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JUDGE STEPHEN F. WILLIAMS AND THE UNDERESTIMATED HISTORY OF THE NONDELEGATION DOCTRINE

C. Boyden Gray*

INTRODUCTION

Among his many accomplishments, Judge Stephen F. Williams is well known for several opinions during his tenure on the D.C. Circuit that have become part of the administrative law canon. But one of his most important decisions is perhaps the most underappreciated and misunderstood. That case—*American Trucking Associations, Inc. v. EPA* ("American Trucking")[1]—showcases his characteristic

* White House counsel to President George H.W. Bush, and U.S. Ambassador to the European Union and Special Envoy for Eurasian Energy under President George W. Bush. Mr. Gray also helped direct President Ronald Reagan's Task Force on Regulatory Relief and construct President Reagan's seminal executive order on White

ability to discern and apply legal nuances long overlooked by many other judges and scholars.[2]

American Trucking involved Judge Williams's application of the nondelegation doctrine, which "bars Congress from transferring its legislative power to another branch of Government."[3] This doctrine had been widely misperceived as an abandoned relic, used only twice in decades-old Supreme Court decisions as a blunt tool to strike down legislation with no limiting principle.[4] But Judge Williams understood that the nondelegation doctrine remained alive and well, though in a far more subtle form than most onlookers realized.

In this essay, I begin with the conventional account of nondelegation as a discarded doctrine and explain how this perspective misstates history and precedent. I then turn to Judge Williams's recognition of the nondelegation doctrine's continuing viability and his application of this doctrine in *American Trucking*. Lastly, I discuss the

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House regulatory review. He is the founding partner of Boyden Gray & Associates PLLC, a boutique law firm focused on constitutional and regulatory issues.

[1] Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

[2] *American Trucking* was certainly susceptible to nuance, involving 52 consolidated cases and almost 3 hours of oral argument. *See* Am. Trucking Ass'ns, Inc. v. EPA, No. 97-1440 (D.C. Cir. Nov. 20, 1998) (order allocating argument times); *id.*, No. 97-1441 (D.C. Cir. Nov. 20, 1998) (order allocating argument times).

[3] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

[4] *See, e.g.*, KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6 (6th Edition, 2022-2 Cumulative Supplement 2018) ("Except for two 1935 cases, the Supreme Court has never enforced its frequently announced prohibition on congressional delegation of legislative power. The Court has become increasingly candid in recognizing its inability to enforce any meaningful limitation on Congress' power to delegate its legislative power to an appropriate institution."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

lasting influence of *American Trucking*'s central insights in the recent resurgence of the nondelegation doctrine.[5]

I. THE UNDERESTIMATED INFLUENCE OF THE NONDELEGATION DOCTRINE BEFORE *AMERICAN TRUCKING*

The conventional account of the nondelegation doctrine begins with *A.L.A. Schechter Poultry Corp. v. United States* ("Schechter Poultry")[6] and *Panama Refining Co. v. Ryan* ("Panama Refining")[7] in 1935 and ends with the Supreme Court's reversal in 2001 of Judge Williams's opinion in *American Trucking*.[8] By this account, the doctrine had no significant impact in between or after those cases and is now essentially a dead letter.

In *Panama Refining*, the Supreme Court struck down a provision of the National Industrial Recovery Act ("NIRA") authorizing the president to restrict the interstate shipment of "hot oil," meaning oil in excess of state-imposed volume limits.[9] Although NIRA detailed a "general outline of policy" that Congress intended to vindicate (e.g., "to eliminate unfair competitive practices," "to reduce and relieve unemployment," or "otherwise to rehabilitate industry and to conserve natural resources"), it included "nothing as to the circumstances or conditions in which" the president should actually

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[5] Portions of this essay have been adapted from my earlier article on Judge Williams's *American Trucking* opinion and the commonly misunderstood history of the nondelegation doctrine. *See* C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619 (2015).

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

[7] Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935).

[8] Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

[9] *Pan. Refin.*, 293 U.S. at 433; *id.* at 436 (Cardozo, J., dissenting).

exercise his powers, and thus the Court found "nothing . . . which limits or controls the authority conferred."[10]

The Court held that the lack of a limiting principle in NIRA's hot oil provision violated the nondelegation doctrine.[11] An act of Congress, the Court explained, "is not a forbidden delegation of legislative power" if the act "lay[s] down . . . an intelligible principle to which the [administrator] is directed to conform."[12] But the Court found no intelligible principle in NIRA's hot oil provision, reasoning that if it "were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function."[13]

Schechter Poultry, decided four months after *Panama Refining*, is cited as the only other successful application of the nondelegation doctrine. There, the Court scrutinized another section of NIRA that authorized the president to promulgate "codes of fair competition" but provided no direction as to what exactly "fair competition" might mean.[14] While "unfair competition" was "a limited concept" well rooted in the common law,[15] and "unfair methods of competition" was a related, broader expression adopted in the Federal Trade Commission ("FTC") Act and intended by Congress to be adjudicated on a case-by-case basis by the "quasi-judicial" FTC,[16] the words "fair competition" boasted neither the FTC Act's terminological specificity nor its procedural rigor.[17] Therefore, the Court found the NIRA provision to be "a sweeping delegation of legislative power

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[10] *Id.* at 417, 419 (majority opinion).

[11] *Id.* at 430.

[12] *Id.* at 429-30 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (internal quotation marks omitted).

[13] *Id.* at 430.

[14] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530-31 (1935).

[15] *Id.* at 531.

[16] *Id.* at 533.

[17] *Id.*

[which] finds no support in the" Court's precedents and thus "unconstitutional."[18]

After these two cases, the conventional account asserts that the nondelegation doctrine faded into insignificance and was never again successfully deployed to invalidate a statute. This account points out that even Judge Williams's opinion sixty years later in *American Trucking*, which merely invoked the nondelegation doctrine to limit an agency's interpretive discretion, was promptly overturned by the Supreme Court.[19]

But this is a shallow reading of precedent and history. Judge Williams understood that the nondelegation doctrine had never ceased to critically influence judicial decisions, although perhaps not in the same dramatic fashion as *Schechter Poultry* and *Panama Refining*. Instead, while the Supreme Court upheld many broadly worded statutes, it had consistently looked to the nondelegation doctrine as a canon of construction to read such statutes narrowly when granting authority to administrative agencies.[20]

For example, in *Kent v. Dulles*, the Court rejected the assertion that a federal statute delegating the Secretary of State power to issue passports also gave him broad discretion to deny passports to communists and communist sympathizers.[21] Citing *Panama Refining*, the Court noted that delegated authority must have "standards . . . adequate to pass scrutiny by the accepted tests," and it construed the

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[18] *Id.* at 539, 541–42.

[19] *See* Gray, *supra* note 5, at 619–20.

[20] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our 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 to be unconstitutional.").

[21] Kent v. Dulles, 357 U.S. 116, 129 (1958).

statute narrowly to deny the Secretary unilateral power to restrict the free movement of citizens because of their beliefs or associations.[22]

The Court similarly invoked the nondelegation doctrine in *Industrial Union Department, AFL-CIO v. American Petroleum Inst.* ("Benzene Case"), decided just a few years before President Ronald Reagan appointed Judge Williams to the D.C. Circuit.[23] In the *Benzene Case*, section 3(8) of the Occupational Safety and Health ("OSH") Act delegated authority to the Secretary of Labor to promulgate standards "which require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[24] In addition, regarding "toxic materials or harmful physical agents," the OSH Act section 6(b)(5) directed the Secretary to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity."[25] The Secretary subsequently concluded that "no safe exposure level can be determined" for any carcinogen, and thus set an exposure limit of one part benzene per million parts of air (1 ppm).[26]

This expansive exercise of authority met sharp resistance from the Court.[27] A four-Justice plurality rejected the argument that sections 3(8) and 6(b)(5) effectively impose no minimum threshold risk

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[22] *Id.* at 129 (citing Pan. Refin. Co. v. Ryan, 293 U.S. 388, 420–30 (1935)). The statute in question read, "The Secretary of State may grant and issue passports ... under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." *Kent*, 357 U.S. at 123.

[23] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*Benzene Case*), 448 U.S. 607 (1980) (plurality opinion).

[24] *Id.* at 612 (quoting Occupational Safety and Health Act § 3(8), 29 U.S.C. § 652(8)) (internal quotation marks omitted).

[25] *Id.* (quoting OSH Act § 6(b)(5), 29 U.S.C. § 655(b)(5)) (internal quotation marks omitted).

[26] *Id.* at 613.

[27] *See generally id.* at 640–43.

of harm before the Secretary can exercise regulatory power. "Under the Government's view," the plurality explained, section 3(8) "imposes no limits on the Agency's power, and thus would not prevent it from requiring employers to do whatever would be 'reasonably necessary' to eliminate all risks of any harm from their workplaces."[28] As for section 6(b)(5), the plurality disapprovingly noted that "the Government [took] an even more extreme position," claiming authority to "impose standards that either guarantee workplaces that are free from any risk of material health impairment, however small, or that come as close as possible to doing so without ruining entire industries."[29] The plurality instead read the Secretary's authority as applying only to "significant risks of harm."[30]

If the plurality's approach had been limited to linguistic analysis, the *Benzene Case* would have had little lasting significance. But crucially, the Justices stressed that the rules of statutory interpretation required them to construe the OSH Act provisions narrowly because to do otherwise would implicate the nondelegation doctrine:

> If the Government was correct in arguing that [neither OSH Act provision requires the Secretary to make a showing of *significant* risk], the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A. L. A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*. A

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[28] *Id.* at 640–41.
[29] *Id.* at 641.
[30] *Id.*

construction of the statute that avoids this kind of open-ended grant should certainly be favored.[31]

This condemnation of a "sweeping delegation of legislative power" demonstrated that the nondelegation doctrine is not merely a legal tool that expired in 1935. To the contrary, it is a presupposition about legislative power that has quietly continued to animate statutory interpretation since *Shechter Poultry* and *Panama Refining* in ways that significantly constrain agency discretion.[32]

II. JUDGE WILLIAMS AND THE NONDELEGATION DOCTRINE: *INTERNATIONAL UNION* AND *AMERICAN TRUCKING*

Judge Williams keenly discerned the ongoing relevance of the nondelegation doctrine as a principle of statutory construction. In *International Union of United Automobile, Aerospace & Agricultural Implement Workers of America v. Occupational Safety and Health Administration* ("Industrial Union"),[33] he confronted a regulation by the Occupational Safety and Health Administration that required employers to "lockout or tagout" energy isolating devices, such as circuit

[31] *Id.* at 646 (citations omitted). Although Justice Rehnquist did not join the plurality opinion, he wrote a concurrence agreeing that the Secretary did not have power to "eliminate marginal or insignificant risks of material harm right down to an industry's breaking point." *Id.* at 683 (Rehnquist, J., concurring). Justice Rehnquist's preferred remedy would have been to invalidate part of section 6(b)(5) to prevent the Secretary from setting a standard without first identifying the "safe" level of exposure. *Id.* at 687–88. Justice Rehnquist's focus on "ensuring that Congress itself [rather than agencies] make the critical policy decisions," *id.* at 687, was in keeping with Judge Williams's later opinion in *American Trucking* and was ultimately adopted by the Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

[32] *See, e.g.*, *Mistretta*, 488 U.S. at 373 n.7 (1989); *Benzene Case*, 448 U.S. at 646; Nat'l Cable Television Ass'n v. United States, 415 U.S. 336 (1974); *Kent*, 357 U.S. 116.

[33] Int'l Union, United Auto., Aerospace & Agric. Implement Works of Am., UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991), *supplemented sub nom.* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. OSHA, No. 89-1559, 1991 WL 223770 (D.C. Cir. Sept. 16, 1991).

breakers, when maintaining or servicing industrial equipment.[34] "Lockout or tagout" procedures are designed to reduce injuries related to ordinary industrial equipment by, for example, placing a "lock" on a circuit breaker so that equipment cannot start up until the lock is removed.[35]

Judge Williams, writing for the D.C. Circuit, rejected the agency's construction of the OSH Act, which would have placed no substantive constraints on its authority to regulate outside the area of toxic materials.[36] As he explained, the *Benzene Case* was "a manifestation of the Court's general practice of applying the nondelegation doctrine mainly in the form of 'giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'"[37]

Accordingly, Judge Williams sought a limiting principle that would save the OSH Act from violating nondelegation principles, such as the "significant risk" requirement in the *Benzene Case.* He proposed an implicit cost-benefit standard as a saving construction to cabin the agency's discretion and avoid nondelegation concerns.[38]

Several years later, Judge Williams again applied the nondelegation doctrine in *American Trucking*, which involved an industry challenge to the EPA's National Ambient Air Quality Standards ("NAAQS"). In the Clean Air Act Amendments of 1970, Congress directed the EPA to promulgate NAAQS for certain air pollutants, to review those standards every five years, and to "make such revisions in such criteria and standards and promulgate such new standards

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[34] *Id.* at 1312.
[35] *Id.*
[36] *Id.* at 1316.
[37] *Id.* (quoting *Mistretta*, 488 U.S. at 373 n.7).
[38] *Id.* at 1321.

as may be appropriate."[39] In 1997, the EPA published NAAQS revisions for particulate matter and ozone.[40] Industry groups and certain states filed petitions with the D.C. Circuit arguing that the standards were too strict, while environmental groups filed petitions arguing that the standards were too lenient.[41] The key to the consolidated case, from all parties' perspectives, was what constituted an "appropriate" NAAQS revision.

The various petitioners did not make nondelegation the central focus of their challenges to the NAAQS revisions. Instead, "the briefs largely focused on whether the EPA's explanation showed reasoned decision-making, and on whether the agency had violated any of the 'regulatory reform' statutes of the 1980s and 1990s."[42] But the nondelegation doctrine was squarely raised—not as an argument to strike down the statute altogether, but rather as a constitutional principle demanding narrow construction of a broad statute, just as in the *Benzene Case*.[43] The non-state petitioners, for example, argued that the EPA's insistence on promulgating new ozone standards despite the lack of scientific certainty regarding their public health impacts risked violating *Panama Refining*'s instruction that statutes must confine agencies to "making . . . subordinate rules within prescribed

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[39] 42 U.S.C. § 7409 (2012); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001) (citing 42 U.S.C. § 7409(a)).

[40] *See Whitman*, 531 U.S. at 463 (citing National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997)). For ozone, EPA set an "8-hour" standard at 0.08 parts per million (ppm); for particulate matter, EPA set a variety of new standards. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,856).

[41] Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027; *Whitman*, 531 U.S. 457.

[42] Craig N. Oren, Whitman v. American Trucking Associations—*The Ghost of Delegation Revived ... and Exorcised*, *in* ADMINISTRATIVE LAW STORIES 7, 27 (Peter L. Strauss ed., 2006).

[43] Brief of Non-State Clean Air Act Petitioners & Interveners at 47, *Am. Trucking Ass'ns*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1441), 1998 WL 35240573.

limits."[44] These petitioners argued that the statute should be construed in a manner that would provide intelligible criteria for what constitutes an appropriate NAAQS revision.[45]

Additional nondelegation arguments were set forth in the amicus briefs of Senator Orrin Hatch and Representative Tom Bliley.[46] For example, after tracing the doctrine's origins in nineteenth century case law to its "high-water mark" in *Schechter Poultry* and *Panama Refining*, Representative Bliley cautioned that "it would be a mistake to say that the doctrine lost vitality" after those two cases, for "the doctrine survives, as a crucial canon of statutory construction and administrative restraint."[47] He argued that the Clean Air Act's lack of a guiding intelligible principle for setting "appropriate" revised NAAQS was apparent when the agency failed to demonstrate any significant risk that the new regulations would alleviate. "As in *Benzene* and *International Union*," he continued, "[the court] should interpret the Clean Air Act to require that any new NAAQS be targeted to the reduction of a significant health risk."[48]

In response, the EPA scarcely addressed these arguments, asserting only that the statute delegated power to promulgate NAAQS that are "requisite to protect the public health" and with "an adequate margin of safety," which provided a sufficiently intelligible principle.[49]

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[44] *Id.* (quoting *Pan. Refin. Co.*, 293 U.S. at 421) (internal quotation marks omitted).

[45] *Id.* at 48.

[46] The briefs were co-written by Alan Raul, Nathan Forrester, and the author of this Article, Boyden Gray.

[47] Brief of Amicus Curiae Congressman Tom Bliley at 19, *Am. Trucking Ass'ns*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1441), 1998 WL 35240577.

[48] *Id.* at 27.

[49] Final Brief for Respondent at 78, Am. Trucking Ass'ns v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (No. 99-1257), 1998 WL 35240574.

This failure to offer a more robust counterargument proved costly when Judge Williams, writing for the D.C. Circuit, compared the case with the opinion he authored in *International Union* and held that the EPA's interpretation of the Clean Air Act violated the non-delegation doctrine. But rather than hold the statute invalid—à la *Schechter Poultry*—the court adopted Judge Williams's subtler approach and remanded the matter to the EPA so the agency could try to better identify and honor the statute's intelligible principles.[50] Alternatively, Judge Williams wrote, if the EPA ultimately could not find an intelligible principle in the Clean Air Act, "it [could] so report to the Congress, along with such rationales as it has for the [NAAQS] it chose, and seek legislation ratifying its choice."[51] Like the *Benzene Case* and *International Union*, the D.C. Circuit held that EPA's new standards would need to adopt a standard more significant than zero-risk in order to accord with the Constitution.[52]

At the time, Judge Williams's *American Trucking* opinion was perceived as a radical attempt to resurrect a dead doctrine.[53] But viewed in context of the *Benzene Case* and similar decisions, Judge Williams's opinion was a modest and natural application of existing principles. His understanding of nondelegation as a canon of construction enabled him to cabin the agency's discretion by requiring it to identify an intelligible principle, without taking harsh action like holding the statute invalid.[54]

Although the Supreme Court reversed Judge Williams's decision on appeal in *Whitman v. American Trucking* ("Whitman"),[55] it championed the most relevant aspects of his opinion. Justice Scalia, writing for the Court, agreed that an intelligible principle was needed but

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[50] *Am. Trucking Ass'ns*, 175 F.3d at 1037–38.
[51] *Id.* at 1040.
[52] *Id.* at 1038.
[53] *See generally* Oren, *supra* note 42.
[54] *Am. Trucking Ass'ns*, 175 F.3d at 1038.
[55] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

stated that it was for the courts, and not the agency, to determine whether an impermissible delegation occurred.[56] This shift of interpretive power from agencies to the courts for purposes of nondelegation review effectively decreased the potential applicability of *Chevron* deference.

Justice Scalia then "quoted with approval the definition of 'requisite'" that was offered at oral argument—"'sufficient, but not more than necessary.'"[57] He also cited the *Benzene Case* approvingly for its imposition of a similar "substantial risk" limiting principle.[58] The EPA had convinced Justice Scalia that it lacked carte blanche and should survive nondelegation review, but only by conceding, consistent with Judge Williams's opinion, that the Clean Air Act authorized the EPA to tighten NAAQS only when necessary to prevent significant or substantial public health risks.[59]

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[56] *Id.* at 472–73 ("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. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

[57] *See* Linda Greenhouse, *E.P.A.'s Right to Set Air Rules Wins Supreme Court Backing*, N.Y. TIMES, Feb. 28, 2001, at A1.

[58] *Whitman*, 531 U.S. at 473–74.

[59] *Id.* at 473. Cost-benefit analysis, while mentioned as a possible limiting principle in Judge Williams's *International Union* opinion, could not be used in this situation because the EPA is barred from considering any factor other than "health effects relating to pollutants in the air." *Am. Trucking Ass'ns*, 175 F.3d at 1038 (citing Nat. Res. Def. Council, Inc. v. Adm'r, U.S. EPA, 902 F.2d 962, 973 (D.C. Cir. 1990)). However, Justice Breyer noted that "States may consider economic costs when they select the particular control devices used to meet the standards, and industries experiencing difficulty in reducing their emissions can seek an exemption or variance from the state

Justice Thomas concurred, while further suggesting the Court should revisit its precedent because the Constitution may require an even more robust nondelegation doctrine.[60]

Judge Williams's recognition in *American Trucking* of the nondelegation doctrine as a principle of statutory construction may have startled those who only knew the conventional account of its history. But his approach was merely another advancing step on an existing path. Although the Supreme Court revised Judge Williams's decision to remand the statutory-interpretation question to the EPA, it did not renounce his application of the nondelegation doctrine, solidifying its influence on jurisprudence today.

III. THE NONDELEGATION DOCTRINE'S NEXT FRONTIER AND THE CONTINUED IMPACT OF *AMERICAN TRUCKING*

Since *American Trucking*, a growing contingent of Justices have voiced support for a more demanding nondelegation doctrine. For example, in his 2019 dissent in *Gundy v. United States*, Justice Gorsuch argued that a federal sex offender statute is invalid because it delegates too much discretion to the Attorney General.[61] Justice Gorsuch emphasized that Congress must set standards "'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[62] Chief Justice Roberts and Justice Thomas joined the dissent.

Justice Alito also indicated in *Gundy* that he supports a strong form of the nondelegation doctrine. Although he did not join the dissent, he noted that in another case he would support an effort to "reconsider the approach we have taken for the past 84 years" if a

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implementation plan." *Whitman*, 531 U.S. at 493 (Breyer, J., concurring) (citing Union Elec. Co. v. EPA, 427 U.S. 246 (1976)).

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

[61] Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

[62] *Id.* at 2136 (quoting Yakus v. United States, 321 U.S. 414, 426 (1944)).

majority of the Court was willing to take that step.[63] In fact, Justice Alito cited *Whitman* in support of the principle that Congress may not delegate its legislative powers to another branch of government.[64]

Later that year, Justice Kavanaugh echoed support of the nondelegation doctrine in his statement on the denial of certiorari in *Paul v. United States*.[65] He emphasized that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[66]

The nondelegation doctrine has only continued to gain momentum since that time. In *National Federation of Independent Business v. Occupational Safety and Health Administration*,[67] the Court stayed an agency rule under the OSH Act implementing a nationwide vaccine mandate for certain private businesses. The Court explained that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," and because the OSH Act did not clearly authorize vaccine mandates, the agency had exceeded its authority.[68]

In his concurring opinion, Justice Gorsuch, joined by Justices Thomas and Alito, explained that this requirement of clear statutory authorization before an agency can exercise such broad or consequential power is closely linked to the nondelegation doctrine.[69]

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[63] *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in judgment).

[64] *Id.*

[65] Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari).

[66] *Id.* at 342.

[67] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

[68] *Id.* at 665 (quoting Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs., 141 S.Ct. 2485, 2489 (2021)).

[69] *Id.* at 668–69.

Indeed, requiring clear statements "guard[s] against the unintentional, oblique, or otherwise unlikely delegations of legislative power."[70]

Finally, in *West Virginia v. EPA*,[71] the Court held that the EPA could not rely on vague language in a seldom used provision of the Clean Air Act to require power plants to shift electricity generation away from coal to other, less carbon intensive sources. Writing for the majority, Chief Justice Roberts rejected the EPA's position that it could mandate practically whatever degree of "generation shifting" it desired, thereby restructuring the entire American energy market.[72] He explained that for such extraordinary claims of regulatory power, "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[73] Justice Gorsuch made clear in his concurring opinion that nondelegation would be a part of the Court's statutory interpretation for the foreseeable future, noting that even the dissenting Justices "recognized that the Constitution does impose some limits on the delegation of legislative power."[74]

What the nondelegation doctrine will ultimately require remains to be seen. In some cases, it may demand the identification of implicit limiting principles.[75] In others, delegations involving major questions of "vast economic or political significance" may require a clear statement from Congress.[76] In others still, the nondelegation doctrine may require holding a statute invalid.[77] But with an increasingly

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[70] *Id.* at 669.

[71] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[72] *Id.* at 2603–04.

[73] *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[74] *Id.* at 2624 (Gorsuch, J. concurring).

[75] *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 938 F.2d at 1321.

[76] *West Virginia*, 142 S.Ct. at 2608 (2022).

[77] *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495.

large administrative state, the nondelegation doctrine will likely only increase in relevance. Judge Williams's perspicacious understanding of its unceasing impact as a canon of construction, displayed in *American Trucking*, will continue to pay dividends as courts seek to safeguard separation-of-powers principles.

CONCLUSION

Judge Williams's tenure on the D.C. Circuit has left a lasting impact on many aspects of administrative law. One of his most far-reaching contributions was his role in changing the narrative surrounding the nondelegation doctrine. His legacy will forever be with us.