ARTICLE I – SEPARATION OF POWERS – NON-DELEGATION DOCTRINE-CONSTRUCTION OF CLEAN AIR ACT PROVISION REQUIRING ENVIRONMENTAL PROTECTION AGENCY TO SET AIR QUALITY STANDARDS AT A LEVEL REQUISITE TO PROTECT THE PUBLIC HEALTH WITH AN ADEQUATE MARGIN OF SAFETY IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER - *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

Marion Johnson

I. INTRODUCTION

[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.[1]

The foundations of the non-delegation doctrine lie in both the three-part system of government established in our Constitution and the concomitant principle of separation of powers.[2] The Constitution provides that "[a]ll legislative [p]owers herein granted shall be vested in a Congress of the United States . . . ."[3]

---

[1] Mistretta v. United States, 488 U.S. 361, 372 (1989).

[2] *Id.* at 371. Constitutional separation of powers between the three branches of government is intended to prevent one branch from usurping the powers of any other branch. *See* Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 949 (2000) (examining the usefulness of the non-delegation doctrine and attempting to harmonize it with the principles of judicial review under the Administrative Procedure Act). However, this does not require each and every function of the executive, judiciary and legislature to be separate. *Id.* There are occasions when Congress may and has delegated some authority to others that it could ordinarily exert itself. *Id.* Justifying the adoption of this flexible approach to separation of powers, the Court in *Mistretta* said that "[t]he greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta*, 488 U.S. at 381.

[3] U.S. Const. art. 1 §1. Although there is no explicit source within the Constitution authorizing the creation of administrative agencies to which powers can be delegated, this authority can be implied under the Necessary and Proper Clause as a means "necessary and proper" to assist Congress in carrying out its responsibilities and properly focus on its primary duty to enact laws. *See*, Zellmer, *supra* note 2, 950-51.

Historically, the Supreme Court has held that Congress may not delegate its legislative power to another branch of government.[4] Following the establishment of the administrative state, however, Congress has increasingly allocated decision-making power to executive agencies.[5] In order to ensure that this delegation of authority is consistent with the Constitution, Congress must legislate an "intelligible principle" to which the agency must conform.[6] An "intelligible principle" is one which must be stated by Congress when legislating in order to guide and limit administrative agencies in carrying out their delegated tasks.[7]

Only twice in the history of the Court has the "intelligible principle" been

---

[4] Field v. Clark, 143 U.S. 649 (1892). As early as 1892, the court in *Field v. Clark* unequivocally stated, "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692. *See* David M. Richardson, *American Trucking Associations v. EPA: The Phoenix ("Sick Chicken") Rises From the Ashes and the Nondelegation Doctrine Is Revived*, 49 CATH. U.L. REV. 1053, 1056-67 (2000) (analyzing the historical development of the non-delegation doctrine). Operation of the non-delegation doctrine to invalidate statutes delegating legislative authority did not occur until 1935 when the doctrine reached its apex. *Id.* at 1056-57. *See also* Zellmer, *supra* note 2, 957-67 (discussing the variability in the Court's standard of enforcement of the non-delegation doctrine over time from loose to strict review).

[5] Zellmer, *supra* note 2, 950. By administrative state, some commentators refer to administrative agencies as an unrestricted, 'fourth branch of government' with no source of authority in the Constitution. *Id.* (quoting Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J. dissenting)). Justice Jackson, in his dissent in *Ruberoid,* stated that, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than those of all the courts . . . ." *Ruberoid*, 343 U.S. at 487. *See also* Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 294-98 (2001) (discussing the growth of administrative agencies as a function of Congress' need for assistance in adapting to a changing economy and in carrying out its job).

[6] Hampton v. United States, 276 U.S. 394, 409 (1928). The Court in *Hampton* first articulated the "intelligible principle" doctrine, but did not specify how detailed or exacting it must be. *Id.* Application of the non-delegation doctrine waxed and waned over time after this decision, but, more often than not, an "intelligible principle" was found. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 434-43 (2001) (arguing that the public interest standard in delegations of authority to the Federal Communication Commission does not comport with the principle of separation of powers and the non-delegation doctrine). While the non-delegation doctrine may be fundamental to the operation of our constitutional system, Justice Scalia believes that it is not easily enforced or understood. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

[7] Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?* 98 MICH. L. REV. 303, 330 (1999) (examining the non-delegation doctrine as an anachronistic response to the problems of the modern regulatory state and specifically the EPA).

found lacking in a statute.[8] Other than these two cases, the Court has consistently construed the non-delegation doctrine more broadly and has loosened the standards for the "intelligible principle" doctrine to encompass even a general public interest standard.[9] Allowing Congress to broadly delegate powers and duties to administrative agencies has facilitated the growth of the federal government in the twentieth century.[10]

In a striking decision, the United States Court of Appeals for the District of Columbia Circuit recently held that the Clean Air Act[11] had effected an unconstitutional delegation of legislative power, contravening this long standing precedent.[12] The court decided that the National Ambient Air Quality Standards

---

[8] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474 (2001). The Court explained that of the two statutes, one "provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* (referring to Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 535-537 (1935)).

[9] *See, e.g. Mistretta*, 488 U.S. at 361 (upholding delegation of authority of the United States Sentencing Commission to promulgate Sentencing Guidelines); Am. Power and Light Co. v. SEC, 329 U.S. 90, 121 (1946) (upholding delegation of authority to the Securities and Exchange Commission to prevent holding companies from unfairly or inequitably distributing voting power among security holders); Yakus v. United States, 321 U.S. 414, 425-26 (1944) (upholding delegation of authority to the Price Administrator under the Emergency Price Control Act to fix commodity prices at levels that were "fair and equitable" and would generally effectuate the purposes of the Act); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (upholding delegation of authority to Federal Communications Commission to regulate licensing of broadcasters "as public convenience, interest, or necessity requires"); N. Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24 (1932) (finding that authorization of the Interstate Commerce Commission to allow one interstate carrier to control another by lease was constitutional under a public interest in transportation criterion).

[10] Kevin B. Covington, *Environmental and Land Use Law: Federal Appellate Court Revives the Nondelegation Doctrine in Environmental Case*, 73 FLA. BAR J. 81, 81 (1999) (discussing the impact of the non-delegation holding in American Trucking Ass'ns, Inc. v. EPA, 175 F3d 1027 (D.C. Cir. 1999)). The Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting). Justice Scalia was simply echoing the sentiment expressed by the majority when it surveyed the cases where delegations of authority to administrative agencies were found constitutional. *Id.* at 373.

[11] 42 U.S.C. §§7408-09 (2001).

[12] Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *opinion modified on reh'g*, Am. Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd in part aff'd in part, sub. nom.* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

("NAAQS") promulgated by the Administrator of the Environmental Protection Agency ("EPA") pursuant to the Clean Air Act ("CAA") were improper because Congress had not articulated an "intelligible principle" to guide the EPA in its exercise of discretion.[13] The court of appeals remanded the NAAQS, so that the EPA could avoid an unconstitutional delegation by developing binding standards that were more determinate.[14] The court declined to deem the statute unconstitutional without giving the agency, with its special expertise, an opportunity to repair the overly broad delegation by establishing standards for itself.[15] Thus, the circuit court utilized a novel approach to the non-delegation doctrine by focusing on the EPA's interpretation of its discretion rather than the actions of Congress in setting forth an "intelligible principle."[16]

The Supreme Court, in *Whitman v. Am. Trucking Ass'ns, Inc.*,[17] found this reasoning flawed and unanimously reversed the non-delegation holding.[18] Unwilling to change the status quo, the Court rejected the circuit court's approach to the non-delegation doctrine and reaffirmed its traditional jurisprudence.[19] The Court concluded that the Legislature must continue to set the policies that govern our country, and administrative agencies must continue to conform to the "intelligible principles" which guide them in carrying out these policies.[20] This principle had previously been set forth very simply by Justice Scalia in *Mistretta*, "[e]xcept in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."[21]

---

[13] *Am. Trucking Ass'ns, Inc.*, 175 F.3d at 1033.

[14] *Id.* at 1038.

[15] *Id.*

[16] *Id.*

[17] 531 U.S. 457 (2001).

[18] *Id.* at 472.

[19] *Id.*

[20] *Id.* at 472-79.

[21] *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). Justice Rehnquist, in a famous concurrence, described the three significant functions served by the non-delegation doctrine as follows:

> First, and most abstractedly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress,

II. STATEMENT OF THE CASE

The Supreme Court in *Whitman v. Am. Trucking Ass'ns, Inc.*[22] reviewed whether the CAA[23] effected an unconstitutional delegation of legislative power in its allocation of authority to the Administrator of the EPA to promulgate NAAQS.[24] In a unanimous opinion, the Court held that section 109(b) of the CAA does not impermissibly delegate legislative authority to the EPA, and declined this opportunity to alter the traditional principles of its non-delegation doctrine by reversing the court of appeals' delegation holding.[25] The Court held that where Congress legislated with sufficient specificity to create an "intelligible principle" to which the Administrator must conform, the non-delegation doc-

---

> the branch of our Government most responsive to the popular will . . . Second, the doctrine guarantees that to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion . . . Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685-686 (1980) (Rehnquist, J., concurring) (citations omitted).

[22] 531 U.S. 457 (2001).

[23] 42 U.S.C. §§7408-09 (2001).

[24] *Whitman*, 531 U.S. at 464. 42 U.S.C. §7409(a)(2) requires the Administrator of the EPA to promulgate NAAQS for each air pollutant for which air quality criteria have been issued under §108. 42 U.S.C. §7409(b)(1) dictates that the EPA is to set standards, "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. §7409(b)(1) (2001). These standards must be reviewed every five years and revised as appropriate. *See* 42 U.S.C. §7409(d)(1) (2001).

[25] *Whitman*, 531 U.S. at 464. The Court also examined three other questions. *Id.* First, the Court determined whether the EPA may consider the costs of implementation when setting these standards. *Id.* Second, the Court reviewed whether the court of appeals had jurisdiction to review the EPA interpretation with regard to implementation of the revised NAAQS. *Id.* Finally, assuming the court of appeals had proper jurisdiction, the Court examined whether the interpretation was permissible. *Id.* While this note will primarily focus on the unconstitutional delegation issue, a discussion of the costs of implementation issue will also be included. In making its delegation decision, the Court assessed what authority was granted to the EPA under the statute, and then determined its constitutionality. *Id.* at 465. The Court's analysis of the costs of implementation issue was fundamental to its interpretation of what authority the statute actually conferred and, therefore, was an essential element in its non-delegation holding. *Id.*

trine was not violated.[26]

FACTS

Congress passed the CAA in order 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."[27] Congress then delegated authority to the Administrator of the EPA to determine what levels of air pollutants would be acceptable and what levels would not.[28] NAAQS were to be promulgated at levels "requisite to protect the public health" with "an adequate margin of safety."[29] On July 18, 1997, acting within its authority pursuant to the CAA, the Administrator of the EPA issued revised NAAQS for particulate matter (PM) and ozone.[30]

PROCEDURAL HISTORY

Numerous petitioners challenged these standards in the United States Court of Appeals for the District of Columbia Circuit.[31] Petitioners argued that in setting the NAAQS, the EPA's construction of sections 108 and 109 of the CAA was so loose "as to render them unconstitutional."[32] The court of appeals by a

---

[26] *Id.*

[27] 42 U.S.C. §7401(b)(1) (2001).

[28] 42 U.S.C. §7409 (a)(1)(A) (2001).

[29] 42 U.S.C. §7409 (b)(1) (2001). The statute requires the EPA to promulgate both primary and secondary air quality standards. *Id.* Primary standards are those "requisite to the public health" with an "adequate margin of safety." *Id.* Secondary standards are those "requisite to protect the public welfare." *Id.* at §7409 (b)(2).

[30] *Whitman,* 531 U.S. at 462. In setting the NAAQS, the statute also requires that they "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." 42 U.S.C. §7409 (a)(2) (2001).

[31] Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *opinion modified on reh'g,* American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd sub. nom.* Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001). Petitioners included American Trucking Associations, other private companies, and the States of Michigan, Ohio and West Virginia. *Am. Trucking Ass'ns, Inc.,* 175 F.3d at 1033.

[32] *Am. Trucking Ass'ns. Inc., 175 F3d at 1034.* The EPA's construction of the statute allowed it to select any level of air pollutant above zero without any determinate criteria. *Id.*

two to one majority agreed and held that the statutory language of the CAA and the EPA's interpretation had effected an unconstitutional delegation of power.[33] The court remanded the case to the EPA to articulate an "intelligible principle" to guide it in promulgating NAAQS.[34]

The United States Court of Appeals for the District of Columbia took the opportunity to affirm the nondelegation holding when the EPA filed for a rehearing.[35] Explaining its rationale in the first case, the court stated that when deciding whether an interpretation of a statute delegating power to an administrative agency is constitutionally permissible, "the purpose of the Act, its factual background and the statutory context in which [it] appears" are taken into account.[36] Since choosing an interpretation is the equivalent of making a policy decision, the panel determined that deference must be given to the agency's reasonable interpretation of a statute containing an ambiguous principle by which its exercise of authority is guided.[37]

The EPA also requested a rehearing *en banc*, and the Court of Appeals for the

---

[33] *Id.* at 1038. In dissent, however, Judge Tatel signaled the response of the Supreme Court by chastising the majority for attempting to reinstate the non-delegation doctrine in spite of the last fifty years of Supreme Court jurisprudence severely limiting its application. *Id.* at 1057 (Tatel, J., dissenting).

[34] *Id.* In addition, the court rejected claims that section 109(d) allowed the EPA to consider costs in setting standards. *Id.* at 1033. The court also concluded that the 1990 revisions to the CAA limited the EPA's ability to enforce new ozone NAAQS, and that the EPA must address the possible health benefits of ozone. *Id.* Finally, the court held that the EPA acted in an arbitrary and capricious manner by choosing PM[10] as the indicator for coarse particulate matter and rejected the claims that PM[2.5] must be treated by the EPA as a new pollutant. *Id.* at 1033-34. PM[10] refers to both coarse and fine particulate matter which becomes an airborne pollutant as a result of grinding and crushing of various solids. *Id.* at 1053. These particles generally have a size range of 2.5 to 10 micrometers in diameter and could also be identified as PM[10-2.5]. *Id.* PM[2.5] refers to fine particulate matter which becomes an airborne pollutant as a result of combustion or gases. *Id.* Use of the PM[10] indicator while at the same time establishing a new fine particle indicator would have led to over regulation in some parts, and under regulation in others, making it an arbitrary and capricious decision. *Id.*

[35] Am. Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4, 6-7 (D.C. Cir. 1999) (per curiam).

[36] *Id.* at 7.

[37] *Id.* The court reiterated the conclusion in the first opinion in this case that "when statutory language and an existing agency interpretation involves an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute, but to give the agency an opportunity to extract a determinate standard on its own." *Id.* (citing Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d at 1038).

District of Columbia Circuit refused, with five judges dissenting.[38] The Administrator and the EPA petitioned for review in the United States Supreme Court, and the Respondents cross-petitioned.[39]

The Supreme Court granted certiorari on both petitions and affirmed in part and reversed in part.[40] The Court declined to modify its existing non-delegation precedent and strongly asserted that section 109(b) of the CAA does not delegate legislative power to the EPA.[41] The Court held that not only was the scope of discretion in setting standards allowed by section 109(b) of the CAA well within the outer limits of the Court's precedent, but also that the extent of discretion delegated was very similar to others previously approved.[42] Moreover, the Court concluded that an agency cannot define the "intelligible principle" under which it must operate.[43] The Court maintained that only Congress can cure an unlawful delegation of legislative power by setting forth an "intelligible principle" to which the agency must conform.[44]

---

[38] *Id.* at 13-14. Judge Silberman, in his dissent from the denial of rehearing *en banc,* echoed Judge Tatel's earlier dissent, and agreed that this section of the CAA does not raise a serious constitutional issue. *Id.* at 14 (Silberman, J., dissenting from denial of *reh'g en banc*).

[39] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 464 (2001). The EPA requested review of the following questions: (1) whether § 109(b)(1) of the CAA delegates legislative power to the Administrator of the EPA; (2) whether the Court of Appeals had jurisdiction to review the EPA's interpretation of Title I of the CAA, 42 U.S.C. §§ 7501-7515, with respect to implementing the revised ozone NAAQS; (3) and if so, whether the EPA's interpretation of that part was permissible. *Id.* Respondents cross-petitioned to review whether the Administrator may consider the costs of implementation in setting NAAQS under §109(b)(1). *Id.* The cases were argued in tandem and consolidated for the decision. *Id.*

[40] *Id.* at 464.

[41] *Id.*

[42] *Id.* at 472-74. *See, e.g.*, Touby v. United States, 500 U.S. 160, 167 (1991) (permitting delegation of authority to Attorney General to designate drugs as controlled substances for criminal drug enforcement purposes where "necessary to avoid an imminent hazard to the public safety"); Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 646 (1980) (upholding delegation to agency to set standards under the Occupational Safety and Health Act which "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health").

[43] *Whitman*, 531 U.S. at 472.

[44] *Id.*

III. PRIOR CASE HISTORY

In *Field v. Clark*,[45] the Supreme Court emphasized the importance of separation of powers and the non-delegation doctrine by stating that these principles simply do not allow Congress to delegate any legislative authority to the President.[46] The Court recognized that separation of powers is a vital component of the Constitution, and that sustaining this principle is necessary to maintain the integrity of our tripartite system of government.[47] In *Field*, the Court reviewed the delegation resulting from the Tariff Act of October 1, 1890.[48] The Court examined the authority that was conferred on the President to levy duties on products imported from any country that was found to have exacted "reciprocally unequal and unreasonable" tariffs on comparable American products sold there.[49] Reasoning that only an exercise of legislative power by the President was an unconstitutional delegation, the Court upheld the statute by characterizing the President's duties under the Act as fact finding.[50] The Court found that once the

---

[45] 143 U.S. 649 (1892).

[46] *Id.* at 692.

[47] *Id.*

[48] *Id.* at 662. Section 3 of the Tariff Act of 1890 was purported to delegate an unconstitutional power to the President to lay taxes and duties. *Id.* at 682. In pertinent part the statute provided that:

> [s]o often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and incurred, . . . imposes duties or other exactions upon the agricultural or other products of the United States which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected and paid . . .

Id.

[49] *Id.* at 680.

[50] *Id.* at 692-95. The Court underscored the fact that Congress had set out in advance which duties should be levied, collected and paid while the President's suspension of the statute endured. *Id.* The President was granted the authority to evaluate the regulations of the other countries to see if unfair duties were being levied on American products, but once this fact had been ascertained, the President had no discretion as to whether a suspension must be

President had determined the existence of the unequal tariffs, the statute specifically set forth the products included, the amount of the duty to be levied, and the conditions under which the duties should be applied.[51] The Court maintained that under these conditions the President had no discretion, and once these facts were ascertained, the suspension had to go into effect.[52] Describing the President as merely an agent of the legislature, the Court sustained the statute on the basis that the President was executing an act of Congress, not making law.[53] The Court asserted that whether a statute unconstitutionally delegated power was based on whether the power delegated was legislative in nature.[54]

In *J.W. Hampton, Jr. v. United States,*[55] the Supreme Court upheld the Tariff Act of 1922.[56] The Court noted that Congress must often use administrative officials as officers of the Executive Branch to carry out the details of its legislation.[57] In particular, the Court referred to the need of the Interstate Commerce

---

ordered. *Id.* The Court concluded that the President was therefore only carrying out the will of the Congress in ascertaining the facts and then issuing the suspension. *Id.* The Court stated that the President was not therefore exercising any legislative power, he was merely executing an act of Congress as an appropriate action by the executive. *Id.* Maintaining the proposition that there is a clear dividing line between delegation and execution of legislative authority, the Court said:

> [t]he true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Id. at 693-94 (quoting Cincinnati, Wilmington, & Zanesville R.R. Co. v. Commissioners, 1 Ohio St. 77, 88-89 (1852)).

[51] *Field*, 143 U.S. at 680.

[52] *Id.* at 693-94.

[53] *Id.* at 693.

[54] *Id.* at 693-94. The Court described legislative power as the policy making function that was exercised by Congress in declaring that a suspension of free trade should be ordered when the prescribed contingent events took place. *Id.* at 694.

[55] 276 U.S. 394 (1928).

[56] *Id.* at 394.

[57] *Id.* at 407.

Commission to aid Congress in regulating growing interstate commerce, understanding that there are some details of regulation and rate fixing that would be impossible for Congress to oversee directly.[58] This tariff statute, similar to the one in *Field*, authorized the President to raise or lower tariffs in order to equalize costs of production between the United States and its primary competing country.[59] Also, the Tariff Act required the President to consult with investigators from the United States Tariff Commission and make findings prior to any modifications in tariffs.[60] The Court reasoned that there are times when the separate branches of government may need to seek assistance from another branch.[61] In those instances, the Court explained, "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[62] However, common sense does not go so far as to allow an unlimited delegation of authority.[63] Analogizing this Act to the one in *Field*, the Court in *J.W. Hampton* held that where Congress sets forth "an "intelligible principle" to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legisla-

---

[58] *Id.* at 407-08. The Court referred to the creation of the Interstate Commerce Commission, which regulates rates for passenger and merchandise traffic. *Id.* Because the rates are "myriad," it would be impossible for Congress to fix them all. *Id.* Therefore, Congress may delegate that authority to the Commission so long as Congress lays down general rules of operation to which the Commission must comply. *Id.*

[59] *Id.* at 401-02. This provision was known as the flexible tariff provision of the Tariff Act of September 21, 1922. 42 Stat. 858, 941.

[60] 276 U.S. at 401-03. Under this provision, the President would have to take the following factors into consideration when making his findings:

> (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the Unites States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Id.

[61] *J.W. Hampton, Jr.*, 276 U.S. at 406.

[62] *Id.*

[63] *Id.* at 408-410.

tive power."[64] Requiring the President to consult with the commission, make findings and equalize costs of production were deemed sufficient policy guidelines to constitute an "intelligible principle."[65]

In a pair of cases arising out of New Deal legislation enacted during the Roosevelt administration, the Supreme Court for the first time applied the "intelligible principle" test of the non-delegation doctrine to strike down two statutory delegations.[66] In *Panama Refining v. Ryan,*[67] the Supreme Court held that section 9(c) of Title I of the National Industrial Recovery Act ("NIRA") delegated overly broad authority to the President to prohibit interstate shipments of "hot oil," without providing an "intelligible principle" to govern his actions.[68]

Under the NIRA, the President was authorized to determine whether interstate shipments of petroleum products exceeded state based limits, and if so, ban those shipments and impose criminal penalties for violations.[69] The Court ana-

---

[64] *Id.* at 409. The Court also compared this delegation to that which occurs when Congress sets rules for fixing of rates for interstate commerce and then authorizes the Interstate Commerce Commission to set those rates. *Id.* So long as Congress sets out an "intelligible principle" in the legislation, and the Executive Branch is guided by that principle, Congress may properly authorize the execution of that authority. *Id.*

[65] *Id.*

[66] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the Live Poultry Codes promulgated under Section 3 of the National Industrial Recovery Act, which addressed codes of fair competition. 15 U.S.C.S. §703); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (holding unconstitutional section 9(c) of the National Industrial Recovery Act, authorizing the President to prohibit commerce in petroleum and petroleum products under the codes of fair competition. 15 U.S.C.S. §709).

[67] 293 U.S. 388 (1935).

[68] *Id.* at 418-19. Under the statute, "hot oil" meant oil produced which was in excess of amounts allowed by state law. 15 U.S.C.S. §709(c).

[69] *Id.* at 406. The statute provided that:

> The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months or both.

15 U.S.C.S. §709(c).

lyzed the statute by reviewing section 9(c) as well as other correlated provisions of the statute to determine whether Congress set down a policy and standard with respect to petroleum products, as well as whether the President was required to make any findings regarding these products.[70] The Court held that the perimeters of the challenged delegation were so undefined as to leave the matter entirely to the President "without standard or rule, to be dealt with as he pleased."[71] Concerned with the prospect of unbridled delegation of lawmaking power, the Court explained that the question was not one of the actual content or effect of the statute challenged.[72] Instead, the Court maintained, the primary issue was that the constitutional allocation of legislative powers reserved to Congress should be preserved as an essential element of our government.[73]

Several months following its decision in *Panama Refining*, the Court applied a similar analysis in *A.L.A. Schechter Poultry Co. v. United States*.[74] In *Schechter Poultry*, section 3 of the NIRA was found unconstitutional.[75] This statute authorized the President to approve "codes of fair competition" presented by representatives of various trade groups as well as to initiate these codes himself, provided that they were not discriminatory, did not promote monopolies, and carried out the policies of Title I of the Act.[76] Further, the statute allowed

---

[70] *Panama Ref.*, 293 U.S. at 415-16.

[71] *Id.* at 418. Unlike the statutes upheld in *Field* and *Hampton*, no findings or relationship to specific circumstances or conditions under which the shipments should be banned were required. *Id.* at 417.

[72] *Id.* at 430.

[73] *Id.* Justice Cardozo disagreed with the majority. Justice Cardozo asserted that the statement of policy found in section 1 of the NIRA was a standard sufficient to confine the President's discretion, keeping it "canalized within banks that keep it from overflowing." *Id.* at 440. (Cardozo, J., dissenting). The policies listed in the statute were to prevent unfair competition, waste of natural resources, demoralization of prices, increase in employment, and reduction of purchasing power of workers. *Id.* at 437. (Cardozo, J., dissenting). For Justice Cardozo, these policies made implicit the President's duty to make findings of industry conditions and were a sufficient guiding principle to effect a constitutional delegation of authority. *Id.* at 438. (Cardozo, J., dissenting).

[74] 295 U.S. 495, 537 (1935).

[75] *Id.* This section of the NIRA was consequently omitted from the Act as a result of the unconstitutional delegation of legislative power. 15 U.S.C.S. 703 (2001).

[76] *Id.* at 521-24. The policies stated within Title I of the NIRA were directed specifically at rehabilitating industry and aiding in the recovery of the national economy as a result of the national emergency presented by the depression. *Id.* at 531 n.9.

the President to impose conditions on trade groups or industries at his discretion.[77] In the case of the poultry industry, a "Live Poultry Code" was approved under which the President set the minimum wage, the total hours in a working week, minimum working age, other labor practices, and even means of slaughtering chickens.[78]

While recognizing that the country was still in dire circumstances as a result of the Depression, the Court nevertheless ruled that this did not give Congress proper authority to go beyond the bounds of its constitutional limits.[79] Reasoning as it did in *Panama Refining*, the Court looked to the statute to determine whether Congress had legislated properly by providing a standard to which the President should abide.[80] The Court compared the authority given to the President by the Act to other delegations previously affirmed,[81] and distinguished them because of the due process requirements which guided them.[82] By authorizing the President to prescribe rules of conduct for any trade or industry with few, if any restrictions, Congress virtually granted the President the power to enact laws, which constituted an impermissible delegation of legislative power.[83]

---

[77] *Id.*

[78] *Id.* at 527.

[79] *Id.* at 528.

[80] *Schechter*, 295 U.S. at 530.

[81] *Id. See* Fed. Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 285 (1933) (holding that the delegation of authority to the Federal Radio Commission to grant licenses "as public convenience, interest or necessity requires" was not an unlimited or objectionable delegation of power); New York Central Securities Co. v. United States, 287 U.S. 12, 25 (1932) (holding that public interest standard for transportation service described in the Interstate Commerce Act was sufficiently defined to be a constitutional delegation of authority); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 410-11 (1928) (holding that delegation of authority to the President to increase or decrease tariffs in order to equalize costs of production between the United States and its primary competing country was sufficiently limited as to be a proper delegation of legislative authority).

[82] *Id.* at 539-42. In particular, the Court highlighted the due process requirements of the Interstate Commerce Act that mandated notice, opportunity to be heard, and findings of fact. *Id.*

[83] *Id.* at 541-42. The limits of discretion granted this time were so broad that Justice Cardozo found them a case of "delegation running riot." *Id.* at 553. The Justice concluded that under this regime, "anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code." *Id.*

Since 1935, the Supreme Court has not invalidated a statute strictly on the basis of the non-delegation doctrine.[84] However, the Court's precedent in construing the doctrine more loosely was highlighted in *Mistretta v. United States*.[85] Through the Sentencing Reform Act,[86] Congress created the United States Sentencing Commission, an independent agency to promulgate federal sentencing guidelines.[87] On December 10, 1987, John M. Mistretta was indicted for his activities during a sale of cocaine and was ultimately sentenced under the guidelines to 18 months imprisonment and three years supervised release.[88] Mistretta argued that authorizing the United States Sentencing Commission to promulgate sentencing guidelines was an impermissible delegation of legislative discretion.[89]

In a clear statement of support for the validity of broad delegations of power, the Court held that not only was the delegation constitutional, but compared to others previously upheld, that Congress had carefully legislated goals, purposes and standards under which they were to be achieved.[90] The majority acknowledged that its non-delegation jurisprudence has been shaped by Congress' need for administrative support to perform its functions in our complex society.[91] The Court indicated that where Congress legislates an "intelligible principle," the constitutional doctrine meant to protect the separation of powers may bend to give Congress the necessary flexibility to do its job.[92]

Demonstrating its continued commitment to a broad interpretation of the "in-

---

[84] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474 (2001). The Court found that this fact, along with a laundry list of cases approving relatively vague delegations of authority, weighed in favor of stare decisis and finding an intelligible principle for the EPA. *Id.*

[85] 488 U.S. 361 (1989).

[86] Sentencing Reform Act of 1984, 28 U.S.C. § 991 (2001).

[87] *Mistretta*, 488 U.S. at 368-69.

[88] *Id.* at 370.

[89] *Id.*

[90] *Id.* at 374-77. The Court explained that, "[t]he statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern specific situations." *Id.* at 379 (quoting United States v. Chambless, 680 F. Supp. 793, 796 (E.D. La. 1988)).

[91] *Id.* at 372.

[92] *Id.*

telligible principle," the Court in *Touby v. United States*[93] upheld section 201 of the Controlled Substances Act ("CSA").[94] The CSA authorizes the Attorney General to place drugs on its list of controlled substances, subject to statutorily prescribed procedures,[95] such as, an agreement by the Secretary of Health and Human Services, consideration of the factors specified, and compliance with notice and comment procedures of the Administrative Procedure Act.[96] Substances may also be placed on the list temporarily, pending the regular scheduling procedure, when "necessary to avoid an imminent hazard to the public safety."[97] Petitioners were indicted on a charge of manufacturing and conspiring to manufacture "Euphoria," and challenged the CSA's delegation of this authority to the Attorney General.[98] Because of the possibility of criminal sanctions, petitioners asserted that even more guidance than an "intelligible principle" was required.[99]

The Court did not decide whether more specific guidance is truly needed when criminal sanctions are involved, concluding that section 201(h) would satisfy the non-delegation doctrine regardless.[100] The Court determined that multiple and specific limitations on the discretion granted to the Attorney General were sufficient to support the finding of an "intelligible principle."[101] The Court noted that the Attorney General, in making his determination under the "imminent hazard" statute, must be guided by the history of the drug, the scope and pattern of its abuse, and the nature of the risk to public health.[102] Additionally, the Court pointed out, the Attorney General must make findings of the drug's significant potential for abuse, the lack of any accepted medical use for treat-

---

[93] 500 U.S. 160 (1991).

[94] *Id.* at 167.

[95] *Id.* at 162-63.

[96] *Id.*

[97] 21 U.S.C.S. §811(h) (1970).

[98] *Touby*, 500 U.S. at 162. Euphoria is a so-called designer drug temporarily placed on the schedule of controlled substances under this section. *Id.*

[99] *Id.* at 165-66.

[100] *Id.* at 166.

[101] *Id.*

[102] *Id.*

ment, as well as a lack of known safety for its use.[103] The Court found that satisfying the constitutional standard for the non-delegation doctrine does not require the statute to say how imminent the hazard must be, how necessary it must be, or even how hazardous the drug is to the public.[104] For these reasons, the Court held that the statute, in its delegation of authority to the Attorney General to temporarily designate a controlled substance, was not an improper delegation of legislative power.[105]

IV. *WHITMAN V. AMERICAN TRUCKING ASS'NS*

A. THE OPINION

Faced with the challenge of deciding whether to adopt a novel application of the non-delegation doctrine as adjudicated by the Court of Appeals for the District of Columbia, the Supreme Court in *Whitman v. American Trucking Ass'ns* adamantly refused to deviate from the Court's traditional non-delegation analysis.[106]Writing for a unanimous Court, Justice Scalia commenced the opinion by stating that the proper analysis when faced with a delegation challenge is first to review what authority is granted under the statute and then to assess the constitutionality of that delegation.[107]

Reviewing the text of the statute challenged to ascertain the authority delegated, the Justice explained that section 109(b)(1) of the CAA required the EPA to set NAAQS "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[108] Furthermore,

---

[103] *Id.* at 167.

[104] *Touby*, 500 U.S. at 165-67.

[105] *Id.* at 166.

[106] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 476 (2001). The D.C. Circuit held that Section 109(b)(1) of the CAA had effected an improper delegation of legislative authority as a result of the EPA's interpretation of the statute, but rather than invalidating the statute, it remanded the case back to the EPA to develop a more limiting construction of the statute which would not be unconstitutional. American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *opinion modified on reh'g*, American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd in part aff'd in part, sub. nom.* Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001). *See also*, section B, Procedural History of this note.

[107] *Whitman,* 531 U.S. at 464-65.

[108] *Id.*

Justice Scalia explained that based on the technical "criteria" documents concerning health effects required to be compiled under section 108(a)(2), the EPA must then "identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration to provide an 'adequate' margin of safety, and set the standard at that level."[109] The Court determined that it was clear from this text that costs of attaining those standards were not to be a part of the initial consideration in promulgating NAAQS.[110]

The Court then addressed the Respondents' objections to this conclusion.[111] The Court framed the issues as questions of whether: (1) the definition of public health meant "the art and science dealing with the protection and improvement of community health;"[112] (2) public health is also affected by the economic costs of implementing strict standards which would adversely impact public health by causing whole industries to close down;[113] (3) the terms "adequate margin" and "requisite" could be defined so broadly that a cost consideration would be implied;[114] (4) the Administrator's judgment of what is "requisite" does not have to be based only on the criteria documents developed under section 108(a)(2), and that the criteria are not limited to the "effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air;"[115] and finally, (5) whether costs should be considered when promulgating NAAQS since other sections of the CAA require the production of attainment cost data.[116]

Beginning its analysis of these issues, the Court examined the use of the term "public health" within the context of section 109(b)(1) and found that the definition proposed by Respondents was illogical.[117] Within the statutory context, the Court took "public health" to mean nothing more than the health of the public.[118]

---

[109] *Id.*

[110] *Id.*

[111] *Id.* at 464-71.

[112] *Id.* at 466.

[113] *Whitman,* 531 U.S. at 466.

[114] *Id.* at 468.

[115] *Id.*

[116] *Id.* at 468-71.

[117] *Id.*

[118] *Id.* at 464-66. The Court explained that when the federal clean air statute was first

The Court next rejected Respondents' argument that the economic costs of implementing strict standards would adversely impact public health by causing whole industries to close down.[119] The Court noted that Congress was undoubtedly aware of this potential problem because it commissioned an earlier study to estimate the costs of carrying out the Air Quality Act of 1967.[120] The Court explained that with the information from the study at its disposal, Congress had provided for consideration of compliance costs explicitly in other provisions of the CAA.[121] Therefore, the Court refused to imply a cost consideration in the ambiguous section at issue where Congress had placed those considerations explicitly in other portions of the CAA.[122] Congress, the Court said, does not "hide elephants in mouse holes."[123]

Brushing aside Respondent's claim that the terms "adequate margin" and "requisite" allowed the EPA to modify NAAQS based on implementation costs, the Court determined that this was so unlikely as to be implausible.[124] Moving on to the claim that criteria documents are not the sole basis for promulgating

---

passed, recognizing the dangers from air pollution to the public health, the meaning of public health used was "the health of the community." *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2005 (2d ed. 1950)). Respondents argued that § 109(b)(1), when added to the CAA in 1970, used the term public health to mean "the ways and means of conserving the health of the members of a community, as by preventive medicine, organized care of the sick, etc." *Id.* The Court declared that in the context of § 109(b)(1), that interpretation was incorrect. *Id.* The Court asserted that the proper use of the term public health in this context was its ordinary meaning, "the health of the public." *Id.*

[119] *Whitman*, 531 U.S. at 466-68.

[120] *Id.* The study commissioned in the Air Quality Act of 1967 yielded a detailed survey of the compliance costs of the Act, as well as comprehensive information regarding costs of implementation and the economic effect of strict air quality standards on national industry. *Id.*

[121] *Id.* The Court referred to § 111(b)(1)(B) of the CAA requiring the Administrator to set standards reflecting lowered emissions, which could be achieved by applying the best system available, taking into account the costs of arriving at this level. *Id.*

[122] *Id.* Later amendments to the CAA included a number of provisions specifically authorizing the Administrator to consider costs when performing certain duties. *Id.* The Court referred to §111(b)(1)(B) (commanding the EPA to set standards for new sources of emissions, taking cost of achieving these standards into account), and §202(a)(2) (commanding the EPA to set auto emissions standards after a discretionary period of development, considering cost of compliance within that period). *Id.*

[123] *Id.* at 468-70.

[124] *Id.*

standards, or that these criteria are not limited to the effects on public health, the Court sustained the position that cost of implementation still could not be considered.[125] The Court stated that the cost of implementation factor is only indirectly related to the public health, and could foreseeably cancel out the conclusions drawn from other health effects.[126] If Congress had wanted it considered, the Court noted, Congress would have done so expressly.[127]

Finally, the Court addressed the claim that other sections of the CAA required costs of attainment information to be acquired and utilized and that their proper execution also required that costs be considered in setting NAAQS.[128] The Court asserted that the provisions referred to by Respondents are meant to aid the EPA in assisting the States to carry out the implementation of the NAAQS, and therefore have no relationship to whether costs should be considered in their formulation.[129] Justice Scalia affirmed the judgment of the court of appeals, that implementation costs may not be considered in setting NAAQS, and unequivocally stated that the interpretation of the text of section 109(b)(1), within its historical context and in consideration of its importance to the entire CAA, clearly supports this conclusion.[130]

Returning to the delegation issue, Justice Scalia went on to analyze the extent of the authority delegated to the Administrator of the EPA under section 109(b) of the CAA as it compared to prior Court precedent.[131] The Justice maintained that the proper standard of review in a delegation challenge is to determine whether Congress had legislated an "intelligible principle" to which the agency's decision-making must conform, or whether the statute was so broad and lacking in any standard as to be unconstitutional.[132] The Court reviewed the decision of the Court of Appeals for the District of Columbia Circuit which held that section 109(b)(1) as interpreted by the EPA did not establish an "intelligible principle," and therefore should be remanded back to the EPA to adopt a more limiting con-

---

[125] *Whitman*, 531 U.S. at 468-70.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 468-71.

[129] *Id.* at 468-70.

[130] Id.

[131] *Whitman*, 531 U.S. at 468-70.

[132] *Id.*

struction of the statute to avoid the unconstitutional issue.[133] Justice Scalia sharply disagreed with this analysis, and explained that there was no authority to suggest that an impermissible delegation of legislative power could be "cured" by the agency by adopting a different, more limiting interpretation of the statute.[134] Justice Scalia asserted that only the Court can determine when a statutory delegation of authority is unconstitutional, and only Congress can cure an impermissible delegation because it has the authority to create it in the first place.[135]

The Court concurred with the Solicitor General's assertion that section 109(b)(1) required the EPA to set NAAQS at a level "requisite to protect public health" allowing an "adequate margin of safety" for a defined group of air pollutants based on quality criteria reflecting the most recent scientific advances.[136] Defining requisite as "sufficient, but not more than necessary," the Court found this limitation on discretion allocated to the EPA as "strikingly similar" to others previously approved.[137] The Court analogized the public interest standard in section 109(b)(1) to other public interest standards that were previously found permissible.[138] Justice Scalia emphasized that only twice in the Court's history have statutes been found unconstitutional as a result of a lack of "intelligible principle."[139]

---

[133] *Id.* at 462-64.

[134] *Id.* 472-73. Refuting the idea that an agency can cure its own unconstitutional delegation by voluntarily limiting itself, the Court explained that this was inherently contradictory. *Id.* Justice Scalia went on to say that, "[w]hether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." *Id.*

[135] *Id.*

[136] *Id.* at 472-76.

[137] *Whitman*, 531 U.S. at 472-73.

[138] *Id.* Describing the standards previously approved, the Court noted that they included those used to designate a drug as a controlled substance because it was "necessary to avoid an imminent hazard to the public safety," and for OSHA to assure "to the extent feasible, . . . that no employee will suffer any impairment of health." *Id.* at 472-73. The Court was referring to the standards approved in *Touby v. United States,* 500 U.S. 160 (1991) and *Industrial Union Dept., AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607 (1980). *Id.*

[139] *Id.* at 473-75. Justice Scalia was referring to *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See supra* note 66.

Reviewing the scope of discretion granted, the Court concluded that it was not necessary for Congress to "cure" this delegation because it was certainly well within the limits of non-delegation precedent.[140] Explaining that the degree of acceptable agency discretion would vary according to the amount of authority conferred by Congress, the Court stated that it has never required any statutory determination of a criterion quantifying how much harm would be too much as the court of appeals would have required.[141]

The Court rejected Respondents argument that because ozone and PM are pollutants that do not demonstrate a concrete threshold level at which adverse effects are inflicted, the EPA would be required to impermissibly use its discretion in determining the degree of harm allowed.[142] Justice Scalia concluded, as in *Mistretta*, that this was not conclusive for purposes of a non-delegation analysis because some degree of discretion is generally inherent in executive or judicial action.[143]

The Court thus reaffirmed that the public interest standard set forth in section 109 (b)(1) of the CAA, requiring the EPA to set NAAQS at levels "requisite . . . to protect the public health with an adequate margin of safety," articulates an "intelligible principle" and as such constitutes a permissible grant of discretion.[144]

---

[140] *Id.* The Court pointed out that there are a number of cases which support the proposition that a public interest standard is an intelligible principle. *Id.; See e.g.* Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) (holding valid grant of authority to SEC to modify structure of holding company systems which do not "unfairly or inequitable distribute voting power"); Yakus v. United States 321 U.S. 414, 420-26 (1944) (approving wartime conferral of agency power to set commodity prices at levels that "will be generally fair and equitable and will effectuate the . . . purposes of the Act"); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) (approving regulation in the "public interest").

[141] *Id.* at 473-75. The Court noted, "[i]n *Touby,* for example, we did not require the statute to decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or even—most relevant here—how 'hazardous' was too hazardous." *Id.* (citing Touby v. United States, 500 U.S. 160, 165-67 (1991)).

[142] *Id.* at 473-77.

[143] *Whitman*, 531 U.S. at 475-76. (citing Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

[144] *Id.* As a result of the Court's decision here, it is unlikely that any future delegation challenge to a "public interest" standard would be successful. *See* May, *supra* note 6, at 433 (arguing that the "public interest" standard articulated within the Communications Act of 1934 was so vague as to render it an abdication of Congress' responsibility to establish proper national policies for the future). Experts disagree as to the proper course of action for the future. Sunstein, *supra* note 6, at 311-12. One commentator would reject the non-delegation doctrine except for extreme cases in which it would operate as a device for statutory construction, and

B. JUSTICE THOMAS' CONCURRENCE

Taking a textual approach to the constitutional origins of the non-delegation doctrine, Justice Thomas concurred in the opinion as its non-delegation holding reflected current Court precedent.[145] The Justice noted, however, that a challenge to this settled doctrine, the "intelligible principle" requirement, was not made but might be an issue he would be willing to address in a future case.[146]

Justice Thomas also indicated that Article I section 1 might be the source of a genuine constitutional issue.[147] The Justice explained that Article I section 1 does not mention an "intelligible principle," but simply states that all legislative powers are vested in Congress.[148] Justice Thomas reasoned that there may be instances where an "intelligible principle" is found, but the authority delegated is so great that it could not be construed as anything but legislative.[149] In this context, Justice Thomas would be open to a future determination of "whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[150]

C. JUSTICE STEVENS' OPINION, CONCURRING IN PART AND CONCURRING IN JUDGMENT

While wholeheartedly agreeing with the Court that section 109(b)(1) of the CAA does not in fact effect an unconstitutional delegation of legislative authority, Justice Stevens took issue with its rationale and therefore concurred in part and concurred in the judgment.[151] The Justice characterized the Court's conclu-

---

replace it with the more customary form of judicial review. *Id.* Still another commentator would support continued use of the non-delegation doctrine but finds it in conflict with judicial review of agency decisions where authority is "committed to agency discretion." Amee B. Bergin, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?*, 28 B.C. ENVTL. AFF. L. REV. 363, 393-97 (2001).

[145] *Whitman*, 531 U.S. at 486-87. (Thomas, J., concurring).

[146] *Id.*

[147] Id. at 487. (Thomas, J., concurring)

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Whitman*, 531 U.S. at 487. (Stevens, J., concurring.) Justice Souter joined in the concurrence. *Id.* Justice Stevens made reference to the dramatic statement in *Mistretta* which

sion as a pretense that the delegation is not legislative in nature.[152] Justice Stevens would have preferred that the Court admit that in some cases administrative agency rulemaking really is an exercise of legislative power.[153] The Justice posited that if the NAAQS promulgated by the EPA had been set forth by Congress instead, there would be no disagreement as to the legislative nature of the rulemaking.[154] Further, Justice Stevens stated that the nature of the power exercised rather than the party exercising it was determinative of its legislative character.[155] Justice Stevens thus found it clear that administrative agencies do actually exercise executive and legislative powers.[156]

Looking at the text of Article I section 1 of the Constitution from a different point of view than Justice Thomas, Justice Stevens pointed out that while all legislative powers are vested in the Congress, there is nothing in the language of Article I section 1 that limits the authority of Congress to delegate those powers to others.[157] So long as the delegation sets forth a "sufficiently intelligible principle," the Justice concluded that there was nothing unconstitutional about an actual delegation of legislative authority.[158] Following Justice Stevens' reasoning, the functional test of whether the authority delegated is sufficiently defined produces the same outcome regardless of whether there is actual legislative delegation or not.[159]

---

acknowledged that the reality of government is that Congress can not fill in all the details and requires assistance from administrative agencies to do its job. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)).

[152] *Id.* at 488-89 (Stevens, J., concurring).

[153] *Id.* at 488 (Stevens, J., concurring).

[154] *Id.* at 488-89 (Stevens, J., concurring).

[155] *Id.*

[156] *Id.* Justice Stevens stated, for example, that authority granted to members of the Cabinet and federal agents should be denoted as executive in nature, even though it is not exercised by the President himself. *Id.* Moreover, the Justice added the following: "[t]he Court was probably mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power." *Id.* at 489 (citing 1 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE § 2.6, 66 (3d ed. 1994)).

[157] *Whitman*, 531 U.S. at 488-89 (Stevens, J., concurring).

[158] *Id.*

[159] *Id.* (Breyer, J., concurring).

D. JUSTICE BREYER'S OPINION, CONCURRING IN PART AND CONCURRING IN JUDGMENT

Justice Breyer, while joining in the Court's opinion regarding the delegation question, and concurring in the judgment, took issue with the Court's reasoning in determining that economic costs could not be considered when setting NAAQS under section 109(b)(1) of the CAA.[160] Justice Breyer offered an alternate analysis that would not focus solely on the need for an express "textual commitment" but would resort to an examination of the legislative history and the structure of the statute.[161] The Justice explained that this examination would equally result in the conclusion that there was a congressional decision not to allow the EPA to consider costs.[162] Surveying the legislative history, Justice Breyer concluded that the CAA was meant to be "technology forcing."[163] Justice Breyer stated that section 109(b)(1) only requires the Administrator to set standards within the constraints of the terms "requisite to protect the public health" and with "an adequate margin of safety."[164] According to Justice Breyer, "safe" does not mean free of any risk, but standards may be evaluated within the context of circumstances and other comparative health risks. The Administrator may use her discretion afterwards to determine which standards would be "requisite to the public health."[165] The Justice concluded that this discretion would be sufficient for the Administrator to avoid any risk of regulating against trivial hazards while protecting against the industry fear that the EPA would lead to its downfall by attempting to regulate against every health risk.[166]

---

[160] *Id.* at 490-96 (Breyer, J., concurring)

[161] *Id.* at 490-92 (Breyer, J., concurring)

[162] *Id.*

[163] *Whitman*, 531 U.S. at 491-93 (Breyer, J., concurring). This meant, in essence, that in order to prompt growth of pollution control technology, industries would have to come up with a way of doing what was considered impossible at the time. *Id.* This was to be done whether it was economically feasible or not. *Id.* Moreover, costs could be taken into consideration in other situations, for example, when determining how to implement the NAAQS. *Id.* at 492-94 (Breyer, J., concurring).

[164] *Id.* at 494 (Breyer, J., concurring).

[165] *Id.* at 494-95 (Breyer, J., concurring)

[166] *Id.*

V. CONCLUSION

The Supreme Court in *Whitman v. American Trucking Ass'ns, Inc.* ruled that a broad grant of discretion to the Administrator of the EPA to promulgate NAAQS under a "public interest" standard does not rise to the level of an unconstitutional delegation of legislative authority.[167] In coming to this conclusion, the Court made two important points. First, the Court elected not to accept a radical departure from its traditional non-delegation jurisprudence by affirming the importance of separation of powers and the "intelligible principle" standard for Congressional delegations of authority.[168] Second, the Court unanimously affirmed the D.C. Circuit decision that section 109(b)(1) unambiguously barred the EPA from considering costs in setting NAAQS.[169]

By declining this opportunity to diverge from its policy of approving broad grants of authority to administrative agencies, the Court has also affirmed the policy set out in *Mistretta*, that if Congress is to keep up with our rapidly changing and advancing society, it needs help to do so.[170] Detractors of delegations to administrative agencies argue that "important choices of social policy" ought to be made by Congress, not by bureaucrats who have not been elected and therefore do not truly represent the people.[171] To the contrary, as the Court apparently agrees, administrative agencies serve important functions. They can assist in obtaining information, implement legislation, and provide ongoing responses to social or economic changes not originally foreseen when the statute was passed.[172]

---

[167] *Id.* at 472.

[168] *Id.*

[169] *Whitman*, 531 U.S. at 471.

[170] *Mistretta*, 488 U.S. at 372. Assessing the outcome in this case, it is clear that the Court has decided not to second guess Congress and allow the EPA and the administrative state to come out ahead of industry. Jeff Brax, *Supreme Court Reinstates Clean Air Standards, Rejects Improper Delegation Challenge,* 28 ECOLOGY L.Q. 541, 542 (2001).

[171] Alfred C. Aman, Jr. & William T. Mayton, Administrative Law §1.1 at 12-13 (1993). These advocates of strict application of non-delegation jurisprudence argue that administrative agencies are not politically accountable and therefore are able to make decisions to establish binding policy that Congress would be unlikely to make because it needs to satisfy its constituents, including those very industries regulated under the CAA. Patricia Ross McCubbin, *Case Commentary: The D.C. Circuit Gives New Life and New Meaning to the Nondelegation Doctrine in American Trucking Ass'ns v. EPA,* 19 VA. ENVTL. L.J. 57, 84-86 (2000).

[172] Shuren, *supra* note 5, at 294-99 (discussing the evolution of rationales for administrative agencies).

Agencies are invaluable because they "can respond effectively and efficiently to new situations to which Congress is not equipped to respond due to lack of time, information, or consensus of opinion to enact legislation."[173]

In terms of its effect on human health and well being, the Clean Air Act may be one of the most important environmental statutes.[174] The Supreme Court has agreed with the principle that the CAA is meant to protect the public health without any regard to cost.[175] By affirming this tenet, the Court has pushed industry to fulfill the purpose of the statute, forcing its technology to keep up with statutory demands, even when it may not seem economically or technically feasible.[176]

---

[173] *Id.* at 298.

[174] Sunstein, *supra* note 6, at 307 (discussing the future of the Clean Air Act and the role of the non-delegation doctrine in improving EPA performance).

[175] *Whitman*, 531 U.S. at 471. Justice Breyer, in his survey of the legislative history of the CAA, related that when introducing the 1970 amendments to the CAA, Senator Edmund Muskie stated directly that Congress should not be limited to "what is or appears to be technologically or economically feasible," but rather should focus on its task to protect public health even when the tools to do so are not currently available. *Id.* at 490-91 (Breyer, J., concurring) (citing the Legislative History of the Clean Air Amendments of 1970, 116 Cong. Rec. 32901-02 (1970)).

[176] *Whitman*, 531 U.S. at 491-92 (Breyer, J., concurring). The Court referred to the fact that the Clean Air Amendments of 1970 were intended to be a "drastic remedy to . . . a serious and otherwise uncheckable problem." *Id.* (citing Union Elec. Co. v. EPA, 427 U.S. 246, 257 (1976)).