whether access to the network elements of an incumbent was necessary simply by choosing the most efficient service, while turning a blind eye to the availability of elements outside of the incumbent's network.[403] This, the Court found, was surely contrary to congressional intent.[404]

Although portions of the Court's opinion evidence its overarching concerns about regulatory responsibility for a program with tremendous implications for the national economy and federalism—the same concerns evident in the early New Deal nondelegation cases—nowhere does it cite those precedents, nor does it even mention the nondelegation doctrine. The Court's decisions in both *Iowa Utilities* and *Brown & Williamson Tobacco* indicate that it has no interest in reviving the nondelegation doctrine as a constitutional ground for invalidating congressional enactments. To the contrary, the opinions demonstrate a willingness to hold true to the very basis for the *Chevron* doctrine, i.e., effectuating the intent of Congress.[405] If Congress spoke directly to the issue, delegation was not intended and there is no basis for giving deference to the agency's interpretation, or to even move

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400. *Id.* at 390.

401. *Id.* at 392.

402. *Id.* at 388.

403. *See id.* at 389-90. Justice Scalia characterized the power delegated to the new entrants as "promiscuous," *id.* at 397 (quoting a statement made by GTE's counsel at oral argument), reminiscent of the imagery used by Justice Cardozo in *Schechter Poultry*, *see* Bressman, *supra* note 237, at 1401, 1435-36. The lack of limiting standards, along with the abdication of lawmaking authority to private parties, were the very same flaws which rendered the delegation at issue in *Schechter Poultry* unconstitutional. *Id.* at 1435. Professor Bressman concludes that the *Iowa Utilities* decision can be explained in terms of a nondelegation problem just as easily as it could a *Chevron* step two problem, although the Court did not couch its opinion in constitutional terms. *Id.* at 1436.

404. *Ia. Utilities*, 525 U.S. at 390. Economic and states' rights themes were evident throughout the opinion, and, in particular, the Court seemed acutely conscious of the economic implications of the FCC's interpretation. *See id.* at 395. However, the majority flatly rejected the state utility commissions' appeals to states' rights, *id.* at 378 n.6, although Justices Thomas, Rehnquist and Breyer believed that the case raised "basic principles of federalism," citing "the 100 year tradition of state authority over intrastate telecommunications," *id.* at 411 (Thomas, J., dissenting in part, with Rehnquist and Breyer); *id.* at 427 (Breyer, dissenting in part).

405. *See* Scalia, *supra* note 359, at 516-17. Scalia explains that whether or not ambiguity reveals a true congressional intent to confer discretion on an agency, a query which is "probably a wild goose chase anyway," Congress now knows that, as a result of *Chevron*, intentional or unintentional ambiguities will be resolved by agencies, not courts. *Id.* at 517.

beyond step one of the *Chevron* analysis. On the other hand, if Congress left a gap in the statutory scheme, it has implicitly delegated the power to the agency to fill that gap with a permissible interpretation of the provision in question. *Iowa Utilities* demonstrates a renewed interest in step two, and a clarification of what is "permissible." Reviewing courts are to determine whether the interpretation is permissible and reasonable, giving due deference to the agency's policy choices, while probing the factual and legal bases for the ultimate decision.

Of course, invoking *Chevron* is not a panacea for irregular or unpredictable decision-making. There is a danger that courts can find ambiguity where none exists if they wish to uphold the agency's decision, or, on the other hand, discern clarity where none exists, thereby stripping the agency of discretion when its interpretation is disagreeable to the ideology of the judges.[406] Empirical studies of cases applying the *Chevron* doctrine have yielded contradictory results. Some find that courts do use *Chevron* for partisan purposes,[407] while others conclude that judges actually behaved less ideologically after *Chevron*.[408] Whether judicial proclivities play a distinct role or not, it is apparent that the application of *Chevron* has not produced the predictable results one might expect. But *Chevron* has, at least, given a signal to Congress that legislative ambiguities are more likely to be resolved by agencies, whose political biases are relatively easy to discern, than by individual jurists.[409] And, in cases where Congress established legislative goals but otherwise avoided a particular issue by giving the broadest possible delegation to the agency, the use of *Chevron* as an interpretive norm should caution courts against striking down the delegation and supplying policy-based limitations intended for administrative resolution.

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406. *See* Bressman, *supra* note 237, at 1411-12; Schuck, *supra* note 305, at 788.

407. *E.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998); *see also* Scalia, *supra* note 359, at 521 (stating that, under a textualist approach, a judge can generally find that the plain meaning is apparent from a provision's text and its relationship to other laws; as a result, deference under *Chevron* step two will be less often triggered, making it "relatively rare" that "*Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt").

408. *E.g.*, Aaron P. Avila, *Application of the* Chevron *Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L.J. 398 (2000) (comparing challenges to EPA decisions before and after *Chevron* to see if judges tended to be more ideological after *Chevron*).

409. *See* Scalia, *supra* note 359, at 517. As a result, Justice Scalia concludes, legislating "becomes less of a sporting event." *Id.*

C. A Marriage of Chevron and Overton Park, with a Contextual Twist

It is virtually impossible to square *American Trucking*'s nondelegation approach with *Chevron*.[410] A more reasoned response to separation of powers and due process concerns can be crafted by synthesizing *Chevron* principles with hard look review, as seen in *Brown & Williamson Tobacco* and *Iowa Utilities*. This approach would allow Congress to establish legislative goals and delegate the details to agencies so that the political branches are making policy-based judgments, while promoting meaningful judicial review, without raising constitutional concerns.

The *Brown & Williamson Tobacco* decision provides a viable judicial response where the subject matter of the regulation and the relevant statutory scheme shows a congressional intent to place discernible limits on the agency's discretion. In those instances, courts must fulfill their constitutional duties by holding true to congressional intent and invalidating inconsistent executive action. Where the statute at issue does not specify precise parameters, however, the initial inquiry will still employ "traditional tools of statutory construction" to see if Congress has spoken to the issue, as directed in *Chevron* step one. The nuance added by the proposed nondelegation alternative gives special attention to context—"step one-plus."

Courts can presume that Congress is less likely to delegate open-ended powers to executive agencies in certain areas, and demand greater specificity in those cases. Professor Sunstein describes several categories of "nondelegation canons" to illustrate that courts generally do not defer to agencies when their decisions go against "background" legal principles.[411] These canons justify more rigorous review when the subject of the agency's decision is contrary to widely held expectations or uniquely within Congress's realm. Examples include the retroactive application of a statute or rule, the intrusion on fundamental constitutional rights, the abrogation of American Indian treaties[412] and, possibly, decisions requiring tremendous

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410. *See* Adler, *supra* note 67, at 10,242 (noting the tension between the nondelegation doctrine articulated in the *American Trucking* and *Lockout/Tagout* decisions, and the *Chevron* doctrine of judicial review).

411. Sunstein, *Canons*, *supra* note 391, at 330.

412. *See id.* at 331-35. Although federal taxation would also seem a likely candidate for inclusion in a set of nondelegation canons as a power uniquely within Congress's sovereign and legislative realm, especially subject to lobbying efforts and factional influence by private groups, *see id.*; United States v. Wells Fargo Bank, 485 U.S. 351, 354 (1988); Sunstein, *Canons*, *supra* note 391, at 325, the Supreme Court has explicitly rejected arguments that heightened scrutiny should be given to delegations of the taxing power, *see* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-23 (1989).

expenditures for marginal gains.[413] Courts may expect Congress to voice a clear intent to grant specific powers to the executive branch in these areas, and agencies will not enjoy the benefit of the doubt in the face of legislative ambibuity.[414]

By the same token, a "pro-delegation" presumption might be recognized in other areas where plenary powers have been routinely granted in the past or where separation of powers concerns are minimal. Regardless of the level of statutory detail, certain types of statutes are less likely to trigger nondelegation and separation of powers concerns. As noted in *American Trucking,* and as Justice Rehnquist explained in *Industrial Union Department v. American Petroleum Institute*,[415] some enactments warrant less scrutiny than others.[416] His examples include cases where the delegatee possessed

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413. Sunstein cites, *inter alia,* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1222-23 (5th Cir. 1991), for this proposition, a case that invalidated EPA's decision to ban the manufacture of asbestos under the Toxic Substances Control Act ("TSCA")). Sunstein, *Canons*, *supra* note 391, at 334 n.93. As TSCA explicitly requires a consideration of economic effects, *see* 15 U.S.C. § 2618(a)(3) (1994), a straightforward application of *Chevron* step one dictates against any contrary interpretation. TSCA is also distinctive in that it imposes the more exacting "substantial evidence" standard of judicial review. *Id.* § 2618(c)(1)(B)(i) (1994). Compared to arbitrary and capricious review, this standard "imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate." *Corrosion Proof Fittings*, 947 F.2d at 1214. In two other cases cited in support of his point, agencies were allowed to grant *de minimis* exceptions to statutory prohibitions where costs of regulation in the particular case yielded minimal gains, *see* Alabama Power Co. v. Costle, 636 F.2d 323, 360-61 (D.C. Cir. 1979); Monsanto Co. v. Kennedy, 613 F.2d 947, 955-56 (D.C. Cir. 1979), but there are probably as many cases where the agency was denied the power to imply regulatory exemptions, *see, e.g.*, Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1379 (D.C. Cir. 1977) (invalidating EPA decision to exempt irrigation return flows from the Clean Water Act's definition of "point source"). Sunstein also cites the Benzene case, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 644 (1980), which may be a better example of an implicit "nondelegation canon" against the imposition of excessive costs, *see supra* notes 119-28 and accompanying text.

414. *See* Sunstein, *Canons*, *supra* note 391, at 335-36. Another category that could be included as a "nondelegation canon" involves agency interpretations of their own jurisdictional reach. Although Justice Scalia has argued that it is "settled law" that *Chevron* deference applies to jurisdictional issues, other justices have disagreed. Herz, *supra* note 359, at 216-18 (discussing divergent views evidenced in several Supreme Court cases). Arguably, Congress is less likely to have intended to leave a determination as to the scope of administrative authority to the agency itself, so implied delegation of a jurisdictional issue may be inappropriate. *Id* at 219; *see also* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law,* 41 Wm. & Mary L. Rev. 1463, 1484-1485, 1528-1529 (2000).

415. 448 U.S. 607 (1980).

416. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1037 (D.C. Cir. 1999) (noting that no "special theories," such as "war powers . . . or the sovereign attributes of the delegatee [had been] asserted" to justify the "vague delegation" given in the Clean Air Act), *modified on petition for reh'g,* 195 F.3d 4 (D.C. Cir. 1999), *cert. granted,* 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.); *Am. Petroleum Inst.,* 448 U.S. at 684 (Rehnquist, J., concurring in judgment). A test that embraces differentiated levels of review finds support in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), which gave rise to strict scrutiny for laws

residual authority over particular subjects of regulation, as does the President with respect to foreign affairs,[417] and cases where the statutory delegation takes place against the backdrop of an administrative practice that predated the legislation.[418] Rehnquist also referred to situations where the delegatee itself possesses independent authority over the subject matter, citing a statute that authorized American Indian tribes to regulate the import of liquor into Indian Country.[419] Finally, he would include "a rule of necessity," where broad delegations of authority are upheld simply because "it would be 'unreasonable and impracticable to compel Congress to prescribe detailed rules' regarding a particular policy or situation."[420]

These contextual and practical presumptions become tools of construction to be utilized at step one-plus of the proposed nondelegation approach. Using these tools, if the court is convinced that delegation was not intended by Congress, or that it does result in separation of powers problems, it must remand the decision, as it did in *Brown and Williamson Tobacco,* or

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that discriminate against a "discrete and insular minority" or impair the political processes otherwise expected to result in the repeal of unfavorable legislation. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 714 (1985) (explaining that *Carolene Products* provided a unifying principle for judicial review in the New Deal era, based on "an entirely new constitutional rhetoric-one that self-consciously recognized that the era of laissez-faire capitalism had ended"); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459 (1999) (noting that *Carolene Products* provides "a framework of general judicial deference to the legislature, but with particular areas of more intensive judicial review").

417. *Am. Petroleum Inst.*, 448 U.S. at 664 ("[T]he Court upheld a statute authorizing the President to prohibit the sale of arms to certain countries if he found that such a prohibition would 'contribute to the reestablishment of peace'" (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 307 (1936))). The Court stated that, "in the area of foreign affairs, Congress 'must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" *Id.* (quoting *Curtiss-Wright*, 229 U.S. at 320). Along the same lines, a pro-delegation presumption might also be warranted for decisions governing international trade relationships. *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 754 (D.D.C. 1971) (citing *Curtiss-Wright*; & Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

418. *See Am. Petroleum Inst.*, 448 U.S. at 683 (giving President authority to recapture "excessive profits" (citing Lichter v. United States, 334 U.S. 742, 783 (1948))).

419. *Id.* at 684 (citing United States v. Mazurie, 419 U.S. 544, 556-57 (1975)). Notably, Justice Rehnquist would review this type of delegation less strictly, even though the authority was given to a non-federal entity.

420. *Id.* at 684-85 (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)). According to Justice Rehnquist, there was no necessity which would justify an "evasive" standard like "feasibility" in the Occupational Safety and Health Act: "Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry." *Id.* at 685. In contrast, both a "rule of necessity" and an extensive backdrop of administrative practice justify a pro-delegation presumption in Property Clause cases. *See infra* Part VI.A-B. Rather than attempt to imagine every subject to be included, my intent is to introduce the pro-delegation concept here and try it out in the context of the Property Clause.

invalidate the statute. On the other hand, if the court is satisfied that the agency has been given the power to "fill in the details," then it moves to step two to determine permissibility, as a matter of administrative law.

If heightened emphasis were placed on step two of *Chevron*, as it was in *Iowa Utilities*, courts would take a hard look at the reasonableness of the agency's decision in light of legislative goals, as shown by the overall statutory framework and legislative history.[421] Under this "step two-plus" inquiry, if the question is one of pure interpretation, for example, defining an ambiguous statutory term like "stationary source," the court must follow *Chevron* and defer to the agency's policy-based selection of any permissible definition. If the issue involves a mixed question of interpretation and application of the law to a set of facts, as did EPA's decision that 0.08 ppm ozone is an appropriate level "requisite" to protect public health with an "adequate margin of safety," the court's review of the interpretative component should still be deferential. Review of the "as-applied" component, though, would employ the *Motor Vehicle* factors. The court should look closely at the record and the ultimate decision to ensure that the agency explained itself clearly, considered all relevant factors and made a decision that is well-supported by the record. As a result, the agency's political choices are not second-guessed (unless they were precluded by Congress as revealed in step one-plus), but its factual findings and ultimate conclusions must be the product of regular and well-informed processes, as opposed to factional influence or arbitrary whim, to withstand review. Meanwhile, courts can fulfill their constitutional role and promote deliberative tripartite democratic processes by providing careful judicial review, without displacing the agency's judgment on policy or factual matters, formulated through rulemaking and public input. In turn, agencies are less likely to issue arbitrary or ill-formed decisions if they know that, given a concrete case or controversy, courts will be probing those decisions with a hard look.[422]

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421. *See* Seidenfeld, *supra* note 373, at 128-30; *see also* Adler, *supra* note 67, at 10,243 ("In a 'step two' context, the nondelegation doctrine is satisfied where Congress has included adequate standards in the statute, augmented by its legislative history, to guide an agency in its choices among competing, permissible readings of the statute."); Shapiro & Levy, *supra* note 336, at 1075 n.96, 1076 n.100 (noting that the Administrative Conference recommended the merger of *Chevron* and *Motor Vehicle*, and recommending that step two of *Chevron* include the first two *Motor Vehicle* factors).

422. *See* 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, 731-32 (1977); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 471 (1987) [hereinafter Sunstein, *Constitutionalism*].

Vigorous judicial scrutiny at step two-plus acts as a significant impediment to improperly motivated decisions.[423] Administrative processes generally provide greater opportunities for public involvement than congressional processes, allowing more informed decision-making but, at the same time, increasing the potential for undue influence by more vigilant or well-heeled interest groups. Heightened scrutiny minimizes the potential for abuse of agency discretion by revealing the influences of interest group pressure on administrative processes. By requiring the agency to explain why a rule or interpretation favoring any particular faction is a reasonable balance of statutory goals in a way that furthers the public interest and takes account of all relevant facts, courts play an important role in preventing factionalism—one of the primary concerns of the separation of powers doctrine.[424]

The marriage of *Chevron* principles and *Overton Park* "hard look" review, guided by the *Motor Vehicle* factors, would not deprive the nondelegation doctrine of its force or effect. This approach is actually more likely to result in each branch performing its primary functions. Meaningful judicial review goes a long way toward ensuring that, when Congress performs its law-making duties by crafting policy-based objectives while delegating the details of regulatory implementation to administrative agencies, judges—not "foxes"—are "guarding the henhouses."[425] Legislatures and agencies are both made more accountable through judicial review, and agency decisions are more likely to be based on intelligible and well-supported principles because of the procedural protections afforded through the administrative process and access to the courts.[426]

Admittedly, rigorous judicial review is not without its own dangers. The knowledge that each decision may be subjected to heightened scrutiny can ossify the agency's decision-making process and result in less regulation, tending to cause in the administrative arena the same adverse consequence

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423. Sunstein, *Constitutionalism*, *supra* note 422, at 471; *see also* Seidenfeld, *supra* note 373, at 133 ("According to deliberative democracy, agencies, rather than courts, should have primary interpretive authority, not only because of their superior expertise and greater political accountability, but also because agency decision-making processes are geared toward more meaningful interest group discourse.").

424. Seidenfeld, *supra* note 373, at 135-36.

425. Farina, *supra* note 365, at 498 (citing *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 368 (1987) (remarks of Cass R. Sunstein at panel discussion, Oct. 10, 1986)); *see also* Sunstein, *Constitutionalism*, *supra* note 422, at 467 (criticizing *Chevron's* deferential stance, in that "[t]he case for judicial review depends in part on the proposition that foxes should not guard henhouses").

426. *See* discussion *supra* notes 117-18 and accompanying text (discussing *Warren* and Davis' proposal).

feared of strong nondelegation review in the legislative forum.[427] In other words, because stringent judicial review encourages more detailed and cautious rulemaking, it may result in less frequent rulemaking, and standards like the NAAQS, once set, will rarely be revised.[428] While this provides stability to states and regulated entities, it also causes standards to lag behind scientific advancements. Yet some delay, or ossification, may well be an unavoidable cost of the business of governance in a democracy. Delay occurs both at the legislative and administrative levels when opportunities for public involvement and judicial scrutiny are afforded as a result of constitutional checks and balances. The increased accountability and public confidence resulting from full and open processes, safeguarded by judicial review, will likely outweigh the costs of delay in most cases.

As for the NAAQS at issue in *American Trucking*, instead of focusing on whether intelligible principles exist to curb the agency's discretion, the Court should consider the actual effects of the action at issue, as well as the overall context of the statutory directives, to resolve the nondelegation issue at step one-plus. Even though Congress may have stated its Clean Air Act objectives in relatively broad terms, by no stretch of the imagination does the Act pose a danger of "aggrandizement or encroachment" into core prerogatives of other branches.[429] If Congress had given the power to the EPA to implement whatever environmental standards it deemed appropriate, with no guidance as to the relevant legislative goals or priorities, perhaps that could be viewed as abdication of its Article I duties, in light of the Act's effects on the "whole economy" and state interests. But Congress did not do that—it specified its objectives and prioritized health over other considerations. As the D.C. Circuit itself recently observed, if "Congress can lawfully delegate the power to define crimes—a power which is arguably at the height of that which might be defined as legislative—then surely it can lawfully delegate" other powers, like the regulation of public health and welfare, to executive agencies.[430]

Step two-plus of the proposed approach requires an in-depth look at the administrative record and the EPA's explanation and factual basis for selecting the final NAAQS.[431] If this inquiry reveals that EPA arbitrarily

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427. *See generally* Thomas O. McGarity, *Some Thoughts on "DeOssifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

428. *See* Oren, *supra* note 351, at 10,664.

429. *See* Mistretta v. United States, 488 U.S. 361, 382 (1989).

430. Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1474 (D.C. Cir. 1998) (discussing Loving v. United States, 517 U.S. 748, 768 (1996); *Mistretta*, 488 U.S. at 385).

431. For an assessment of the possible deficiencies in EPA's conclusions regarding the final ozone standard, see Sunstein, *Air II*, *supra* note 48, at 324-30.

selected the studies relied upon, ignored relevant data, failed to explain its conclusions or drew a conclusion that is not supported by the evidence in the record, its decision would fail "hard look" review, and would be remanded.[432]

In the end, reviewing courts should heed the advice given in *Brown & Williamson Tobacco,* and be guided "by common sense" as to the likelihood and effects of implied delegation in a particular context.[433] Courts will still invalidate congressional attempts to abdicate its law-making function. Separation of powers precludes Congress from reassigning powers constitutionally vested in one branch to another branch or its agent, for example, by giving uniquely legislative powers to the Executive through a line item veto, as in *Clinton v. City of New York.*[434] By the same token, Congress may not hoard executive or judicial powers unto itself, as in *INS v. Chadha*[435] and *Bowsher v. Synar.*[436] In cases like *American Trucking,* however, the issue is not one of reassignment or abdication of legislative

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432. *See supra* notes 341-45 and accompanying text.

433. FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1301 (2000); *see also* Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) (using common sense approach in upholding broad standards as "a reflection of the necessities of modern [securities] legislation dealing with complex economic and social problems"); J.W. Hampton, Jr. v. United States, 276 U.S. 394, 407-08 (1928) (upholding, as a matter of "common sense," legislation that gave a presidential commission the power to fix rates in accord with general objectives); *cf.* United States v. Midwest Oil Co., 236 U.S. 459, 472 (1915) (implying congressional acquiescence to the President's power to withdraw public lands, and remarking that "government is a practical affair intended for practical men").

434. 524 U.S. 417 (1998). In *Clinton*, the Line-Item Veto Act was held unconstitutional because it violated the procedures of Article I, section 7, governing statutory enactment; the Court refused to reach the separation of powers issue. *Id.* at 448. However, Justice Kennedy, in his concurrence, noted, "By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure." *Id.* at 452. Notably, the majority did not invoke nondelegation as a ground for invalidation, and dissenting Justice Breyer expressly concluded that there was no nondelegation problem. *Id.* at 490; *see also* Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than "A Dime's Worth Of Difference,"* 49 CATH. U. L. REV. 337, 341 (2000) (noting that the Court's avoidance of the nondelegation doctrine is "telling, for if the Court does desire to reinvigorate the nondelegation doctrine, it will be hard pressed to find a better opportunity than the Line Item Veto Act presented").

435. 462 U.S. 919 (1983). In *Chadha*, the Supreme Court struck a provision giving the House power to veto deportation decisions of the Immigration and Naturalization Service, explaining that Congress must abide by its decision to delegate authority to decide deportation matters until it legislatively altered or revoked the delegation. *Id.* at 954-55. Moreover, because the veto exercised by the House was essentially legislative in purpose and effect, it was subject to the procedural requirements of Article I, sections 1 and 7, i.e., passage by a majority of both houses and presentation to the President. *Id.* at 957-58.

436. 478 U.S. 714 (1986) (holding that Congress may not exercise removal power over officer performing executive functions).

duties, but of a legitimate delegation of discretion as to the details of executing the stated objectives of the law. The only question, then, is whether the discretion has been effectuated in a non-arbitrary, non-biased way.

VI. THE DELEGATION OF POWER OVER PUBLIC LANDS AND RESOURCES: "DEFY THE DEVIL"[437]

If the *American Trucking* approach receives a warm reception in the Supreme Court, aggressive executive action over public lands and resources may well be the flashpoint for the resultant wave of nondelegation review. The presidential withdrawal of public lands to create national monuments is particularly controversial, and is often raised as an example of unbounded, heavy-handed federal intrusion into states' rights. Recent challenges to President Clinton's designation of several new national monuments, including the Grand Canyon - Parashant National Monument and the Grand Staircase-Escalante National Monument,[438] explicitly raise nondelegation and separation of powers claims. In *Esplin v. Clinton*, a group of ranchers and state legislators allege that the decision to withdraw public lands and reserve them as the Parashant National Monument is unconstitutional because, under the Property Clause, only Congress may designate federal lands "for disposition," and it may not "delegate power to dispose of federal land to the Executive."[439] Likewise, in *Utah Association of Counties v. Clinton* and

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437. WILLIAM SHAKESPEARE, TWELFTH NIGHT act 3, sc. 4.

438. *See* Proclamation No. 7265, 65 Fed. Reg. 2825 (2000) (designating the Grand Canyon-Parashant National Monument); Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996) (designating the Grand Staircase Escalante National Monument).

439. Compl. for Declaratory J. and Injunctive Relief and Deprivations of Federal Constitutional Rights ¶¶ 112-29, Esplin v. Clinton (D. Ariz. filed Jan. 26, 2000) (No. CIV 00 0148 PCT PGR). Plaintiffs characterize the withdrawal for the specific purpose of creating a national monument as the equivalent of a disposition of the public lands, a matter plaintiffs claim is left solely to Congress. *Id.* ¶¶ 121, 127. Plaintiffs apparently believe that the designation should have been effectuated (if at all) pursuant to the Enclave Clause, most frequently used to create military posts and post offices. *See id.* ¶¶ 38, 114-117; *see also* U.S. CONST. art. I, § 8, cl. 17 (allowing the creation of federal enclaves with the consent of the affected state). Plaintiffs also raise a variety of assertions founded on "equal footing" and rather vague federalism themes. They argue that the designation of Parashant National Monument treats Arizona as if it were merely a territory, discriminating against its citizens by creating "specific classifications of persons and different rights in similarly situated groups of people," thereby depriving them of privileges and immunities, equal protection and voting rights. Compl. for Declaratory J. and Injunctive Relief and Deprivations of Federal Constitutional Rights ¶¶ 73, 77, 86-87, 140-42, Esplin v. Clinton (D. Ariz. filed Jan. 26, 2000) (No. CIV 00 0148 PCT PGR). In support of this theory, plaintiffs invoke *Dred Scottt v. Sandford*, 60 U.S. 393 (1856), *see id.* ¶¶62, 136-38 ("It is no longer constitutional for Congress to

Mountain States Legal Foundation v. Clinton, plaintiffs allege that the President's decision to designate the Grand Staircase Escalante National Monument violates the separation of powers doctrine and exceeds his delegated authorities under the Antiquities Act of 1906.[440]

The rather vaguely worded Antiquities Act would not fare well if strict nondelegation review were applicable, as noted above in Section IV of this article.[441] However, executive decisions governing the management of public lands, including Antiquities Act withdrawals, should be less susceptible to nondelegation problems than the exercise of Commerce Clause powers. Under the contextual *Chevron*-based approach, property Clause authority would be included as another type of delegation justifying less intense scrutiny. Executive exercises of Property Clause power easily fit within two of Rehnquist's "pro-delegation" categories, as they take place within an extensive backdrop of pre-existing administrative practices governing public lands, and they satisfy the "rule of necessity."[442] Moreover, the regulation of public lands and resources generally does not affect the whole economy, unlike the executive actions invalidated on nondelegation grounds in *American Trucking* and *A.L.A. Schechter Poultry Corp. v. United States.*[443] Last but certainly not least, Congress's Property Clause power is plenary in nature, with both proprietary and sovereign attributes, and is therefore more sweeping, at least with respect to the resources it covers, than its Commerce Clause powers. Consequently, the delegation of Property Clause power to the executive branch may be correspondingly broad.

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create different rights to state citizenship."), a case which now has little or no precedential value, *see* notes 509-12, *infra,* and accompanying text.

440. Compl. for Injunctive and Declaratory Relief ¶¶ 1, 100, Utah Ass'n of Counties v. Clinton (D. Utah filed June 23, 1997) (No. 2:97CV-0479B) (citing Antiquities Act of 1906, 16 U.S.C. §§ 431—433 (1994)); First Am. Compl. ¶¶ 45-48, Mountain States Legal Found. v. Clinton, (D. Utah filed Dec. 15, 1997) (No. 2:97CV-0863G) (alleging that the Escalante designation violates nondelegation doctrine). The *Utah Counties* and *Mountain States* plaintiffs also allege violations of the withdrawal and planning provisions of the Federal Land Policy and Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA"). Compl. for Injunctive and Declaratory Relief ¶¶ 105-37, Utah Ass'n of Counties v. Clinton (D. Utah filed June 23, 1997) (No. 2:97CV-0479B); First Am. Compl. ¶¶ 58-65, 83-90, Mountain States Legal Found. v. Clinton, (D. Utah filed Dec. 15, 1997) (No. 2:97CV-0863G).

441. *See supra* Part IV.A.

442. United States v. Grimaud, 220 U.S. 506, 516-17 (1911). *See supra notes* 415-20 and accompanying text (discussing pro-delegation categories). For discussion of the historic backdrop for executive withdrawals of public lands, see *infra* Part VI.B.1.

443. 295 U.S. 495 (1935).

A. The Duality of Property Clause Powers and Responsibilities

1. Proprietorship of Public Lands

Congress's power to make all "needful" regulation respecting the public lands and integral resources[444] has been described as "without limitations."[445] Property Clause enactments concern only *federal* property and *federal* resources, and the regulatory power takes on both proprietary and sovereign attributes.[446] Because of the relatively narrow focus of the Property Clause power, the exercise of its authority has far less potential to invade state sovereignty in areas of traditional state regulation and is less likely to impact the "whole economy" than Commerce Clause legislation. Thus, even if the trend toward "strict" nondelegation review continues in the Commerce Clause context, it should not carry over to public lands decisions.

As discussed above, the only Supreme Court cases to strike legislation on nondelegation grounds involved statutes enacted under the Commerce Clause.[447] The Court has become increasingly vigilant in reviewing the use of the federal Commerce Clause authority when it bumps up against areas perceived as being within traditional state powers.[448] Although the Commerce Clause power has been described at times as plenary in nature,[449] when it

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444. U.S. CONST. art. IV, § 3, cl. 2 (providing that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

445. United States v. San Francisco, 310 U.S. 16, 29 (1940); *see also* Kleppe v. New Mexico, 426 U.S. 529, 539-40 (1976) (describing Congress's broad powers under the Property Clause); Camfield v. United States, 167 U.S. 518, 525 (1897) (noting that the power over public property was at least as extensive as "the police power of the several States").

446. The exertion of Property Clause power over activities on private or state land adjacent to federal public lands has been upheld where the regulation involved subjects closely related to the protection of federal property or resources integral to federal property. *See Kleppe*, 426 U.S. at 538; *Camfield*, 167 U.S. at 525; *see also* Minnesota v. Block, 660 F.2d 1240, 1250-51 (8th Cir. 1981) (holding that the Property Clause power authorizes the regulation of motorboats and snowmobiles on non-federal lands and waters where such activities would threaten the designated purpose of the public lands).

447. *See* Carter v. Carter Coal Co., 298 U.S. 238, 297 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

448. *E.g.*, United States v. Lopez, 514 U.S. 549, 559 (1995) (holding that an activity must "substantially affect" interstate commerce to be regulated under the Commerce Clause); *supra* notes 141-70 (assessing trends in Commerce Clause jurisprudence).

449. *E.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 15 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996); Nat'l League of Cities v. Usery, 426 U.S. 833, 840 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); United States v. Darby, 312 U.S. 100, 118-21 (1941); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

impacts states' rights, the Court has found that the broader principles of the Constitution, reserving powers to the states unless specifically enumerated as federal powers, must impose some limits.[450]

Further, as noted in *Schechter Poultry* and *American Trucking*, and more recently in *FDA v. Brown & Williamson Tobacco Corp*,[451] courts most closely scrutinize statutes that affect the entire American economy, such as the Occupational Safety and Health Administration's ("OSHA") authority to reach into "every workplace."[452] The Clean Air Act, like the Occupational Safety and Health Act and other Commerce Clause authorities,[453] undoubtedly has great potential to affect a wide array of state and private interests, and in turn the "whole economy." Public lands provide significant economic resources in the form of hard rock minerals, oil and other fuel minerals, timber and forage. However, in contrast to the Clean Air Act and the Occupational Safety and Health Act, the regulatory impacts of Property Clause delegations are generally felt, not across broad and diverse sectors of the economy, but instead by a handful of local communities and specialized industries, such as logging companies, sawmills and mining companies.[454]

Executive actions governing public lands and resources are also readily distinguishable from public health and environmental regulations because the

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The theory that Commerce Clause power is "plenary" seems to have been repudiated by a majority of the Court, in application if not in express judicial holdings. *See Seminole Tribe*, 517 U.S. at 61-62; *Lopez*, 514 U.S. at 566-68.

450. *See* U.S. CONST. amend. X; Printz v. United States, 521 U.S. 898, 932-33 (1997); *Lopez*, 514 U.S. at 559; *supra* notes 160-70 (assessing trends in federalism jurisprudence).

451. 120 S. Ct. 1291 (2000).

452. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1037 (D.C. Cir. 1999) (noting that the nondelegation doctrine has special force if the exercise of the delegated power affects the whole economy (citing *Schechter Poultry*, 295 U.S. at 553; and Int'l Union, UAW v. OSHA ("Lockout/Tagout I"), 938 F.2d 1310, 1317-18 (D.C. Cir. 1991))), *modified on petition for reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) (mem.); 120 S. Ct. 2193 (2000) (mem.); *see also* FDA v. Brown & Williamson Tobacco, Corp., 120 S. Ct. 1291, 1315 (2000) (observing that *Chevron* deference is less likely when agency action affects an industry constituting a "significant portion of the American economy"). The dissent in *American Trucking* distinguished the Occupational Safety and Health Act from the Clean Air Act, noting that under the Clean Air Act the states are on the front-lines of implementing the NAAQS and allocating the burdens of pollution reduction to individual sources through their State Implementation Plans; thus, courts have less reason to second-guess the specificity of the delegation to the EPA. 175 F.3d at 1061 (Tatel, J., dissenting).

453. Pollution control statutes like the Clean Air Act are generally enacted under the Commerce Clause. *See generally* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

454. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 28-33, 149-50, 166-67 (1992) (describing economic effects of timber and mining enterprises); Michael Axline, *Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613, 614 (1996) (assessing economics of logging on public lands in the Pacific Northwest); Zellmer, *supra* note 25, at 467-71, 483 (discussing effects of Pacific Northwest "timber wars").

Property Clause, unlike the Commerce Clause, evidences a duality of governmental power.[455] In executing delegated Property Clause powers, the Executive acts both as a proprietor and as a sovereign.[456] Thus, property management is not necessarily analogous to other types of lawmaking, and more leeway might be afforded executive agencies, acting not only as instruments of a tripartite government but also as proprietors, when public property is implicated.[457]

Courts have regularly cited the Executive's role as proprietor of the public lands and resources to ratify sweeping exercises of power. Proprietorship is viewed not as a limitation on power, but as a supplement to the government's sovereign powers. In *Kleppe v. New Mexico*,[458] the Court described Congress's dual powers under the Property Clause as "complete power" over the public property entrusted to it.[459] The extent to which the federal government may exercise its Property Clause power is simply "measured by the exigencies of the particular case."[460]

At one time, the proprietary nature of the power over public lands was routinely invoked to curtail both public participation and judicial review. Public involvement was considered inappropriate "because public land management was [merely] an internal affair."[461] Judicial review of executive

455. *See* Kleppe v. New Mexico, 426 U.S. 529, 540-41 (1976); United States v. Midwest Oil Co., 236 U.S. 459, 459-60, 474 (1915); Light v. United States, 220 U.S. 523, 536-37 (1911); Camfield v. United States, 167 U.S. 518, 525 (1897).

456. *See Kleppe*, 426 U.S. at 540-41; *Midwest Oil* , 236 U.S. at 459-60, 474; *Light*, 220 U.S. at 536-37; *Camfield*, 167 U.S. at 525.

457. *See* Schoenbrod, *supra* note 75, at 1265-69 (explaining that mere expectations to use public property, such as public lands and even government contracts and broadcast signals, have not been treated as protected property interests by the takings and due process clauses under the Fifth and Fourteenth amendments; these expectations have "special feature[s]" and should be subject to less stringent review); *see also* Louis L. Jaffe, *An Essay on Delegation of Legislative Power II*, 47 COLUM. L. REV. 561, 567-68 (1947) (noting that property management is not law-making).

458. 426 U.S. 529 (1976).

459. *Id.* at 540. *Kleppe* upheld the Wild Free-Roaming Horses and Burros Act as a valid exercise of the Property Clause power, in spite of alleged impacts on the traditional roles of state and local governments in regulating livestock. *Id.* at 546.

460. *Camfield*, 167 U.S. at 525 (upholding Congress's power to prevent the enclosure of public lands). The sweeping nature of the executive's power to protect public lands was addressed in *Midwest Oil*, where the Court recognized the President's power to withdraw public lands from extractive activities "as the exigencies of the public service required." *Midwest Oil*, 236 U.S. at 471 (quoting Grisar v. McDowell, 73 U.S. 363, 381 (1867)). See *infra* Part VI.B. for a more detailed discussion of the *Midwest Oil* decision.

461. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 303 (1980). This approach was consistent with a provision of the Administrative Procedure Act, which provides that rulemaking is not required for matters "relating to . . . public property." 5 U.S.C. § 553(a)(2) (1994 & Supp. III 1997). At one point, the Attorney General defined public property to include "real or personal property owned by the United States" or its agencies, and stated that "the making of rules relating to the public domain, i.e., the sale or lease of

activities was sometimes denied as "committed to agency discretion by law."[462] When courts did review public lands decisions, the scope of review was sharply circumscribed on the grounds that agencies had wide latitude in their roles as proprietors.[463] As a result, the agencies' own decision-making processes took place, for the most part, behind closed doors. This changed significantly in the 1960's and 1970's, with the enactment of the National Environmental Policy Act ("NEPA"),[464] and the extensive overhaul of statutes governing national forest and rangeland management.[465] Yet the concept of proprietorship as a basis for authority over public lands and resources remains a viable analytical tool for distinguishing Property Clause power from other governmental powers.

In the nondelegation context, the breadth of the Executive's Property Clause powers is perhaps best illustrated by *United States v. Grimaud*,[466] where the broadly phrased language of the National Forest Organic Act of 1897 was tested and upheld by the Supreme Court against a nondelegation challenge.[467] The Act, designed "to improve and protect the forest and to secure favorable conditions of water flows," states that the Secretary "may make such rules and regulations . . . as will insure the objects of such reservation; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction."[468] To achieve these ends, persons entering forest reservations must comply with the Secretary's regulations.[469]

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public lands or of mineral, timber or grazing rights in such lands, is exempt . . ." from rulemaking requirements. Wilkinson, *supra*, at 303 n.149 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 27 (1947)).

462. Wilkinson, *supra* note 461, at 303 (citing Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964)); *see also* Linn Land Co. v. Udall, 255 F. Supp. 382, 386 (D. Or. 1966) (expressing "grave doubts as to a court's jurisdiction to review the power of the Secretary to classify the lands pursuant to . . . [the Taylor Grazing Act]" (citing *Ferry*)). For more extensive treatment of this topic, see *supra*, Part IV.A.

463. *See* Wilkinson, *supra* note 461, at 303; *see also* Udall v. Tallman, 280 U.S. 1, 7 (1965) (finding that the Secretary had broad authority to issue oil and gas lease on public lands); Dorothy Thomas Found., Inc. v. Hardin, 317 F. Supp. 1072, 1076 (D.N.C. 1970) (holding that agency had broad authority over timber sales).

464. 42 U.S.C. § 4332 (1994).

465. 16 U.S.C. § 1601 (1994); 43 U.S.C. § 1701 (1994). The enactment of NEPA, the National Forest Management Act ("NFMA"), and FLPMA, along with the Wilderness Act of 1964, established that the federal government has duties to the public in its role as sovereign, as well: "[r]ulemaking is required, records are open, decision-making is shared, and the courts are available because public lands business is public business. It is the public to whom public lands managers are ultimately accountable." Wilkinson, *supra* note 461, at 304.

466. 220 U.S. 506 (1911).

467. *Id.* at 522.

468. *Id.* at 515.

469. *See id.* at 515. The provision at issue is currently codified at 16 U.S.C. § 478 (1994).

Mr. Grimaud was indicted for grazing sheep on a forest reserve without permission of the Secretary of Agriculture.[470] In defense, he claimed that the Act was unconstitutional in that it delegated legislative functions—the power to make rules and regulations—to an executive entity.[471] The Court found that the delegation of power was permissible; it provided sufficient guidance to the Secretary and therefore avoided the pitfalls of excess delegation.[472] Although Congress cannot delegate to "other tribunals, powers which are strictly and exclusively legislative," it may give authority to those who are directed to act under general legislative provisions "to fill up the details."[473]

Foreshadowing Chief Justice Rehnquist's "rule of necessity," the Court recognized that it was "impracticable" for Congress to specify various details of management or determine when activities might be harmful in one forest but not in another, given the stage of timber growth or the season of the year.[474] Accordingly, it held that the Organic Act had adequately defined the subjects on which the Secretary could regulate.[475] "Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle . . . was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations."[476]

Similarly, in *Butte City Water Co. v. Baker*,[477] the Supreme Court rejected a nondelegation challenge to a provision of the General Mining Act which allowed Congress to entrust "minor and subordinate regulations . . . to the inhabitants of the mining district or state in which the particular lands are situated."[478] Even though the provision transferred power to non-federal entities, the Court found that the delegation of Property Clause power "is not of a legislative character in the highest sense of the term, and, as an owner may delegate to his principal agent the right to employ subordinates . . ., so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands."[479] Notably, *Butte City* was later distinguished in *Schechter Poultry*, where the Court remarked that, unlike public lands management, it could not "be seriously contended that Congress could delegate its legislative authority to

470. *Grimand*, 220 U.S. at 514.
471. *Id.* at 513.
472. *Id.* at 522.
473. *Id.* at 517 (citing Wayman v. Southard, 23 U.S. 1, 42 (1825)).
474. *Id.* at 516.
475. *Id.* at 522.
476. *Id.* at 521 (citations omitted).
477. 196 U.S. 119 (1905).
478. *Id.* at 126.
479. *Id.*

trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries."[480]

Executive power to protect federal property has been upheld in the face of nondelegation challenges even when the regulations pertain to activities *off* the federal lands. For example, in *United States v. Brown*,[481] the Eighth Circuit held that regulations prohibiting hunting on nonfederal waters within the boundaries of Voyageurs National Park were enforceable as a proper delegation of congressional authority.[482] The court gave the nondelegation argument short shrift, satisfied that the regulations were "founded upon a rational basis:"[483] hunting on adjacent waters could "significantly interfere with the use of the park and the purpose for which it was established."[484]

Likewise, in *Stupak-Thrall v. United States*,[485] the Forest Service's regulations prohibiting the use of houseboats and sailboats on Crooked Lake, most of which was within a designated wilderness area, were upheld.[486] There, owners of recreational and resort properties along the lakeshore, who also held water rights pursuant to Michigan state law, alleged that the Forest Service had acted beyond its Property Clause powers and its statutory authority under the Organic Act and the Wilderness Acts, in that it had unlawfully infringed on plaintiffs' valid existing riparian rights.[487] The court

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480. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

481. 552 F.2d 817 (1977)

482. *Id.* at 823 n.8 (citing United States v. Cassiagnol, 420 F.2d 868, 872-77 (4th Cir. 1970)); *see also* Udall v. Wash., Va. and Md. Coach Co., 398 F.2d 765, 769-70 (D.C. Cir. 1968)). The court went on to state that the regulations, "which are not overbroad or vague, cannot be invalidated merely because they are penal in nature." *Brown*, 552 F.2d at 823 n.8 (citing United States v. Grimaud, 220 U.S. 506, 521 (1911)).

483. *Id.*

484. *Id.* at 822 (citing United States v. Alford, 274 U.S. 264, 266-67 (1927); and McKelvey v. United States, 260 U.S. 353, 359 (1922)). The court specifically referred to the National Park Service Act, as well as the Voyageurs Park enabling act: "[t]he fundamental purpose of national parks, including Voyageurs Park, is to 'conserve the scenery and the natural historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'" *Id.* at 822 n.7 (citing 16 U.S.C. §§ 1, 160). In comparison, the Department of the Interior's authority over nonfederal lands is far more circumscribed outside of the Property Clause context. *See generally* South Dakota v. United States Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995).

485. 843 F. Supp. 327 (W.D. Mich. 1994), *aff'd*, 89 F.3d 1269 (6th Cir. 1996). Plaintiffs' nondelegation claims were assessed in an Eighth Circuit panel decision which was vacated when the court accepted a petition for rehearing. Stupak-Thrall v. United States, 70 F.3d 881 (6th Cir. 1995). The district court opinion was affirmed by an equally divided vote of the *en banc* court. Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996).

486. *Stupak-Thrall*, 843 F. Supp. at 330-31.

487. *Stupak-Thrall*, 70 F.3d at 887; *see also* Organic Act of 1897, 16 U.S.C. § 551 (1994) (authorizing the Secretary to "regulate [national forest] occupancy and use and to preserve the

rejected the challenges, finding that Congress had the authority to regulate non-federal lands in order to protect federal property under the Property Clause.[488] The court went on to say that "the scope of [the Forest Service's] authority—except to the extent that Congress may expressly limit it—is coextensive with Congress' own authority under the Property Clause."[489]

Even a leading critic of delegations, Professor David Schoenbrod, concludes that the management of government property is distinct from the governance of private conduct: "[f]or Congress to manage public property through agents having broad discretion rather than through narrowly legislated rules is not just convenient but necessary."[490] Thus, a liberalized construction of Property Clause legislation and regulation, i.e., "loose" nondelegation review, may be warranted under a "rule of necessity," given the unique nature and history of the Property Clause power, even if the *American Trucking* decision is upheld.

2. Plenary Power and the Public Trust

The Supreme Court has observed that federal land management agencies possess "*plenary authority* over the administration of public lands."[491] This

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forests thereon from destruction"); Wilderness Act of 1964, 16 U.S.C. § 1133(b) (1994) (agencies shall administer wilderness areas with a view toward "preserving the wilderness character"); Michigan Wilderness Act of 1987, Pub. L. No. 100-184, § 5, 101 Stat. 1274, 1275-76 (making certain Forest Service regulations subject to "valid existing rights").

488. *Stupak-Thrall*, 70 F.3d at 888.

489. *Id.* Reminiscent of the Supreme Court's opinion in *Camfield v. United States*, 167 U.S. 518, 525 (1897), Judge Moore's concurring opinion on rehearing characterized the delegation as one of police powers under the Property Clause. *Stupak-Thrall*, 89 F.3d at 1271 (Moore, J., concurring). In his dissenting opinion, Judge Boggs agreed that there was no need to reach "extreme constitutional questions" such as nondelegation, because in his view, the Forest Service's regulations could not be sustained under *Chevron* as they violated a clear congressional mandate by infringing on valid existing rights. *Id.* at 1284-85, 1300. Judge Boggs nonetheless surmised that the nondelegation doctrine was not totally dead: although "Congress could not enact the text of Joyce's FINNEGAN'S WAKE and then delegate to the Forest Service the power to administer it" because such a statutory standard would truly be "meaningless," the statutes at issue were not meaningless. *Id.* at 1300.

490. Schoenbrod, *supra* note 75, at 1268 (concluding that many delegations regarding property "must be under goals statutes that grant broad discretion. Consider the example of building construction . . . . The legislature cannot deal with the myriad details involved in designing private buildings. How then could Congress write a set of rules that would positively tell the General Services Administration how to go about building the many government buildings?").

491. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963) (emphasis added). The *Best* decision reviewed the Secretary's authority under the General Mining Act, 30 U.S.C. § 22 (1994), as well as the general powers over public lands granted in Title 43 of the U.S. Code. *Id.* Although federal power is regularly characterized as "plenary" in the mining context, the plenary nature of the power has been noted in a variety of other circumstances. *See* Kleppe v. New

broad-sweeping power flows from the Property Clause and more specific congressional directives. The Forest Service has received explicit congressional delegations and directives in the National Forest Management Act ("NFMA"),[492] and Title 7 of the U.S. Code.[493] Likewise, Congress has provided Interior agencies with express delegations of authority to manage public lands and resources in various sections of Titles 16 and 43 of the U.S. Code.[494]

Although some scholars have suggested that the Property Clause power derives its plenary nature and escapes the constraints of the nondelegation doctrine due to its placement in Article IV of the Constitution, rather than Article I,[495] this is probably a distinction of little significance. Article I lists a variety of law-making powers, while the provisions of Article IV govern relations with the states, including the full faith and credit clause, provisions for the admission of new states, and the privileges and immunities clause.[496] Yet Congress acts in a legislative capacity whenever its action has "the

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Mexico, 426 U.S. 529, 540-41 (1976) (noting that Congress, as both proprietor and sovereign, has "complete power" to protect public lands and resources, including wildlife); Ideal Basic Indus., Inc. v. Morton, 542 F.2d 1364, 1367 (9th Cir. 1976) (recognizing that "the Secretary of Interior has broad plenary powers over the disposition of public lands" (citing Cameron v. United States, 252 U.S. 450, 459-64 (1920); Knight v. United States Land Ass'n, 142 U.S. 161, 177 (1891); and United States v. Williamson, 75 I.D. 338, 342 (1968))); *see also* Robert L. Glicksman & George Cameron Coggins, *Hardrock Minerals, Energy Minerals, and Other Resources on the Public Lands: The Evolution of Federal Natural Resources Law*, 33 TULSA L.J. 765, 781 (1998) (noting that *Camfield*, 167 U.S. 518, and Light v. United States, 220 U.S. 523 (1911), neither of which involved mining, "confirmed that congressional Property Clause power is plenary, unlimited, and preemptive").

492. 16 U.S.C. § 1600 (1994 & Supp. III 1997).

493. 7 U.S.C. § 6912 (1994). The Secretary of Agriculture has delegated authority to administer the national forests to the Under Secretary for Natural Resources and Environment, 7 C.F.R. § 2.20(a)(2)(ii) (2000), who has in turn delegated that power to the Chief of the Forest Service, 7 C.F.R. § 2.60(a)(2) (2000). The Chief has delegated the authority for forest regions to regional foresters, and for individual units of the National Forest System to the forest supervisors. 36 C.F.R. § 200.2 (1999). The Secretary may still exercise those powers which have been sub-delegated. 7 C.F.R. § 2.12 (2000).

494. *E.g.*, 16 U.S.C. § 1 (1994) (directing the Secretary and the National Park Service "to promote and regulate the use of" national parks, units and monuments); 43 U.S.C. § 1457 (1994) (charging the Secretary "with the supervision of public business relating to the following subjects and agencies: . . . 12. Petroleum conservation. 13. Public lands, including mines"). The enactment of FLPMA in 1976 added more specific provisions regarding public lands. *See* 43 U.S.C. §§ 1732(b) (1994) ("In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."), 1733(a) (1994) ("The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon").

495. *See* Schoenbrod, *supra* note 75, at 1265-1266.

496. U.S. CONST. art. IV, § 1, cl. 1 (full faith and credit); *id.* § 2, cl. 1 (privileges and immunities); *id.* § 3, cl. 1 (admission of states).

purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," whether the power to act flows from Article I or Article IV.[497]

Moreover, along with public lands management, a handful of Article I powers have been described as plenary in nature, including immigration, national security and military matters, taxation, foreign trade, and relations with American Indians.[498] Whether Article I or Article IV powers are involved, the plenary power doctrine has been held to support broad delegations of legislative-like authority, and Congress's ability to delegate its plenary powers to the executive branch is generally considered concomitant with its own broad power.[499]

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497. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991) (citing INS v. Chadha, 462 U.S. 919, 952-55 (1983)); *see also* Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617, 658 n.129 (1985). In *Metropolitan Washington Airports*, the Supreme Court concluded that Congress must follow constitutionally acceptable legislative procedures when it transferred federal lands to an airport governing board. *Metro. Wash. Airports*, 501 U.S. at 274. Although it found that the process of delegating power to the board violated separation of powers under *Chadha*, 462 U.S. at 951, because congressmen sat on the board and maintained veto power over decisions of local authorities, it implied that the substantive scope of the delegation at issue was acceptable: "Congress itself can formulate the details, or it can enact general standards and assign to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards." *Metro. Wash. Airports*, 501 U.S. at 272, 277. For dicta regarding the constitutionality of section 204(e) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1714(e) (1994), which requires the Secretary of Interior to temporarily withdraw lands at the direction of a congressional committee, see *National Wildlife Federationn v. Watt*, 571 F. Supp. 1145, 1155 (D.D.C. 1983), and *Pacific Legal Foundation. v. Watt*, 529 F. Supp. 982, 1002 (D. Mont. 1982).

498. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (describing relations with American Indian tribes as a plenary power (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978))); Solorio v. United States, 483 U.S. 435, 441 (1987) (citing U.S. CONST. art. I, § 8, cl. 14, as providing plenary power regarding "Rules for the Government and Regulation of the Land and Naval Forces"); United States v. Richardson, 418 U.S. 166, 178 (1974) (citing U.S. CONST. art. I, § 9 cl. 7, regarding the reporting of expenditures of appropriated funds and the exemption of certain "secret activities" from public reporting); Palmore v. United States, 411 U.S. 389, 397 (1973) (citing U.S. CONST. art. I, § 8, cl. 17, regarding legislation for the District of Columbia); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (describing immigration power as plenary). In addition, the power to prohibit obstructions in navigable waters, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 424 (1940), to tax income, *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938), to exclude or regulate merchandise brought from foreign countries, *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904), and to dictate "the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc.," *The Civil Rights Cases*, 109 U.S. 3, 18 (1883), have been described as plenary in nature.

499. *Kleindienst*, 408 U.S. at 769 (holding that "the Attorney General [had] validly exercised the plenary power . . . delegated to the Executive" in the immigration context); Sabin v. Berglund, 585 F.2d 955, 958 (10th Cir. 1978) (finding that Congress may delegate its plenary power over public lands to the Secretary of Agriculture (citing Best v. Humboldt Placer Mining Co., 371 U.S.

The plenary power doctrine declares broad authority over the subject of the power, typically insulating the action at issue from probing judicial review; as a result, it is frequently criticized for fostering abusive government action.[500] However, in the Property Clause context, the delegation of plenary power is arguably tempered by special duties regarding public lands and resources. Executive branch officials, while having wide latitude to make all needful rules regarding the public lands, may have a countervailing trust-like responsibility to protect those resources on behalf of the public.[501]

The idea that governments have a "public trust" duty regarding certain natural resources flows from ancient Roman and English law.[502] The public trust doctrine was invoked by the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*[503] to set aside the state's disposition of submerged lands because the sale would interfere with the public's rights to access and enjoy Lake Michigan.[504] "[S]uch property is held by the state, by

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334, 336-38 (1963); and Sierra Club v. Hickel, 433 F.2d 24, 28 (9th Cir. 1970))); *see also* Snaider, *supra* note 128, at 107 (discussing plenary nature of immigration powers).

500. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990); *see also* Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 320 (1997) (stating that the doctrine "ratified the absorption of Indian tribes physically and politically into the national republic . . . . The brutal effect . . . was both to strip tribes of their constitutional status and to make their sovereignty subject to the unconstrained (and extra-constitutional) authority of the federal government."). Professor Pommersheim notes that the doctrine is often used for the benefit of tribal interests. *Id.* at 323-324. But "of course, extensive power is like that; it can be used for good or ill." *Id.* at 323.

501. *See* Light v. United States, 220 U.S. 523, 536-38 (1911) (upholding the Forest Service's power to protect forest reserves from trespass under a broad delegation from Congress to regulate the use and occupancy of said reserves, and stating that "the public lands of the nation are held in trust for the people of the whole country"); Knight v. United States Land Ass'n, 142 U.S. 161, 177, 181 (1891) (stating the Secretary of Interior is a guardian of the public lands with an obligation to "see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it"); *see also* Mansfield, *supra* note 284, at 47 (discussing public trust concept as applied to public lands). Plenary power is tempered by a trust responsibility in the Indian law context as well, although this trust relationship flows from treaties, tribal sovereignty and "the special place of aboriginal people in international jurisprudence;" as such, it should not be confused with the public trust concept. Wilkinson, *supra* note 461, at 275 & n.23.

502. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429-31 (1989).

503. 146 U.S. 387 (1892).

504. *Id.* at 460, 464. The states hold title to the beds of navigable waterways received at statehood under the "equal footing" doctrine. *Id.* at 465 (Shiras, J., dissenting); *see also* Pollard v. Hagan, 44 U.S. (3 How.) 212, 224 (1845); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842).

virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State . . . ."[505]

The public trust doctrine enunciated in *Illinois Central* is not strictly applicable to federal lands, given that Congress retains explicit constitutional power to dispose of them.[506] In addition, inland public lands would not be considered trust resources under the traditional formulation of the doctrine, which is limited to navigable and tidal waters and submerged lands.[507] Nonetheless, the public trust doctrine has endured over time as a living, evolving concept, and, even though the duties of federal agencies are distinct from the duties of states, "public trust notions have charged and vitalized public land law, particularly in the modern era."[508]

Some of the earliest Supreme Court cases to address disputes over inland public lands characterized the government's responsibility as a "trust."[509] In *Dred Scott v. Sandford*,[510] the Court noted that new territory is "acquired by the General Government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their

505. *Id.* at 455. The Court defined the state's power over navigable waters as "the 'jus regium,' the right of regulating, improving and securing them for the benefit of every individual citizen . . .: 'The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right.'" *Id.* at 456.

506. Given the explicit authorization in the Property Clause, and the history of public lands management and sale, there can be no serious argument that the federal government may not "dispose of" public lands. Wilkinson, *supra* note 461, at 276. Most of the nineteenth century was marked by an active campaign to dispose of the public lands, but federal policy began to shift toward retention during the late 1800's. While the President had withdrawn and reserved vast areas of land for various purposes throughout the nineteenth century, the congressional shift toward retention most likely began with the creation of Yellowstone National Park in 1872. *See id.* at 280 n.44. Congressional retention policy was explicitly incorporated into FLPMA, 43 U.S.C. § 1701(a)(1) (1994).

507. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988); *Ill. Cent. R.R. Co.*, 146 U.S. at 435, 452-53; .

508. Wilkinson, *supra* note 461, at 278; *see also id.* at 304, 310-15. Professor Sax has explained that the core concepts of the American trust doctrine are not limited by Roman and English law. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 192-93 (1980). Instead, the trustee's obligations should be viewed in an evolutionary fashion "with an eye toward insulating those expectations that support social, economic and ecological systems from avoidable destablization [sic] and disruption." *Id.*

509. *E.g.*, Light v. United States, 220 U.S. 523, 537 (1911); Camfield v. United States, 167 U.S. 518, 524 (1897); Knight v. United States Land Ass'n, 142 U.S. 161, 177-78 (1891); *Pollard*, 44 U.S. (How. 3) at 222; *see also* Wilkinson, *supra* note 461, at 281 n.45 (citing additional cases, issued between 1888 and 1970, which describe the United States' role in terms of a trust).

510. 60 U.S. (19 How.) 393 (1856).

common and equal benefit."[511] Of course, the *Dred Scott* opinion is better known, and justly vilified, for holding that Scott was not a citizen entitled to invoke diversity jurisdiction, but its discussion of the public trust doctrine is illuminating.[512]

Congress has, from time to time, considered its Property Clause powers and responsibilities to be akin to those of a trustee.[513] The strongest congressional statement of a federal trust duty can be found in NEPA: "it is the continuing responsibility of the Federal Government to use all practicable means . . . [to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[514] Taken together, the complex modern "legislative matrix" governing public lands and resources provides fairly compelling evidence of some sort of a trust responsibility: the lands cannot be sold except in "limited and exceptional circumstances";[515] the public resources—wildlife, watersheds, forage, minerals, timber and aesthetics—are to be utilized, but also nurtured and sustained for future generations;[516] and "the public is to play a . . . significant role in decision-

511. *Id.* at 448. However, the Court also noted the United States' role as a temporary custodian of the lands, holding them until they could be sold so that new states could enter the nation not as mere "colonies" but on equal footing with original states. *Id.* at 447-48; David E. Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 293-96 (1976).

512. The Court held that Mr. Scott, once enslaved in Missouri, did not enjoy one of the most basic rights of the "people of the United States"—that to invoke the power of the courts to ensure his own freedom. *Dred Scott*, 60 U.S. (19 How.) at 453-54. The *Dred Scott* opinion is also known for invalidating the Missouri Compromise on grounds that it interfered with the Fifth Amendment due process rights of citizens who owned slaves as property. *Id.* at 449-52. The case was overturned by the Fourteenth Amendment's guarantee of privileges and immunities and equal protection, and the Thirteenth Amendment, which ended slavery. *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV, § 1.

513. *See, e.g.*, The Wilderness Act of 1964, 16 U.S.C. § 1131(a) (1994) (requiring that wilderness areas shall be "administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas"); National Park Service Organic Act, 16 U.S.C. § 1 (1994 & Supp. IV 1998) (stating that lands within the national park system shall be managed "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations").

514. 42 U.S.C. § 4331(b) (1994). The provision further characterizes the trust duty as requiring the government to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." *Id.* But in spite of its lofty substantive objectives, NEPA requires only procedural duties. *See* 42 U.S.C. § 4332(a) (1994 & Supp. III 1997); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

515. 43 U.S.C. § 1701(a)(1) (1994); *see also* Wilkinson, *supra* note 461, at 299.

516. *See* Multiple Use Sustained Yield Act (MUSYA), 16 U.S.C. § 528 (1994); National Forest Management Act (NFMA), 16 U.S.C. §§ 1600, 1604(e) (1994 & Supp. IV 1998); Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701(a)(7)-(8) (1994); *cf.* Endangered

making."[517] "The whole of these laws is greater than the sum of its parts. The modern statutes set a tone, a context, a milieu. When read together they require a trustee's care."[518]

The public trust concept has been invoked to justify the vesting of plenary powers over public lands in executive agencies as proper recipients of broad-sweeping congressional delegations.[519] But along with this power comes a duty "to protect the public domain from trespass and unlawful appropriation."[520] Although the exact parameters of a public trust as a duty of care for managing public lands and resources are not defined, the concept has great potential as a tool for measuring executive activities. Even in its most general sense, a trust duty would prevent executive agencies from unreasonably exploiting public resources to promote the private gain of any particular industry or faction.[521] Equally important, the public trust doctrine could provide a basis for the judiciary to engage in "hard look" review of agency action, even when the statutory standards governing a particular category of public lands or activities are relatively vague, for a protective standard of care would be required as the default—a baseline to fill any congressional gaps.[522]

Species Act, 16 U.S.C. § 1531(b)-(c) (1994) (placing duties on all federal agencies to conserve listed species and their ecosystems).

517. Wilkinson, *supra* note 461, at 298-99 (discussing statutes); *see e.g.*, National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1994 & Supp. III 1997); National Forest Management Act (NFMA), 16 U.S.C. § 1604(d) (1994); Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701(a)(5)—(6), 1712(a) (1994).

518. Wilkinson, *supra* note 461, at 311-13. A counter-argument can be made that the comprehensive array of federal statutes governing public lands curtails the operation of a common law doctrine like the public trust. *See id.* at 298-99; *see also* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633, 710-16 (1986) (arguing that the public trust ought not apply to natural resource management, in part because it relies too heavily on the judiciary to further its goals; as such, "the doctrine amounts to a romantic step backward toward a bygone era at a time when we face modern problems that demand candid and honest debate on the merits, including consideration of current social values and the latest scientific information," better served by legislation than common law). Wilkinson concludes, however, that the public lands laws can be supplemented with the public trust concept as a rule of statutory construction. Wilkinson, *supra* note 461, at 299, 311-13.

519. *See* Light v. United States, 220 U.S. 523, 534 (1911) (citing United States v. Grimaud, 220 U.S. 506, 522 (1911)).

520. *Id.* at 536 (quoting United States v. Beebee, 127 U.S. 338, 342 (1888)).

521. *See* Wilkinson, *supra* note 461, at 310-11 (explaining that express legislative authority would be required to support such decisions).

522. *See id.* at 310-13 (arguing that the public trust doctrine could serve as a rule of construction for public lands statutes); *see also* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 334 (1982) (concluding that the public trust doctrine could require courts to demand greater justification for extractive activities on public lands).

The doctrine has been raised in court both as a shield, to justify extensive executive power to protect the lands and resources, and as a sword, to prohibit agencies from allowing extractive or destructive activities on and near public lands. Notions of public trust and stewardship powers are woven throughout the Court's opinion in *Light v. United States*,[523] upholding Forest Service regulations requiring that grazing only occur under permit.[524] In the Monongahela National Forest case,[525] the court, noting the historic role of the Forest Service as "custodian and protector" of the forest reserves, implicitly relied on public trust concepts to construe the "broad and ambiguous" language of the Multiple Use Sustained Yield Act ("MUSYA") as precluding even-aged management or clear-cutting.[526] In the Redwood National Park cases, the court expressly relied on the public trust doctrine to require affirmative action to protect park resources from external threats.[527]

Although the courts have not considered the public trust doctrine in the context of a nondelegation challenge, it may mean that executive agencies have greater latitude to prevent the destruction or impairment of public lands and resources.[528] As a result, separation of powers is in no way offended when an agency acts in this fashion, for the judiciary can review the action under the Administrative Procedure Act in light of statutory objectives and standards (generic though they may be), with the extensive history of public lands management as the backdrop and the public trust doctrine to provide context and fill in the gaps. In addition, so long as the decision in question is preservation oriented, such that resources are not irreparably damaged or

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523. 220 U.S. 523 (1911).

524. *Id.* at 536-38; *see also* Utah Power & Light Co. v. United States, 243 U.S. 389, 409-11 (1917) (affirming injunction against trespass on public lands for the generation of power).

525. W. Va. Div. of Izaak Walton League of Am., Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975).

526. *Id.* at 948, 950-55 (construing the requirements of MUSYA and the 1897 Organic Act, 16 U.S.C. § 476 (1994), which required trees to be mature, and that they be individually marked, before harvest). This provision was repealed by NFMA, 16 U.S.C. § 1604(g)(3)(F), (m) (1994).

527. Sierra Club v. Dep't. of the Interior, 424 F. Supp. 172, 174-75 (N.D. Cal. 1976); Sierra Club v. Dep't. of Interior, 398 F. Supp. 284 (N.D. Cal. 1975); Sierra Club v. Dep't. of the Interior, 376 F. Supp. 90, 95-96 (N.D.Cal. 1974). The Sierra Club alleged that the Secretary of the Interior had failed to protect Redwood National Park from adjacent logging operations. *See Sierra Club*, 398 F. Supp. at 294. However, other courts have not been so willing to impose affirmative trust-like duties. *See* Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980) (holding that the Department of the Interior had no duty to take further action to protect reserved water rights).

528. *See* Getches, *supra* note 522, at 333 (stating that "[s]o long as the volume and thrust of statutory law is directed at protection and judicious use of public lands, it is reasonable to expect more deferential treatment of interpretations that deny development, demand caution in use, or prefer non-damaging uses than of interpretations that err on the side of facilitating development").

conveyed away, Congress can change course by stepping in with legislation to specify its intentions and constrain agency discretion in a particular area.

B. Executive Withdrawals and Reservations

Withdrawals of public lands under the Antiquities Act are among the most unconstrained exercises of executive power over public lands and resources. Nonetheless, given the plenary nature of the Property Clause power, the government's historic and dual roles as proprietor and sovereign, and the countervailing notion of a public trust responsibility to temper abuses of discretion, delegations to effectuate public lands withdrawals satisfy the first step of a contextual *Chevron*-based inquiry. The presidential designation of national monuments, however, lacks the procedural safeguards necessary for the meaningful application of step two-plus. Although this does not necessarily mean that Antiquities Act decisions fail nondelegation review, it does leave them open to criticism, albeit not as a matter of separation of powers or federalism but as one of due process and fairness.

1. The History of Public Lands Withdrawals

Many of the earliest presidential withdrawals reserved public lands from various disposal laws for military or American Indian reservations, bird reserves and various other public uses, with no explicit congressional authorization.[529] By 1867, the Supreme Court had already recognized that "from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, [federal lands] to be . . . set apart for public uses."[530]

In 1909, President Taft executed one of the most extensive withdrawals ever accomplished by a President, without any specific delegation of congressional power, by declaring over three million acres of public lands

529. *Id.* at 283 (citing Wheatley, Study of Withdrawals and Reservations of Public Domain Lands 55 (rev. 1969), as "the most comprehensive source on withdrawals").

530. Grisar v. McDowell, 73 U.S. 363, 381 (1867). In *Grisar*, the plaintiff asserted title to lands reserved for military purposes, claiming that he had derived title from the City of San Francisco to lands formerly held by Mexican pueblos under the laws of Mexico. *Id.* at 365. The Court rejected plaintiff's argument that public lands "could only be reserved from sale and set apart for public purposes under the direct sanction of an act of Congress," and noted that Congress had implicitly recognized the President's withdrawal authority through numerous enactments dating back to 1830. *Id.* at 380-82.

"off limits" to oil and gas development.[531] In *United States v. Midwest Oil Co.*,[532] the Supreme Court upheld Taft's decision, finding that his authority was implicitly allowed by Congressional acquiescence based on the Executive's long continued practice of making withdrawals without express statutory authority.[533] The President's national perspective and direct accountability to the voters was specifically noted: "[he] was in a position to know when the public interest required particular portions of the people's lands to be" set aside.[534] Such actions did "no harm to the interest of the public at large," given that the reservation, by denying use of the resource, simply preserved congressional prerogatives and could therefore be subject to legislative reversal.[535]

Congress itself has validated the practice of executive withdrawal through a variety of enactments going as far back as the early 1800's.[536] One of the most widely used withdrawal statutes was the 1891 General Revision Act, which authorized the President to "set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations."[537] Presidents withdrew more than 194 million acres of forest lands under this statute.[538] Congress did not always sit quietly on the sidelines, and although repeal efforts were generally rebuffed, presidential authority to create new reserves in six western states was ultimately revoked.[539] Congress also passed the Pickett Act, in part to "restrict the greater power already possessed" by the Executive, by stating that "[t]he President may, at any time in his discretion, *temporarily* withdraw from settlement, location, sale, or entry any of the public lands . . . and reserve the same for . . . public purposes."[540] Instead

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531. United States v. Midwest Oil Co., 236 U.S. 459, 467 (1915) (citing Temporary Petroleum Withdrawal No. 5 (1909)).

532. 236 U.S. 459 (1915).

533. *Id.* at 468-70.

534. *Id.* at 471.

535. *Id.; see also* Getches, *supra* note 522, at 287.

536. *Grisar*, 73 U.S. at 381 (citing statutes).

537. Ch. 561, § 24, 26 Stat. 1095 (1891).

538. Getches, *supra* note 522, at 286.

539. *Id.* (citing Ch. 2907, 34 Stat. 1271 (1907). The evening before he signed the bill into law, President Theodore Roosevelt, with the advice of Gifford Pinchot, proclaimed 32 new forest reserves and enlarged existing reserves in the restricted states. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 580 (1968); Getches, *supra* note 522, at 286.

540. Act of June 25, 1910, ch. 421, §§ 1—3, 36 Stat. 847 (1910) (emphasis added) (repealed by Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1714 (1994 & Supp. III 1997)). The Pickett Act further restricted presidential power, as withdrawals were to remain "open to exploration, discovery, occupation, and purchase under the mining laws." *Id.;* 43 U.S.C. § 142 (1994).

of restricting itself to temporary withdrawals, however, the executive branch continued to assert that it possessed all the implied withdrawal powers it had enjoyed prior to the Pickett Act, reserving millions of acres from disposition under mining laws and other public lands statutes, with no judicial curtailment.[541]

In the Antiquities Act of 1906, Congress further delineated the withdrawal power by authorizing the President, "in his discretion, to declare . . . historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments."[542] This provision has served as one of the most powerful preservation tools in the federal arsenal, and the executive branch has exercised its Antiquities Act powers aggressively since the Act's inception, reserving vast areas of land for hundreds of national monuments.[543] President Theodore Roosevelt utilized the Antiquities Act power almost immediately, creating the first national monument, Devils Tower, as well as one of the largest, the Grand Canyon National Monument, and dozens of others.[544] Various congressional members have attempted to rescind or curtail this power over the years, with only minimal success.[545]

The only true inroad on Antiquities Act power was effected when, in the wake of the Grand Teton National Monument designation, Congress forbade the President from creating any additional monuments in Wyoming absent express authorization.[546] Subsequently, when Congress enacted Federal Land

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541. Getches, *supra* note 522, at 293-98; Portland Gen. Elec. Co. v. Kleppe, 441 F. Supp. 859, 861-62 (D. Wyo. 1977) (stating that even if the Pickett Act did curtail the President's implied authority to make withdrawals, congressional acquiescence over the course of more than sixty years had restored the power (citing 40 Op. Att'y. Gen. 73 (1941) in upholding temporary withdrawal of three million acres of oil shale lands from appropriation)).

542. 16 U.S.C. § 431 (1994 & Supp. IV 1998).

543. *See* 146 CONG. REC. S7030-7032 (daily ed. July 17, 2000) (statement of Sen. Nickles) (listing monuments by President and total acreage). President Franklin Roosevelt designated the greatest number of monuments (28), while Carter holds the record for amount of land withdrawn (55,975,000 acres, mostly in Alaska). *Id.* at S7031. President Clinton takes second place in terms of total acreage withdrawn (3,789,669 as of July 2000). *Id.* at S7031-32.

544. Proclamation No. 794, 35 Stat. 2175 (1908) (creating Grand Canyon National Monument); Proclamation No. 658, 34 Stat. 3236 (1908) (creating Devils Tower National Monument); Getches, *supra* note 522, at 302.

545. Justin James Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 84-85, 93-96 (1999) (describing proposals to amend or rescind the Antiquities Act); James R. Rasband, *Utah's Grand Staircase: The Right Path To Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 531-32 (1999) (describing congressional backlash and proposed bills in the wake of the Escalante National Monument designation).

546. 16 U.S.C. § 431a (1994 & Supp. IV 1998). Congress also restored some of the lands within the Grand Teton Monument to the Teton National Forest, while merging the remainder with the Grand Teton National Park. *Id.* §§ 406d-1, 482m (1994).

Policy and Management Act ("FLPMA") in 1976, it repealed the Executive's implied authority to make withdrawals and reservations but left Antiquities Act powers intact.[547] FLPMA § 1714 otherwise requires congressional approval for withdrawals over 5,000 acres if intended to last more than twenty years in duration.[548] It also specifies that notice and an opportunity for public hearing must be provided before a new withdrawal occurs.[549] The Secretary of Interior may, however, take immediate, unilateral action to withdraw public lands for up to three years without public participation or congressional approval in situations where "extraordinary measures must be taken to preserve values that would otherwise be lost."[550]

2. Judicial Treatment of Monument Designations

The courts have uniformly rejected challenges to monument designations. In *Cameron v. United States*,[551] the United States brought action to eject Ralph Cameron, a mining claimant, from a tract on the southern rim of the Grand Canyon.[552] Cameron, in defense, challenged the Grand Canyon's designation, claiming that the area was not an object of historic or scientific interest, nor was the reservation the smallest area compatible with its proper care and management.[553] A unanimous Supreme Court rejected the argument in one short paragraph.[554] The Court noted that the presidential proclamation had expressly determined that the canyon "is an object of unusual scientific interest," and described it as the "greatest eroded canyon in the United States, if not in the world . . . . [It] has attracted wide attention among

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547. 43 U.S.C. § 1714(a) (1994 & Supp. III 1997) (delegating power to the Secretary of Interior "to make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations of this section"); *see also* Getches, *supra* note 522, at 308, 315 (noting that Congress, through FLPMA, intended to rein in executive withdrawal authority, even though it did not repeal the Antiquities Act). As originally enacted, § 1714(a) expressly stated that the President's "implied authority . . . resulting from acquiescence of the Congress (United States v. Midwest Oil Co., 236 U.S. 459 (1915)) . . . [is] repealed." Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792 (1976).

548. 43 U.S.C. § 1714(c)(1) (1994 & Supp. III 1997).

549. *Id.* § 1714(b), (h) (1994 & Supp. III 1997).

550. *Id.* § 1714(b)(2), (h), (i), (1994 & Supp. III 1997).

551. 252 U.S. 450 (1920).

552. *Id.* at 454.

553. *Id.*; Getches, *supra* note 522, at 303 n.131.

554. *Cameron*, 252 U.S. at 455-56. Cameron argued that the President had set aside the enormous canyon simply because of it size, which, in and of itself, did not qualify the area as an object of unusual scientific interest within the meaning of the Antiquities Act. Getches, *supra* note 522, at 303 n.131 (citing Brief for Appellant at 44-48). The court did not address this issue. *Cameron*, 252 U.S. at 455-56.

explorers and scientists, affords an unexampled field for geologic study, [and] is regarded as one of the great natural wonders . . . ."[555] The Court did not definitively address whether the Act authorized such a large withdrawal,[556] although the legislative history indicates that Congress intended relatively small areas to be set aside as necessary to protect archeological ruins and relics.[557]

A challenge to the Grand Teton designation was also rejected in *Wyoming v. Franke*.[558] The presidential proclamation establishing the monument addressed the statutory criteria in the most cursory manner: "the Jackson Hole country . . . contains historic landmarks and other objects of historic and scientific interest."[559] In order to satisfy the minimal standards provided in the Act, the United States was allowed to submit evidence of historic and scientific characteristics of the area.[560] The court concluded that the President had acted within his authority under the Antiquities Act, stating that "if the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about."[561] Expressing its belief that the decision could result in hardship and injustice to the state of Wyoming,[562] the court questioned the wisdom of the action but found that separation of powers

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555. *Cameron*, 252 U.S. at 455-56.

556. *Id.*; Getches, *supra* note 522, at 303 n.131.

557. Getches, *supra* note 522, at 302 nn.124-27 (reviewing the legislative history of the Act, during which the floor manager, Representative Lacey, assured his colleagues that, unlike the forest reserves, "[n]ot very much land" would be taken off the market as a result of the Antiquities Act, because it would involve only the "smallest area necesstry [sic] for the care and maintenance of the objects to be preserved . . . these old objects of special interest and the Indian remains in the pueblos of the Southwest" (citing 40 CONG. REC. 7888 (1906))); *see also* H.R. REP. NO. 59-2224 (1905) ("The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."). Professor Getches concludes that Congress likely intended that large reservations "would become national parks through congressional action rather than [national] monuments withdrawn under the Antiquities Act. Getches, *supra*, at 490.

558. 58 F. Supp. 890 (D. Wyo. 1945).

559. *Id.* at 894-95 (quoting Proclamation No. 2578, 47 Stat. 731 (1943)). The Grand Teton National Monument consisted of 221,610 acres of public lands, some of which had been donated for park purposes by John D. Rockefeller, Jr. Proclamation No. 2578, 47 Stat. 731 (1943); Getches, *supra* note 522, at 304. The evidence showed that the area included mineral deposits, important indigenous plants, glacial formations and historic trails and camps. *Franke*, 58 F. Supp. at 895.

560. *Franke*, 58 F. Supp. at 895.

561. *Id.* at 896. The court added that "the power and control over and disposition of government lands inherently rests in its Legislative branch." *Id.*

562. *Id.* at 896. The designation by President Franklin D. Roosevelt ended nearly two decades of congressional wrangling, which was largely the result of resistance by the Wyoming delegation. Getches, *supra* note 522, at 304.

necessitated deference to the President: "For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains."[563]

Given the broad and relatively general criteria of the Antiquities Act, and the charged political context of executive withdrawals, it is not surprising that a court would be loath to second-guess a presidential determination that national monument lands possess some historic and scientific interest, but would instead leave it to Congress to remedy if it so chose.[564] The *Franke* court did suggest that "a bare stretch of sage-brush prairie . . . would undoubtedly be . . . outside the scope and purpose of the Monument Act," absent substantial evidence of historic or scientific objects.[565] Yet if the President were to proclaim that a particular sage-brush prairie was unique in that it was undisturbed by grazing or mining, or that it contained indigenous vegetation or important soil or geological features, a court would be hard pressed to find a monument designation arbitrary and capricious, considering the extensive amount of discretion given by the Act.[566]

Nondelegation challenges to executive withdrawals have fared no better. Reminiscent of the judicial deference given President Taft's withdrawals in *Midwest Oil*,[567] in *Linn Land Co. v. Udall*,[568] the Secretary's power to

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563. *Franke*, 58 F. Supp. at 896 (quoting United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940)).

564. Courts are generally reluctant to interfere in political controversies between the Legislature and the Executive Branch. *See* Dalton v. Specter, 511 U.S. at 462, 476 (1994) (stating that the President's exercise of discretionary powers granted by Congress "is not a matter for our review"); *George S. Bush & Co.*, 310 U.S. at 380 (holding that the exercise of presidential discretion does not raise any reviewable question of law); Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 184 (1919) (stating that a claim concerning "mere excess or abuse" of presidential discretion over powers granted by Congress "involves considerations beyond the reach of judicial power"); *Franke*, 58 F. Supp. at 896; *cf.* Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (given unique constitutional position of President, congressional silence is not enough to subject presidential decisions to Administrative Procedure Act review); Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982) (the President's unique constitutional status distinguishes him from other executive officials).

565. *Franke*, 58 F. Supp. at 895.

566. Professor Getches notes that the history of expansive interpretation of authority, beginning with *Cameron* and including Congress's failure to rescind the Antiquities Act in FLPMA, "has legitimated a broad construction." Getches, *supra* note 522, at 308.

567. *See* United States v. Midwest Oil Co., 236 U.S. 459, 471 (1915). Although the Court did not explicitly address separation of powers or nondelegation in *Midwest Oil*, it noted both that the President was directly accountable to the public and that the government did not contend that it had "any general authority in the disposition of the public land which the Constitution has committed to Congress, and freely concede[d] the general proposition as to the lack of authority in the President to deal with the laws otherwise than to see that they are faithfully executed." *Id.* at 505.

classify lands as valuable for grazing, production of crops or any other use, or to be exchanged for scrip rights, as provided in the Taylor Grazing Act and Executive Order 6910, was found constitutional.[569] According to the court, the relevant statutory standards should not be piecemealed or viewed in isolation, as they "gain their vitality from the background and purposes of the entire Act. . . ," passed as part of a "general plan to protect the Government's lands."[570] The court further remarked that the few cases which did find nondelegation problems, namely *Schechter Poultry* and *Panama Refining Co. v. Ryan*, have been "questioned and seriously modified by later United States Supreme Court decisions."[571]

3. Ascending the Grand Staircase

As evidenced by *Linn Land* and *Midwest Oil,* the decisions to create the Grand Staircase-Escalante and Parashant National Monuments are less susceptible to nondelegation challenges under the first step of the proposed *Chevron*-based approach than Commerce Clause-oriented decisions, given their unique, multi-faceted Property Clause foundation with volumes of public lands history as their backdrop. However, the Antiquities Act lacks a key element fundamental to the satisfaction of step two-plus. Unlike the extensive administrative procedures afforded by the Clean Air Act,[572] and, for that matter, other public lands statutes like NFMA and FLPMA,[573] Antiquities Act withdrawals lack procedural safeguards. There are no formalized administrative processes required for monument designations,[574]

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568. 255 F. Supp. 382, 387-88 (D. Or. 1966). *Linn Land* involved consolidated cases, *see id.* at 385, one of which was reversed on other grounds, *see* Udall v. Battle Mountain Co., 385 F.2d 90 (9th Cir. 1967).

569. *Linn Land*, 255 F. Supp. at 387 (citing 43 U.S.C. § 315f and Exec. Order No. 6910, which withdrew western public lands from settlement, location, sale or entry pursuant to the Pickett Act of 1910, 36 Stat. 847).

570. *Id.* at 385. "Certainly, the Constitution does not require Congress to foresee the countless situations to which it may wish a particular policy to be applied and to formulate specific rules for each problem as it arises." *Id.* at 388.

571. *Id.* at 387-88 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); and Panama Refining Co. v. Ryan, 293 U.S. 388, 420 (1935)). The court noted approvingly that Professor Davis "is of the belief that neither *Panama Refining* or *Schechter* would be followed today on the same facts." *Id.* (citing 1 DAVIS, ADMINISTRATIVE LAW, §§ 2.01—.16).

572. *See supra* Part I.C.2.

573. *See* National Forest Management Act (NFMA), 16 U.S.C. § 1600 (1994 & Supp. III 1997); Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 (1994).

574. Rasband, *supra* note 545, at 560-61 (concluding that either the Antiquities Act should be amended to include procedural safeguards or the President should voluntarily include the public in withdrawal decisions; "[a]chieving preservation should not come at the expense of a fair process").

and no statutory vehicle for challenging presidential designations as arbitrary and capricious in federal court.[575]

The Antiquities Act provides no regular means for members of the interested public to receive notice of the decision-making process or to make their views known through public hearings or the submission of public comments.[576] In addition, when the President designates a new national monument, there is no requirement that environmental effects be assessed or that alternatives be considered because NEPA does not apply to presidential action.[577] Notably, FLPMA's withdrawal provisions, which do require notice and an opportunity for public hearing,[578] were enacted "to regularize administrative practice that had in the past been used to effect withdrawals which were 'not always in the best interest of all the people.'"[579] Although the Clinton Administration has afforded some opportunities for public input with regard to most of the recent designations,[580] other administrations may not be as amenable to public processes.

The lack of process is exacerbated by the lack of opportunity for judicial review. The Administrative Procedure Act provides for review of "final agency action," but the President is not an agency within the purview of that Act.[581] Even if the review were allowed, courts would have little to assess other than the presidential proclamation itself, which will routinely state that the area being withdrawn is of scientific, historic or archeological interest.[582] In the absence of regular pre-designation processes, opposing viewpoints are

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575. *See* 5 U.S.C. § 704 (1994).

576. *See* 16 U.S.C. § 431 (1994 & Supp. IV 1998).

577. *See* 42 U.S.C. § 4332(C) (1994 & Supp. III 1997); Alaska v. Carter, 462 F. Supp. 1155, 1161-64 (D. Alaska 1978) (finding that NEPA does not apply to monument designations because the President is not a federal agency).

578. *See* 43 U.S.C. § 1714(b), (h) (1994 & Supp. 1997).

579. Getches, *supra* note 522, at 318 (citing H.R. REP. NO. 94-1163 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175).

580. John D. Leshy, *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from the Inside,* 25 ENVTL. L. 679, 681 (1995) (noting the Clinton Administration's efforts to engage the public and promote "cooperative federalism"). Executive branch officials have been criticized, however, for keeping the decision-making process for the Escalante National Monument quiet until just a few days before the designation was announced. *See* Rasband, *supra* note 545, at 484 n.5 (citing Tom Kenworthy, *President Considers Carving Natoinal Monument out of Utah Land,* WASH. POST, Sept. 7, 1996, at A3 (breaking the news about possible monument designation)).

581. 5 U.S.C. § 704 (1994); Dalton v. Specter, 511 U.S. 462, 468-470 (1994); Franklin v. Massachusetts, 505 U.S. 788, 796, 800-801 (1992).

582. *See* Wyoming v. Franke, 58 F. Supp. 890, 896 (1945) (admitting, in a pre-Administrative Procedure Act case, additional evidence of historic and scientific objects, in view of cursory statements contained in the proclamation, and determining that the President's decision was not arbitrary in that the statutory criteria were met).

less likely to be publicly aired and fully considered, and the court could be reduced to accepting post hoc rationalizations in an administrative record compiled solely for litigation purposes.[583] Yet, taking their cue from the Supreme Court's opinion in *Cameron*, courts will rarely question the presidential findings.[584]

If the Secretary were to make the designation decision rather than the President, the Administrative Procedure Act would allow review of the merits of the decision.[585] NEPA would also apply, so the court could review the environmental impact statement and the administrative record generated by the NEPA process.[586] The authority to withdraw and reserve national monuments has been delegated to the Secretary of Interior,[587] and, in spite of NEPA and other procedural requirements, the Secretary possesses a great deal of latitude to effectuate the Antiquities Act's standards, given the Act's loosely phrased directives. Nonetheless, designations are almost always made by the President, likely to signify the political importance of the decision and to avoid the constraints of NEPA and the Administrative

583. *See id.*

584. *See* Cameron v. United States, 252 U.S. 450, 455-56 (1920).

585. Although the directive allowing the reservation of "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" is rather loosely phrased, designations are unlikely to be found wholly committed to agency discretion by law. The Act surely sets forth enough law to apply so that judicial review could go forward. *See supra* notes 264-69 and accompanying text (discussing Administrative Procedure Act § 701); *supra notes* 291-98 and accompanying text (discussing South Dakota v. U.S. Dep't of Interior, 69 F.3d 878 (8th Cir. 1995), *cert. granted, vacated and remanded*, 519 U.S. 919 (1996), where the court concluded that a lack of judicial review under the Act, which addresses tribal lands and interests, as opposed to public lands, contributes to a nondelegation problem).

586. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 336 (1989). Although a few courts have held that environmentally beneficial actions do not trigger NEPA, *e.g.*, Douglas County v. Babbitt, 48 F.3d 1495, 1507 (9th Cir. 1995), others refuse to recognize any such exception, *e.g.*, Catron County Bd. of Com'rs v. U.S., 75 F.3d 1429, 1436 (10th Cir. 1996).

587. The President's authorities to withdraw or reserve federal lands were delegated to the Secretary of the Interior by executive order. Exec. Order No. 10,355, 17 Fed. Reg. 4831 (May 26, 1952); *see* 43 C.F.R. § 2300.0-3(a)(1)(iii), (2). One district court, however, has assumed, without analysis, that because the Antiquities Act refers expressly to the President's power to declare national monuments, "apparently this authority cannot be delegated." Alaska v. Carter, 462 F. Supp. 1155, 1159 (D. Alaska 1978). This conclusion is likely erroneous; other courts have regularly upheld delegations to agencies even though the statutory language refers to the President's power to take action. *See* Wagner Seed Co. v. Bush, 946 F.2d 918, 920 (D.C. Cir. 1991) (noting that, although the Comprehensive Environmental Response, Compensation and Liability Act specifically grants authority to the President, 42 U.S.C. §§ 9604, 9606, that authority was delegated to the EPA in Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987), and therefore the agency was entitled to *Chevron* deference).

Procedure Act, as well as FLPMA's withdrawal provisions, which specifically speak to secretarial duties.[588]

Procedural safeguards could be formalized through regulations to avoid due process concerns. Establishing regular means for public input would not only provide the executive branch with more complete information from a variety of perspectives, at least some of which will flow from local interests knowledgeable about the land base in question, but it would also heighten public acceptance of designation decisions.[589] Judicial review could then enhance the legitimacy of the decision-making process and the ultimate outcome, in keeping with the purposes of the second step of the proposed approach.

As a practical matter, the executive branch will be reluctant to adopt the suggested regulations, in part because regulations have become increasingly difficult to promulgate.[590] A substantive draw-back is that the imposition of extensive preliminary requirements may result in fewer designations, and less federal land ultimately placed in protective status. The cumbersome nature of NEPA and other public processes could have a chilling effect on executive withdrawals, and the delay caused by public involvement and other procedural requirements may result in harm to the resources in question. However, if extractive activities were imminent, the regulations could include emergency procedures similar to those found in FLPMA, allowing temporary withdrawal until public processes are complete.[591] This proposal

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588. *See* 43 U.S.C. § 1714 (1994 & Supp. III 1997); Alaska v. Carter, 462 F. Supp. 1155 (1978); *see also* Rasband, *supra* note 545, at 505-61 (noting that, to avoid having to comply with NEPA, executive branch officials wanted a letter from President Clinton to Secretary Babbitt regarding the suitability of Utah lands for designation as the Escalante National Monument).

589. *See* Rasband, *supra* note 545, at 560 (extolling the virtues of public process, and noting that, though the Escalante National Monument may well be regarded as one of the "jewels" of our national monument system, "like the collection of old world antiquities in the British Museum . . . [it] is forever tarnished by its method of acquisition"). Notably, the Secretary has responded to nondelegation concerns by promulgating regulations to constrain the exercise of review, and thereby hasten judicial review, in at least one other context. *See supra* notes 291-98.

590. *See* Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 709 (2000) (describing legislation and executive orders which require agencies to assess the costs and benefits of proposed and final rules, along with the rules' impacts on federalism, small businesses, intergovernmental interests, property rights and environmental justice). Of course, procedural requirements could be effectuated by a legislative amendment to the Antiquities Act, *see* Rasband, *supra* note 545, at 555, and several bills have been proposed to that effect, *e.g.*, H.R. 1487, 106th Cong. (1999), H. REP. 106-252 (passed the House Sept. 24, 1999); S. 729, 106th Cong. (reported by committee Aug. 25, 2000). The labyrinthine nature of congressional processes and the risk entailed in bringing this highly beneficial, long-standing statute up for amendment in the current political climate, with Congress touting private property rights as one of its primary values, make regulation a better bet.

591. *See* 43 U.S.C. § 1714(e) (1994 & Supp. III 1997).

would in many ways emulate FLPMA's withdrawal provisions, with one critical distinction—by utilizing the Antiquities Act power, the executive branch frees itself from FLPMA's congressional approval requirement.[592]

Absent formalized procedural safeguards, monument designations may implicate due process issues,[593] but they do not trigger the separation of powers and federalism concerns raised in *American Trucking* and especially evident in *Schechter Poultry*. As noted in *Midwest Oil* and, more recently, in *Brown & Williamson Tobacco*, the President is acutely accountable to political processes, and, consequently, his or her cabinet members are as well.[594] Moreover, given the federal government's plenary power over public lands and resources, the expectations of both state and private entities in having a say over the use of those resources are less compelling.[595] Finally, because Antiquities Act withdrawals are preservation-oriented, preventing extractive or destructive uses which are inconsistent with monument designation, Congress has ample opportunity to step in and correct any situations it determines are unfounded or improperly motivated.

But the ends do not wholly justify the means. If the executive branch, acting through the Department of Interior, were to adopt regulations providing for more meaningful and predictable administrative procedures, allowing for public input and judicial review, designation decisions could effectuate preservation objectives in a more open and publicly acceptable way.

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592. *See id.* § 1714(c) (1994 & Supp. III 1997).

593. The concern noted here is one of fairness and public buy-in rather than constitutional law. An analysis of whether the lack of procedures and judicial review in the public lands context actually violates constitutional due process under the Fifth Amendment is beyond the scope of this article. However, courts have tended to reject such claims. *See* Fed'l Lands Legal Consortium v. United States, 195 F.3d 1190, 1197-1200 (10th Cir. 1999); Clouser v. Espy, 42 F.3d 1522, 1540-41 (9th Cir. 1994); *see also* Linn Land Co. v. Udall, 255 F. Supp. 382, 388 (1966) (noting that, once plaintiffs' nondelegation challenge to the withdrawal of lands under the Taylor Grazing Act had been rejected, their due process claims must also fall "when viewed in the light of the [Property Clause] power of the Congress and the Secretary . . . to dispose of and regulate lands belonging to the United States").

594. FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1330-31 (2000) (Breyer, J., dissenting); United States v. Midwest Oil Co., 236 U.S. 459, 471 (1915). Arguably, a lame duck President is less accountable than one who acts during the first term, but presidential action is likely to be constrained by the knowledge that controversial decisions will be attributed to the President's political party regardless of timing.

595. *See* United States v. Locke, 471 U.S. 84, 104-105 (1985) (noting that unpatented mining claims are held with knowledge of the federal government's "substantial" regulatory power; thus, no reasonable expectation had been impaired when Congress exercised that power by requiring that claims be filed); United States v. Fuller, 409 U.S. 488, 494 (1973) (holding that the government need not compensate rancher for loss of value added to his fee lands by adjacent federal grazing lands in light of clear congressional intent that grazing permits create no right, title or interest in the federal lands).

VII. CONCLUSION

The revival of the nondelegation doctrine goes hand in hand with the recent hue and cry for regulatory reform, i.e., less regulation and, consequently, less federal interference with states' rights and private economic interests. Yet the concerns evidenced by the D.C. Circuit in *American Trucking* do not justify the resurrection of an antiquated doctrine premised on an elusive quest for intelligible legislative nomenclature. Unless Congress has completely side-stepped its legislative responsibility by failing to make a fundamental policy choice and handing a "blank check" to an executive agency, thereby abdicating—not delegating—its law-making functions, separation of powers concerns are scarcely implicated, and the concerns that are raised by ambiguous statutory provisions can be better addressed through other means. In the regulatory context, reviewing courts need not, and should not, reach constitutional issues when established principles of administrative law provide less drastic and, in many ways, more meaningful means to scrutinize agency action and set aside abusive or irrational decisions.

With regard to the *American Trucking* controversy, although the EPA may find itself rewriting the national ambient air quality standards ("NAAQS") or providing a more detailed explanation of its choice in the administrative record, the Clean Air Act itself, a long-standing regulatory statute and venerable member of the "first generation" of federal environmental laws, should not be struck down on nondelegation grounds. The statutory objectives and standards do not reflect an abdication of legislative power, particularly when considered in the context of the Act as a whole. Instead, the Act specifies policy goals and provides appropriate legislative parameters, allowing the EPA to fill in the details within those parameters, an activity especially well suited for an executive agency with technical expertise in environmental quality.

The Clean Air Act and many other regulatory statutes enacted under the Commerce Clause provide substantive law for the courts to apply in reviewing agency action, while affording procedural safeguards to both the regulated community and the interested public through the administrative rulemaking process, and, ultimately, judicial review. When faced with statutory ambiguity in this context, the court should assume that Congress intended to delegate regulatory authority to the agency, as noted in *Chevron,* but scrutinize the agency's ultimate decision using the principles of "hard look" review, all the while conscious of the overall context of the regulation at issue, including other constitutional ramifications. Agencies would be then required to articulate and support their decisions based on all relevant

legislative objectives and factors in an open and complete administrative record. As a result, the legislative, executive, and judicial branches could each effectuate their primary constitutional functions, and the public would gain the assurances of impartial, reasoned and predictable regulation and accountable decision-makers.

The merits of nondelegation arguments outside of the Commerce Clause context should be considered in light of the source of constitutional power giving rise to the executive decision in question. Under the first step of the proposed approach, certain subjects may warrant heightened vigilance to nondelegation issues, while in other areas, congressional intent to delegate extensive powers can be presumed, and such delegations will call for less constitutional interest. In the public lands context, Congress's explicit Property Clause power to make all needful regulations respecting public lands and resources includes the plenary power to delegate extensive regulatory duties to executive agencies to manage those resources. Public lands statutes generally do not raise the constitutional concerns evident in the early New Deal cases—separation of powers, federalism, and due process—nor do they have the pervasive effects on the whole economy noted in those cases. This is especially true when the Executive implements the laws in a protective manner, preserving options for the future. Judicial review of a complete administrative record resulting from open and regular decision-making processes under the second step of the proposed approach serves to enhance reasonable and unbiased outcomes.

Under this formula, Antiquities Act withdrawals will withstand nondelegation challenges as appropriate exercises of the Property Clause power, but they come up short under the second step of the proposed alternative, as they lack formalized procedural safeguards. This shortcoming does not require invalidation on constitutional grounds, but it diminishes public confidence in the executive action, and creates opportunities for abuse with no judicial corrective check. As for other public lands decisions, where Congress has provided the basic policy objectives, and opportunities for public participation and judicial review are available, the powers and prerogatives of all three branches remain intact and the interests of the affected public are adequately protected.