Loose Canons: Statutory Construction and the New Nondelegation Doctrine

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Introduction

Should judges construe statutes narrowly to avoid deciding whether Congress has unconstitutionally delegated legislative authority to another body? The Supreme Court's recent decision in *Whitman v. American Trucking Ass'ns*[1] sheds light on this issue. The Court rejected the District of Columbia Circuit's practice of ordering administrative agencies to narrowly construe statutes to avoid possible violations of the nondelegation doctrine.[2] Since the Court did not examine the question of whether its rationale for rejecting administrative saving constructions should likewise apply to courts, this question remains open, and of great interest to scholars, judges, and litigants.[3] Indeed, this question raises issues central to the operation of federal courts, administrative law, and to constitutional law. Judicial reliance upon the nondelegation doctrine as a source of constitutional authority to revise regulatory statutes could aggrandize the judiciary at the expense of the more democratic branches of government, and could significantly affect public law.

This article has two major aims. Descriptively, this article disputes the conventional view that numerous canons of construction, including the canon that courts should construe statutes to avoid

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[1] 531 U.S. 457 (2001).

[2] Id. at 472-73. *Cf.* American Trucking Ass'ns. v. Browner, 175 F. 3rd 1027, 1038 (D.C. Cir. 1999), *modified on petition for rehearing en banc,* 195 F.3rd 4, *reversed in part sub. nom.* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001); International Union, UAW v. OSHA, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

[3] *See* Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns,* 87 Cornell L. Rev. 452, 476 (2002) (reading *American Trucking* as suggesting that courts, rather than agencies, should interpret statutes to avoid nondelegation claims); Cass Sunstein, *Regulating Risks After ATA,* ___ SUP. CT. REV ___, ____ (2002) (identifying judicial saving construction as an available response to serious nondelegation concerns after *American Trucking*). *Cf.* American Trucking, 531 U.S. at 472-73.

constitutional issues if fairly possible (the avoidance canon), currently implement nondelegation values.[4] It shows that the nondelegation doctrine has played little or no role in statutory construction. Normatively, this article argues that the nondelegation doctrine should play little or no role in statutory construction. It examines Justice Scalia's reasons for rejecting administrative construction as a cure for non-delegation ills in *American Trucking* and explains how this reasoning applies to judicial construction as well.[5] Construction by another branch of government just does not solve the problem created by arguably improper delegation.[6] This article also refines this argument extending Scalia's analysis, by pointing out its limits, and adds to it, by exploring the consequences of not avoiding the constitutional issue. This exploration of consequences emphasizes a point neglected in the literature: a constitutional ruling on nondelegation does not formally limit the policy choices available to Congress. Because of this, the avoidance canon has less value in the nondelegation context than in other contexts.

While the nondelegation doctrine has played less of a role in statutory construction than many

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[4] *Cf.* Cass Sunstein, *Nondelegation Canons,* 67 U. CHI. L. REV. 315 (2000) (arguing that numerous substantive canons of statutory construction implement nondelegation doctrines); Lisa S. Bressman, *Essay: Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State,* 109 YALE L. J. 1399, 1409-11 (2000) (describing the application of clear statement rules and the avoidance canon as "surrogates for the nondelegation doctrine"); Ernest Gelhorn, *The Proper Role of the Nondelegation Doctrine,* 31 ENVT'L L. REP. (ENVT'L L. INST.) 10232, 10232 (2001) (claiming that the lower court opinion in *American Trucking was* "remarkable only for its ordinariness in applying the nondelegation doctrine in a limited sphere," that of statutory interpretation).

[5] *See* American Trucking, 531 U.S. at 473.

[6] *Cf.* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance,* 2000 SUP. CT. REV. 223, 228 (2000) ("if the point of the nondelegation doctrine is to ensure that Congress makes important statutory policy, a strategy that requires the judiciary . . . to rewrite . . . a . ..statute cannot . . .serve" the doctrine's goal.)

scholars suggest, the nondelegation doctrine has played a role in a few significant recent decisions. Justice Rehnquist's concurring opinion in the "*Benzene Case*"[7] (evaluating the legality of an Occupational Safety and Health Administration standard for benzene) called for a revival of the nondelegation doctrine,[8] which the Court had used to strike down significant New Deal legislation at the end of the Lochner-era.[9] A small group of scholars, following Rehnquist's lead, called for a revival of the nondelegation doctrine.[10]

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[7] Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980).

[8] Id. at 672-688.

[9] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking down New Deal legislation establishing restrictions on "hot oil" under the nondelegation doctrine); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down New Deal industrial codes under the nondelegation doctrine) . *See also* American Textile Manufacturers Union, Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist J., dissenting) (reiterating his support for a revival of the nondelegation doctrine, this time with Justice Burger joining his opinion). *See generally* Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal,* 32 ARIZ. STATE L. J. 941, 942-43 (2000) (suggesting that the nondelegation doctrine expressed Lochner-era hostility to "socially progressive legislation").

[10] *See e.g.* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Randolph J. May, *The Public Interest Standard: Is it Too Indeterminate to be Constitutional,* 53 FED. COMM. L. J. 427 (2001) (calling for Congressional amendment of the public interest standard, because of a conflict with nondelegation principles); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999); David Schoenbrod, *Delegation and Democracy: A Reply to my Critics*, 20 CARDOZO L. REV. 731 (1999); Serge Mezhburd, *The Unintelligible Standard: Rethinking the Mandate for the FTC from a Nondelegation Perspective,* 57 N.Y.U. ANNUAL SURVEY OF AMER. L. 361 (2000); Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation,* 68 CORNELL L. REV. 1 (1982) (arguing for a nondelegation doctrine revival based on public choice theory); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power,* 36 AM. U. L. REV. 295, 296 (1987) (broad delegation "deranges" virtually all constitutional relationships). *See also* Gary Lawson, *The Rise and Rise of the Administrative State,* 107 HARV. L. REV. 1231, 1237-1241 (1994) (contrasting the "true constitutional rule of nondelegation" with the "post-New Deal positive law"). For responses to these advocates of a revival, *see* JERRY L.

The *Benzene* plurality opinion construed the Occupational Health and Safety Act[11] (OSHA) to require a finding of significant risk on statutory grounds, but responded to the Rehnquist concurrence by stating that absent this construction the OSHA "might" offend the nondelegation doctrine.[12] The Supreme Court subsequently suggested, in a footnote in *Mistretta v. United States,*[13] that the nondelegation doctrine has played a significant role in statutory construction, through application of a familiar statutory canon requiring judges to construe statutes to avoid grave doubts about a statute's constitutionality, when such a construction is reasonably available.[14] The District of Columbia Circuit, in two cases reviewing rulemaking under OSHA[15] and the Clean Air Act[16], characterized legislation as suspect under the nondelegation doctrine and ordered the implementing agency to adopt a narrowing construction, citing the *Mistretta* footnote and *Benzene* to support its rulings.[17] Several scholars have

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MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 139-40 (1997); Dan M. Kahan, *Democracy Schmemocracy,* 20 CARDOZO L. REV. 795 (1999); Peter Schuck, *Delegation & Democracy: Comments on David Schoenbrod,* 20 CARDOZO L. REV. 775 (1999). Richard Stewart, *Beyond Delegation Doctrine,* 36 AM. U. L. REV. 323 (1987).

[11] 29 U.S.C. §§ 651-678.

[12] *See Benzene,* 448 U.S. at 646.

[13] 488 U.S. 361, 373 n. 7 (1988).

[14] *See e.g.* United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998).

[15] 29 U.S.C. §§ 651-678, 3142-1.

[16] 42 U.S.C. § 7401-7671.

[17] *See* American Trucking Assn's v. Browner, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (citing Indus. Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685 (1980)), *modified on petition for rehearing en banc,* 195 F.3rd 4, *reversed in part sub. nom.* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001); International Union, UAW v. OSHA, 938 F.2d 1310, 1316

argued that the nondelegation doctrine has not become dormant but has been "relocated" in the form of numerous canons of statutory construction.[18] This claim goes far beyond the claim that application of the avoidance canon as applied to nondelegation claims serves the nondelegation doctrine, identifying numerous clear statement rules (rules eschewing various substantive results absent explicit statements calling for those results in statutes) with the nondelegation doctrine.[19] These scholars favor the resulting quasi-constitutional law-making,[20] in the form of constitutionally motivated "construction" of statutes to

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(D.C. Cir. 1991) (quoting Mistretta, 488 U.S. at 373 n.7). *See also* International Union, UAW v. OSHA, 37 F.3d 665 (D.C. Cir. 1994) (upholding agency construction that followed the remand in the first UAW case).

[18] *See* Sunstein, *supra* note 4; Bressman, *supra* note 4,at 1409-11; Gelhorn, *supra* note 4, at 10232 (claiming that the lower court opinion in *American Trucking was* "remarkable only for its ordinariness in applying the nondelegation doctrine in a limited sphere," that of statutory interpretation). This article will not focus upon theories of statutory interpretation that bear nondelegation labels, but address concerns markedly different from those central to the nondelegation doctrine. For example, John Manning has argued that cases barring delegation of lawmaking authority to people Congress directly controls might justify a refusal to consider legislative history. *See* John F. Manning, *Textualism as a Nondelegation Doctrine,* 97 COLUM. L. REV. 673 (1997); Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc. 501 U.S. 252 (1991) (rejecting delegation of authority to a board under Congressional control); Ins v. Chadha, 462 U.S. 919 (1983) (rejecting one house veto); Bowsher v. Synar*,* 478 U.S. 714 (1986) (rejecting delegation to Congressional agents or members). Notwithstanding the title of Manning's article, he focuses on a limit upon who may receive delegated authority, rather than the focus of this article, limits on what authority may be delegated at all. *See* Manning, *supra* at 728-29 (distinguishing his self-delegation concerns from those surrounding the nondelegation doctrine). *Cf.* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers,* 53 VAND. L. REV. 1457 (2000) (rebutting Manning's constitutional rejection of legislative history). My article focuses upon the problem of an improper delegation of legislative authority to a judicial or administrative body, which unquestionably has constitutional authority to implement law passed by Congress.

[19] *See* Sunstein, *supra* note 4, at 316 n. 5.

[20] *See generally* William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,* 45 VAND. L. REV. 593 (1992).

avoid nondelegation problems.[21] These commentators support a "new" nondelegation doctrine, not as a source of rulings holding statutes unconstitutional, but as a ground for narrow statutory construction.[22]

The Supreme Court's *American Trucking* decision, however, dealt a blow to the new nondelegation doctrine, by reversing the D.C. Circuit's nondelegation ruling. The Court held that the principle goal setting provision of the Clean Air Act - the provision requiring EPA to set health based national ambient air quality standards -[23] clearly did not offend the nondelegation doctrine[24] and declined to construe this provision to authorize consideration of cost in setting health-based air quality standards in order to avoid the nondelegation issue.[25] The Court declined to construe the statute to avoid the constitutional issue, because Congress had decided, albeit not through a clear statement explicitly excluding costs, that EPA should base its NAAQS decisions solely on protecting public

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[21] Sunstein, *supra* note 4, at 317, 341-343; Note, *The Weak Nondelegation Doctrine and American Trucking Ass'ns v. Browner,* 2 B.Y.U. L. REV. 627 (2000).

[22] *See e.g.* Alex Forman, Note, *A Call to Restore Limitations on Unbridled Congressional Delegations: American Trucking Ass'ns v. EPA,* 34 INDIANA L. REV. 1476 (2001) (calling for courts to demand limiting constructions from agencies in order to limit delegations to administrative agencies); Bressman, *supra* note 4 (advocating a new nondelegation doctrine and claiming that Supreme Court precedent supports it); Cass Sunstein, *Is the Clean Air Act Constitutional?,* 98 MICH. L. REV. 303, 337, 350 (1999) (arguing that the new nondelegation doctrine promotes rule of law values); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 50 (1969) (calling for administrative clarification of legislative standards); Kenneth Culp Davis, *A New Approach to Delegation,* 36 U. CHI. L. REV. 713 (1969). *Cf.* Mark Seidenfeld & Jim Rossi, *The False Promise of the New Nondelegation Doctrine,* 76 NOTRE DAME L. REV. 1 (2000) (criticizing the new nondelegation doctrine).

[23] 42 U.S.C. § 7409(b)(1).

[24] American Trucking, 531 U.S. at 474 (discretion allowed by section 109(b)(1) is "well within the outer limits of our nondelegation precedent").

[25] Id. at 471.

health.[26] So, a construction requiring EPA to consider cost was not reasonably available under the statute.[27] Justice Scalia's opinion for the unanimous Court explicitly rejected one form of the new nondelegation doctrine by flatly repudiating the D.C. Circuit approach of ordering administrative agencies to narrowly construe statutes to avoid nondelegation problems as theoretically unsound.[28]

The issue of whether judicial statutory construction serves the nondelegation doctrine continues to matter after *American Trucking.* Academic proponents of the new nondelegation doctrine have continued to support activist judicial construction, employing numerous substantive canons of construction.[29] But scholars recognize that substantive canons of construction allow judges to engage in quasi-constitutional law-making, accomplishing results through statutory construction that the constitution may not directly authorize.[30] The avoidance canon, in particular, may extend judicial policy making power by creating a constitutional penumbra,[31] an effective extension of scope of a

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[26] *See* id. at 465-471.

[27] Id. at 471.

[28] *See* id. at 472-73.

[29] *See* Sunstein, *supra* note 3 (arguing for judicial activism on a variety of grounds); Cass Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001) (same). *Cf.* Bressman, *supra* note 3, at 452-453 (calling for administrative law standards to "discipline delegation). *See also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State,* 103 HARV. L. REV. 405 (1989) (arguing for increased activism through substantive canons); Eben Moglen and Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing Fictions of Statutory Interpretations,* 57 U. CHI. L. REV. 1203 (1990) (contesting Sunstein's views).

[30] *See generally* Eskridge & Frickey, *supra* note 20.

[31] *See generally* RICHARD POSNER, THE FEDERAL COURTS: CRISES AND REFORM 285 (1985) ("The practical effect of interpreting statutes to avoid raising constitutional questions . . . is to enlarge the . . . reach of constitutional prohibition beyond even the most extravagant modern interpretations of the

constitutional doctrine as an influence in statutory interpretation. This implies that statutory interpretation in the service of the nondelegation doctrine could greatly limit the scope of regulatory programs.

Moreover, narrowing statutory construction in the service of a nondelegation doctrine might appear attractive to federal judges, because it comports with current judicial skepticism regarding federal regulatory power.[32] The Supreme Court has become increasingly active in imposing substantive and structural constitutional restraints upon the federal government's regulatory powers. The Court has limited the means Congress can employ to carry out its policy choices, restricting the use of private damage actions to enforce federal obligations against states under principles derived from the 11th Amendment,[33] restricting the federal government's form under separation of powers principles[34] and

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Constitution . . ."); William K. Kelly, *Avoiding Constitutional Questions as a Three Branch Problem,* 86 CORNELL L. REV. 831, 860-65 (2001) (treating this problem as a "traditional critique" of the avoidance canon).

[32] *See e.g.* Richard L. Revesz, *Environmental Regulation, Ideology and the D.C. Circuit,* 83 VA. L. REV. 1717, 1766 (1997) (concluding that the judges on the powerful D.C. circuit "employ a strategically ideological approach to judging."); Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust,* 25 HARV. ENVTL. L. REV. 405, 449 (2001) (describing an ideological swing toward conservatism on the D.C. Circuit leading to "a gauntlet of hurdles" to regulation).

[33] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (striking down order that Florida negotiate with the Seminole Indian tribe under the Indian Gaming Act as inconsistent with the 11th Amendment); Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank, 527 U.S. 627 (1999) (invalidating federal abrogation of state immunity from private suit for patent infringement); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999) (invalidating federal abrogation of state immunity from private suit for false and misleading advertising); Alden v. Maine, 527 U.S. 706 (1999) (invalidating enforcement of the Fair Labor Standards Act by a private individual against his own state in state court); Kimel v. Board of Regents, 528 U.S. 62 (2000) (holding state immune from suit under Age Discrimination in Employment Act); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (forbidding

limiting coercion of states under the 10th Amendment.[35] Even more importantly, the Court, in a series of 5-4 rulings, has adopted an increasingly narrow view of Congressional authority to regulate interstate commerce[36] under Article I, section 8 of the Constitution and to enforce the equal protection clause of the Fourteenth Amendment,[37] the two principle constitutional sources of federal regulatory power. In

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private damage actions against the states under the Americans with Disabilities Act). *See generally Symposium: State Sovereign Immunity and the Eleventh Amendment,* 75 NOTRE DAME L. REV. 817 (2000).

[34] Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the line item veto); Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc. 501 U.S. 252 (1991) (rejecting delegation of authority to a board under Congressional control); Ins v. Chadha, 462 U.S. 919 (1983) (rejecting one house veto of agency actions); Bowsher v. Synar, 478 U.S. 714 (1986) (rejecting delegation to Congressional agents or members).

[35] *See e.g.* New York v. United States, 505 U.S. 144, 174-88 (1992) (holding that the take title provisions of the Low-Level Radioactive Waste Policy Act violate the Tenth Amendment); Printz v. United States, 511 U.S. 898, 933-35 (1997) (holding that federal requirement that states conduct background checks on prospective handgun purchasers violates the Tenth Amendment). *Cf.* Reno v. Condon, 528 U.S. 141 (2000) (upholding law prohibiting states from divulging information collected by state motor vehicle departments).

[36] United States v. Lopez, 514 U.S. 549 (1995) (constitutional grant of authority to regulate interstate commerce does not allow for federal restrictions on gun possession near schools); United States v. Morrison, 529 U.S. 598, 607-19 (2000) (interstate commerce authority does not authorize creation of a federal remedy for gender-based violence).

[37] *See* Garrett, 531 U.S. at 365-74 (2001) (holding that Congress may not enforce the equal protection clause of the fourteenth amendment by requiring reasonable accommodations for the disabled); Morrison, 529 U.S. at 619-627 (Congress has no power to create a private right of action against perpetrators of gender-based violence under the 14th amendment); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act as outside the scope of Congressional authority to enforce the 14th Amendment); Florida Prepaid, 527 U.S. at 639-647 (federal remedy for state patent violations not appropriate under the14th Amendment); College Savings Bank, 527 U.S. at 672-75 (federal remedy for false and misleading state advertising not appropriate under 14th Amendment). *See also* Catherine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison,* 114 HARV. L. REV. 135 (2000).

many of these cases limiting Congressional regulatory power, the dissenters accused the majority of taking steps toward a return to the *Lochner*-era practice of applying theoretically unsound and unworkable formalistic constitutional doctrine to advance laissez-faire goals.[38]

The Court's treatment of federalism issues shows that the extension of constitutional protection through statutory interpretation can matter even when a dormant constitutional doctrine is at stake. The Tenth Amendment to the Constitution states that powers not granted the federal government are reserved to the states and the people, respectively.[39] In a line of cases directly addressing the scope of the Tenth Amendment, the Court upheld application of the Fair Labor Standards Act (FLSA)[40] to state government in *Maryland v. Wirtz,*[41] then repudiated that position, 5-4, in *National League of Cities v. Usery.*[42] *National League of Cities* held that the FLSA, by applying to "States *qua* States,"[43] would "impermissibly interfere [with] integral government functions,"[44] thereby violating the Tenth Amendment. In *Garcia v. San Antonio Metropolitan Transit Authority,*[45] however, the Court

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[38] *See, e.g.,* Morrison, 527 U.S. at 644 (Souter J., dissenting); Lopez, 514 U.S. at 608 (Souter J., dissenting).

[39] U.S. Const. Amend. 10.

[40] 29 U.S.C. §§ 201-219.

[41] 392 U.S. 183 (1968).

[42] 426 U.S. 833 (1976).

[43] Id. at 847.

[44] Id. at 851.

[45] 469 U.S. 528 (1985).

overruled its Tenth Amendment holding in *National League of Cities.*[46] The *Garcia* Court found a state right to freedom from federal regulation of traditional government functions "unworkable" and "unsound in principle."[47] Thus, the Court, when it directly faced the constitutional issue, emphatically rejected the notion that the 10th Amendment immunizes traditional state governmental functions from federal regulation.[48]

Yet in *Gregory v. Ashcroft*,[49] the Court applied the avoidance canon to reach the kind of constitutional result it rejected in *National League of Cities.*[50] The *Gregory* Court, after referring to the Tenth Amendment,[51] held that the federal Age Discrimination in Employment Act of 1967[52] did not protect state judges from state mandatory retirement laws.[53] It announced a plain statement rule enforcing the constitutional principle it had rejected in *National League of Cities,* stating that the Court will read statutes not to "intrude on state government functions" absent a plain statement in the statute

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[46] Id. at 557.

[47] Id. at 546.

[48] *See* id. at 531 (stating that the federal judiciary's use of the 10th Amendment to immunize traditional state governmental functions from federal regulation is unworkable and "inconsistent with [the] established principles of federalism).

[49] 501 U.S. 452 (1991).

[50] *See* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF FEDERAL POLICY 687 (1995) (*Gregory* demonstrates that "what the court taketh away as constitutional protection it can revive as canonical interpretive protection.").

[51] Gregory, 501 U.S. at 457, 463.

[52] 29 U.S.C. §§ 621-634.

[53] Id. at 473.

expressing the intent to do so.[54]

The Tenth Amendment experience suggests that the avoidance canon has the potential to revive the nondelegation doctrine as a substantial restraint upon federal regulation, notwithstanding its dormant constitutional status. Hence, the question of whether judges should interpret statutes to avoid nondelegation issues is of vital importance.

This article argues that construction of statutes to avoid nondelegation claims poses enormous theoretical and practical problems. Most fundamentally, a strong nondelegation claim casts doubt not just upon the constitutionality of a statute, but also upon the constitutional authority of government agencies and courts to adopt saving constructions. Construction to avoid serious nondelegation claims invites, indeed may require, unconstrained judicial or administrative lawmaking.[55]

This article begins with a review of the nondelegation doctrine, the avoidance canon, the claim that the nondelegation doctrine has been "relocated" in numerous statutory canons of construction, and the argument that recent Supreme Court statutory construction reflects a revival of the dormant nondelegation doctrine.[56] It shows that the canons of construction have not played a major role in implementing the nondelegation doctrine. It then shows that nondelegation concerns played no

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[54] Id. at 464.

[55] *Cf.* Thomas O. McGarity, *The Clean Air Act at a Crossroads: Statutory Interpretation and Longstanding Administrative Practice in the Shadow of the Delegation Doctrine,* 9 N.Y.U. ENVTL L. J. 1, 4 (2000) (characterizing the D.C. Circuit's holding in *American Trucking* as "an unprincipled arrogation of power to the federal judiciary").

[56] *Cf.* Sunstein, *supra* note 4.

discernible role in other cases that some scholars have identified with the doctrine.[57]

The article's second part develops the argument that grave doubts about the constitutionality of a statute under the nondelegation doctrine create equally grave doubts about the constitutionality of saving constructions. It explains why the *American Trucking* Court was probably correct to disapprove of judges ordering administrative agencies to narrowly construe statutes in order to save them from nondelegation claims. It further shows that the Court's rationale for discouraging saving administrative construction plausibly extends to the judiciary as well, calling into question judicial application of the avoidance canon to avoid adjudication of nondelegation claims.

The final part addresses the problem of what courts should do when confronting a nondelegation problem. This discussion leads to renewed respect for the value of the limits to the application of the avoidance canon articulated in Supreme Court decisions. The Court should respect these limits and the limits of the nondelegation doctrine itself, to prevent the constitutional problems outlined in this article from arising frequently. Congress too must play its part, by continuing to make at least some general policy when writing legislation.

Statutory construction offers a constitutionally unsuitable home for a revival of the nondelegation doctrine. Ironically, in this area, construction to avoid a constitutional problem might create constitutional dilemmas where few currently exist, with quite pernicious consequences for democratic governance.

I. **The Nondelegation Doctrine and Statutory Construction**

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[57] *Cf.* Bressman, *supra* note 4, at 1401 (claiming that "*Iowa Utilities Board*" may be understood to revive the dormant nondelegation doctrine).

This part describes the nondelegation doctrine and the contours of the avoidance canon. It then examines the claim that the nondelegation doctrine has been relocated in the form of numerous canons of construction.

A. **The Nondelegation Doctrine**

Article I of the constitution vests all legislative authority in the Congress.[58] The Supreme Court has inferred a constitutional prohibition of delegation of legislative authority from this affirmative grant of authority.[59]

The constitution authorizes the executive branch to "execute" laws, so the Court has consistently recognized that the nondelegation doctrine does not prohibit administrative agencies or courts from filling in the details of very general statutes or from applying general principles to new facts.[60] In particular, agencies and, in some circumstances, judges, may write legislative rules implementing Congressional legislation embodying a general policy choice.[61]

Nevertheless, cases involving quasi-legislative rulemaking can sometimes raise nondelegation

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[58] U.S. Const. Art. I, § 1.

[59] *See* Mistretta v. United States, 488 U.S. 361, 371 (1988).

[60] *See* U.S. Const. art. II, sec. 3; Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (Congress may delegate power to "fill up the details" under general provisions of law). *See also* Manning, *supra* note 18, at 695 (textualists accept that agencies and courts routinely define the specific meaning of general statutory texts).

[61] *See* Loving v. United States, 517 U.S. 748, 758-59 (1996) (entities other than Congress may write prospective rules executing a statute); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) (approving agency authority to "make supplementary rules and regulations . . ."); Mistretta, 488 U.S. at 368-369, 371 (upholding delegation of authority to write sentencing guidelines to a commission including federal judges).

issues. When the executive branch enacts rules, they operate generally and prospectively, and so resemble ordinary legislation.[62] While administrative agencies sometimes make policy judgments through case-by-case decisions, lawsuits arising under the nondelegation doctrine usually challenge executive branch exercises of rulemaking authority.[63] The challenges that have arisen outside of the rulemaking context have been few and unsuccessful.[64]

The nondelegation doctrine has little substantive content. Unlike, for example, a constitutional provision forbidding limits on speech, its strictures can apply in almost any substantive context.[65] In

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[62] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 488-89 (2001) (Stevens J., concurring).

[63] *See e.g.* Panama Refining Co. v. Ryan, 293 U.S. 388, 405-412 (1935) (challenge to executive orders and Interior Department regulations governing oil production); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-527 (1935) (describing poultry code enacted through an executive order); Mistretta, 488 U.S. at 371 (challenge to sentencing guidelines enacted by a Sentencing Commission); National Broadcasting Co. v. United States, 319 U.S. 190, 209 (1942) (regulation of broadcasting); Loving, 517 U.S. at 754-58 (executive order establishing aggravating factors that can justify the death penalty's application in cases before military tribunals); Yakus v. United States, 321 U.S. 415, 418, 438 (1943) (Office of Price Administration's maximum price regulations).

[64] *See e.g.* American Power Co. v. S.E.C. 329 U.S. 90, 96, 104-106 (1946) (upholding an order dissolving two regulated utilities); Lichter v. United States, 334 U.S. 743, 747-53, 774-787 (1947) (upholding orders forcing disgorgement of "excess profits" from several named companies and individuals); Fahey v. Mallonee, 332 U.S. 245, 247-250 (1946) (upholding federal takeover of Long Beach Federal Savings and Loan Ass'n) . *Lichter* involved orders that applied a prior general administrative directive elaborating the relevant statutory standard. But the petitioners did not challenge the administrative directive itself. Instead, they sought to invalidate the specific actions undertaken under the statute against them on the grounds that the statute itself violated the nondelegation doctrine.

[65] I use the term "almost" because the doctrine may not apply fully when the body to whom Congress delegates the authority has independent authority over the subject matter. *See infra* notes 291-292, 344-345 and accompanying text. Nevertheless, the nondelegation doctrine applies quite broadly to a wide variety of subject matter.

other words, it prohibits all delegations of legislative authority almost regardless of subject matter, and allows all delegations of implementation authority, again regardless of subject matter.[66] Indeed, our constitutional system routinely delegates the most drastic decisions the legal system ever makes, decisions about who shall live and who shall die, to private bodies, juries deciding death penalty cases.[67] And the Court has upheld delegations of authority to write rules establishing the factors that can justify imposition of the death penalty or a life sentence.[68] Hence, the doctrine does not eliminate private or executive branch implementation of important decisions or particular types of decisions.[69]

The modern Court has emphasized that the nondelegation doctrine responds to concerns about separation of powers.[70] Therefore, the doctrine functions as a procedural check on the form of government, rather than as a restriction upon the substance of statutes.

For many years, the doctrine existed only in dicta. Until 1935, the Court never based a

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[66] *See* Panama Refining, 293 U.S. at 406, 430 (delegation of authority to regulate oil supplies); United States v. Mazurie, 419 U.S. 544, 546, 556 (1975) (delegation of authority to regulate liquor); Schechter, 295 U.S. at 521-22, 541-42 (delegation of authority to establish codes of fair competition);); Loving, 517 U.S. at 751, 771 (delegation of authority to establish factors justifying the death penalty in murder cases before courts martial).

[67] *See* Duncan v. Louisiana, 391 U.S. 145, 154-157 (1968) (holding that defendants facing the death plenalty have a right to a jury trial).

[68] *See* Loving, 517 U.S. 748; Mistretta, 488 U.S. 361.

[69] *Cf*. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that a delegation of authority to a private industry body that allows it to oppress competitors violates due process).

[70] *See* Loving, 517 U.S. at 758-59 (emphasizing that delegation doctrine involves a distinction between the power to make law and the power to execute it).

constitutional ruling upon the nondelegation doctrine.[71] Indeed, during this period the Court upheld delegations of authority containing either no policy guidance at all or extraordinarily vague guidance for implementing executive branch officials.[72]

In 1935, however, the Court struck down provisions of the National Industrial Recovery Act (NIRA)[73] under the nondelegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*[74] and *Panama Refining Corp. v. Ryan.*[75] One of these provisions authorized the President to adopt privately developed codes of fair competition, with very sparse guidance as to content.[76] Another authorized the President to regulate the supply of oil, but did not spell out a specific policy for this regulation.[77] The Court held, in essence, that the challenged NIRA provisions lacked intelligible

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[71] Mistretta, 488 U.S. at 373.

[72] *See e.g.* Field v. Clark, 143 U.S. 649, 693 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (approving delegation of authority to write the law governing execution of judgments); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 403-04 (1928) (upholding delegation of power to adjust tariffs when rates failed to equalize. . . differences in the cost of production); Buttfield v. Stranahan, 192 U.S. 470, 497-98 (1904) (sustaining delegation of power to "establish uniform standards" for importing tea); New York Central Securities Corp. v. United States, 287 U.S. 12, 24-25 (1932) (upholding a "public interest" standard); United States v. Grimaud, 220 U.S. 506, 515 (1911) (upholding delegation of authority to regulate the occupancy and use of forest preserves).

[73] Ch. 90, 48 Stat. 195 (1933).

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

[75] 293 U.S. 388 (1935).

[76] *See* Schechter, 295 U.S. at 521-523.

[77] *See* Panama Refining, 293 U.S. at 406.

principles to guide its implementers.[78]

In subsequent years, the Court consistently rejected challenges to statutes under the nondelegation doctrine.[79] It upheld, once again, delegations containing very vague policy guidance, such as laws directing regulation serving "the public interest, necessity, or convenience"[83] or authorizing "fair and equitable" regulation.[84] Such standards leave a great deal of room for agency policymaking.

The Supreme Court has emphasized that the doctrine only requires the existence of a general "intelligible" principle in authorizing legislation.[85] This means that the legislation must reflect at least a general policy that guides those implementing the statute.[86] The doctrine does not require detailed legislation.[87] This view of the nondelegation doctrine forms the basis for the modern administrative

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[78] *See* Loving v. United States, 517 U.S. 748, 771 (1996).

[79] Mistretta v. United States, 488 U.S. 361, 373 (1988). The Court did hold that a law delegating standard setting authority to a private industry body constituted "legislative delegation in its most obnoxious form." Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936). It found that this private delegation violated the due process clause of the Fifth Amendment, however, rather than the prohibition on delegating legislative authority without an accompanying intelligible principle. Id.

[83] National Broadcasting Co. v. United States, 319 U.S. 190, 216-217, 225-226 (1943).

[84] Yakus v. United States, 321 U.S. 414, 420, 427 (1943). The statute upheld in Yakus also identified some policy goals and factors to be taken into account in writing just and equitable price controls. *See* id. at 420-27.

[85] *See* Loving, 517 U.S. at 771; Mistretta, 488 U.S. at 372-73. This view of the doctrine actually pre-dates *Schechter* & *Panama Refining*. *See* J.W. Hampton, Jr. Co. v. United States, 276 U.S. 394, 409 (1928) (delegation is not forbidden if accompanied by an "intelligible principle").

[86] *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971) (3 judge panel) (citing Yakus, 321 U.S. at 426; Hampton, 276 U.S. at 409; L. Jaffe, *An Essay on Delegation of Legislative Power,* 47 COL. L. REV. 561, 569 (1947))

[87] *See* Mistretta, 488 U.S. at 372 ("Congress cannot do its job absent an ability to delegate power under broad general directives.").

state, which relies upon legislation that authorizes administrative agencies to make subsidiary policy judgments under fairly general legislation.[88]

Nevertheless, the nondelegation doctrine limits delegation to a wide variety of bodies, not just to administrative agencies. The doctrine rests upon the assumption that Congress may not delegate legislative authority at all, which implies that it may not delegate this authority to anybody. Historically, the doctrine has applied to entities besides administrative agencies.

The only two cases to invalidate statutes on nondelegation grounds involved delegations of power to the President, not just to administrative agencies.[89] And the Court has repeatedly applied the doctrine to legislative delegations of rulemaking authority to the judiciary.[90] Hence, the doctrine generally applies to delegations to any other branch of the federal government.

In practice, the Supreme Court has often accepted as evidence of compliance with the nondelegation doctrine constraints other than an intelligible principle in authorizing legislation.[91] It has

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[88] 1 Kenneth Culp Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE 8-9, 66 (3d ed. 1994).

[89] *See* Shechter, 295 U.S. at 521-22, 525, 537-39; Panama Refining, 293 U.S. at 405, 414-15, 420. *See also* Hampton, 276 U.S. at 403-04 (upholding delegation of power to President to set tariffs).

[90] *See* Wayman v. Southard, 23 U.S. (10 Wheat) 1, 43 (1825) (Marshall, C.J.); Mistretta, 488 U.S. at 368-79 (considering claim that Congressional delegation of authority to write sentencing guidelines to a judicial commission violates the nondelegation doctrine); Manning, *supra* note 6, at 238.

[91] *See generally* Amalgamated Meat Cutters, 337 F. Supp. at 748-763; Sunstein, *supra* note 22, at 349-50 (discussing the idea of procedural safeguards as surrogates for the safeguards of the nondelegation doctrine); Aranson et al., *supra* note 10, at 14 (referring to Meat Cutters as an "authoritative modern statement of the procedural due process gloss on the delegation doctrine.").

suggested, at times, that judicial review,[92] agency construction,[93] and the existence of relevant background legal principles[94] may obviate the need for an "intelligible principle." *American Trucking,* however, rejects agency construction as an acceptable substitute.[95] The Court has also never demanded an intelligible principle when the recipient of delegated authority has adequate independent constitutional authority over the subject matter.[96]

B. **The Avoidance Canon**

For more than 80 years, the Supreme Court has accepted the principle that the courts should construe statutes, if reasonably possible, in a way that allows the Court to avoid resolving grave doubts about a statute's constitutionality.[97] This rule allows the Court to avoid resolving constitutional issues until it is absolutely necessary. This reluctance to resolve constitutional issues rests on important

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[92] *See e.g.* Yakus v. United States, 321 U.S. 414, 426 (1943). *See also* Amalgamated Meat Cutters, 337 F. Supp. at 759-62. *Cf.* Department of the Interior v. South Dakota, 519 U.S. 919, 921-22 (1996) (Justices Scalia, O'Connor, and Thomas dissenting) (doubting that the availability of judicial review is relevant to the question of whether a statute delegates legislative authority to an agency).

[93] *See e.g.* Lichter v. United States, 334 U.S. 742, 783 (1948) (suggesting that administrative clarification of statutory term helps it survive nondelegation doctrine scrutiny).

[94] *See e.g.* Fahey v. Mallonee, 332 U.S. 245, 250 (1947) ("discretion" to regulate in fields with customary practices may exceed permissible discretion in field without such practice).

[95] *See* American Trucking, 531 U.S. at 472-73.

[96] *See e.g.* Loving v. United States, 517 U.S. 748, 772-73 (1996) (nondelegation doctrine may not apply fully to rulemaking regarding military discipline because of President's authority as commander-in-chief); United States v. Mazurie, 419 U.S. 544, 556-557 (1975) (nondelegation doctrine does not apply fully to delegation to an Indian Tribe).

[97] *See e.g.* United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (*citing* United States Delaware and Hudson Co., 213 U.S. 366, 408 (1909)).

prudential considerations. When the Court resolves a constitutional issue, it may permanently limit the scope of future democratic decision-making.[98] If it makes a mistake in such a ruling, only a constitutional amendment (or a rare decision to overrule precedent) can correct it.[99] In most contexts, the avoidance canon reinforces democratic decision-making by allowing statutes that the Court might otherwise find unconstitutional to remain in effect, albeit in narrowed form.

It also serves the function of avoiding erroneous constitutional rulings upholding legislation.[100] Such rulings have the potential to lend the Court's imprimatur to the legislation's policy, even if the legislation's wisdom is questionable.[101] And decisions upholding legislation may permanently limit the scope of important constitutional rights.[102]

Nevertheless, the Court has recognized that the avoidance canon, if applied inappropriately, can undermine democratic decision-making by distorting the policy choices embodied in the legislation the Court construes. For that reason, the Court has emphasized that it may only adopt "reasonably

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[98] *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 27 (1985) (discussing the principle of electoral accountability).

[99] *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions,* 35 BOST. COLL. L. REV. 1003, 1036 (1994). A constitutional amendment ordinarily requires ratification by three-fourths of the state legislatures, so passage of an amendment is very difficult. *See* U.S. Const. art. V.

[100] *See generally* Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues,* 75 HARV. L. REV. 40 (1960).

[101] *See e.g.* Kloppenberg, *supra* note 99, at 1049-1050. *See generally* Bickel, *supra* note 100, at 48.

[102] *See* Korematsu v. United States, 323 U.S. 214, 245-46 (Jackson J., dissenting) (describing ruling upholding internment of citizens of Japanese extraction under the due process clause as a blow to liberty).

available" statutory constructions, not constructions that do violence to the legislative will.[103] Indeed, this aspect of the avoidance canon played an important role in *American Trucking.* Since the Court concluded that the Clean Air Act "unambiguously bars cost considerations from the . . . process" for setting National Ambient Air Quality Standards, it could not construe the Act to include cost in order to avoid deciding the nondelegation issue raised in the case.[104] Justice Scalia, writing for the Court, explained, "No matter how severe the constitutional doubt, courts may choose only between reasonably available interpretations of a text."[105]

In order to avoid disruption of the democratic process through questionable construction, the Court has also held that the canon properly applies only in the case of "grave doubt" about a statute's constitutionality,[106] not in every case where a litigant claims that a constitutional issue exists. Indeed, in *Almendarez-Torres v. United States*,[107] the Court held that judges should only apply the avoidance canon where a "serious likelihood" exists that the Court would otherwise have to strike down the statute.[108] It expressed the fear that otherwise the Court would construe statutes to avoid constitutional issues that "upon analysis, evaporate."[109] In *Rust v. Sullivan,* the Court declined to apply the canon

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[103] *See e.g.* Miller v. French, 530 U.S. 327, 341 (2000) (declining to apply canon).

[104] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 471 (2001).

[105] Id.

[106] *See* Jin Fuey Moy, 241 U.S. at 401.

[107] 523 U.S. 224 (1998).

[108] Id. at 237-38.

[109] Id.

even though the constitutional objections before it (to federal restrictions on abortion counseling) had "some force."[110] *Almendarez-Torres* and subsequent cases demand that the courts examine precedent carefully in assessing whether a grave doubt should exist about a statute's constitutionality before applying the avoidance canon.[111]

The Court is right to recognize that abuse of the avoidance canon can interfere with democratic decision-making. Judge Posner has pointed out that a misinterpretation of a statute, while theoretically correctable through ordinary legislation, may remain uncorrected for a long time in practice.[112] Congress often fails to revise misinterpreted legislation, not because the correction is not needed or desired, but because its members lack the time to consider all needed revisions of existing law as they grapple with an annual budget process, new legislation, provision of constituent services, and fund raising for coming elections.[113]

Prior to *Almendarez-Torres*, the Court has often applied the avoidance canon inconsistently, even though the clearer statements of the avoidance canon going back to Holmes' day have always contained the strictures that the Court subsequently reaffirmed and rationalized in *Almendarez-*

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[110] 500 U.S. 173, 191 (1991).

[111] *See* Almendarez-Torres, 523 U.S. at 239-247 (extensively examining precedent in determining that no grave constitutional doubt should exist). *See e.g*. Jones v. United States, 526 U.S. 227, 239-51 (1999) (same); Zadvydas v. Davis, 121 S. Ct. 2491, 2498-2502 (2001) (same).

[112] *See* POSNER, *supra* note 31, at 285.

[113] *See e.g.* Bressman, *supra* note 4, at 1419 (discussing how competing bills may lessen chances of reenacting stricken legislation); Lawrence C. Marshall, *Let Congress Do It: The Case for An Absolute Value of Statutory Stare Decisis,* 88 MICH. L. REV. 177, 190 (1989) (same).

Torres.[114] The Court has followed its own doctrinal position more consistently since articulating the reasons for the avoidance canon's limits in *Almendarez-Torres.*[115]

C. **Statutory Construction in the Service of the Nondelegation Doctrine**

The avoidance canon authorizes construction to avoid grave doubts about constitutionality under a variety of constitutional provisions.[116] This section examines its application in the nondelegation context. It also considers the claim that the nondelegation doctrine permeates statutory construction, not just under the avoidance canon, but under a large number of other canons as well. Finally, it addresses arguments that the nondelegation doctrine explains a recent Supreme Court case narrowly interpreting statutes without invoking "nondelegation canons."[117]

1. **The Practice of Reaching, Rather than Avoiding, Nondelegation Issues**

Avoidance of the nondelegation doctrine has played a very minor role in the Court's statutory

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[114] Almendarez-Torres, 523 at 237; Ashwander v. TVA, 297 U.S. 288, 348 (1936) (only authorizing avoidance if the saving construction is "fairly possible"); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (canon applies when doubts about constitutionality are "grave").

[115] *See e.g.* Jones, 526 U.S. at 239-51 (declining to apply canon where constitutional doubt is not grave); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 471 (2001) (declining to apply canon where statute is clear); Miller v. French, 530 U.S. 327, 341 (2000) (same).

[116] *See e.g.* N.L.R.B. v. Catholic Bishops of Chicago, 440 U.S. 490, 507 (1979) (free exercise clause of the First Amendment); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns,* 30 U.C. DAVIS. L. REV. 1 (1996); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases,* 30 GA. L. REV. 85 (1995).

[117] *See* Bressman, *supra* note 4.

construction cases. This minor role may reflect the moribund status of the nondelegation doctrine.[118]

In most of the cases adjudicating litigants' requests to narrowly construe a statute to avoid a nondelegation problem, the Court has declined the request and reached the nondelegation issue. In a very early nondelegation case, *Wayman v. Southard,*[119] the Marshall Court rejected a request that it construe the Process Act narrowly to avoid a constitutional issue about Congressional authority to delegate the power to create law governing execution of federal judgments to the federal courts.[120] The Court construed the question before it narrowly, without construing the statute narrowly. It held that Kentucky statutes enacted after the Process Act cannot govern execution of federal judgments.[121] While the Court might have avoided the constitutional issue by saying nothing more than that, it went on to address the nondelegation issue, stating that Congress may authorize federal courts to create the law governing execution of federal judgments.[122]

In later cases as well, the Court declined to avoid nondelegation issues through statutory

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[118] *See* John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 894 (1990) (describing the nondelegation doctrine as "long moribund"); 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, 340 (2000) (describing the nondelegation doctrine as "currently moribund" and suggesting that the nondelegation doctrine has been moribund for some time).

[119] 23 U.S. (10 Wheat.) 1 (1825).

[120] *See* id. at 15 (arguing that construing the Process Acts to authorize "Courts to make execution laws, would be to suppose Congress intended to violate the constitution by delegating their legislative authority to the judiciary.")

[121] *See* id. at 48-49.

[122] *See* id. at 50.

construction. In 1942, broadcasters challenging Federal Communication Commission (FCC) regulations argued that the Court must construe the Communications Act of 1934[123] narrowly in order to avoid an unconstitutional delegation of legislative power.[124] Instead, the Court reached and rejected the nondelegation argument, upholding the regulations.[125] Indeed, the Court, far from trying to duck the nondelegation issue, interpreted the Act broadly to effectuate its purposes in a dynamic changing environment.[126]

A Supreme Court majority has only arguably construed a statute to avoid a nondelegation problem on one occasion, and that occasion involved an anomalous variant of the doctrine. The relevant case, *National Cable Television Ass'n., Inc. v. United States*,[127] involved a challenge to fees that the FCC imposed upon owners of cable television systems. Justice Douglas' opinion for the Court construed the statute authorizing these fees narrowly, explaining that "Congress is the sole organ for levying taxes" and "it would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power."[128] While the opinion did cite nondelegation doctrine precedent, it may have construed the statute narrowly not to avoid a problem of delegation without a guiding intelligible principle, but to avoid the conclusion that the statute authorized an administrative

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[123] 47 U.S.C. §§ 151-161.

[124] Nat'l Broadcasting Co. v. U.S., 319 U.S. 190, 209 (1942).

[125] *See* id. at 215-218.

[126] *See* id. at 219-221.

[127] 455 U.S. 336 (1974).

[128] Id. at 341.

agency to levy a tax.[129]

Justice Douglas, however, cites two nondelegation doctrine cases.[130] He cites *Schechter* for the proposition that Congress may not delegate "essential legislative functions."[131] In context, this seems to suggest that Congress may not delegate any taxation authority.

But Justice Douglas then points out that Congress may delegate authority to an administrative agency if it provides an "intelligible principle" guiding its exercise, citing a case, *Hampton & Co. v. United States,*[132] that upheld delegation of authority to set a tariff - a type of tax. He then states that the "hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems."[133] The opinion, however, does not precisely identify these hurdles.[134] The reference to hurdles, in the plural, does suggest that Douglas sees not one, but at least two hurdles.[135] It is possible that the lack of an intelligible principle is one of the hurdles. But the rest of the decision casts some doubt upon the hypothesis that a want of intelligible principle matters much to this case.[136]

The Court explains why the statute would violate a prohibition on implied delegation of taxation

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[129] Id. at 341-42.

[130] Id. at 342 (*citing* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

[131] Id.

[132] 276 U.S. 394.

[133] National Cable, 415 U.S. at 342.

[134] *See* id.

[135] *See* id. at 342.

[136] *See* id.

authority,[137] but it does not explain why the statute would raise a serious question regarding the existence of an intelligible principle.[138] Indeed, the principle that the FCC relied upon, that the charge should cover all of the costs of regulating cable television, seems as intelligible as the principle the Court adopted, that the charge should cover only the benefits conferred upon the industry through regulation.[139] While the Court found the delegation of taxation authority troubling, the Court did not really decide whether a grave constitutional doubt existed regarding the requirement of an intelligible principle at the core of the nondelegation doctrine.[140]

Two years later, the Court confronted the issue of whether a statute should be construed to avoid a classic nondelegation problem, an arguable lack of an intelligible principle. In *FEA v. Algonquin SNG, Inc.*[141], the Court upheld Presidential imposition of license fees on oil imports under the Trade Expansion Act of 1962, as amended[142].[143] The Court confronted a statute that authorized the President to "take such action . . . as he deems necessary to adjust . . . imports" to avoid national security threats.[144] Since this statute contains only an objective- to avoid national security threats - and

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[137] *See* id. at 341-342.

[138] *See* id.

[139] *See* id. at 341-44.

[140] *See* id. at 340-44.

[141] 426 U.S. 548 (1976).

[142] 19 U.S.C. §§ 1801-1982.

[143] Id. at 550, 571.

[144] Id. at 550.

no specific policy about when and how to avoid such threats, it seems to raise a potential classic nondelegation issue.

The Supreme Court, however, did not construe the statute to avoid the nondelegation issue. It reversed a Court of Appeals ruling holding that this statute authorized only import quotas, but not license fees.[145]

The *FEA* Court squarely rejected the suggestion that it should construe the statute narrowly to avoid a nondelegation problem, finding the statute "clearly sufficient to meet any delegation attack."[146] Unlike the *National Cable Television* Court, the *FEA* Court seriously examined the content of the nondelegation doctrine, and found that the statute presented "no looming problem of improper nondelegation that should affect our reading" of the statute.[147] And indeed, prior cases upholding delegations of taxation authority suggested that the statute did not wholly lack intelligibility.[148]

The *FEA* Court reinterpreted *National Cable Television* to fit conventional nondelegation concepts. In distinguishing that case, the *FEA* Court claimed that the *National Cable Television* decision was "apparently motivated" by a desire to avoid the problem of having to decide whether

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[145] Id. at 557-58.

[146] Id. at 558-59.

[147] Id. at 559-560.

[148] *See e.g.* Field v. Clark, 143 U.S. 649, 683-689 (1892) (giving weight to longstanding practice of delegation of taxation authority to President, and upholding delegation of authority to levy a tariff against nondelegation challenge); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) (upholding delegation of authority to President to tax imports).

"open-ended" language in the general statute failed to provide an intelligible principle.[149]

The nondelegation doctrine also played a role in the Benzene case, *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*[150] The plurality opinion held that the Occupation Health and Safety Administration may only regulate when it finds that a toxic substance poses a "significant risk."[151]

The *Benzene* plurality opinion mentions the nondelegation doctrine without explicitly invoking the avoidance canon, stating that the Occupational Safety and Health Act "might" offend the nondelegation doctrine absent the construction the plurality adopted.[152] The *Benzene* plurality, however, states that its resolution of the case "turns, to a large extent" on the analysis of two specific statutory subsections, which the opinion parses at length before briefly mentioning nondelegation.[153] In any case, the *Benzene* plurality decision does not involve explicit consideration of the intelligible principle issue, an explicit application of the avoidance canon, or a majority opinion on anything.[154]

In footnote 7 of *Mistretta v. United States,*[155] the Court stated, "In recent years our

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[149] FEA, 426 U.S. at 560 n. 10.

[150] 448 U.S. 607 (1980).

[151] Benzene Case, 448 U.S. at 662.

[152] Id. at 646 (plurality opinion).

[153] Id. at 639. Cf. American Trucking Ass'ns v. EPA, 195 F.3d 4, 14 (D.C. Cir. 1999) (Judge Silberman dissenting) (characterizing Benzene's reference to nondelegation as a "makeweight"), *majority opinion reversed in part sub. nom.* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

[154] *See* Benzene Case, 448 U.S. 607.

[155] 488 U.S. at 373 n. 7.

application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly to giving narrow constructions to statutory delegations that might otherwise be thought unconstitutional" citing only *National Cable Television* and *Benzene*'s plurality opinion. These applications have been few and quite questionable.

Shortly after relying upon *National Cable Television* in the *Mistretta* footnote as the only example of a majority opinion using the nondelegation doctrine as a tool of statutory construction, the Court revisited *National Cable Television* and suggested that it did not, in fact, involve a serious nondelegation issue. In *Skinner v. Mid-American Pipeline Co.,*[156] the Court reversed a ruling holding that a law delegating authority to set user fees for natural gas and hazardous liquid pipelines unconstitutionally delegated taxation authority to the Executive Branch.[157] In doing so, the Court squarely rejected the proposition that the nondelegation doctrine applies more strictly to tax cases than to other cases,[158] relying upon *FEA* while distinguishing *National Cable Television.*[159] Had it stopped there, *Skinner* might have reinforced the *FEA* and *Mistretta* view of *National Cable Television* as a case involving construction to avoid the classic nondelegation concern about intelligible principles.

The *Skinner* Court, however, went on to recharacterize *National Cable Television* in a way that divorces it from any concern about the nondelegation doctrine generally. Justice O'Connor, writing for the Court, states that *National Cable Television* "stand[s] *only* for the proposition that Congress

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[156] 490 U.S. 212 (1989).

[157] Id. at 214.

[158] Id. at 222-23.

[159] Id. at 223-24.

must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties . . ."[160] [emphasis added]. Thus, the *Skinner* Court cast doubt upon the proposition that the open-ended nature of the language governing the delegation explains *National Cable Television,* the hypothesis of the *FEA* Court. Justice O'Connor's opinion converts a general concern about open-ended language that might create an unintelligible principle, into a requirement that has never been part of the nondelegation doctrine, a requirement that a specific type of policy decision, a decision to impose monetary burdens upon regulated industry that do not benefit them, requires a "clear statement."[161] This amounts to a strong statutory presumption favoring industries burdened by fees and has little to do with the nondelegation doctrine's concern about the existence, rather than the substantive direction, of a governing legislative principle.

The Court has never addressed in detail the wisdom or constitutionality of applying the avoidance canon to avoid nondelegation issues. In practice, however, the Court has often sought to reach, rather than avoid, nondelegation issues. The one possible exception seems anomalous and has been subsequently construed by the Court to have little connection with constitutional concerns about nondelegation. Hence, the Court has never clearly applied the avoidance canon just to avoid a real nondelegation issue.

2. **The Claim that Numerous Canons of Construction Embody a Nondelegation Doctrine**

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[160] Id. at 224 (emphasis added).

[161] Id.

Notwithstanding this evidence that the nondelegation doctrine has played little or no role in the Supreme Court's construction of statutes, Cass Sunstein argues that the nondelegation doctrine is "alive and well" in the realm of statutory construction.[162] He claims that it has been relocated from its home as a constitutional basis for invalidating legislation to a set of holdings that "federal administrative agencies may not engage in certain activities unless and until Congress . . . expressly" authorizes them.[163] Thus, Sunstein identifies the nondelegation doctrine with clear statement rules.[164] He cites as examples a large number of substantive canons of construction, some of which are often implemented without a clear statement requirement. These include the rule of lenity,[165] the avoidance canon,[166] the statutory presumption that legislation only applies domestically,[167] and several other substantive canons of construction.[168]

This subsection will show that these canons do not implement a nondelegation doctrine. As Sunstein acknowledges, the Supreme Court has never claimed that these canons (excepting the

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[162] Sunstein, *supra* note 4, at 315.

[163] Id. at 316.

[164] *See* id. at 316 n. 5 (the nondelegation canons are all clear statement rules). Sunstein's examples, however, include cases that do not invoke clear statement rules or any canon of construction. *See e.g.* id. at 331 n. 79 (citing National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989)).

[165] Id. at 332.

[166] Id. at 331.

[167] *See* id. at 333.

[168] *See* id. at 334-335.

avoidance canon as applied to nondelegation claims) implement the nondelegation doctrine.[169]

Moreover, they reflect no particular concern with the problem that Sunstein focuses upon, delegation to administrative agencies.[170] Sunstein claims that these are nondelegation canons because they "forbid agencies from making decisions on their own,"[171] but the canons he cites affect all substantive interpretation within the policy concern of the canon, regardless of whether an agency has an interpretive role, and the cases he cites say nothing about agency decision-making.

For example, Sunstein refers to a canon that "agencies are not permitted to apply statutes outside the territorial borders of the United States."[172] The case he cites for this proposition, *EEOC v. Arabian American Oil Co.,*[173] simply does not prohibit *agency* application of a statute abroad. Indeed, the case involved review of a *district court* application of Title VII of the Civil Rights Act of 1964 to a lawsuit brought by a private party, not an agency application of the statute.[174] The Court held that unless Congress has "clearly expressed" an intent to regulate conduct oversees, it will only apply domestically.[175] The case thus embodies a strong principle of construction that applies to all

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[169] *See* id. at 316 (acknowledging that, "as a technical matter" the holdings he relies upon are not based on the nondelegation doctrine).

[170] Sunstein recognizes that some clear statement rules are not nondelegation canons, "because they do not involve agencies at all." Id. at 316 n.5. But, as shown below, the cases Sunstein cites do not involve agencies in any significant way either.

[171] Id. at 316.

[172] Id. at 316.

[173] 499 U.S. 244 (1998).

[174] *See* id. at 247.

[175] Id. at 248.

legislation, not just to statutes delegating authority to agencies. Any limitation on agency conduct would be purely incidental.

Consider another example, the rule of lenity, which counsels courts to construe criminal statutes narrowly.[176] Most criminal statutes do not delegate any broad rulemaking authority to administrative agencies.[177] And the Supreme Court's lenity decisions do not address Sunstein's theme of limiting

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[176] *See e.g.* United States v. Lanier, 520 U.S. 259, 266 (1997) (rule of lenity "ensures fair warning" by confining scope of a criminal prohibition to matters "clearly covered."); United States v. Kozminski, 487 U.S. 931, 952 (1988) (rule of lenity promotes fair notice, minimizes risk of arbitrary enforcement, and maintains the proper balance between Congress, prosecutors, and courts); Crandon v. United States, 494 U.S. 152, 158 (1989) (rule of lenity assures fair warning and that legislatures rather than courts define criminal liability); McNally v. United States, 483 U.S. 350, 359-60 (1986); (narrowly construing mail fraud statute rather than leaving its outer boundaries ambiguous); Liparota v. United States, 471 U.S. 419, 427 (1984) (rule of lenity provides concerning conduct rendered illegal and strikes "the appropriate balance between the legislature, the prosecutor, and the court of defining criminal liability."); United States v. Bass, 404 U.S. 336, 347-48 (1971) (rule of lenity provides fair warning and assures that finding of criminality reflects moral condemnation of the community by making sure that legislatures, not courts, define crimes); Bifulco v. United States, 447 U.S. 381, 387 (1979) (rule of lenity applies to interpretation of penalty provisions of criminal statutes).

[177] *See e.g.* Crandon, 494 U.S. at 177 (Scalia J., concurring) ("the law in question, a criminal statute, is not administered by any agency but by the courts."). *Cf.* Babbitt v. Sweet Home Chapter, Communities for Greater Oregon, 515 U.S. 687, 704 n. 18 (1995) (Court has applied rule of lenity where no regulations are present, but never suggested that the lenity rule provides a standard for reviewing regulations enforced through criminal sanctions). To be sure, prosecutors, the police, and judges must interpret criminal statutes in order to enforce the law. *See* Kozminski, 487 U.S. at 949 (statute if construed as government requests would delegate to prosecutors and juries the "legislative task" of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes."). *Cf.* Crandon, 494 U.S. at 177 (Scalia J., concurring) (discussing opinions of government lawyers advising clients about scope of criminal bribery statute). But individual judgments by prosecutors and police about a statute's meaning do not generally create prospective rules governing the conduct of all future actors subject to the legislation. *See* Kozminski, 487 U.S. at 949 (suggesting that government interpretation of involuntary servitude statutes would "provide almost no objective indication of the conduct or condition they prohibit."). *Cf.* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion,* 46 U.C.L.A. L. REV. 757, 789-810 (1999) (discussing mechanisms of more broadly controlling prosecutorial discretion). In this respect, prosecutorial and police judgments differ markedly from exercises of quasi-legislative rulemaking

agency action.

The rule of lenity also illustrates another problem with Sunstein's "nondelegation canons," they implement policies that have little connection to the nondelegation doctrine.[178] The rule of lenity assures that people have notice of what conduct will trigger criminal sanctions.[179] It also limits arbitrary law enforcement.[180] The nondelegation doctrine serves neither goal.

Statutes raising nondelegation problems by authorizing agency regulation generally do not raise a notice problem, because they do not regulate private conduct directly, unlike a criminal statute. Even the complete absence of standards in a statute delegating rulemaking authority to an administrative agency creates no issue of notice to private parties; they will get notice from the rules an agency enacts pursuant to the statute.[181]

The Supreme Court has repeatedly recognized that delegation under broad standards creates

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authority that can raise serious questions under the nondelegation doctrine.

[178] *See* Sunstein, *supra* note 4, at 316 (acknowledging that "as a technical matter" the key holdings of the cases he relies upon are not based on the nondelegation doctrine)

[179] *See* Lanier, 520 U.S. at 266 (rule of lenity assures "fair warning").

[180] *See* Kozminski, 487 U.S. at 952.

[181] *See* Loving v. United States, 517 U.S. 748, 768 (1996) ("The exercise of a delegated authority to define crimes may . . . supply" adequate "notice"); Kraus & Bros., Inc. v. United States, 327 U.S. 614, 622 (1946) (public looks to regulations to provide notice of what conduct is criminal); Yakus v. United States, 321 U.S. 414, 435 (1943) (publication of regulations in the federal register gives adequate notice for purposes of due process). *Accord* Seidenfeld & Rossi, *supra* note 22, at 10 (agency rules provide the certainty regulated parties need to know whether their conduct violates the law).

no problem of notice, as long as implementing regulations provide sufficient clarity.[182] The Court's

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[182] *See* Kraus & Bros. v. United States, 327 U.S. 614. 621-22 (1945) (applying the rule of lenity to the regulation, because the regulation, not the underlying statute, must provide notice of what conduct is criminal); Yakus v. United States, 321 U.S. 414, 435 (1943) (publication of regulations in the federal register gives adequate notice for purposes of due process). While the case law does not support the view that the lenity canon aims to limit delegation of the authority to define criminal offenses to agencies, a minor element in the doctrine does recognize some reluctance to delegate such authority to courts. This reluctance, however, has no connection with Sunstein's theory that the nondelegation canons serve a nondelegation doctrine by limiting **agency** action.

The concern about delegation really revolves around interpretive authority rather separate from the nondelegation doctrine's concern with delegation of legislative authority. Judicial decisions interpreting criminal statutes may operate prospectively by binding subsequent decisions. But judicial decisions in the criminal area usually come from efforts to adjudicate the scope of a particular defendant's rights, so they might be better thought of as part of the interpretation and enforcement process, not as an exercise of legislative authority.

The rationale expressing concern about delegation to courts originated late in the long history of the rule of lenity, in the Court's 1971 decision in *United States v. Bass,* 404 U.S. 336. The *Bass* Court stated:

> Because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. Id. at 347-48.

This dictum's opposition to delegation to the judiciary on grounds of democratic theory, while repeated in subsequent decisions, has dubious salience, for the Court does accept judicial clarification of the definition of criminal conduct, when it provides sufficient notice to defendants. *See* id. at 347-349. The Court considers judicial interpretation when deciding whether a statute is sufficiently ambiguous to invoke the rule of lenity, declining to apply the rule of lenity when judicial interpretation has sufficiently clarified a statutory definition of criminal conduct, and recognizes that the exercise of delegated authority to define crimes may be sufficient to provide adequate notice. *See e.g.* Staples v. United States, 511 U.S. 600, 619 n. 17 (1994) (rule of lenity not applied because case law clarifies mens rea requirement); Loving, 517 U.S. at 768 ("The exercise of delegated authority to define crimes may be sufficient. . . to supply" adequate notice to defendants). Later decisions sometimes reinterpret *Bass* as supporting something less than a doctrine opposing delegation to the judiciary, namely the "proper balance of authority between the legislature, prosecutors, and the judiciary," impliedly recognizing that notice and arbitrariness, not a blanket prohibition upon a class of judicial decisions, remains at the heart of the rule of lenity. *See e.g.* Liparota, 471 U.S. at 427 (rule of lenity strikes "the appropriate balance between the legislature, the prosecutor, and the court of defining criminal liability."); Kozminski, 487

recent decision not to apply the lenity canon in *Babbitt v. Sweet Home Chapter, Communities of Greater Oregon,*[183] illustrates the lack of connection between notice concerns and nondelegation concerns. *Babbitt* upheld the Secretary of the Interior's interpretation of a statutory prohibition upon "taking" endangered species as reaching conduct that harmed the species by modifying its habitat.[184] Since the Endangered Species Act[185] provides for criminal penalties for willful taking of species, respondents argued that the rule of lenity applies.[186] The Court rejected the suggestion that the rule of lenity should provide the standard for reviewing challenges to administrative regulations that can be criminally enforced.[187] The Court did not consider any possible ambiguity in the governing statute germane to the question of whether the defendants would have adequate notice without the narrowing construction of the legislation they proposed.[188] Rather, the Court suggested that notice may come from the regulations themselves, which define precisely what taking an endangered species means under the statute.[189] The Court conceded that a regulation might in some circumstances provide inadequate

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U.S. at 952 (rule of lenity promotes fair notice, minimizes risk of arbitrary enforcement, and maintains the proper balance between Congress, prosecutors, and courts).

[183] 515 U.S. 687 (1995).

[184] Id. at 691, 708.

[185] 16 U.S.C.. §§ 1531-44.

[186] Sweet Home, 515 U.S.. at 704 n.18.

[187] Id.

[188] *See id*. at 704 n.18.

[189] Id.

notice of potential liability and therefore offend the rule of lenity.[190] But the regulation challenged in *Sweet Home* provides adequate notice, because it "gives a fair warning of its consequences" and "has existed for two decades."[191] No connection exists between the nondelegation doctrine and the central concern of the lenity canon, the notice concern.

The lenity canon's concern with arbitrary law enforcement (primarily by courts and the police) also has little connection to the nondelegation doctrine's concern that Congress should not delegate legislative authority to agencies. Indeed, the nondelegation doctrine has less connection to the very separate concern about arbitrary administrative agency action then many suppose, for reasons set out in the margins.[192]

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[190] Id.

[191] Id. The Court also recognized that administrative regulation can serve the function of identifying criminal conduct with greater clarity in Federal Communications Commission (FCC) v. American Broadcasting Company, 347 U.S. 284, 289-90 n. 7 (1954). The *FCC* Court held that radio and television give-away programs did not constitute statutorily prohibited broadcast of a lottery, notwithstanding an FCC regulation bringing give-aways within the ambit of the statute. Id. at 285, 290. The Court found that give-aways did not constitute a lottery because the audience provided no consideration for its chance to win a prize, relying, in part, upon prior construction by the Postal Department and the Department of Justice. Id. at 290-295. Dictum in the case does apply the lenity canon to support this result. Id. at 296. The *FCC* Court applied the canon mechanically, without explicitly discussing why it should be necessary in the face of a clarifying regulation. Id. But the Court may have been concerned about ambiguity arising from the inconsistency between the Department of Justice's position and that of the FCC, which would certainly interfere with the clarifying function of administrative construction. *See* id. at 294-96. My general claim is not that the rule of lenity can never play a role in judicial review of agency action, but that the rule of lenity does not aim to limit delegation so much as provide notice, a function sometimes performed by regulations clarifying general statutory language.

[192] While the rule of lenity seeks to limit arbitrary law enforcement, the nondelegation doctrine does not address the question of whether an agency exercises its authority arbitrarily. The nondelegation doctrine prohibits delegation of legislative authority completely, regardless of how the agency exercises the legislative authority granted. In public law, the Administrative Procedure Act's

The claim that the rule of lenity serves as a home for a relocated nondelegation doctrine does not withstand scrutiny. The lenity canon encourages adequate notice of what conduct will be criminal and limits arbitrary law *enforcement*, whilst the nondelegation doctrine serves neither purpose, focusing on opposition to delegation of *legislative authority.*[193]

(APA's) arbitrary and capricious test, rather than the nondelegation doctrine, checks arbitrary agency exercise of authority. *See* Patricia Ross McCubbin, *The D.C. Circuit Gives New Life to the Nondelegation Doctrine in American Trucking Ass'ns v. Browner,* 19 VA. J. ENVTL. L. 57, 78 -79 (2000).

Agencies may act arbitrarily regardless of the breadth of a delegation. For example, imagine a statute that requires EPA to ban all chemicals killing more than 100 people, a rather specific statute. EPA could apply this very arbitrarily, by concluding that a chemical kills 100 people, even though less than 100 people are exposed to the chemical. This would be arbitrary, because it is impossible to die from a chemical without any exposure to it.

Also, an agency may act reasonably under very broad delegations of authority. For example, consider the code of fair competition at issue in *Schechter*. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 490, 521-525 (1935) (describing the codes). The *Schechter* Court found the legislative mandate to create these codes provided almost no guidance as to their content. *See* id. at 541 (statute "sets up no standards, aside from the statement of general aims of rehabilitation, correction, and expansion."). But President Roosevelt could have approved codes that did nothing more than prevent one manufacturer from passing off his goods as that of another company. *Cf.* id. at 531 (identifying pawning of goods as unfair competition at common law). Surely, this would constitute reasonable implementation of a statute authorizing creation of fair competition codes. The intelligibility of a legislative mandate and the general reasonableness of agency action under the mandate are analytically separable.

Indeed, a broader statutory mandate should increase the number of non-arbitrary actions an agency may take. For example, while an agency may act arbitrarily to ban a chemical that less than 100 people are exposed to under a statute that only authorizes action if more than 100 people die from exposure to the chemical, that same action would not necessarily be arbitrary under a statute directing the agency to write "good environmental policy." An agency may reasonably conclude that "good environmental policy" requires no deaths and adequately justify regulating a substance posing high risks to a small population under such a broad standard. Hence, the nondelegation doctrine does not serve as a limit to arbitrary agency action.

[193] *See* United States v. Bass, 404 U.S. 336, 348 (1971) (*quoting* United States v. Cardiff, 344 U.S. 174 (1952)); McBoyle v. United States, 283 U.S. 25, 27 n. 15 (1931); Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209 (1967)) (describing policy supporting the rule of lenity).

The avoidance canon does not generally serve the values of the nondelegation doctrine either.[194] The avoidance canon's primary traditional purpose has been to help the Court avoid constitutional rulings that would limit the range of decisions open to democratic decision-making or permanently limit constitutional rights, as the Court has said repeatedly.[195] The avoidance canon generally does not seek to discourage delegation of legislative authority to agencies, even legislative authority in a particular area where constitutional questions might arise.[196]

Sunstein argues that the purpose of the avoidance canon is to require Congress to raise

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[194] *See* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (avoidance canon minimizes disagreement with Congress by preserving enactments that might otherwise "founder upon constitutional objections."); Rust v. Sullivan, 500 U.S. 173, 191 (stating that avoidance canon reflects respect for Congress, which the Court assumes legislates with constitutional limitations in mind). I leave the discussion of whether the avoidance canon serves the values of the nondelegation doctrine when applied to avoid a nondelegation issue to later in the paper, showing that even in that context, it does not serve nondelegation values.

[195] *See* Almendarez-Torres, 523 U.S. at 238 (avoidance doctrine serves the "basic democratic function of maintaining a set of statutes that reflect" elected representatives' policy choices); Rust, 500 U.S. at 190 (emphasizing canon's role in saving a statute).

[196] Sunstein refers to the avoidance canon as the canon that "agencies will not be permitted to construe statutes in such a way as to raise serious constitutional doubts." Sunstein, *supra* note 4, at 331. But the case he cites for the existence of this canon, *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988), does not refer to the avoidance canon. Instead, the Court held that "a statutory grant of rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Bowen, 488 U.S. at 208-09. The majority made no mention of a constitutional issue to avoid. And Justice Scalia, in a concurring opinion, stated that the "issue here is not constitutionality." Id. at 223.

The avoidance canon, while irrelevant to *Bowen,* does exist. But it applies to statutes that do not delegate authority to administrative agencies as well as to statutes that delegate authority to agencies. The more specific "nondelegation canon" that Sunstein mentions, that agencies in particular may not construe statutes in such a way as to raise serious constitutional doubts, does not exist. *See* Rust, 500 U.S. at 190-91 (contrasting petitioners' claim that regulations raising serious questions must be invalidated with cases holding that statutes generally must be given a construction that avoids grave constitutional doubts if fairly possible).

constitutional issues only through an explicit statement and prohibit agencies from raising these issues through their interpretation, but cites no authority to support that view.[197] The Court has never stated that the avoidance canon has a general purpose of prohibiting agencies from raising constitutional issues through interpretation.[198] Nor does the avoidance canon require Congress to raise issues through explicit statement, for the Court has sometimes declined to apply the avoidance canon to unclear statutory language when legislative history or statutory structure, rather than a clear statement, make Congressional intent reasonably clear.[199]

To be sure, the Court has sometimes applied clear statement rules to serve quasi-constitutional values.[200] Some of these clear statement rules, such as the rule discouraging legislation infringing in

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[197] Sunstein, *supra* note 4, at 331.

[198] *Cf.* Almendarez-Torres, 523 U.S. at 238 (canon minimizes disagreement among branches and is followed out of respect for Congress); Jones v. United States, 526 U.S. 227, 239-40 (1999) (canon reflects a respectful assumption that Congress legislates "in light of constitutional limitations"). The canon has sometimes been invoked in the face of an administrative interpretation, but the Court has never suggested that the canon has any special role to play in limiting administrative agencies. *See e.g.* DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 574-78 (1987) (holding that avoidance canon trumps Chevron deference and treating the case as an ordinary avoidance canon question); *See generally* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation,* 108 HARV. L. REV. 593, 609-10, 636-46 (1995) (identifying the kind of textualism Sunstein advocates here with a "disciplinarian approach toward statutory interpretation which tends to narrow the scope of regulatory legislation").

[199] *See* Almendarez-Torres, 523 U.S. at 229-238 (declining to avoidance canon when structure, legislative history, title of statutory amendments make Congressional intent clear); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 471 (2001) (since statute clearly excludes cost, albeit without a clear statement explicitly excluding them, avoidance canon does not apply). *See also* DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 577-78, 583-88 (1987) (suggesting that avoidance canon would not apply if legislative history clearly called for regulation of hand billing).

[200] *See* Eskridge & Frickey, *supra* note 20.

certain ways upon state sovereignty, do have a goal of demanding legislative specificity.[201] But clear statement rules do not have the purpose of avoiding delegation of legislative authority to an agency. Indeed, many of the relevant cases arose in contexts where formal agency interpretation played little or no role.[202] Rather, clear statement rules ensure that the legislature gives the quasi-constitutional value the clear statement rule protects careful consideration.[203] It does not constitute a general requirement that Congress itself, rather than administrative agencies, carefully consider all policy details.

Sunstein defends his "nondelegation canons" on the grounds that the canons only restrict agency discretion when the substantive values the canons protect are at issue.[204] But that suggests that the canons are not really aimed at the nondelegation problem at all, rather they limit agency discretion, if at all, incidentally and for other reasons.[205] Hence, calling them nondelegation canons is misleading.

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[201] *See* Gregory v. Ashcroft, 501 U.S. 452, 460-61, 467 (1990) (requiring Congress to make its intention to alter the balance between the states and the federal government unmistakably clear in the statutory language).

[202] *See e.g.* Gregory, 501 U.S. at 455-74 (not mentioning any agency interpretation of statute); EEOC v. Arabian American Oil Co., 499 U.S. 244, 247 (1998) (adjudicating district court, rather than agency application of Title VII of the Civil Rights Act of 1964).

[203] Gregory, 501 U.S. at 461 (clear statement rule "assures that the legislature has in fact faced" the federalism issue) [citations omitted]; Harold J. Krent, *Avoidance and its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases,* 15 CONN. L. REV. 209, 212 (1983) (clear statement rules "prod Congress" to consider rights arguably infringed by the statute).

[204] *See* id. at 338.

[205] A similar objection applies to Sunstein's efforts to link the nondelegation doctrine to the void for vagueness doctrine. *See* id. at 320. That doctrine generally applies to criminal statutes, because of the concern of criminalizing unspecified conduct, but not to regulatory statutes. *See* City of Chicago v. Morales, 527 U.S. 41, 55 (1999) (vagueness doctrine applies to criminal statutes lacking a scienter requirement).

Sunstein's very modest normative claim about the value of substantive canons as a new home for a nondelegation doctrine does not justify more widespread use of substantive canons. He claims that this new "nondelegation doctrine" suffers from fewer vices than the traditional nondelegation doctrine.[206] A normative case for the proliferation of such canons or more frequent application of existing canons would have to show that this alternative is better than the existing applications of the existing canons. But Sunstein does not make such a claim, at least not generally.[207] Nevertheless, Sunstein has advocated expansion of the catalogue of substantive canons, even when no constitutional values are at stake.[208] In particular, Sunstein has argued for a presumption favoring cost-benefit analysis,[209] a position the *American Trucking* Court, with the exception of Justice Breyer, declined to embrace.[210]

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[206] *See* Sunstein, *supra* note 4, at 338.

[207] *See* id.

[208] *See* Sunstein, supra note 29. Professor Sunstein presents his argument for expansion of canons as a mere description of existing law. But he recognizes that the "default principles" he advocates "remain mostly the creation of the United States Court of Appeals for the District of Columbia Circuit." Id. at 1654. His article advocates an expansion in two senses. First, the D.C. Circuit has not canonized the interpretations that Sunstein relies upon; it has not generally claimed that the particular interpretations Sunstein relies upon amount to general principles of construction. So, by seeking to identify a set of interpretations of particular statutes as containing generally applicable principles, Sunstein effectively seeks to canonize these cases and thereby extend their influence. Second, by seeking to defend, not just describe them, Sunstein effectively advocates their spread beyond the D.C. Circuit.

[209] Id. at 1655; Cass R. Sunstein, *Cognition and Cost-Benefit Analysis,* 29 J. LEGAL STUDIES 1059, 1095 (2000).

[210] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001) (majority opinion) (in order to show that costs may be considered, respondents "must show a textual commitment of authority to the EPA to consider costs . . ."). *Cf.* Id. at 490 (Breyer J., concurring) (Court should

Moreover, a major criticism that Sunstein makes of the nondelegation doctrine as a constitutional doctrine applies to many of the canons he defends. He argues that judicial rulings about whether legislation is too vague to withstand nondelegation scrutiny require judgments of degree not susceptible to control through reasonably clear legal rules.[211] In practice, he states, these judgments will likely depend on the judge's substantive policy views, with judges more likely to find a statute too vague when they disagree with a statute's policy.[212]

This problem of judgments depending on judicial policy views applies to substantive canons of construction. Judges choose the values the substantive canons protect.[213] While some of these values may have constitutional roots, some do not.[214] When the Court, as it did in *Skinner*, makes these kinds of policy judgments they seem quite troubling. The *Skinner* Court does not explain why Congress must issue a clear statement when imposing fees that force industries to internalize external costs, but may rely upon more general language to impose narrower fees only recapturing regulatory benefits for industry. The Court has certainly provided no constitutional support for judicial authority to prefer narrower over broader fees.

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generally read statutory silences or ambiguities as permitting consideration of cost).

[211] *See* Sunstein, *supra* note 4, at 326-27.

[212] Id. at 327.

[213] *See generally* Krent, *supra* note 203, at 217 (clear statement rules may allow Court to "graft its values into a statute.")

[214] *See* id. at 245 (discussing the Justices' tendency to radiate "consideration for subconstitutional issues in applying clear statement rules"). *Cf.* Sunstein, *supra* note 29 (proposing a number of non-constitutional substantive canons).

Judges also must make judgments of degree not susceptible to legal rules about when Congressional intent is clear enough to stand in face of a substantive canon favoring a contrary policy.[215] Commentators have criticized some of these judgments as laden with poorly justified value judgments.[216]

I do not mean to argue that the substantive canons are necessarily bad. But their defects are very similar to the defects that Sunstein (and many others) recognize in the nondelegation doctrine.[217]

In any case, Sunstein's loose canons are not shooting at the nondelegation problem. If we start re-aiming them to do so, their targets and their hits may be as erratic as a revitalized nondelegation doctrine.[218]

3. The Claim that Supreme Court Statutory Interpretation Cases Revive the Nondelegation Doctrine.

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[215] *See* Krent, *supra* note 203, at 209 ("Courts enjoy great latitude in deciding . . .which statutes" may receive "fairly possible" saving construction). *See e.g*. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262-63 (1991) (dissenting opinion) (clear-statement rules compel selection of "less plausible" constructions and exclude extrinsic aids to interpretation); Landgraf v. USI Film Products, 511 U.S. 244, 251 (1994) (recognizing that Congress superseded *EEOC v. Arabian Am. Oil Co.'s* holding).

[216] *See* Eskridge & Frickey, *supra* note 20, at 629-646 (discussing some of these choices); William N. Eskridge, *Public Values in Statutory Interpretation,* 137 U. PA. L. REV. 1007, 1010 (1989) (expressing concerns about the values the Justices have chosen to defend through substantive canons of construction).

[217] *See* Sunstein, *supra* note 13, at 321-28 (discussing the defects of the nondelegation doctrine); Krent, *supra* note 203 (documenting in detail the inconsistency of judicial applications of a clear statement rule in labor cases based on shifting judicial policy preferences).

[218] *See* Seidenfeld & Rossi, *supra* note 22, at 10 (allowing courts to "override general legal requirements" to serve a nondelegation doctrine is "neither principled nor predictable").

Professor Bressman has recently argued that *AT&T Corp. v. Iowa Utilities Board*[219] "may be understood to revive the dormant nondelegation doctrine."[220] But Professor Bressman acknowledges that the *Iowa Utilities Board* decision neither mentioned the term nondelegation nor cited nondelegation cases.[221]

A natural reading of the case suggests that this case involves routine, albeit intricate, statutory interpretation, rather than the concerns of the nondelegation doctrine.[222] The passage Professor Bressman focuses on[223] as a supposed use of the nondelegation doctrine evaluates a claim that a Federal Communication Commission (FCC) Order[224] conflicted with a local competition provision of the Telecommunications Act of 1996 (Act)[225]. The local competition provisions seek to assure competition in a deregulated telecommunications market by providing competitors with access to elements of local telephone company networks.[226] The relevant section of the FCC Order provided

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[219] 525 U.S. 366 (1999).

[220] *See* Bressman, *supra* note 4, at 1401.

[221] Id.

[222] *See* Iowa Utilities, 525 U.S. at 392 ("Because the Commission has not interpreted *the terms of the statute* in reasonable terms, we must vacate" the unbundled access rule). [emphasis added]. *Accord* Seidenfeld & Rossi, *supra* note 22, at 17-18; Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act,* 76 N.Y.U.L.REV. 1692, 1704, 1723-1726 (2001).

[223] Iowa Utilities, 525 U.S. at 386-90. *See* Bressman, *supra* note 4, at 1431-38.

[224] In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Red 15499 (1996).

[225] 47 U.S.C. § 251(d)(2).

[226] *See* Iowa Utilities, 525 U.S. at 371-73.

the rules governing this access - referred to as unbundling.[227]

The Court read the telecommunications law as delegating authority to regulate these decisions to the FCC, so no issue of unconstitutional delegation to private parties existed under the statute.[228] Indeed, under the views of the dissenting Justices, which read the grant of regulatory authority to the FCC as not reaching the unbundling provisions, there would be no delegation to private parties under this statute, because the state commissions would then implement the unbundling provisions with no FCC guidance.[229] Nevertheless, Professor Bressman claims that the *Iowa Utility Board* Court invoked a "prohibition on private lawmaking" as a ground for its decision.[230]

Furthermore, the statute contained a policy to guide implementing agencies' determination of what unbundled services local phone companies must make available to competitors.[231] That policy required consideration of whether the "network element" in question "is necessary"[232] and "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks

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[227] *See* id. at 373-74.

[228] *See* id. at 382-83.

[229] *See* id. at 413 (Breyer, J. dissenting in part, and concurring part) (claiming that the lack of federal rulemaking authority is required in order to protect state jurisdiction over the unbundling rules that Professor Bressman's analysis focuses upon).

[230] *See* Bressman, *supra* note 4, at 1401.

[231] *See* Iowa Utilities Board, 525 U.S. at 351 n. 2 (quoting 42 U.S.C. § 251(c)(3)) (describing the general duty to make "network elements" available).

[232] This requirement only applies to "proprietary" elements under the statute. *See* 42 U.S.C. § 251(d)(2)(A).

to offer."[233] Although the Court drops not a hint that this "necessity" and "impairment" standard lacks an intelligible principle, Bressman claims the Court invoked "the requirement of limiting standards," which she refers to as a nondelegation principle.[234]

Professor Bressman finds a nondelegation doctrine revival in the Court's interpretation of language requiring the Commission to consider impairment and necessity.[235] The Court quite naturally read this standard as requiring a commission decision as whether a lack of access to a desired network element was necessary and would impair service.[236] It concluded, however, that the FCC regulation did not provide for the statutorily required Commission impairment determination, a violation not of the nondelegation doctrine, but of the statute.[237] The Court objected to "entrants, rather than the Commission" determining whether the necessity and impairment standards are met.[238] But that objection flowed from the language in the statute requiring "the Commission" to consider the necessity and impairment factors, not from any constitutional objection to delegation to private parties.[239]

The Court held that "the *Act* requires the FCC to apply *some* limiting standard, rationally

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[233] Id. at 388 (quoting 42 U.S.C. § 251(d)(2)).

[234] Bressman, *supra* note 4, at 1401.

[235] *See* id. at 1431-38; Iowa Utilities Board, 525 U.S. at 388-90 (citing 42 U.S.C. § 251(d)(2)).

[236] *See* id. at 388-89.

[237] *See* id.

[238] *See* id. at 389.

[239] *See* id. at 388-89.

related to the goals of the Act."[240] In context, the Court objected not to Congressional failure to limit the Commission, nor to the Commission's failure to limit itself,[241] but to the FCC's failure to write regulation broadly enough to limit carrier claims to access in keeping with the statutory impairment and necessity standard. Indeed, the Court objected to a limitation on Commission authority, a categorical decision to exclude evidence that access to a particular network element was not necessary because available from somebody other than the local carrier.[242] The Court's elaboration of that statement makes plain that the FCC regulation did not provide for any serious Commission check upon claims that a particular element was necessary and impaired service.[243] It based this claim not upon the regulation's breadth, but upon its narrowness.[244]

American Trucking provides further evidence that the Court's call for limiting principles and FCC decisions reflected a reading of statutory requirements not influenced by nondelegation concerns. Several petitioners cited *Iowa Utilities Board* to the Court as authority for the D.C. Circuit's practice of requiring agencies to construe mandates narrowly to address potential nondelegation concerns.[245]

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[240] Id. at 388 [emphasis on "Act" added, emphasis on "some" in original].

[241] *Cf.* Bressman, *supra* note 4 at 1401 (describing *Iowa Utilities Board* as requiring the agency to limit its own discretion).

[242] *See* Iowa Utilities Board, 525 U.S. at 389.

[243] *See* id. at 391 (claiming that FCC read the statute as requiring access whenever technically feasible, without a real showing of necessity or impairment).

[244] *See* id. at 388-89 (explaining that exclusion of consideration of alternative service providers rendered regulation inconsistent with the statute).

[245] Brief for the Respondents Appalachian Power Co., et al. at 24, Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001) (No. 99-1257) (citing Iowa Utilities Board to support the

The unanimous Court not only rejected the D.C. Circuit approach, it declined to even cite *Iowa Utility Board* while discussing the new nondelegation doctrine, thus suggesting that it found the case irrelevant to nondelegation issues.[246] The *American Trucking* Court cites *Iowa Utility Boards* for the proposition that agency interpretation may not go beyond the range of the ambiguities in the statute, in a portion of the opinion addressing a statutory interpretation issue with no link to the nondelegation problem.[247]

Bressman also claims that *Kent v. Dulles*[248] revives the nondelegation doctrine.[249] *Kent,* like *Iowa Utilities Board,* does not explicitly mention the nondelegation doctrine.[250] But *Kent*, unlike *Iowa Utilities Board,* refers to the doctrine through citation.[251] *Kent's* passing reference to nondelegation, however, has little to do with the case's holding.

Kent holds that the Secretary of State cannot deny an applicant a passport based on the

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proposition that "where an agency construes a statute to provide no legal standard at all to constrain its discretion, the courts properly have questioned that construction under the nondelegation doctrine.").

[246] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472-73 (2001) (containing no citation to Iowa Utilities Board).

[247] *See* id. at 481.

[248] 357 U.S. 116 (1957).

[249] *See* Bressman, *supra* note 4, at 1409 (citing *Kent* as "an example" of statutory construction as a surrogate for the nondelegation doctrine). *See also* Aranson *et al., supra* note 10, at 12 (Justice Douglas "reasoned" that a broad interpretation of the statute might "render the statute an invalid delegation.")

[250] *Cf* Kent, 357 U.S. at 129.

[251] *See* id. (citing Panama Refining Co. v. Ryan, 293 U.S. 388, 420-30 (1935)).

applicant's beliefs and associations.[252] Justice Douglas' opinion for the Court found that the right to travel constitutes a "liberty" protected by the Fifth Amendment's due process clause.[253] The *Kent* Court construed the statute authorizing discretionary denials of passports to avoid infringement of this liberty interest.[254]

The statute involved would seem to pose a serious nondelegation problem even under the modern nondelegation doctrine, for it authorizes denial of passports "under such rules as the President shall designate."[255] It thus contains, at least on its face, no policy at all to guide the Secretary of State or the President.

Yet, at the outset of the opinion the Court suggests its lack of concern with the nondelegation doctrine. The majority opinion states that "the key to the problem . . . is in the manner in which the Secretary's discretion has been exercised, not in the bare fact that he has discretion."[256] This suggests no concern at all about the absolute breadth of discretion, but rather a concern about its exercise to curtail a specific constitutional right.

The Court ultimately declined to "find in this broad generalized power [to deny passports] an authority to trench so heavily on" citizens' rights.[257] Along the way Justice Douglas notes that standards

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[252] *See* id. at 130-31.

[253] *See* id. at 125.

[254] *See* id. at 127-130.

[255] *See* id. at 123 (citing Act of July 3, 1926, 44 Stat. Part 2, 887).

[256] *See* id. at 125.

[257] Id. at 129.

governing delegated authority to deny passports "must be adequate to pass scrutiny by the accepted tests."[258] A citation to *Panama Refining Co. v. Ryan*[259] suggests that the nondelegation doctrine is one of the tests that the standards governing delegated authority must pass.[260] But the Court in no way relies upon the nondelegation doctrine, or its avoidance, to sustain its holding.

Indeed, if one believes that the delegation of authority to deny passports without any policy guidance violates the nondelegation doctrine, then the Court's construction did not cure this problem. The Court's decision cuts out only one ground for denial, denial based on the beliefs and associations of the applicant.[261] The decision otherwise leaves the Secretary of State free to grant or deny passports as he sees fit, with no policy guidance at all from Congress. But it should not surprise careful readers that the *Kent* Court does not solve a nondelegation problem through construction, because it did not seek to address a nondelegation problem.

The advocates of a new nondelegation doctrine should remember that the term "nondelegation doctrine" provides a shorthand reference to the doctrine that Congress cannot delegate its legislative authority. When the Court narrows a delegation, not because of the legislative character of the power delegated, but because of its specific substantive content, it does not implement the nondelegation doctrine, i.e. the doctrine disapproving of all delegations of legislative authority. It implements some other constitutional or policy norm.

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[258] Id.

[259] 293 U.S. 388 (1935).

[260] *See* Kent, 357 U.S. at 129.

[261] *See* id. at 130.

A large literature exists discussing the problems and value of the substantive canons.[262] I will focus here upon the one application of a substantive canon that really aims to address a nondelegation problem, application of the avoidance canon to avoid adjudicating a nondelegation claim. It turns out that this particular application involves unusual constitutional problems not fully appreciated in the relevant literature.[263]

II. **May Judges and Administrative Agencies Constitutionally Construe Statutes to Avoid a Nondelegation Problem?**

Allowing either an agency or a court to construe a statute that creates grave constitutional doubts under the nondelegation doctrine creates a serious constitutional problem. Grave doubt about the constitutionality of the statute under the nondelegation doctrine should create grave doubt about the authority of courts and administrative agencies to interpret a statute to avoid nondelegation defects.[264]

This section will explain why the *American Trucking* Court correctly disapproved of the D.C.

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[262] *See e.g.* Eskridge, *supra* note 216; Eskridge & Frickey, *supra* note 20; John Copeland Nagle, *Delaware and Hudson Revisited,* 72 NOTRE DAME L. REV. 1495 (1997); Lisa A. Kloppenberg, *supra* note 99; Frederick Schauer, *Ashwander Revisited,* 1995 SUP. CT. REV. 71; Kloppenberg, *supra* note 116; Murchison, *supra* note 116; Schacter, *supra* note 198; Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992); Frederic Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning,* 1990 Sup. Ct. Rev. 231; Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal* Statutes, 32 WM. & MARY L. REV. 827 (1991); Sunstein, *Interpreting Statutes*, *supra* note 29; Krent, *supra* note 203; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed,* 3 VAND. L. REV. 395 (1950).

[263] *Cf.* Manning, *supra* note 6, at 228 (noting conflict between democratic theory supporting the nondelegation doctrine and rewriting of a statute).

[264] *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (suggesting that Congress may not delegate exclusively legislative authority to the judiciary).

Circuit's practice of ordering administrative agencies to cure nondelegation defects through saving constructions[265], and why this practice is constitutionally suspect. It will then examine whether this reasoning can be extended to the judiciary. Finally, it will explain why the avoidance canon might be more problematic in the nondelegation context than in constitutional contexts where it has played a large role.

A. **Agency Authority**

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), the principle forum for public law litigation under a large number of federal statutes,[266] has recently taken to heart the suggestion in footnote 7 of *Mistretta* that the principle application of the nondelegation doctrine may lie in construing statutes to avoid adjudication of nondelegation claims,[267] and added an interesting wrinkle. Confronting a nondelegation claim, the D.C. Circuit reversed and remanded a rule protecting workers from accidents by requiring that hazardous equipment be "locked down" or "tagged out" while not in use with a demand that the Occupational Health and Safety Administration interpret

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[265] *See* American Trucking, 531 U.S. at 471.

[266] *See* Robert H. Frank and Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position,* 68 U. CHI. L. REV. 323, 324 (2001) (characterizing the D.C. Circuit as "the most important court in regulatory law"). *See e.g.* 42 U.S.C. § 7507(b)(1) (requiring judicial review of rules having national impact in the D.C. Circuit).

[267] Mistretta v. United States, 488 U.S. 361, 374 n.7 (1988) (*citing* Indus. Union Dep't. v. American Petroleum Inst., 448 U.S. 607, 646 (1980); Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974)).

the Occupational Health and Safety Act[268] to avoid a nondelegation claim.[269] This approach combines the avoidance canon with the rule in *Chevron v. Natural Resources Defense Council*[270] committing resolution of statutory ambiguity to agencies in the first instance.[271]

The D.C. Circuit applied a similar approach to the Clean Air Act[272] in *American Trucking Ass'ns v. Browner.*[273] The Court misread the nondelegation doctrine as requiring a determinate criterion in authorizing legislation[274] and held that the Act's requirement that EPA write national ambient air quality standards protecting the public health with an adequate margin of safety,[275] at least as construed by EPA, violated the nondelegation doctrine.[276] Rather than strike down the statute, however, it remanded the rule before it to the agency, directing EPA to impose a narrowing

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[268] 29 U.S.C. §§ 651-678.

[269] *See* International Union, UAW v. OSHA, 938 F.2d 1310, 1317 (D.C. Cir. 1991).

[270] 467 U.S. 837 (1984).

[271] *See generally* International Union, 938 F.2d at 1321 (remanding to the agency).

[272] 42 U.S.C. §§ 7401-7671.

[273] 175 F. 3rd 1027.

[274] Id. at 1034. *Cf.* American Trucking, 531 U.S. at 475 (rejecting the D. C. Circuit's determinate criterion requirement).

[275] *See* 42 U.S.C. § 7409(b)(1).

[276] *See* American Trucking, 175 F.3d at 1034. The Supreme Court characterized the Court of Appeals holding as a finding that "EPA's interpretation (but not that of the statute itself) violated the nondelegation doctrine." American Trucking, 531 U.S. at 472. This characterization seems charitable, for the Court of Appeals stated that "EPA appears to have articulated no 'intelligible principle' to channel its application of . . . statutory factors; *nor is one apparent from the statute.*" American Trucking, 175 F.3d at 1034. [emphasis added]. The italicized part of the sentence suggests that the statute itself, not just the EPA interpretation, failed the nondelegation test.

construction upon the relevant provision of the Clean Air Act.[277]

Justice Scalia, writing for the Court in *American Trucking,* rejected the D.C. Circuit's practice of remanding rules to agencies with instructions to narrowly construe legislation creating nondelegation problems. He explained:

> We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise - that is to say, the prescription of the standard that Congress had omitted- would *itself* be an exercise of the forbidden legislative authority. [emphasis in original][278]

This statement explained why the D.C. Circuit was incorrect to evaluate EPA's interpretation of the Clean Air Act, rather than the statute itself, for conformity with the nondelegation doctrine.[279] But the rejection of the relevance of agency construction as a general matter to the constitutional question also shows that a remand for purposes of construing a statute to avoid a nondelegation defect would be pointless and therefore inappropriate. This part will explain why the Court is generally correct to take this position.

Justice Scalia did not explain why agency construction of a statute should be viewed as "an exercise of the forbidden legislative authority."[280] The answer must be that the rule against delegating legislative authority generally makes rules issued under statutes not containing an intelligible principle

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[277] American Trucking, 175 F.3d at 1038-40.

[278] American Trucking, 531 U.S. at 472-73.

[279] *See* id.

[280] *See* id. at 473.

invalid. *Schechter* and *Panama Refining* both confirm this, for they invalidated implementing regulations issued under statutes giving the President legislative authority.[281]

These decisions, however, do not fully explain why the conclusion that a statute violates the nondelegation doctrine justifies the invalidation of an implementing regulation. Both *Panama Refining* and *Shechter* contain valuable clues; they strongly suggest that executive branch action under a statute violating the nondelegation doctrine is ultra vires.[282] The *Panama Refining* Court states that regulations are "valid only as subordinate rules and when found to be within the framework of the policy *which the legislature has sufficiently defined.*"[283] It then states that due process of law requires that punishment for violations of "a legislative order of an executive office" only take place when "the order is within the authority of the officer."[284] Neither these decisions nor *American Trucking,* however, explain why regulations under a statute lacking an intelligible principle are *ultra vires*.[285] The reason is, however,

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[281] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-527, 551 (1935) (invalidating code provisions enacted through executive order under the NIRA); Panama Refining Co. v. Ryan, 293 U.S. 388, 405-410, 433 (1935) (invalidating code provisions enacted through executive order and accompanying implementing regulations).

[282] *See* Schechter, 295 U.S. at 542 (objecting to "unfettered" Presidential authority to prescribe codes of fair competition); Panama Refining, 293 U.S. at 429, 432.

Schechter is much less explicit than *Panama Refining* about why executive action pursuant to a statute violating the nondelegation doctrine is invalid. But the *Schechter* Court does object to "unfettered" Presidential authority to prescribe codes of competition. 295 U.S. at 542. This suggests that executive action without some fetters, i.e. some prior policy decision by Congress, is ultra vires.

[283] 293 U.S. at 429 (emphasis added).

[284] Id. at 432. The *Panama Refining* Court also relied on the lack of factual findings supporting the relevant executive order. Id. at 432-33.

[285] *See* American Trucking, 531 U.S. at 472-473; Schechter, 295 U.S. 495; Panama Refining, 293 U.S. 388.

plain enough.

If Congress fails to legislate while conferring authority upon the President or an administrative agency, rulemaking pursuant to the unconstitutional legislation involves an exercise of legislative authority. No policy exists in the statute, so the executive branch cannot be implementing a Congressional policy when it writes rules under such a statute. Rulemaking under a statute lacking an intelligible principle differs little from writing a law without any statute having been written at all to authorize it.[286] In this situation, the executive branch makes all (not just some) of the relevant and constitutionally permissible policy decisions itself, just as Congress would if it legislated.

The executive branch may only write a law without properly delegated authority if the constitution authorizes executive branch legislation.[287] If an agency may not constitutionally exercise legislative authority on its own, doing so is ultra vires and invalid. Article II, section 3 of the Constitution authorizes the President to "take care that the laws be faithfully executed."[288] This authorizes the President, and by extension the rest of the executive branch, to execute delegated authority, not to write laws with no policy guidance at all from Congress.[289] Hence, writing rules without legislative policy

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[286] *Cf*. Merrill, *supra* note 99, at 22 (neither the federal judiciary nor an administrative agency may make law on its own initiative absent a delegation from Congress).

[287] *Cf*. Miller v. AT & T Corp., 250 F.3d 820, 843 (4th Cir. 2001) (Hilton, J., dissenting) (". . .[A]gency officials do not have the constitutional right . . . to make law.").

[288] U.S. CONST. art. II, § 3, cl. 4.

[289] *See* Loving v. United States, 517 U.S. 748, 771 (1996) ("Congress may delegate no more than the authority to make policies and rules that implement its statutes."); Skinner v. Mid-America Pipeline, 490 U.S. 212, 220-21 (1988) (discussing authority Congress may delegate, consistent with the nondelegation doctrine "in order that the President may `take Care that the Laws be faithfully executed.'").

guidance is *ultra vires*, because article II does not generally authorize Presidential legislation.[290]

In areas where the entity exercising delegated authority has independent authority over the subject matter, rulemaking pursuant to a statute lacking an intelligible principle does not violate the nondelegation doctrine.[291] The Court has made this fairly explicit in cases involving "delegation" of authority to Indian tribes, to states, and to voters.[292] This principle can apply to executive branch lawmaking in areas where the President has plenary authority under the Constitution irrespective of legislation, for example, the Presidential authority to act as commander-in-chief.[293] But the general rule remains that the executive branch may not write laws, except under an enacted law providing at least some policy guidance.[294]

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[290] *See* U.S. CONST. art II.

[291] *See* Loving, 517 U.S. at 772-773 (nondelegation doctrine may not apply fully to rulemaking regarding military discipline because of President's authority as commander-in-chief); United States v. Mazurie, 419 U.S. 544, 556-557 (1975) (nondelegation doctrine does not apply fully to delegation to an Indian Tribe).

[292] *See e.g.* Mazurie, 419 U.S. at 556-57 (Indian tribes); United States v. Sharpnack, 355 U.S. 286 (1958) (upholding a statute that allows States to dictate what constitutes a federal crime); Eastlake v. Forest City Enterprises, 427 U.S. 668, 677-798 (1976) (upholding a city charter provision requiring voter ratification of land use changes, because the people exercised power reserved to themselves).

[293] *See* Loving, 517 U.S. at 772-773. *See generally* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (discussing the scope of Presidential law-making authority).

[294] *See* American Trucking, 531 U.S. at 473 (agency choice of a standard would constitute "an exercise of forbidden legislative authority."); Loving, 517 U.S. at 771-773 (suggesting that delegated power to interpret legislation is needed in areas where the executive has no inherent authority); Field v. Clark, 143 U.S. 649, 693-694 (1892) (approving exercise of authority to apply law to facts as legal execution, rather than legislation); Bressman, *supra* note 3, at 474 ("In the absence of a constitutional transfer of authority, the agency simply possesses no authority at all.").

It follows that an agency interpreting a statute with a nondelegation defect to make it more specific acts unconstitutionally as well.[295] This implies that grave doubt about the constitutionality of a statute under the nondelegation doctrine introduces grave doubt about the constitutionality of an agency construction of the statute clarifying the statute.

For example, imagine that Congress enacts a statute requiring EPA to make "good environmental policy."[296] A court reviewing an agency rule under this statute limiting an air pollutant to 5 parts per million in the atmosphere concludes that this very general statute gives rise to grave constitutional doubts under the nondelegation doctrine.[297] It directs the agency on remand to interpret the statute to make the policy more specific. On remand, the agency must decide whether good environmental policy means health protective policy, policy that balances costs and benefits, or something else. This very general interpretive decision involves an exercise of legislative judgment without adequate Congressional guidance. Hence, the decision, no matter how wise and specific, is constitutionally suspect, because the legislative guidance behind it was so vague as to raise a serious nondelegation issue.

Indeed, the agency's general decision about the meaning of the statute is, in some respects, more

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[295] *See* American Trucking, 531 U.S. at 473 (agency "perscription of the standard that Congress had omitted . . . would *itself* be an exercise of forbidden legislative power") (italics in original) .

[296] *Cf.* Sunstein, *supra* note 22, at 339 (suggesting that a statute authorizing the President to "enact such environmental regulations as he deemed best" would offend the nondelegation doctrine).

[297] Given the breadth of permissible delegations under the nondelegation doctrine, this statute may not raise a grave issue under the doctrine. I ask the reader to assume that it does for purposes of this discussion and further discussion of this hypothetical in the article.

"legislative" than the decision to write the 5 parts per million standard. The agency's interpretation is general, and like legislation, guides a host of future agency actions. The decision to write the 5 parts per million standard only governs the particular pollutant at issue. On the other hand, the 5 parts per million standard presumably binds those who must implement the standard, while an agency generally may change its interpretation of its own legislation with an adequate explanation.[298] But the main point is simple, both rulemaking under a defective mandate and interpretation curing the defect are constitutionally suspect under the nondelegation doctrine.[299]

Nevertheless, the *American Trucking* Court's disapproval of agency construction of a statute to avoid a nondelegation difficulty stands in some tension with the Court's prior practice of considering administrative practice when deciding whether a statute violates the nondelegation doctrine. Scalia addresses this problem, stating that, "We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[300] While this is literally true, it would be hard to reconcile disapproval of agency construction with a general rule that such agency construction of an otherwise invalid statute generally saves it from an unfavorable nondelegation ruling. Such a general rule would amount to giving controlling weight to unconstitutional decisions by administrative agencies.

It is not clear, however, that such a general rule of giving weight to an agency construction in this

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[298] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 41-42 (1983) (agency may reverse its previous decision if it provides a reasoned explanation for the change).

[299] *See* American Trucking, 531 U.S. at 472-73; Schechter Corp. v. United States, 295 U.S. 495, 551 (1934) (striking down regulations because issued pursuant to an invalid delegation).

[300] American Trucking, 531 U.S. at 472.

context exists. The Court has not always explicitly explained why and how administrative practice effects nondelegation analysis. Scalia's *American Trucking* opinion distinguishes the leading cases in which administrative construction has played a role.[301] In doing so, the Court provides a basis for reconciling a practice of sometimes considering agency interpretation germane to the question of whether a nondelegation defect exists, while still recognizing the lack of a satisfactory constitutional basis for construing an otherwise unintelligible mandate.

Scalia points out that the Court in *Lichter v. United States*[302] took agency regulations into account because Congress subsequently incorporated the agency regulations before the Court into the statute.[303] *Lichter* thus demonstrates that administrative practice may help a court assess the acceptability of a statutory mandate under the nondelegation doctrine for reasons independent of the mere existence of a narrowing administrative interpretation. Thus, reliance upon an unconstitutional interpretation by an agency did not influence the result in *Lichter,* rather the decision by Congress to incorporate the agency interpretation influenced the result.[304]

If Congress did intend to adopt an administrative interpretation clarifying a statute's meaning, then the Court should consider that interpretation in ruling on a nondelegation objection. Otherwise, the Court will invalidate legislation that in fact provides perfectly intelligible guidance to the delegate because of a shared understanding of terms that might seem utterly vapid to a reviewing court if taken out of

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[301] Id.

[302] 334 U.S. 742, 783 (1948).

[303] American Trucking, 531 U.S. at 472.

[304] Id.

context. Using administrative interpretation as a tool to understand actual legislative intent, however, is very different from allowing an agency to cure a statute lacking any intelligible principle upon which one might base an interpretation through post-enactment "construction" that Congress did not intend to adopt.

If the Court automatically assumed that Congress intends to adopt every agency construction, then the distinction between reliance upon an unconstitutional administrative agency interpretation and Congressional adoption of an agency interpretation would vanish. *Lichter,* however, held that the particular administrative interpretation before it revealed Congressional intent, because Congress was aware of the interpretation, acquiesced in it, and then adopted it explicitly in a statutory amendment.[305] The Court often presumes that Congress intends to adopt a pre-existing administrative interpretation when it re-enacts a statute without change.[306] This presumption, however, does not establish a per se rule that Congress always intends to incorporate administrative interpretation, because the rule does not apply if no reenactment takes place and because the presumption can sometimes be overcome.[307] Indeed, the Court has sometimes rejected the assumption that Congress intended to adopt a prior

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[305] Lichter, 334 U.S. at 783.

[306] Lorillard v. Pons, 575 U.S. 575, 580 (1978).

[307] *See e.g.* FDA v. Brown and Williamson Tobacco Corp. 529 U.S. 120, 131-33 (2000) (holding that Congress did not acquiesce in agency construction of authority to regulate a "medical device" as including cigarette regulation); Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corp of Engineers, 531 U.S. 159, 168-170 (2001) (declining to acquiesce in an administration interpretation of the definition of navigable waters under the Federal Water Pollution Control Act, despite reenactment of relevant provision).

agency construction, even in the face of some evidence of acquiescence.[308]

Scalia also distinguishes, albeit with some difficulty, *Fahey v. Mallonee,*[309] another nondelegation case that involves agency construction.[310] Scalia claims that the *Fahey* Court mentioned agency regulations "because the customary practices in the area, implicitly incorporated in the statute, were reflected in the regulations."[311]

Surely, a court should consider Congressional incorporation of customary practice in evaluating a nondelegation claim, for the same reason that it should consider adopted administrative practice. A court should not evaluate the intelligibility of a statutory mandate without fully understanding what it means to implementing officials and Congress. While the *Fahey* Court did not explicitly say that Congress had adopted the custom the Court referred to,[312] such a conclusion is a plausible inference from the opaque discussion in *Fahey*.[313]

In context, it seems more likely, however, that the *Fahey* Court intended to suggest that if administrators and courts had sufficient experience with a problem, then an intelligible legislative policy

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[308] *See e.g.* SWANCC, 531 U.S. at 168-70 (declining to acquiesce in an administration interpretation of the definition of navigable waters under the Federal Water Pollution Control Act). *Cf*. Haig v. Agee, 453 U.S. 280, 300 (1980) ("congressional acquiescence may *sometimes* be found from nothing more than silence in the face of an administrative policy.") [emphasis added].

[309] 332 U.S. 245, 252-53 (1947).

[310] *See* American Trucking, 531 U.S. at 472-73.

[311] Id.

[312] *See* Fahey, 332 U.S. at 251-54 (suggesting that the custom clarifies the statute, but not expressly claiming that Congress had incorporated the relevant custom).

[313] *See* id. at 249-58.

may not be necessary.[314] This would suggest that the *Fahey* Court did not, in fact, rely upon administrative interpretation to clarify an otherwise impermissibly vague statutory mandate on a predictable across the board basis. Rather, it relied on administrative experience to suggest that some pragmatically acceptable substitute for Congressional control of policy is available. If that is what the Court means, then this part of *Fahey* has little to teach about the constitutional acceptability of relying on particular administrative interpretations to clarify an otherwise impermissibly vague mandate.

Scalia did not discuss another prominent nondelegation case in which administrative interpretation played a role, *Yakus v. United States.*[315] That case, however, does not present any real difficulty for Scalia's position. In *Yakus*, the Court considered a statement accompanying challenged regulations relevant, because it established a predicate for political and judicial review of the regulations to ascertain their conformity (or non-conformity) with the underlying statute.[316] This use of administrative practice does not give great weight to the clarity the regulations themselves may add to the statutory mandate. Rather, it relies on the existence of an explanation as evidence that the underlying statute itself provides meaningful guidance to the agency and that a check exists to limit the power of the agency under the statute.[317] *Yakus* is basically irrelevant to the question of whether the Court should allow a

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[314] *See* id. at 250 (citing judicial and administrative experience with banking regulation as a reason to demand very little specificity under a statute involving federally created banks).

[315] 321 U.S. 414 (1944).

[316] Id. at 426.

[317] *See* id. (because administrative "statement of considerations" enables Congress, the courts, and the public, has conformed to statutory standards, there is no unauthorized delegation of legislative power).

regulation clarifying an otherwise unconstitutionally vague statute to help justify the statute.[318]

While the *American Trucking* Court clearly rejected remands to agencies for the purpose of administrative construction, *American Trucking* might not preclude reliance upon well established prior administrative construction to save a statute. The formal logic of Scalia's rationale seems to preclude this, but the Court still might allow a well established prior gloss on a statute to influence its nondelegation analysis. The Court sometimes construes a lack of legislative response to statutory construction as acquiescence, so it can always claim that Congress intended to adopt an administrative gloss upon the statute.[319] That approach can render incorporation of any prior administrative construction in a nondelegation analysis consistent with Scalia's statements for the *American Trucking* Court. Indeed, even if an agency should seek Congressional clarification, rather than interpret a statute to "solve" a nondelegation problem when it sees one, it may appropriately interpret a statute for the simple purpose of deciding how to implement it. Indeed, such interpretation is often unavoidable. Once established, it would seem unduly formalistic, if not for Scalia, than perhaps for much of the rest of the Court, to ignore it.

In sum, the precedent giving weight to administrative practice in nondelegation cases does not squarely conflict with the suggestion that construction of an unintelligible statute to solve a nondelegation problem is constitutionally suspect. While a court decision ordering an agency to prospectively choose a new policy where no policy exists in the underlying legislation is problematic, recognizing that past

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[318] *See* Yakus v. United States, 321 U.S. 414 (1944).

[319] *See* Haig v. Agee, 453 U.S. 280, 300 (1980) ("congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy.")

administrative practice may cast light on the content of the legislative mandate or demonstrate that judicial review will prove effective is legitimate. In such cases, the Court is not using administrative practice to cure a constitutional defect; instead, the Court uses administrative practice as an interpretive tool to discern whether the underlying legislation has such a defect.

This discussion establishes several crucial principles. A body that may act only pursuant to delegated authority may not constitutionally act pursuant to an unintelligible delegation. Therefore, an arguably unintelligible delegation makes construction of the delegating legislation constitutionally suspect.[320]

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[320] Professor Bressman resists this conclusion. She claims that the *American Trucking* Court's discussion of administrative construction is dictum. *See* Bressman, *supra* note 3, at 473. But the Court discusses administrative construction in a case where the D.C. Circuit ordered construction of the statute to avoid the nondelegation problem. Hence, the Court's unanimous general rejection of administrative saving construction supports *American Trucking's* result as directly as the Court's holding that the avoidance canon cannot apply because the statute raises no grave constitutional doubt on constitutional grounds. When the Court offers two rationales for a decision, either of which is sufficient to justify reversal, writing one off as dictum is problematic.

Even if Bressman's characterization of the statement rejecting administrative construction as dictum were clearly correct, that would not obviate the need to consider that statement carefully. Lower courts usually follow Supreme Court dicta if possible, and dicta often become holdings in subsequent cases.

Bressman does not really grapple with the Court's point that administrative construction as a cure for serious nondelegation problems conflicts with the legislative supremacy principle at the heart of the nondelegation doctrine. *See* id. at 474-78 (arguing that the Court's statement simply reflects rejection of administrative usurpation of the Court's interpretive authority). She simply claims that "delegations susceptible to narrowing construction are not invalid *ab initio.*" Id. at 476. But she makes no attempt to reconcile this statement with *Schechter's* rejection of convictions obtained before the Court held that the National Industrial Recovery Act conflicts with the nondelegation doctrine, *see* A.L.A. Schechter Corp. v. United States, 295 U.S. 495, 519, 555 (1935), or with *American Trucking's* language, *see* American Trucking, 531 U.S. at 472-73 (rejecting saving administrative construction). In the end, she essentially claims that the Court cannot mean what it said, because its logic would doom judicial construction to avoid nondelegation claims as well. *See* Bressman, *supra* note 3, at 477. I agree that the Court's logic does call into question judicial construction, but that calls

B. **Judicial Authority**

Scalia's rationale for disapproving of agency saving constructions might apply equally well to courts.[321] The idea that a court can "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power" (or ordering an agency not to), seems as "internally contradictory" as the notion of agency cure through construction.[322] Surely, "the very choice of which portion of the power to exercise - that is to say, the prescription of the standard that Congress had omitted- would *itself* be an exercise of the forbidden legislative authority."[323] If the nondelegation doctrine requires at least a general policy choice from Congress, then neither a Court nor agency can "cure" Congressional failure to make such a choice by making a choice in Congress' stead.

Judicial saving "construction" not only raises a constitutional issue, it poses even more troubling problems for democratic theory than administrative saving construction.[324] Suppose that a court rather than an agency interprets the good environmental policy statute, holding that the statute requires

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for an assessment of whether judicial construction should be called into question, a problem that the following pages address. But Bressman's reading of *American Trucking* simply refuses to accept that the Court meant what it said on this issue.

[321] *Cf.* Bressman, *supra* note 3, at 477 (noting that if delegations susceptible to narrowing constructions were "invalid *ab initio*," courts could not resuscitate them through statutory construction either).

[322] *Cf.* American Trucking, 531 U.S. at 473.

[323] *Cf.* id.

[324] *See* Marshall, *supra* note 113, at 223-25 (delegation of authority to judiciary is more problematic than delegation to an agency, because democratic controls do not limit the judiciary as much); Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine,* 52 ADMIN. L. REV. 63, 92 (2000) .

protection of public health. That holding amounts to judicial legislation for all practical purposes. The protect public health rule reflects the Court's own policy decision without any meaningful Congressional guidance, and this rule prospectively binds a host of future actions by the implementing agency. Democratic constraints do not limit the judiciary's policy choices, but such constraints might well limit an administrative agency's policy choices in making a similar unbounded policy decision.[325] Administrative agencies, unlike the judiciary, face supervision from elected officials, the President of the United States and Congressional representatives serving on oversight committees.[326] From the standpoint of democratic theory, it would be quite senseless to discourage saving constructions from the agencies, while encouraging them from courts.[327]

Like agencies, courts may not exercise legislative authority without some constitutional justification.[328] In most administrative law cases, applicable statutes delegate interpretive authority to the

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[325] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-866 (1984) (describing administrative agencies as part of a political branch and indirectly accountable to the people).

[326] *See generally* WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 909-938, 954-57 (1995); Pierce *supra* note 324, at 94 (discussing Presidential "arm twisting" and "jawboning.").

[327] Richard Pierce has objected to the D.C. Circuit practice of ordering agencies to narrowly construe their statutory mandates as anti-democratic. *See* Pierce, *supra* note 324, at 92-94. He points out that to the extent a narrowing administrative construction binds future administrations, it limits the policy discretion of future administrations, and therefore the effects of future Presidential elections. *See* id. Even if administrative decisions do bind future presidents, they are less anti-democratic than judicial constructions. For the judicial constructions not only bind and limit future Presidents but come from the "*least* politically accountable officials," namely judges. *See* id. at 92 (emphasis in original).

[328] *Cf* Martha A. Field, *Sources of Law: The Scope of Federal Common Law,* 99 HARV. L. REV. 883, 893 n. 46 (there must always be statutory or constitutional authority for any federal common law rule).

judiciary.[329] If a statute itself does not properly delegate the needed authority to the judiciary, because it lacks an intelligible principle, then the statute's existence may not justify judicial construction. A lack of an intelligible principle might suggest that there is "no law to apply" in resolving a case.[330] Traditionally, the courts have declined to review agency action where no law applies, suggesting doubt about judicial authority to second guess agency decision-making where no intelligible principle exists.[331]

In other words, if Congress may not delegate legislative authority, Congress may not delegate legislative authority to courts. And to throw a question to the courts without the benefit of an announcement of at least a general policy seems just as suspect as to delegate quasi-legislative rulemaking authority to an agency with no guidance.

To the extent federal judicial authority to craft a policy emanates from a statute,[332] judicial construction of a statute that arguably lacks an intelligible principle is at least as constitutionally suspect as administrative construction. In light of the line of cases approving delegations to entities that have independent authority to address the matter at hand without strict application of the intelligible principle

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[329] *See e.g.* 5 U.S.C. § 706; 42 U.S.C. § 7607(b).

[330] *See generally,* Zellmer, *supra* note 9, at 989-991 (suggesting that a situation where no law applies might create a serious nondelegation issue). *Cf*. Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and The Quiet Revolution in Administrative Law,* 1988 DUKE L. J. 819, 874 (calling for repeal of the Administrative Procedure Act provision prohibiting judicial review where no law applies); Kenneth Culp Davis, *No Law to Apply,* 25 SAN DIEGO L. REV. 1, 4-10 (1988) (recommending judicial review even without law to apply).

[331] *See* Heckler v. Chaney, 470 U.S. 821, 830-31 (1985).

[332] *See e.g.* Texas Ind., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (power to write common law rule emanates from statute); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (declining to craft federal common law rule governing federal mineral leases, because the Court found no threat to a discernable federal policy or interest).

requirement,[333] one must inquire into the scope of federal court's independent authority to make law. Just as *American Trucking's* rejection of administrative saving construction should not apply in areas where independent executive branch lawmaking authority exists under the constitution, so too rejection of judicial saving constructions should not apply to areas where federal courts have lawmaking power independent of any Congressional authorization.

Under *Erie R. Co. v. Tompkins*, however, the federal courts enjoy no general lawmaking authority.[334] The *Erie* Court held that state law, rather than federal common law, should define the scope of a railroad's liability for accidents occurring along its right of way.[335] In doing so, it rejected the general authority of federal courts to develop rules of decision. The rationale for this rejection reflected a combination of both statutory and constitutional restraints upon the independent law-making authority of federal courts.[336] The *Erie* Court overruled a prior decision, *Swift v. Tyson,*[337] construing the Federal Judiciary Act of 1789 to authorize federal courts to decide "what the common law of the State

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[333] *See e.g. See* Loving v. United States, 517 U.S. 748, 772-73 (1996) (nondelegation doctrine may not apply fully to rulemaking regarding military discipline because of President's authority as commander-in-chief); United States v. Mazurie, 419 U.S. 544, 556-557 (1975) (nondelegation doctrine does not apply fully to delegation to an Indian Tribe).

[334] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1937) ("There is no general federal common law."); Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (federal courts "do not possess a general power to develop and apply their own rules of decision").

[335] Erie, 304 U.S. at 69, 80.

[336] *See* Erie, 304 U.S. at 71-80 (discussing the reasons behind the Court's denial of a federal common law).

[337] 16 Pet. 1 (1842).

is or should be."[338] *Swift* interpreted a statutory requirement that federal courts must generally apply the "laws of the several States" to exclude any federal judicial obligation to follow state supreme court decisions announcing common law rules,[339] thus allowing federal courts to choose the common law rules that would apply in diversity suits. *Swift's* view that state supreme court decisions were not state laws made sense in an era when the common law was viewed as a "transcendental body of law" that courts discovered rather than created.[340] Under this view, state court decisions, while evidence of the content of the law, were not themselves law.[341] But once the Supreme Court perceived that federal selection of common law rules reflected judicial policy judgments (in keeping with legal realism), it decided that federal courts ought not exercise the general lawmaking power approved in *Swift.*[342] *Erie*'s rejection of judicial policy-making also rested in part upon constitutional grounds, creating a rule that the federal courts lack general lawmaking power.[343]

Exceptions to the general principle that federal courts lack legislative authority exist.[344] But the

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[338] Erie, 304 U.S. at 71-80.

[339] Id. at 71.

[340] *See* id. at 79.

[341] *See* id. at 79.

[342] *See id*.

[343] *See* id. at 77-78 (the unconstitutionality of the "course pursued" compels reversal of *Swift).*

[344] *See e.g.* Hinterlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (holding on the day Erie issued that federal common law governs apportionment of water from an interstate stream). *See generally* Henry J. Friendly, *In Praise of Erie-And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-422 (1964) (noting and defending the existence of some federal common law); Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Alfred Hill, *The Lawmaking Power of the Federal Courts: Constitutional*

Supreme Court has repeatedly stated that the courts may only craft federal rules of decision in a few narrowly circumscribed areas.[345] These exceptions probably do not reach many things of importance, such as the power to establish public law standards to govern administrative agencies.

For example, a court probably does not have the authority to write legislative instructions to EPA about how to write pollution control standards without any delegated authority to do so. The Court has certainly never suggested that the limited exceptions to the rule that federal courts may not legislate embrace such a sweeping power.[346] If the courts would not have this authority to create a legislative program for a federal agency without an authorizing statute, then its authority to write

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Preemption, 67 COLUM. L. REV. 1024 (1967); Paul J. Mishkin, *The Variousness of Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PENN. L. REV. 797 (1957); Note, *The Federal Common Law,* 82 HARV. L. REV. 1512 (1969); Note, *The Competence of Federal Courts to Formulate Rules of Decision,* 77 HARV. L. REV. 1084 (1964); Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie,* 74 YALE L. J. 325 (1964); Comment, *Rules of Decision in Nondiversity Suits,* 69 YALE L. J. 1428 (1960); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327 (1992); Martin H. Redish, *Federal Common Law, Political Legitimacy and the Interpretive Process: An Institutionalist Perspective*, 83 NW. U. L. REV. 761 (1989); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989); Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853 (1989); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW U. L. REV. 860 (1989).

[345] *See* Texas Industries v. Radcliff Materials, Inc. 451 U.S. 630, 640 (1981) (federal common law applies only in "some limited areas."); Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988) (federal common law exists in a "few areas, involving `uniquely federal interests.'") (citations omitted); Wheedin v. Wheeler, 373 U.S. 647, 651 (1963) (areas of federal common law are "few and restricted").

[346] *Cf.* C. WRIGHT, A. MILLER, & E. COOPER JURISDICTION AND RELATED MATTERS 2d §§ 4514-19 (listing cases). I cannot offer a full theoretical proof that the constitution bars the creation of such an authority here, because doing so would require the development and defense of an entire theory of the scope of federal common law.

standards governing agency action relies upon delegated authority.[347] If that is the case, then exercise of that authority in the face of a serious nondelegation challenge seems suspect indeed.[348]

Even when a statute contains a general policy clearly satisfying the nondelegation doctrine, recent Supreme Court cases express skepticism about the constitutional authority of courts to create legal rules filling in the interstices of very broad statutes. In a number of cases, the Court has turned to state law to fill in these interstices, on the grounds that judges should not make law without adequate Congressional guidance.

For example, in *O'Melveny & Myers v. FDIC,*[349] the Court declined to fashion a federal common law rule that would affect the Federal Deposit Insurance Company's (FDIC's) ability to recover damages against a law firm that had represented a failed federally insured savings and loan association (S & L).[350] The Court bottomed its refusal on separation of powers grounds (like those that give rise to the nondelegation doctrine).[351] It explained that a decision affecting the tort liability of lawyers and accountants representing S & Ls would require weighing and appraisal of a host of

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[347] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001) (characterizing the nondelegation doctrine has precluding any Congressional delegation of legislative power, not just a delegation to an agency); Loving v. United States, 517 U.S. 748, 771, 776-77 (1996); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

[348] *See* Larry Kramer, *The Lawmaking Power of the Federal Courts,* 12 PACE L. REV. 263, 290 (1992) (arguing that federal common law must further "ascertainable statutory purposes").

[349] 512 U.S. 79 (1994).

[350] *See* id. at 80-81, 89.

[351] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1367 (1996). *See generally* Weiser, *supra* note 222 at 1704 (noting the role separation of powers has played in increasing judicial reluctance to create federal common law).

competing policy considerations.[352] That weighing and appraising, said the Court, is more appropriate for "those who write the laws" than for "those who interpret them."[353] It thus suggested that no federal common law rulemaking was appropriate, because Congress should make the relevant policy choice.[354]

Recently, the Court has emphasized the need for some Congressional policy as a prerequisite to federal judicial use of common law authority. For example, in *Atherton v. FDIC,*[355] the Court rejected the applicability of federal common law standards establishing the duty of care officers and directors owe to federally chartered and insured banks.[356] The Court emphasized that a conflict between a federal policy or interest and a state law is normally a precondition for the application of federal common law to a problem.[357]

If a statute contains no federal policy, then a Court cannot find a conflict between a federal policy or interest and a state law to justify creation of a federal rule of decision. Indeed, the *Atherton* Court declined to create a federal common law rule notwithstanding a federal statute expressing the general policy of assuring the solvency of federally chartered and insured institutions and a specific policy

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[352] O'Melveny & Myers, 512 U.S. at 89.

[353] Id.

[354] *Cf*. Paul Lund, *The Decline of Federal Common Law*, 76 B.U.L.REV. 895, 901, 920-954 (1996) (arguing that a Court should have crafted a federal rule to serve identifiable federal policy interests).

[355] 519 U.S. 213 (1997).

[356] Id. at 215-18.

[357] Id. at 218.

regarding a duty of care.[358]

Courts do have the authority to fashion common law rules addressing unanswered policy issues in federal statutes that contain an intelligible principle.[359] But the Court's expressions of doubt about the appropriateness of judicial creation of policy, even in cases where some intelligible principle exists, suggest a grave constitutional doubt about judicial authority to write federal rules where a statute provides no intelligible principle.

Readers should not confuse a want of intelligible principle with the mere existence of some ambiguity in a statute.[360] Every statute, no matter how specific, will provide ambiguous guidance as to

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[358] The Court suggested that the federal interest in promoting the fiscal soundness of banks it chartered and insured should not count as a ground for creating a federal common law rule on formalist grounds. Specifically, since the Federal Deposit Insurance Corporation acted as a "receiver of a failed institution," the Court assumed that it "is not pursuing the interest of the Federal Government as a bank insurer." Id. at 225. It did not explain why it believed that the use of a federal receiver was unrelated to the federal interest in making banks fiscally sound or conserving insurance proceeds. Nor did it explain why the limits of the particular interest a litigating agency had in a given case should limit the federal policies that a Court should consider relevant to deciding whether to create a federal rule of decision.

The Court divorced its decision about creation of a federal law rule from its consideration of the specific statutory provisions creating a standard of care for such cases. It held that the statutory language created a gross negligence standard as a minimum floor governing the standards of directors. Id. at 226-27. It held that stricter state law would continue to apply as well. Id. at 227-231. The holding that no federal common law applied had the effect, in this context, of buttressing the conclusion that state laws establishing stricter standards of care continued to apply. *See* id. at 230-31.

[359] *See generally* Donald L. Doernberg, *Juridical Chameleons in the "New Erie" Canal,* 1990 UTAH L. REV. 759, 803 (claiming that cases creating federal law involve a relevant federal statute).

[360] *See* Sunstein, *supra* note 22, at 361 (statutory ambiguity does not imply unconstitutionality under the nondelegation doctrine). *See generally* Lund, *supra* note 354, at 1010 (distinguishing between making policy and "making federal rules to effectuate" Congressional "policy decisions").

some subsidiary issue.[361] But that's very different from lacking any intelligible policy at all.

If a statute announces some policy, courts have the authority to interpret or add to a statute, even if the policy is too general to dictate a resolution of the issue before the Court.[362] This principle accounts for some of the most expansive and troubling exercises of federal judicial lawmaking authority. For example, in *Textile Workers v. Lincoln Mills*,[363] a very controversial decision among constitutional scholars,[364] the Supreme Court reversed a decision not to specifically enforce an obligation to arbitrate disputes under a collective bargaining agreement.[365] Section 301 of the Labor Management Relations Act of 1947,[366] under which the Court acted, provided no rules to govern enforcement of these agreements, as the dissent pointed out.[367] The Court, however, provided a rule of specific enforcement,

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[361] *See* Lund, *supra* note 354, at 1011, Merrill, *supra* note 344, at 353.

[362] *See* Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (federal courts have authority to require agencies to follow specific Congressional intent and to overrule unreasonable agency constructions of ambiguous legislation). *See e.g.* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 755 (1998) (decision about employer liability under Title VI for a supervisor's creation of a hostile work environment involves interpretation rather than federal common law); United States v. Bestfoods, 524 U.S. 51, 63 (1998) (declining to displace state law governing parent corporation liability under CERCLA because the statute does not address parent liability).

[363] 353 U.S. 448 (1956).

[364] *Compare* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1 (1957) *with* Note, *The Federal Common Law,* 82 HARV. L. REV. 1512, 1531-35 (1969).

[365] 353 U.S. 448 (1956).

[366] (Taft-Hartley Act), § 301, 29 U.S.C. § 185(a).

[367] *See* Lincoln Mills, 353 U.S. at 460-61 (Frankfurter J., dissenting).

notwithstanding the statutory silence as to remedies.[368] The Court identified an intelligible principle in the statute to guide the creation of federal common law on collective bargaining, specifically the principle of encouraging collective bargaining as a means of providing for labor peace.[369] That general principle led the Court to adopt a rule specifically enforcing arbitration clauses in collective bargaining agreements.[370] Subsequent cases developing this body of law contain common law reasoning based on general principles found in the statute.[371] Not surprisingly, a long line of cases allow the judiciary to make policy judgments in interpreting ambiguous statutes and even in creating common law rules to effectuate their purposes.[372] But the courts deciding these cases rely, at least implicitly, upon delegated authority from Congress.[373]

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[368] Id. at 455-56.

[369] Id. at 454-56.

[370] Id. at 456.

[371] *See e.g.* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (requiring arbitration of a grievance under a collective bargaining agreement before a court could rule on the validity of a grievance); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (subjecting a dispute over contracting out to arbitration under a collective bargaining agreement, notwithstanding a management rights clause in the agreement); United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960) (enforcing arbitral award after expiration of the underlying collective bargaining agreement).

[372] *See e.g.* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) (creating standards for employer liability under Title VI for a hostile work environment created by a supervisor); Urie v. Thompson, 337 U.S. 163 (1949); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) (federal court creates a statute of limitations for claims under a collective bargaining agreement). Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 317 (1992) ("the whole purpose of federal common law is to effectuate" Congressional policies).

[373] *See generally* Donald L. Doernberg, *Juridical Chameleons in the New Erie Canal*, 1990 UTAH L. REV. 759, 761 (federal common law does not offend separation of powers if constrained by

I do not mean to suggest that no federal judicial common lawmaking authority exists without a statutory policy. The Court's holdings regarding admiralty,[374] interstate pollution,[375] and the act of state doctrine[376] pursue policies not derived from any statute. But the Court's powers to write law with no statutory predicate at all are even more limited than the power to write rules of decision to advance statutory purposes. And there's no reason to expect independent judicial legislative authority to prove relevant more often than independent executive branch legislative authority, which does exist in limited areas as well.

I would expect some federal courts scholars to argue that even without a statutory policy, courts have inherent authority to interpret a statute, including the authority to narrow it to avoid a nondelegation

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expressions of policy in positive law). This does not necessarily mean that the delegation must be explicit. *Compare* Milwaukee v. Illinois, 406 U.S. 91 (1972) (majority finds no federal common law because Congress did not explicitly mandate its creation) *with* United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973) (rejecting argument that state law applies absent specific contrary statutory directive); Bush v. Lucas, 462 U.S. 367, 357-76 (1983) (rejecting requirement for specific Congressional authorization of federal common law). Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (no specific command to create federal common law required when federal preemption applies). Even if Courts have inherent authority to write rules to elaborate or interpret a federal statute, they may have no inherent authority to write federal law on their own without a federal statute in many areas.

[374] *See e.g.* American Ins. Co. v. Canter 26 U.S. (1 Pet.) 511, 545-46 (1828) (courts apply admiralty law as cases arise); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) (expansively interpreting lawmaking authority of federal courts in admiralty).

[375] *See e.g.* Missouri v. Illinois, 200 U.S. 496 (1906) (adjudicating a dispute over discharge of sewage into interstate rivers under federal common law).

[376] *See e.g.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine precludes a claim based upon invalidity of Cuban expropriation).

claim.[377] If such an authority exists, it must come from the Article III authority to decide cases arising under federal law.[378] While this is plausible, an equally plausible rationale exists for rejecting the Court's statement that agencies cannot cure nondelegation defects. One might posit that the authority to "execute" the laws, an authority that the President, and by extension, an administrative agency clearly has under article II of the constitution, authorizes interpretation of statutes. It does not seem plausible, however, to reject inherent agency authority to interpret a statute, as the *American Trucking* Court does with respect to agency saving constructions in the face of a nondelegation claim, but to accept judicial authority to do so (except in cases where a more specific source of constitutional authority is available for either the agency or the court). After all, agencies must interpret statutes to implement them just as courts must interpret them in order to review their application.

Finally, nothing in *American Trucking* casts serious doubt upon the extension of its rationale to judicial saving construction under the avoidance canon. The Court specifically declined to apply the avoidance canon to the question of whether cost should be considered in writing national ambient air quality standards under the Clean Air Act; indeed, it reached and rejected the nondelegation claim.[379] Hence, the case does not address the problem of a judge saving a statute from a possible ruling on a nondelegation issue through extraordinary construction.

American Trucking does, however, illustrate an important caveat. Judicial and administrative

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[377] *See generally* Jonothan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation,* 96 NW. U. L. REV. ___ (2002).

[378] U.S. Const. Art. III, sec. 2.

[379] *See* American Trucking, 531 U.S. at 472-76.

construction must continue to play a role in nondelegation cases, not in saving statutes through narrowing construction, but simply in trying to understand what they mean. In the paragraph immediately following the Court's rejection of agency saving construction, the Court accepted a construction of the Clean Air Act offered by the Solicitor General.[380] That construction read the requirement that EPA establish standards "requisite" to protect the public health as requiring standards "sufficient, but not more than necessary."[381] The Court did not indicate that it adopted this reading as a saving construction facilitating the avoidance of the nondelegation issue. Nor did the Court indicate that this construction was essential to eliminating any grave doubt about the statute's constitutionality, finding "the scope of discretion 109(b)(1) allows . . . well within the outer limits" of the Court's "nondelegation precedent."[382] But the Court found it helpful, as one might expect, to understand the text's meaning as a prelude to evaluating it under the nondelegation doctrine.[383] For those purposes, administrative and judicial construction should continue to play a role.

Furthermore, the Court's statement reserving to itself the question of whether a statute delegates legislative authority[384] does not embrace judicial saving construction. Because a determination that a statute delegates legislative authority requires a holding of unconstitutionality, this statement reserves to

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[380] Id. at 473.

[381] Id.

[382] *See* id. at 474.

[383] *See* id. at 473 (addressing the question of the Act's interpretation first because "the first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers").

[384] Id. at 473.

the Court adjudication of the constitutional issue, but does not address the question of whether a Court should construe a statute to avoid, rather than resolve, a nondelegation issue.

Grave doubts about the constitutionality of legislation under the nondelegation doctrine generally create grave doubts about the constitutionality of constructions narrowing an unintelligible underlying mandate.[385] This seems as true of judicial as of administrative construction.

C. **Why Application of the Avoidance Canon Poses Unique Problems in the Nondelegation Context.**

This problem of doubts about the constitutionality of a statute creating doubts about the constitutional authority to construe a statute to avoid a constitutional issue does not arise under most other applications of the avoidance canon, because most constitutional doctrines that trigger the avoidance canon do not really raise questions about the delegation of interpretive authority to the Court. They typically call into question a particular statutory application, not the entire statute (or even an entire statutory provision).[386] Furthermore, the constitutional doctrine triggering avoidance tends to enhance the legitimacy of saving judicial construction outside of the nondelegation context, by providing a constitutional basis for the substantive direction of construction. Construing a statute to avoid a nondelegation issue requires constitutionally suspect judicial policy-making without statutory guidance, in

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[385] Some exceptions may exist to this rule in areas where the courts have truly independent authority to write law. *See generally* Clark, *supra* note 351, at 1270-71 (agreeing with general principle of no federal common law, but arguing that constitutional structure supports exceptions to this principle in some areas).

[386] *Cf.* Aranson et al., *supra* note 10, at 16-17 (pointing out that procedural due process, equal protection, and free speech doctrines do not "void entire regulatory schemes.")

great tension with the legislative supremacy principle that motivates the nondelegation doctrine.

NLRB v. Catholic Bishops of Chicago[387] illustrates the point that avoidance outside of the nondelegation context does not call into question the Court's overall authority to interpret a statute. That case raised the question of whether the National Labor Relations Act (NLRA)[388] applies to a parochial school.[389] The Court held that it did not.[390] The Court interpreted the legislation narrowly, because it feared that the statute, by requiring federal supervision of collective bargaining between teachers and the Church, would otherwise pose a difficult free exercise issue.[391] The NLRA was constitutional in general.[392] The Court had general authority to interpret the statute.[393] And Congress had made a general policy decision, namely that employers (with some exceptions set out in the act) would have to bargain in good faith with unions representing employees.[394] The Court's narrow interpretation simply cut off a possibly unconstitutional (in the Court's view) application of the statute, leaving the rest

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[387] 440 U.S. 490 (1979).

[388] 29 U.S.C. §§ 151-169.

[389] NLRB, 440 U.S. at 507.

[390] Id.

[391] Id. at 506-07.

[392] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding statute under commerce clause).

[393] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (it is the judiciary's province to say what the law is).

[394] *See* NLRB, 440 U.S. at 493-94 (case arises out of failure of the religious schools to recognize and bargain with the union representing its employees).

intact.[395]

Commentators have sharply attacked this particular application of the avoidance canon, because it seemed to ignore the rule that a saving construction must be plausible.[396] After all, the NLRA applied by its terms to all "employees," with some exceptions not relevant in this case.[397] As the dissent pointed out, the Court did not explain why religious school teachers were not employees of the employing religious school.[398] The argument that the construction is wrong, however, does not suggest that the Court lacked authority to construe the statute and legislated when it did so.[399] Rather, the Court made a particular narrow decision about the statute's application that it clearly had authority to make, but did so badly. A ruling that upheld NLRB jurisdiction over religious school teachers would satisfy the concerns of this case's critics. This means that criticism of this application of the avoidance canon does not involve questioning the Court's general authority to interpret the statute. Rather, the commentators call into question the particular construction the Court chose.

The *NLRB* case also shows how, outside of the nondelegation context, the constitutional motivation for the substance of the construction can enhance the construction's legitimacy. The *NLRB*

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[395] Id. at 506-07.

[396] *See e.g.* Eskridge, *Public Values*, *supra* note 216, at 1066.

[397] *See* NLRB, 440 U.S. at 511 (Brennan J., dissenting); 29 U.S.C. § 152(3)..

[398] NLRB, 440 U.S. at 517 (Court does not provide evidence that Congress intended religious school teachers to be exempt from definition of employee).

[399] *See* Kramer, *supra* note 348, at 289, 300 n. 116 (distinguishing between arguments about the wisdom of a judicial decision's substance from questions about the legitimacy of the federal court's deciding an issue).

Court construed this statute to avoid a serious constitutional problem, interference with freedom of religion.[400] Thus, the Court's decision, to the extent the constitutional analysis is at all plausible, derives some legitimacy from the constitutional values it serves.

Avoiding a nondelegation issue through statutory construction creates a serious legitimacy problem. Such constructions always take place where grave doubt exists about the very existence of any legislative policy decision. And doubt exists about the constitutionality of any construction of the statute for the sake of avoiding a nondelegation claim, because, absent some prior Congressional policy decision, the interpretation becomes a forbidden legislative act. Put another way, in many contexts the avoidance canon has some countermajoritarian constitutional basis for its countermajoritarian tendencies. But in the nondelegation context, the Court's construction undercuts the very majoritarian values the construction aims to serve.[401]

Furthermore, construction to avoid a nondelegation problem will tend to prove more unprincipled than constructions serving substantive constitutional values. The arguments thus far have primarily been formalist in nature, in keeping with the general tenor of recent Supreme Court decisions.[402] Judicial construction of statutes to avoid nondelegation claims, however, produces

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[400] *See* NLRB, 440 U.S. at 507.

[401] *Accord* Manning, *supra* note 6, at 228.

[402] *See* Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters,* 54 OKLA. L. REV. 1, 2 (2001) ("the continuing allure of formalism dominates constitutional law."); Jack Goldsmith, *The New Formalism in United States Foreign Relations Law,* 70 U. COLO. L. REV. 1395 (1999); Andrew S. Gold, *Formalism and State Sovereignty in Printz v. United States: Cooperation by Consent,* 22 HARV. J. L. & PUB. POL'Y 247, 247 (1998) (describing *Printz* as replacing functionalism with "structural formalism" in the "state sovereignty context") ; Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism,*

functional problems as well, of the sort the modern Court has taken quite seriously in other contexts.[403]

Application of the avoidance canon in the nondelegation context will usually force judges to shape saving constructions reflecting their individual views of sound policy. Many different constructions serving many different values may clarify a statutory mandate. For example, take our statute requiring EPA to write "good environmental regulations." A judge could clarify this by requiring that costs not exceed benefits or that no individual suffer health impairment. The choice between these views (and other possibilities) would necessarily reflect a judicial policy preference.

In other cases, parties opposing government regulation will get to choose a saving construction, even when a saving construction supporting more vigorous government regulation is fairly available. Regulated parties will have an incentive to challenge a statute under the nondelegation doctrine, because they will escape regulation if a court finds the statute unconstitutional. They can argue in the alternative for a construction weakening regulation.

Beneficiaries of government regulation, by contrast, have no incentive to raise a nondelegation claim. Since they will benefit from regulation under a statute, they do not want a court to find it unconstitutional. Hence, they probably will not ask a court to construe a statute to avoid a nondelegation question.

This probably explains why the *American Trucking* Court granted certiorari on the question of

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1997 SUP. CT. REV. 199, 200 (describing the Court's opinion in *Printz* as "decidedly formalistic"); *Cf.* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence,* 67 U. CHI. L. REV. 1089, 1094 (2000) (characterizing the Court's commerce and dormant commerce clause jurisprudence as casting "aside" the "categories and methods" of "formalism" and "realism"). *See generally* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases,* 22 HARV. J. L. & PUB. POL'Y 21 (1998).

[403] *See e.g.*. O'Melveny & Myers, 512 U.S. 79, 89 (1994) (suggesting that judicial policy-making is inappropriate and declining to fashion a federal common law rule).

whether it should construe the Clean Air Act to require EPA consideration of cost when the agency promulgated national ambient air quality standards.[404] The Supreme Court considered this interpretation because the parties challenging the Act under the nondelegation doctrine preferred this construction.[405] A court could clarify the Act's mandate that EPA protect public health with an adequate margin of safety, by specifying that this meant allowing no more than 100 people to die or experience serious injury.[406] But no party asked the Court to consider this construction, because EPA, environmental groups, and the pro-EPA states did not favor any statutory holding on nondelegation grounds.[407]

Under other constitutional doctrines, the nature of the constitutional problem controls the policy direction of constructions avoiding constitutional questions. The avoidance canon tends to encourage

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[404] The issue of whether EPA should consider cost in writing the NAAQS does not present a strikingly appropriate issue for certiorari otherwise. The lower courts had consistently affirmed the principle that EPA may not consider cost in setting the NAAQS, s*ee* American Trucking, 531 U.S. at 464, and the Supreme Court had denied certiorari on the same question when it first made its way to the court of appeals. *See* Lead Industries Ass'n, Inc. v. EPA, 449 U.S. 1042 (1980).

[405] *See* American Trucking, 531 U.S. at 470.

[406] *Cf.* American Trucking Ass'ns v. EPA, 175 F.3rd 1027, 1038-39 (D.C. Cir. 1999) (suggesting various interpretations of the statute that do not require consideration of cost).

[407] *See* Brief for the Federal Respondents at 48, American Trucking Ass'ns, Inc. v. Whitman, 531 U.S. 457 (2001) (No. 99-1426) (arguing that this case offers "no occasion to give Section 109 a narrowing construction"); Brief for Respondents Massachusetts & New Jersey at 37, American Trucking Ass'ns, Inc. v. Whitman, 531 U.S. 457 (2001) (No. 99-1426) (heading urges Court not to use nondelegation doctrine as an "excuse to rewrite the statute."); Brief for Cross-Respondent American Lung Association at 40, American Trucking Ass'ns, Inc. v. Whitman, 531 U.S. 457 (2001) (No. 99-1426) (stating that "[t]he Act's NAAQS provisions pose no colorable nondelegation problem that could justify imposing a narrowing construction of the Act.").

free speech,[408] protect criminal defendants,[409] and limit regulation of churches[410] because of the substantive content of the constitutional provisions underlying the constructions. Therefore, the substantive policies that the judicial constructions implement have roots in constitutional values, rather than judicial policy decisions lacking constitutional foundation.

This problem of constitutionally suspect and unprincipled construction has the potential to have quite broad consequences. Since legislation almost always leaves some issues unresolved, litigants can raise nondelegation claims about almost every statute relying upon executive branch implementation.[411] To be sure, many of these claims will appear implausible to courts and will not trigger extraordinary construction. But judges may find any one of these claims plausible and construe a statute to avoid it. The D.C. Circuit's holding in *American Trucking* suggests that this practice would prove random and unpredictable, for that court found a nondelegation attack plausible under one of the most prescriptive statutes this side of the Internal Revenue Code.[412]

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[408] *See e.g*. Int'l Ass'n of Machinists v. S. B. Street, 367 U.S. 740, 749-50 (1961); DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1987) (construing statute to permit leafleting); Kloppenberg, *supra* note 116 (discussing avoidance in the first amendment context).

[409] *See e.g.* Jones v. United States, 526 U.S. 227, 239-40 (1999).

[410] *See e.g.* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (construing statute to avoid NLRB jurisdiction over church-operated schools).

[411] *See* United States v. Haggar Apparel Co., 526 U.S. 380, 392-93 (1999) (Congress probably cannot anticipate all applications of a general policy).

[412] *See* Chevron v. United States, 467 U.S. 837, 848 (1984) (describing the Clean Air Act as "detailed, lengthy," and "complex"); American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1058 (D.C. Cir. 1999) (Judge Tatel dissenting) (the Act describes "in detail" many of EPA's powers), *modified,* 195 F.3d 4, *majority opinion reversed in part,* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001); General Motors Corp. v. EPA, 871 F.2d 495, 499 (5th Cir. 1989) (describing the Act as

A practice of construing statutes to avoid nondelegation problems, if it catches on, has the potential to unpredictably affect a lot of public law. The avoidance canon does not now control most statutory construction, because the constitution's specific provisions usually only present problems in somewhat limited areas. For example, free speech claims may arise in libel,[413] but arise seldom (if at all) in the environmental context, where the law limits pollution rather than communication. The nondelegation doctrine, by contrast, involves a general theory of legislation, so litigants can raise nondelegation claims about a wide variety of statutes.[414]

This means that frequent use of the avoidance canon in the nondelegation context could lead to significant judicial control of important policies now set by Congress. This would represent a radical change, especially for regulatory legislation. Currently, most administrative law cases revolve around searches for Congressional intent and evaluations of the reasonableness of agency actions under the Administrative Procedure Act[415]. They do not often involve constitutional questions. Nor do they frequently allow judges to construe statutes based on their own policy preferences, even though these preferences may subtly influence judicial reading of Congressional intent.

It is perhaps not surprising that the cases where the Court has most clearly recognized the need

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a "detailed legislative scheme").

[413] *See e.g*. New York Times v. Sullivan, 376 U.S. 254 (1964).

[414] *See e.g.* American Trucking, 531 U.S. 457 (Clean Air Act); Loving v. United States, 517 U.S. 748 (1996) (Uniform Code of Military Justice); W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) (Tariff Act of 1922).

[415] 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521.

to limit application of the avoidance canon have arisen in the area of criminal law.[416] Serious and legitimate constitutional issues arise so frequently in that area, that the Court often confronts arguments based on the avoidance canon. While the arguments arise frequently in this area, substantive constitutional values usually apply and shape the direction of constructions. Furthermore, this does not involve a radical constitutionalizing of criminal law, because constitutional issues already arise routinely in this area of the law.[417] This contrasts with regulatory cases that usually do not raise serious constitutional issues.

Hence, recognizing that judicial application of the avoidance canon in the nondelegation context raises serious constitutional concerns does not call its application into question in most other areas. On the other hand, introducing frequent resort to the avoidance canon under the nondelegation doctrine would radically change the judicial role in public law.

III. **Respecting the Limits of the Avoidance Canon and the Nondelegation Doctrine**

This part will address the implications of the argument that construction to avoid nondelegation problems leads to unprincipled and constitutionally suspect judicial policymaking. It will first discuss some of the advantages that such construction might offer, showing that they are not as strong as might appear. It will then discuss the issue of what federal courts should do when asked to construe a statute to avoid a nondelegation difficulty.

A. **Advantages of Construction to Avoid Resolving a Nondelegation Problem**

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[416] *See e.g.* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998); Jones, 526 at 239-40; Miller v. French, 530 U.S. 327, 341 (2000).

[417] *See* WAYNE R. LAFAVE, CRIMINAL LAW 97-112, 124-135, 146-158, 163-198 (3d ed. 2000) (discussing various constitutional issues that arise in criminal law).

If a statute poses a serious nondelegation problem, then a decision not to adopt a saving construction may leave a court with no alternative but to issue a ruling on whether that statute violates the nondelegation doctrine. The case law on the avoidance canon generally teaches that avoidance of constitutional issues is desirable, suggesting that the avoidance of a decision on a nondelegation claim is likewise desirable.[418]

The rationale for avoiding constitutional issues, however, does not apply as forcefully to a nondelegation claim as it does to many other types of constitutional claims. Avoiding application of the nondelegation doctrine offers fewer advantages than most decisions to avoid resolving a constitutional issue and entails greater disadvantages.

Application of the avoidance canon in many contexts avoids a permanent bar upon democratic control of an important substantive policy choice, the usual consequence of a ruling striking down a statute on constitutional grounds.[419] The Supreme Court's decision in *Buckley v. Valeo*[420] illustrates how serious cutting off democratic control of policy choices can be. *Buckley* held that Congress may not limit campaign expenditures, because doing so limits free speech.[421] This ruling limited democratic experimentation with campaign finance reform. Future campaign finance legislation might limit campaign

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[418] *See* Kelly, *supra* note 31, at 836.

[419] *See* Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation,* 66 CHI. KENT L. REV. 481, 484 (1990) (describing constitutional decisions as "irrevocable" and "virtually impossible" to amend).

[420] 424 U.S. 1 (1976).

[421] Id. at 14-20.

contributions, but not expenditures.[422] Many scholars have argued that this ruling has seriously crippled efforts to limit money's influence on politics.[423] Thus, a ruling of unconstitutionality reduced the range of democratically available policies to solve a serious public problem.

A risk always exists that a court will exercise this power to eliminate democratic control erroneously. I have chosen a particularly important decision, and one many scholars think erroneous. But the same general problem applies to many constitutional rulings. In the area of individual rights, where the avoidance canon applies most frequently, a constitutional ruling frequently cuts off an entire policy option. While this is acceptable if the Court gets it right, the risk that the Court will get it wrong is ever present.[424] Largely for this reason, the avoidance canon serves an important function by preventing premature or unnecessary truncation of democratic decision-making.

The avoidance canon, however, does not serve the function of preserving the formal opportunity for democratic control of policy decisions when applied to save a statute from the nondelegation doctrine. If the Court holds that a statute violates the nondelegation doctrine, Congress remains free to effectuate the full range of policy choices otherwise available to it. Since Congress has made no policy choice to begin with, but directed another branch of government to legislate, then a judicial finding that the legislation is unconstitutional formally eliminates no legislative policy option. Congress may continue to legislate on the subject, but must adopt a policy. Thus, the avoidance canon applied to a

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[422] Id. at 20-21.

[423] *See e.g.* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform,* 77 TEX. L. REV. 1705 (1999).

[424] *See* Kloppenberg, *supra* note 99, at 1053 (discussing fallibility of judges).

nondelegation claim does not serve one of its principal functions, avoidance of a permanent ban on specific future policy options.

A ruling that Congress has unconstitutionally delegated legislative authority to an agency, however, does have serious, albeit different, consequences. Such a ruling prohibits the agency from acting, at least until Congress rewrites the legislation to embody a policy. Prohibiting executive branch action unless and until Congress adopts a policy can have very serious negative consequences. If Congress enacts legislation, it has decided that the subject matter of the legislation needs attention. Given the enormous workload that Congress has,[425] a Congressional decision that a matter requires executive and/or judicial attention must be taken very seriously. At a minimum, a holding of unconstitutionality implies that the government will not immediately address a pressing national problem.

More seriously, the holding of unconstitutionality may cause a failure to address a pressing problem at all. Congress may not always be able to respond to a holding of unconstitutionality by adopting a policy.[426] A failure to adopt a policy might arise for a number of reasons. Congress may not have the time to gather and assess relevant information, especially if a very broad and complicated problem presents itself.[427]

Alternatively, Congress may have sufficient information to at least make a general policy, but a

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[425] *See generally* POSNER, *supra* note 31, at 285 (discussing increasing congressional workload).

[426] *See* Manning, *supra* note 18, at 714 (referring to "the substantial inertia of the legislative process.").

[427] *See* Mishkin, *supra* note 344, at 800; Sunstein, *supra* note 22, at 338 (lack of information may provide a good reason for Congress to delegate authority).

legislative majority may not favor any policy choice.[428] In either case, a possibility exists that a nondelegation ruling will cut off a needed policy decision, thwarting a democratically elected majority's effort to make sure that some important problem is addressed.[429]

But this elimination of a policy choice does not come from a formal, permanent, legal prohibition. It comes from institutional choices and limits that may change over time. So, Congress may, at least on occasion, respond to a nondelegation ruling by making a policy choice. This means that the consequences of holding that a statute violates the nondelegation doctrine sometimes may prove less permanent and serious than a ruling formally limiting the scope of political decision-making to protect individual rights. Accordingly, a principle advantage of the avoidance canon, the avoidance of a formal prohibition forbidding democratic pursuit of specific substantive policy options, simply does not exist in this area.

All this does not suggest that the Courts should feel free to make the nondelegation doctrine more stringent. I will address the subject of the appropriate scope of the nondelegation doctrine in another article, but I must say a little about this here. Congress appropriately legislates at a fairly high level of generality for a variety of reasons. The words in legislation must guide a large number of future

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[428] *See* Sunstein, *supra* note 22, at 338 (a "multimember body" may find "closure on any particular course of action" difficult); Mishkin, *supra* note 344, at 800 (political realities may compel Congress to bypass an issue).

[429] *See* Seidenfeld & Rossi, *supra* note 22, at 13-14 (arguing for the appropriateness of allowing agency discretion when the "political system" dooms direct Congressional efforts to alleviate an important problem).

actions, often over a long period of time.[430] Legislation must be general enough so that its principles can make sense when applied to a variety of circumstances,[431] some of which nobody can foresee.[432] Even when it is desirable to legislate with great particularity, majority rule requires less than ideal particularity. Legislation must reflect the views of a majority, and agreement between a large group of people may often only exist at a fairly high level of generality. A judicial demand for great specificity may paralyze democratic rule.

A nondelegation ruling does limit the availability of a democratic decision to have the executive branch cope with a vexing and perhaps changing problem with maximum flexibility. That can prove very serious, especially in areas where repeated detailed decisions are essential.[433]

Unfortunately, a court seems especially unlikely to know when a constitutional ruling will block or improve the democratic process in Congress.[434] Predicting whether a nondelegation holding will lead to a policy decision requires an understanding of elected officials and the political pressures they face. Because judges have little direct involvement in either electoral politics or legislative processes, they seem very unlikely to fully appreciate the changing political realities that govern the question of whether

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[430] *See* Hampton v. United States, 276 U.S. 394, 405, 407 (1928) (explaining that the facts from which a tariff should be calculated may vary over time).

[431] *See* id.

[432] *See* id. at 407 ("Congress may feel itself unable conveniently to determine exactly when its" power over tariffs "should be effective.")

[433] *See* Louis F. Jaffe, *An Essay on Delegation of Legislative Power,* 47 COLUM. L. REV. 359, 361 (1947).

[434] *Cf.* Mistretta v. United States, 488 U.S. 361, 415-16 (Scalia J., dissenting) ("Congress is better equipped to inform itself of the necessities of government.").

Congress will respond to a constitutional ruling with a policy decision.

The point that holding a statute unconstitutional under the nondelegation doctrine creates a risk of political paralysis rather than a permanent formal prohibition on policy-making, however, sharply reframes the issue of whether avoidance of constitutional rulings under the nondelegation doctrine through saving constructions is desirable. For the risk to the democratic process that a constitutional ruling poses resembles the risk to the democratic process that a saving construction poses under the nondelegation doctrine. If a construction is erroneous, Congress may not correct it, because of political paralysis.[435] Similarly, if a Court erroneously strikes down a statute under the nondelegation doctrine, Congress may not correct it, because of political paralysis.

Indeed, a judicial construction may enhance the probability that Congress will fail to make a needed policy choice.[436] Once a Court construes a statute, a democratic policy choice requires not just a Congressional reversal of the previous paralysis that prevented a policy choice in the original legislation, but also summoning the political will to overcome a new status quo bearing judicial imprimatur. While Congress sometimes overrules judicial decisions including judicial decisions implementing various substantive canons, it usually does so, at least in part, because it has already agreed upon a policy and sees the Court as having erroneously interfered with its policy choice.[437] If

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[435] *See* Merrill, *supra* note 99, at 22-23 (because of its crowded agenda, Congress is likely not to act on any given issue; therefore "lawmaking by federal courts" would shift policymaking power from Congress toward the judiciary).

[436] *Accord* Krent, *supra* note 203, at 220 (clear statement rules "chill congressional efforts to formulate policy").

[437] For example, the Court interpreted the civil rights act as not applying oversees, a very dubious interpretation based upon a clear statement rule. *See* EEOC v. Arabian Am. Oil Co., 499

Congress has not been able to choose a policy in the past, a saving construction probably will lessen the chances of it choosing one in the future.[438]

Saving legislation that might flunk a nondelegation test will not encourage Congress to legislate more vaguely than necessary.[439] Congress sometimes legislates in the hopes of exercising as much control as possible over the future. To the extent representatives want to have power over the country's future (which seems like at least one significant motivation to run for public office), they have a built in incentive to be specific when a majority can agree to specific legislation. For specificity enhances their control over future implementation.[440]

On the other hand, if Congress wants to do nothing while appearing to do something, it does not require the Court's endorsement of vagueness to do this. Indeed, representatives that do not want to control the future will not care if the Court strikes down their vapid legislation. A ruling of unconstitutionality only helps evaders of responsibility in Congress. Such a ruling allows evaders to claim

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U.S. 244, 262-63 (1991) (dissenting opinion) (explaining why majority's construction was poor). Congress subsequently revised the statute to correct the Court's arguably erroneous construction. Landgraf v. USI Film Products, 511 U.S. 244, 251 (1994) (recognizing that Congress superseded *EEOC v. Arabian Am. Oil Co.'s* holding). The causes for overriding, however, are complex. *See* William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions,* 101 YALE L. J. 331 (1991). Professor Eskridge reaches the disturbing conclusion that Congress is unlikely to overrule decisions that harm unorganized individuals or groups. *See* id. at 352-53.

[438] *Cf.* Bressman, *supra* note 4, at 1420 (explaining that when broad delegation is needed to secure passage of a statute, it is hard to get another statute enacted quickly).

[439] *Cf*. Aranson, et al., *supra* note 10, at 21 (arguing that a weak nondelegation doctrine encourages Congress to shift from legislating to casework).

[440] *Cf*. Manning, *supra* note 18, at 712 (constitution imposes a "structural cost - loss of control over policy details- when Congress . . . leaves policy questions unresolved.").

credit for trying to do something, to simultaneously avoid any blame for actual implementation (since the legislation won't be implemented), and to blame the Court for the failure to get anything done.[441]

A saving construction facilitates the partial fulfillment of the Congressional desire that an agency solve some of the problems the legislation addresses. If this advantage suffices to justify saving construction, however, it would justify administrative or judicial construction. Hence, it would be difficult to reconcile a view that saving construction is appropriate because of the need to allow some action with *American Trucking's* rejection of administrative saving construction. Indeed, saving construction to facilitate administrative action ignores, rather than avoids, the nondelegation issue.

The value of avoidance of a ruling potentially affirming unwise legislation also seems more problematic in the nondelegation context.[442] A holding that a statute conforms to the nondelegation doctrine does not implicate the substantive content of the statute. Therefore, upholding a statute under the nondelegation doctrine does not lend judicial support to the statutes' substantive policies. While it's conceivable that the public will misperceive the Court as lending its imprimatur to upheld legislation, that risk is slight when the Court has said little or nothing about its substantive content. Judicial endorsement of vagueness, the problem that one might read into rulings upholding statutes under the nondelegation doctrine, is simply too abstract a problem to influence public opinion. For that reason, it will have little effect upon Congress. Judicial choices of saving constructions run a risk of encouraging questionable policies, but decisions simply upholding statutes on nondelegation grounds pose little risk of lending

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[441] *See* Schauer, *supra* note 262, at 92 (noting that politicians pay no political penalty for voting for good policies that courts subsequently find unconstitutional).

[442] *See* Bickel, *supra* note 100, at 358; Kloppenberg, *supra* note 99, at 1049-1050.

judicial support to bad policies.

If an erroneous holding of constitutionality has few negative consequences, but an erroneous holding of unconstitutionality has some serious consequences (albeit not the cutting off of democratic policy choice altogether), the better approach might be to apply a different canon, the canon that requires the Court to construe statutes to avoid holdings of unconstitutionality.[443] This canon only comes into play when the statute will fail unless saved.[444] This contrasts with the avoidance canon, which properly applies even if the Court is not sure that it will otherwise strike down the statute.[445]

The foregoing analysis, however, casts doubt on the virtues of any construction to avoid a nondelegation ruling. The arguments about the lack of constitutional foundation for saving constructions and the lack of principled guidance for their substance apply fully to application of the canon favoring constructions to save an otherwise unconstitutional statute. The argument that construction and holdings of unconstitutionality under the nondelegation doctrine have similar consequences for future Congressional policy-making also applies fully to this older canon. The imminence of a holding of unconstitutionality, however, exacerbates the concern about thwarting any action on a matter deemed important by Congress. Thus, a slightly stronger argument exists for application of this canon, than for the application of the avoidance canon.

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[443] *See* Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 211-12 (1967). Judge Friendly argued that the availability of this narrower canon counsels that rulings construing statutes to avoid constitutional doubts should only come into play where the doubt is exceedingly real, a position that the Court endorsed in *Almendarez-Torres.*

[444] *See* id. at 210.

[445] *See* United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Nagle, *supra* note 262 (explaining the history of the two canons and their differences).

The decision about whether to save a statute facing a nondelegation defeat through construction, from a functionalist perspective, requires a comparison of the threats to the democratic process posed by a constitutional ruling to that posed by a saving construction. The foregoing discussion shows that the sharp advantage avoidance usually offers from a functionalist democratic perspective simply does not exist when the avoidance canon applies to a nondelegation claim.

The functionalist perspective is the traditional perspective of the avoidance canon jurisprudence.[446] The Court avoids constitutional questions in order to avoid functioning as an impediment to democratic decision-making.[447]

On the other hand, the modern Court appears quite formalist. A formalist perspective might suggest that neither a court nor an agency should ever save a statute from a nondelegation problem. The existence of such a problem implies a failure to legislate, which implies a need for fresh legislation, not presumptively unconstitutional construction.

B. **Avoiding the Problem of Avoidance**

The problematic nature of both nondelegation rulings and constructions avoiding nondelegation rulings supports the Court's adherence to its current views regarding the nondelegation doctrine and the limits in the avoidance canon.[448] The Court has largely heeded the critics of the avoidance canon and strengthened the canon's strictures in recent years. Critics have emphasized the danger activist statutory

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[446] *See* Jin Fuey Moy, 241 U.S. at 401.

[447] *See* Merrill, *supra* note 99, at 27.

[448] *See e.g.* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998); Miller v. French, 530 U.S. 327, 341 (2000).

construction can pose to democratic control of policy, and the Court has recently emphasized the requirement that saving construction be "reasonably available" as a result.[449] Nevertheless, the case for avoidance remains strong in a variety of areas, because a constitutional ruling has such serious counter-majoritarian consequences.

This article's analysis, however, should lead to more attention to the variety of consequences constitutional rulings entail in different constitutional realms as part of the debate about the avoidance canon. This article shows that the consequences of a nondelegation ruling do not include formally cutting off Congressional policy options. One can generalize that conclusion, to a degree. When constitutional doctrines limit the procedures government can employ, rather than the substantive content of legislation, holdings of unconstitutionality do not cut off substantive policy options for Congress. Thus, holdings regarding the separation of powers, for example, may limit the form of government, rather than its ends. This implies that avoidance of constitutional rulings in some procedural areas may not have the direct formal consequence of avoiding limitations upon substantive democratic policy choice. By contrast, rulings avoiding holdings about the substance of individual rights and the extent of the power of the federal government, for example, may avoid cutting off Congressional control of policy.

A full assessment of the consequences differentiation of constitutional impacts should have for application of the avoidance canon lies beyond the scope of this article. In many cases, avoidance may have salutary consequences other than avoiding loss of democratic control of specific substantive policy choice. For example, avoidance of separation of powers questions may limit the need for constitutional

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[449] *Compare* Almendarez-Torres, 523 U.S. at 238 *with* POSNER, *supra* note 31, at 285; Mashaw, *supra* note 262, at 840..

decisions without adequate textual guidance.[450] For textualists or for those concerned about the difficulty of wise functional judicial choices in the separation of powers realm, this virtue might constitute a significant advantage.[451] This differentiation of consequences will add to a finer assessment of the value of application of the avoidance canon in various constitutional realms.

This article's concern about avoidance of nondelegation issues, however, also rests significantly upon concerns about the lack of a constitutional basis for a saving construction, a concern which may be unique to nondelegation cases. These concerns should, at a minimum, make judges want to avoid the problem of avoiding nondelegation rulings.

Judicial adherence to the Court's cases reaffirming the limits of the nondelegation doctrine and refusing to apply the avoidance canon without first examining the relevant constitutional precedent to ascertain whether a really serious constitutional difficulty exists may allow the Court to continue its tradition of not ducking nondelegation challenges. Congress, of course, must continue to write at least general policy into legislation. Otherwise, the Court will have to choose between narrowing construction and a holding of unconstitutionality.

This article shows that the logic of *American Trucking* leads to the conclusion that courts probably lack the power to save statutes facing truly serious nondelegation claims from constitutional attack, except in the few areas where they have lawmaking power wholly independent of legislation.

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[450] *See* Murchison, *supra* note 116, at 112 (the Court's separation of powers jurisprudence has produced "considerable doctrinal confusion").

[451] *See e.g.* Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 910 (D.C. Cir. 1993) (suggesting that the difficulty of applying a separation of powers balancing test justifies application of the avoidance canon).

Furthermore, the functional considerations supporting avoidance in most contexts do not fully apply in the nondelegation context.

Thus, the *American Trucking* Court acted properly when it reached the nondelegation issue in the Clean Air Act, finding it constitutional, thereby continuing its general practice of not ducking nondelegation issues.[452] I have suggested that this is not problematic and few people will mistake this holding for a ringing endorsement of the Clean Air Act's mandate to protect public health. In so doing, it remained true to the nondelegation doctrine. This article suggests that the Court also, perhaps unconsciously, avoided some peculiar problems that would arise from construing statutes to avoid nondelegation defects as well. Its decision was even wiser than the Court realized.

[452] *See* Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472-76 (2001).

Conclusion

Construing statutes to avoid nondelegation problems may create more constitutional problems than it solves. Fortunately, substantive canons of statutory construction have not created a new home for a revived and revamped nondelegation doctrine. Indeed, the common view that the Court has frequently applied the avoidance canon to avoid difficult nondelegation issues turns out to be incorrect. This article suggests that the Court has acted properly in reaching and resolving nondelegation issues when they arise, rather than using statutory construction to avoid them. It would be ironic indeed if canons of statutory construction inspired by the ghost of the nondelegation doctrine converted unelected administrators or judges into legislators, thereby reading a doctrine prohibiting delegation of legislative authority as a reason to exercise broad prospective legislative authority to rewrite our laws.