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REFINING THE NONDELEGATION DOCTRINE IN LIGHT OF REAL ID ACT SECTION 102(c): TIME TO STOP BULLDOZING CONSTITUTIONAL BARRIERS FOR A BORDER FENCE

Bryan Clark

“Good fences make good neighbours.”1 This is particularly true of the U.S.-Mexico border fence. The fence consists of reinforced barriers that will eventually span 700 miles, and is aimed at securing the southern border2 over which hundreds of tons of illegal drugs3 and more than one million undocumented immigrants cross each year.4 However, this fence, which Congress decided was crucial to stemming dangerous and unlawful cross-border trafficking,5 has not been popular, especially among border residents.6


6. Editorial, Haste Lays Waste: Ill-Planned Security Fencing Along the Border Would Ravage the Communities it’s Meant to Protect, HOUSTON CHRON., Oct. 4, 2007, at B8 [hereinafter Haste Lays Waste] (Texas’s homeland security director was quoted as saying “a fence isn’t going to work. It’s not the solution.”). Congressman Raúl Grijalva, who represents the 7th District of Arizona, which is situated along the U.S.-Mexico border, see About Raúl, http://grijalva.house.gov/?sectionid=2&sectiontree=2 (last visited Apr. 3, 2009), even introduced
Arguably more controversial than the fence itself though, is the free reign Congress gave the Department of Homeland Security (DHS) Secretary to determine how and where the fence will be built, and to expedite its construction by waiving laws that would normally provide residents and other interested parties an opportunity to challenge such decisions.\(^7\)

The question for many border residents is whether the U.S. Constitution allows Congress to give the DHS Secretary such broad unilateral authority.\(^8\) This question, which was a principle issue litigated in *Defenders of Wildlife v. Chertoff*,\(^9\) implicates important competing national security,\(^10\) public policy,\(^11\) and constitutional issues.\(^12\)

Congress, without a doubt, may enact legislation authorizing and funding construction of the U.S.-Mexico border fence.\(^13\) Congress may also, through duly enacted legislation, waive any provision of any law to accomplish this goal.\(^14\) The question in *Defenders of Wildlife*, however, was whether Congress can delegate this power to a member of the executive branch when the

\(^7\) See Consolidated Appropriations Act, § 564(a)(2)(B)(ii), 121 Stat. at 2090 (providing the DHS Secretary broad discretion to construct 700 miles of border fencing based on what is "most practical and effective"); REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 102(c), 119 Stat. 231, 306 (to be codified at 8 U.S.C. § 1103(c)) (providing the Secretary with broad authority to "waive all legal requirements" the Secretary deems "necessary to ensure expeditious construction" of the U.S.-Mexico border fence); see also Randal C. Archibold & Julia Preston, *Despite Growing Opposition, Homeland Security Stands by Its Fence*, N.Y. TIMES, May 21, 2008, at A18 ("Opposition to the fence intensified . . . after [DHS Secretary] Chertoff used authority provided by Congress to waive more than two dozen environmental laws and others to push ahead with construction.").


\(^10\) See OFFICE OF IMMIGRATION STATISTICS, supra note 4, at 1 (noting that, in 2006 alone, the DHS "apprehended more than 1,206,000 foreign nationals," of whom "[n]early 88 percent were natives of Mexico"). Roughly ninety-eight percent of these apprehensions occurred along the southwest U.S.-Mexico border. Id. at 3. In the same year DHS removed 272,389 aliens from the U.S., sixty-seven percent of whom were from Mexico. Id at 1. DHS also removed 95,752 known criminal aliens. Id.; see also Archibold & Preston, supra note 7 (according to experts, "[a]s many as 2,000 immigrants a day still cross the Southwest border illegally").

\(^11\) See Archibold & Preston, supra note 7 (questioning the efficacy of the border fence given that "82 percent of the immigrants who succeeded in crossing said they came through San Diego . . . where fences have been in place since 1993"); Randal C. Archibold, *Government Issues Waiver for Fencing Along Border*, N.Y. TIMES, Apr. 2, 2008, at A18 (noting the Department of Interior’s objections to the DHS Secretary’s border fence construction decisions); *Haste Lays Waste*, supra note 6 (reporting the environmental and economic impact of the location of border fence on local communities).

\(^12\) See *Defenders of Wildlife*, 527 F. Supp. 2d at 126.

\(^13\) See U.S. CONST. art. I, §§ 1, 8.

\(^14\) See id. art. I, § 1.
Refining the Nondelegation Doctrine

separation of powers prohibits Congress from delegating its legislative power.\textsuperscript{15}

This restriction is known as the nondelegation doctrine, and is "rooted in the principle of separation of powers that underlies our tripartite system of Government."\textsuperscript{16} The separation of powers doctrine derives from the founding notion that the three branches of the federal government—legislative, executive, and judicial—ought to remain separate, preventing the accumulation of power in a single branch and minimizing the threat of tyrannical rule.\textsuperscript{17} Specifically, the proper role of the legislature, its "power . . . being derived from the people,"\textsuperscript{18} is to "make laws, and not to make legislators."\textsuperscript{19} This principle "[t]hat Congress cannot delegate legislative power" was first expressly recognized by the Court in 1892 when it declared the nondelegation principle was "vital to the integrity and maintenance . . . of government ordained by the Constitution."\textsuperscript{20} However, the Court has consistently avoided interpreting the separation of powers doctrine as a constitutional straightjacket, "hermetic[ally] sealing" each branch from the others.\textsuperscript{21} Rather, separation of powers has been viewed as "diffus[ing] power . . . to secure liberty, [while] integrat[ing] the dispersed powers into a workable government."\textsuperscript{22}

The nondelegation doctrine is one of the mechanisms courts use to enforce the Constitution's separation of powers requirement.\textsuperscript{23} Its purpose is to ensure that Congress does not delegate its exclusive legislative power in violation of Article I of the Constitution.\textsuperscript{24} The nondelegation doctrine attempts to achieve this purpose by requiring Congress to provide an "intelligible principle" to guide and confine the exercise of delegated power.\textsuperscript{25} The precise definition of

\begin{itemize}
  \item \textbf{15.} Defenders of Wildlife, 527 F. Supp. 2d at 126; see also Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (holding that the text of Article I of the U.S. Constitution "permits no delegation of [Congress's legislative] powers").
  \item \textbf{17.} Buckley v. Valeo, 424 U.S. 1, 120-21 (1976) (per curiam); THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001).
  \item \textbf{18.} JOHN LOCKE, Two Treatises of Government, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 163 (Ian Shapiro, ed. 2003).
  \item \textbf{19.} \textit{Id.}
  \item \textbf{20.} Field v. Clark, 143 U.S. 649, 692 (1892). Though not expressly stated, the principle of the nondelegation doctrine was recognized by the Court as early as 1813. See Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 383, 386, 388 (1813).
  \item \textbf{21.} Buckley, 424 U.S. at 121; THE FEDERALIST NO. 48 (James Madison), \textit{supra} note 17, at 256.
  \item \textbf{22.} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
  \item \textbf{25.} J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406, 409 (1928); \textit{see also} Whitman, 531 U.S. at 472. The rationale is that Congress retains, and does not delegate, its
an "intelligible principle," and whether that should even be the test, has been a hotly debated aspect of United States Supreme Court jurisprudence.

At the heart of the prevailing nondelegation doctrine jurisprudence is a tension between two competing purposes of the separation-of-powers principle: (1) to protect individual liberties against tyrannical government; and (2) to ensure efficient government through pragmatic inter-branch cooperation. The age-old nondelegation doctrine debate has primarily pitted formalists against functionalists in a struggle to determine which principle should prevail, and the functionalists have indisputably won.

26. Patrick M. Garry, Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines, 38 ARIZ. ST. L.J. 921, 933-34 (2006) ("[W]hile acknowledging the intelligible principle test as the measure of whether a statute violates the nondelegation doctrine, the Court has declined to give any strict definition of an intelligible principle.").

27. Compare Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. CHI. L. REV. 1721, 1721-22 (2002) (arguing that the nondelegation doctrine is a fiction and should be buried once and for all), with Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. CHI. L. REV. 1297, 1297-1300 (2003) (arguing that "the nondelegation doctrine is alive and kicking").

28. See Mistretta, 488 U.S. at 371-72; see also THE FEDERALIST NO. 47 (James Madison), supra note 17, at 249 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); THE FEDERALIST NO. 48 (James Madison), supra note 17, at 256 (noting that the separation of powers "does not require that the legislative, executive, and judiciary departments, should be wholly unconnected with each other").

William Howard Taft, who experienced the different roles of the executive and judicial branches first-hand as the twenty-seventh President of the United States and tenth Chief Justice of the Supreme Court famously stated: "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." J.W. Hampton, 276 U.S. at 406.

29. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 287 (2d ed. 2005) (noting that formalists interpret Article I of the Constitution to impose rigid separation of powers restrictions enforced by the judiciary).

30. See id. (explaining that functionalists, on the other hand, assert that where the political branches—Congress and the Executive—agree, courts should invalidate their actions only in exceptional circumstances).

31. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) ("[The Court has] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting Mistretta, 488 U.S. at 416 (Scalia, J., dissenting))).

The two concurring opinions in Whitman epitomize this debate. The majority opinion, penned by Justice Scalia, applies the traditional "intelligible principle" doctrine showing extreme deference to Congress. Id. at 472. Justice Thomas, in his concurring opinion, invites the opportunity to reconsider the Court's intelligible principle jurisprudence, noting that "the Constitution does not speak of 'intelligible principles[,]'' and that he is "not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power." Id. at 487 (Thomas, J., concurring). On the other hand, Justice Stevens, joined by Justice Souter, argues
As a result, the nondelegation doctrine poses no real check on congressional delegations. In fact, the Supreme Court has only twice struck down legislative enactments as unconstitutional delegations of legislative power.\textsuperscript{32} Even in light of the Supreme Court's hands-off approach, Congress's sweeping delegation of power to the DHS Secretary in section 102(c) of the REAL ID Act of 2005 tests the outer limits of the "intelligible principle" requirement's ability to protect the separation of powers, demanding a more refined analysis of this foundational constitutional principle.\textsuperscript{33}

Section 102(c) of the REAL ID Act has three essential elements—power, principle, and judicial review. First, Congress delegated to the DHS Secretary the power to "waive all legal requirements" that impede construction of the authorized U.S.-Mexico border infrastructure.\textsuperscript{34} Second, Congress laid down a principle—in order to waive any legal requirement, the DHS Secretary must determine in his "sole discretion" such waiver is "necessary to ensure expeditious construction" of authorized U.S.-Mexico border infrastructure.\textsuperscript{35} Last, Congress severely circumscribed judicial review of the Secretary's discretionary waivers, requiring claims challenging the Secretary's exercise of authority to allege constitutional violations and stripping the intermediate appellate courts of jurisdiction over such challenges.\textsuperscript{36}

To date, the DHS Secretary has issued four sets of waivers that waived more than thirty federal laws, from the Endangered Species Act to the Religious Freedom Restoration Act.\textsuperscript{37} In 2007, two environmental organizations, the

\textsuperscript{32} See id. at 474 (majority opinion). Some scholars argue that the Court also applied the nondelegation doctrine to invalidate the Bituminous Coal Conservation Act of 1935 in \textit{Carter v. Carter Coal Co.}, 298 U.S. 238 (1936). See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 207-08 (1992). However, in \textit{Carter v. Carter Coal Co.}, 298 U.S. 238 (1936), the Court did not invalidate section 3(g) of the Act as an unconstitutional delegation under the nondelegation doctrine, but rather invalidated the Act on the basis of the presently disfavored theory of economic substantive due process under the Fifth Amendment, id. at 310–11; see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring) (distinguishing the nondelegation doctrine from \textit{Lochner}-Era economic substantive due process).


\textsuperscript{34} Id. § 102(c)(1).

\textsuperscript{35} Id.

\textsuperscript{36} Id. § 102(c)(2).

Defenders of Wildlife and the Sierra Club, sued DHS Secretary Chertoff and others in the United States District Court for the District of Columbia challenging the REAL ID Act waiver provision under the nondelegation doctrine, among other theories. The court upheld section 102(c), concluding that it was not an unconstitutional delegation of legislative authority.

This Comment will examine the constitutionality of Congress’s delegation of authority to the DHS Secretary under section 102(c) of the REAL ID Act. Most importantly, however, this Comment will attempt to avoid the trap of traditional academic extremism. Rather, this Comment will dissect the Court’s precedents and suggest a meaningful application of them, as opposed to the cursory application that has prevailed.

First, this Comment will examine the constitutional roots of the nondelegation doctrine. It will then lay out the Supreme Court’s hands-off approach to the nondelegation doctrine through its expansive interpretation of the intelligible principle requirement. Next, this Comment will explore factors the Supreme Court has considered as part of the intelligible principle requirement in deciding previous nondelegation doctrine cases. Upon establishing the purpose and application of the doctrine, this Comment will deconstruct section 102(c) of the REAL ID Act, distinguishing it from prior delegations upheld by the Supreme Court based on: (1) the power delegated; (2) the principle enunciated; and (3) the substantial absence of judicial review. Finally, this Comment will argue that section 102(c) is an unconstitutional delegation of legislative power pursuant to the refined intelligible principle test proposed herein.

Specifically, the Secretary waived “all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of” these laws “in their entirety, with respect to the construction of roads and fixed and mobile barriers” in certain areas of “high illegal entry.” Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act, 73 Fed. Reg. at 18,293.


40. Most scholarly work on the nondelegation doctrine advocates either the death of the doctrine or a radical reinvigoration of it. Compare Posner & Vermeule, supra note 27, at 1721–22 (“In our view there just is no constitutional nondelegation rule, nor has there ever been [one].”), with Alexander & Prakash, supra note 27, at 1297–99 (“The nondelegation doctrine is alive and kicking.”).

41. See, e.g., Defenders of Wildlife, 527 F. Supp. 2d at 129 (declining to find unconstitutional delegation based on a superficial review of precedent).
I. THE (NON)DELEGATION DOCTRINE’S INTELLIGIBLE PRINCIPLE PARADOX

Article I, Section 1 of the U.S. Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States"—not the executive branch, nor the judicial branch. This is the heart of the nondelegation doctrine, that Congress cannot delegate its exclusive legislative power. However, the Supreme Court, consistent with separation-of-powers principles, has narrowly construed what constitutes delegation of legislative power. Since 1928 the Supreme Court has consistently held that so long as "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."

A. Nondelegation Doctrine in Two Words: “Intelligible Principle”

The "intelligible principle" rule, which epitomizes the Supreme Court’s functional approach, is the Court’s oversimplified proxy for determining whether a particular congressional enactment unconstitutionally delegates Congress’s plenary legislative power. On its face, the intelligible principle requirement appears to constrain Congress's power to delegate authority to the executive branch, including administrative agencies. However, the Supreme Court has construed the terms so broadly that some argue the nondelegation doctrine is dead, and has been for years.

Indeed, “the nondelegation doctrine has had only one good year”—1935—the first and last year the Court declared a statutory provision unconstitutional for delegating Congress’s legislative power. In 1935, the Court applied the
doctrine to strike down two provisions of the National Industrial Recovery Act of 1933 (NIRA), a centerpiece of President Franklin Delano Roosevelt's New Deal legislation.

B. The One Good Year: Hot Oil and Sick Chickens

In *Panama Refining Co. v. Ryan*, two Texas oil producers challenged a NIRA provision that authorized the President to prohibit, and punish, interstate and foreign commerce in hot oil—petroleum or petroleum products produced in violation of state-prescribed limits. The Court struck down the hot oil provision, declaring that it exceeded the "limits of delegation which there is no constitutional authority to transcend [because] Congress . . . declared no policy, . . . established no standard, [and] laid down no rule" to govern the implementation of the hot oil provision.

In *A.L.A. Schechter Poultry Corp. v. United States*, defendant slaughterhouses challenged the President's authority to establish the Live Poultry Code under section 3(a) of the NIRA as an unconstitutional delegation of legislative power. Section 3(a) empowered the President to approve "codes of fair competition" upon application by associations representative of their respective industries. Once approved, the code was binding on the entire industry. The Court invalidated the NIRA's fair competition section, holding that the breadth of the President's code-making authority, in light of his "virtually unfettered" discretion to promulgate the codes, was an "unconstitutional delegation of legislative power."

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53. National Industrial Recovery Act, ch. 90, §§ 3, 9(c), 48 Stat. 195, 196-97, 200 (1933); see also Schechter, 295 U.S. at 541-42; Panama Refining, 293 U.S. at 430.
54. BREYER ET AL., supra note 51, at 45; Huefner, supra note 24, at 352.
56. National Industrial Recovery Act § 9(c), 48 Stat. at 200; see also Exec. Order No. 6,204 (1933), reprinted in 2 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 282 (Random House 1938) [hereinafter PUBLIC PAPERS]; Exec. Order No. 6,199 (1933), reprinted in PUBLIC PAPERS, supra, at 281.
57. Panama Refining, 293 U.S. at 430. Ironically, the Court buttressed its reasoning by finding that "[nothing] would be left of limitations upon the power of the Congress to delegate its law-making function" if section 9(c) were permitted to stand. *Id.*
58. Schechter, 295 U.S. at 519-23.
60. *Id.* § 3(b).
61. *Schechter*, 295 U.S. at 541-42. Before concluding that section 3(a) of the NIRA was an unconstitutional delegation, the Court painstakingly discussed the need to provide Congress broad latitude in setting policy and delegating the details to others in the interest of maintaining a functional government. *Id.* at 529-30. The Court emphasized that:

The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. . . . [T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules
In *Panama Refining* and *Schechter*, the Court showed that the nondelegation doctrine had teeth. But shortly after the two cases were decided, the Court took a sharp ideological turn, shirking *Panama Refining* and *Schechter*, and relegating the nondelegation doctrine’s bite to the Court’s jurisprudential rear-view mirror.

C. Intelligible Principles: How Unintelligible Can They Get?

Shortly after *Panama Refining* and *Schechter* were decided, the Court began re-articulating the nondelegation doctrine standard, stating that Congress need only “clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority” in order to meet the intelligible principle requirement.

Within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

Id.

Interestingly, the *Schechter* Court’s recitation of the nondelegation doctrine is not substantially different than the Court’s more recent recitation of the doctrine in *Mistretta* or *Whitman*; the primary difference is the outcome. Compare id., with Mistretta v. United States, 488 U.S. 361, 371–75 (1989) (noting that Congress may not delegate its legislative authority to a coordinate branch, but may “obtain[] the assistance” of other branches), and Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472–74 (noting that Congress may delegate certain authority so long as it provides an “intelligible principle” as a guidepost for implementation).

62. See *Schechter*, 295 U.S. at 541–42; *Panama Refining*, 293 U.S. at 430.

63. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (1937) (breaking with the Court’s *Lochner*-era jurisprudence and giving “fresh consideration” to questions previously considered due to a change in “economic conditions”).


Interestingly, the Court in its decisions immediately following *Panama Refining* and *Schechter* did not even mention the nondelegation doctrine’s roots in the Constitution’s separation of powers requirement. See, e.g., United States v. Rock Royal Co-op., 307 U.S. 533, 574–75 (1939); Mulford v. Smith, 307 U.S. 38, 48–49 (1939). The Court re-acknowledged the doctrine’s constitutional roots as early as 1944. See *Yakus* v. United States, 321 U.S. 414, 425–26 (1944).

In *Yakus v. United States*, the Court dispelled any doubt about the direction in which its nondelegation doctrine jurisprudence was heading, holding that congressional delegations of power satisfy the nondelegation doctrine so long as there is not "an absence of standards" to guide the delegate in exercising the authority. The Court's decision in *Yakus* effectively neutered the nondelegation doctrine principles applied in *Panama Refining* and *Schechter*, foreshadowing its precipitous decline.

Therefore, despite the nondelegation doctrine's bark—that Congress cannot delegate its Article I legislative powers—the Court's interpretation of the intelligible principle requirement made clear the doctrine had very little bite, if any. Accordingly, the Court has upheld congressional delegations based upon the "vague and indefinite" principles of "public interest, convenience, or necessity," and what is "generally fair and equitable," or "requisite... to protect the public health." Conversely, the Court has also upheld Congress's delegation of what appeared to be purely legislative power—"to

67. See Jeffrey A. Werkin, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO. L.J. 1055, 1067 (2002) ("Since *Panama Refining* and *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court has not struck down a single statute for violating the intelligible principles standard. ... [In] *Yakus v. United States*, the first post-New-Deal nondelegation case considered by the Supreme Court[,] ... [t]he Court weakly attempted to distinguish *Yakus* from *Schechter*, but the real difference between the cases was not factual but rather a decision to devalue nondelegation principles. ... This practice of... devaluing the... nondelegation principles at stake[,] continues to pervade modern nondelegation jurisprudence." (footnotes omitted)).
69. See *Touby v. United States*, 500 U.S. 160, 166–67 (1991) (upholding delegation authorizing the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "necessary to avoid an imminent hazard to the public safety" in light of three factors given by Congress); United States v. Mazurie, 419 U.S. 544, 545–46 (1975) (upholding delegation to an Indian tribal council the authority to regulate the introduction of "spirituous" beverages onto an Indian reservation); *Am. Power & Light*, 329 U.S. at 104–05 (upholding section 11(b)(2) of the Public Utility Holding Company Act giving the SEC authority to modify the structure of holding company systems to ensure they are not "unduly or unnecessarily complicated" and do not "unfairly or inequitably distribute voting power among security holders"); *Yakus*, 321 U.S. at 420 (upholding an Emergency Price Control Act delegation to the price administrator of the authority to fix maximum prices of commodities which "in his judgment will be generally fair and equitable"); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 593, 604–05 (1944) (upholding delegation to the Federal Power Commission under the Natural Gas Act to set "just and reasonable" gas rates); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation authorizing the Federal Communications Commission to promulgate radio regulations in the "public interest").
71. See id. at 227 (upholding the licensing system established by Congress in the Communications Act of 1934); *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (upholding section 5(2) of the Interstate Commerce Act).
promulgate sentencing guidelines for every federal criminal offense—simply because of the "specific directives" that Congress laid down "to govern particular situations" the Commission confronts.

In sum, the Court, under its broad interpretation of the intelligible principle requirement, has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." However, even though the "intelligible principle" is clearly the centerpiece of the Court's nondelegation doctrine jurisprudence, the Court has also considered other factors, in addition to the statutory guidelines laid down, that inform the intelligibility of the principle.

D. Intelligible Principles and Beyond: The Unsung Considerations of the Supreme Court's Nondelegation Doctrine Jurisprudence

The Supreme Court has considered two factors, among others, to determine whether a particular statute unconstitutionally delegates Congress's legislative power: the nature of the delegation, including the scope of the power delegated and the entity to which the power is delegated; and the availability of judicial review.

1. Scope of Power Delegated

The Supreme Court has repeatedly noted that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." The "scope" of the delegation, for purposes of the nondelegation doctrine analysis, is determined by the plain text of the delegation itself, not by agency interpretation or exercise of the delegated power.

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75. Id. at 379 (quoting United States v. Chambless, 680 F. Supp. 793, 796 (E.D. La. 1988)).
The Court's Mistretta decision highlighted the synergistic effect of the growth in size and complexity of the U.S. government and the Court's deference to Congress. Id. at 379 ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.").
76. Whitman, 531 U.S. at 474-75 (quoting Mistretta, 488 U.S. at 416 (Scalia, J., dissenting)).
77. See id. at 474; see also supra notes 23-27 and accompanying text.
79. See, e.g., Loving v. United States, 517 U.S. 748, 772 (1996); see also Whitman, 531 U.S. at 475.
Thus, the broader the delegation language, the more direction Congress must give the agency in exercising that power. Thus

2. **Officer/Agency to Whom Power Is Delegated**

In addition to the proportionate relationship between power and principle, in each of the Supreme Court's nondelegation cases there has been a nexus between the power delegated and the executive delegate. For example, the Court has upheld statutes that Congress delegated the power to: the Federal Communications Commission to regulate radio frequency licenses; the Federal Power Commission to set natural gas rates; an Indian tribal council to regulate liquor on an Indian reservation; the U.S. Sentencing Commission to promulgate sentencing guidelines; and the Environmental Protection Agency to promulgate air quality standards. Where Congress has delegated power outside the delegate's traditional scope of authority, it has required consultation with other members of the executive branch who are experts in the field and who have vested interests in the collateral effects of the delegation.

82. *Whitman*, 531 U.S. 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[.]”); therefore, “[w]hether the statute delegates legislative power is a question for the courts, and an agency’s voluntary self-denial has no bearing upon the answer.”).

83. *Id.* at 475 (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”). Indeed, “[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators,’ which are to be exempt from new-stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy.” *Id.* (citation omitted). Likewise, Congress must provide more guidance when delegating the authority to waive “all legal requirements,” REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 102(c)(1), 119 Stat. 231, 306 (to be codified at 8 U.S.C. § 1103(c)), than when delegating the authority to regulate radio waves, Nat'l Broad. Co. v. United States, 319 U.S. 190, 214–15, 226 (1943), or air quality standards, *Whitman*, 531 U.S. at 475, for example.

That said, *Schechter* is the only case in which the Court relied on the inordinate scope of delegated power to invalidate the delegation, as opposed to more recent cases in which the Court noted the connection between the scope of the power delegated and the intelligibility of the principle, but upheld the delegation in question either because the principle was sufficiently intelligible even in light of the broad delegation, see *id.* at 475–76, or because the delegate had independent authority over the subject matter, *Loving*, 517 U.S. at 772–73; *Mazurie*, 419 U.S. at 556–57.

89. See, e.g., Touby v. United States, 500 U.S. 160, 162–63, 167 (1991) (upholding section 201(h) of the Controlled Substances Act, which authorizes the U.S. Attorney General to temporarily designate a drug as a controlled substance for purposes of criminal drug enforcement, but only after giving notice to the Secretary of Health and Human Services).
In addition, the Supreme Court has long held that the scope of the delegate’s independent authority may be dispositive of whether a congressional delegation of authority violates the Constitution.90 Because the nondelegation doctrine is fundamentally based on the separation of powers doctrine, the limitations it imposes are “less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.”91

3. Judicial Review

Judicial review of congressional delegations serves two important functions. First, the Court, particularly in recent years, interprets a statute by “giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”92 Second, the Court’s “judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds.”93

Indeed, some argue that these are the only two reasons the nondelegation doctrine still has a pulse.94 Instead of invalidating congressional delegations, the modern Court has imposed a “super-strong clear statement rule[95] of statutory interpretation that prohibits administrative agencies from performing certain activities without express Congressional authorization, thus narrowing the scope of the statute.96

90. Loving v. United States, 517 U.S. 748, 772 (1996) (“Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving’s last argument that Congress failed to provide guiding principles to the President might have more weight.”); Mazurie, 419 U.S. at 556–57 (“[I]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, they are ‘a separate people’ possessing the ‘power of regulating their internal and social relations . . . .’” (citations omitted) (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).


93. Touby, 500 U.S. at 170 (Marshall, J., concurring); id. at 168–69 (majority opinion) (implying the importance of judicial review in determining the constitutionality of a congressional delegation of power by refusing to declare judicial review irrelevant to the nondelegation analysis). Justice O’Connor, writing for the majority in Touby, noted, as the Court did in Skinner, that judicial review is important because it is essential to “ascertain whether the will of Congress has been obeyed.” Id. at 168 (quoting Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989)).


95. Id.

Although a Supreme Court nondelegation doctrine case has never turned on the presence or absence of judicial review, the Court has repeatedly noted that judicial review provides a critical check on the power delegated by Congress. In *Schechter*, the Court distinguished the NIRA from statutes previously upheld under the nondelegation doctrine, in part, because the NIRA was not judicially reviewable. The Court more explicitly recognized the importance of judicial review in *Yakus v. United States*, stating that one of the purposes of requiring Congress to provide intelligible principles was so that a tribunal "in a proper proceeding [may] ascertain whether the will of Congress has been obeyed." Conversely, without judicial review, the intelligible principle requirement, and the separation of powers it is intended to protect, would be unenforceable.

Perhaps for this reason the Court in *Federal Power Commission v. Hope Natural Gas Co.* explained the process by which a delegate's order could be invalidated by the Court, in order to ensure the delegate did not become a legislator. Similarly, in *Touby*, the Court bent over backward to avoid declaring judicial review irrelevant to the nondelegation analysis, thus implying its importance. In his concurrence, Justice Marshall expressly stated what the majority's judicial gymnastics implied: judicial review is the


98. See *Schechter*, 295 U.S. at 532–34, 539–42 (distinguishing the Federal Trade Commission Act, the Interstate Commerce Act, and the Radio Act of 1927 on numerous grounds, one of which was the lack of judicial review).

99. *Yakus v. United States*, 321 U.S. 414, 426 (1944). The Court held that the fundamental question in nondelegation doctrine cases is whether the principle laid down by Congress is "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the [delegate], in [exercising the delegated authority], has conformed to those standards." *Id.*

100. Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452, 455 (2002) ("The nondelegation doctrine as it is traditionally understood requires Congress to supply an 'intelligible principle' in its statutory delegations that constrains administrative discretion and facilitates judicial review." (emphasis added)).

101. *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). The Court noted that the FPC's "rate-making function . . . involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act." *Id.* (emphasis added) (citation omitted) (quoting *Fed. Power Comm'n Natural Gas Pipeline Co. of Am.*, 315 U.S. 575, 586 (1942)). Likewise, in *American Power & Light v. SEC*, 329 U.S. 90 (1946), the Court held that "[p]rivate rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations[,]" *Id.* at 105.

102. *Touby*, 500 U.S. at 168. Plaintiffs in *Touby* argued that the delegation in question was unconstitutional because it lacked judicial review, but the Court skillfully side-stepped the question, instead holding that judicial review did exist, even if it was delayed. *Id.*

The Court went on to expressly note, as it did in *Skinner*, that judicial review is important because it is crucial to be able to "ascertain whether the will of Congress has been obeyed." *Id.* (internal quotation marks omitted) (quoting *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989)).
lynchpin of the nondelegation doctrine because "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." But for judicial review, the Court's power to "say what the law is" and to narrowly construe statutes to avoid constitutional questions is meaningless because the Court has no way of holding the delegate to the statute's narrow construction.

E. Defenders of Wildlife v. Chertoff: Setting Precedent by Upholding an Unprecedented Delegation

In 2005, Congress passed the REAL ID Act, which was designed, at least in part, to empower the DHS to better secure America's borders. Section 102(c), the centerpiece of the border security provisions of the bill, delegates to the DHS Secretary "the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads" authorized under section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act.

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103. Id. at 170 (Marshall, J., concurring); see also Patrick M. Garry, The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers, 57 ALA. L. REV. 689, 707 (2006). Professor Garry observed that "separation of powers is inextricably connected to judicial review," and that judicial review "preserves the separation of powers [and] is justified by it." Garry, supra, at 707.

104. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province of the [Court] to say what the law is.").


106. See Touby, 500 U.S. at 171 (Marshall, J., concurring) (noting that judicial review of legislative delegation is necessary to ensure "that the exercise of such power remains within the statutory bounds").


108. REAL ID Act § 102(c)(1). The DHS Secretary’s waiver authority in section 102(c) is not entirely new. Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), passed in 1996, provided: "The provisions of the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this
Section 102(c) further provides that "district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to" his waiver authority. Moreover, "[a] cause of action or claim may only be brought alleging a violation of the Constitution of the United States." Finally, section 102(c) requires that any such "cause or claim . . . shall be filed not later than 60 days after the date of the action or decision made by the Secretary," and "may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States."

In *Defenders of Wildlife v. Chertoff*, two environmental organizations, the Defenders of Wildlife and the Sierra Club, sued the DHS Secretary, among others, challenging section 102(c) as an unconstitutional delegation of legislative power under the nondelegation doctrine.

Rejecting plaintiffs' arguments, the United States District Court for the District of Columbia upheld section 102(c) as constitutional. In so doing,
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the court applied the classic nondelegation doctrine "intelligible principle" analysis, and agreed with defendants that it is a "one-step inquiry," concluding that "there is no legal authority or principled basis upon which a court may strike down an otherwise permissible delegation simply because of its broad scope." Under this standard, the court found that Congress laid down a sufficiently intelligible principle in section 102(c), despite the section's broad scope.

Taking a belt and suspenders approach, the court then, assertedly, bolstered its decision by noting that foreign affairs and immigration, both of which are implicated by the delegation, are two matters over which "the Executive Branch already has significant independent constitutional authority," and therefore, the "delegation[] may be broader than in other contexts."

After losing in the district court, plaintiffs petitioned for a writ of certiorari from the Supreme Court, which the Court denied. In the wake of Defenders of Wildlife v. Chertoff, plaintiffs, who are not the first to lose this battle, are left to re-group while others try their hand at waking the sleeping

review . . . ." (internal quotation marks omitted) (quoting Petition for a Writ of Certiorari at 3, Defenders of Wildlife, 128 S. Ct. 2962 (No. 07-1180)).


117. Defenders of Wildlife, 527 F. Supp. 2d at 128. Moreover, the court continued: "Applying [Supreme Court] precedents, the [c]ourt concludes that it lacks the power to invalidate the waiver provision merely because of the unlimited number of statutes that could potentially be encompassed by the Secretary’s exercise of his waiver power." Id. at 129.

118. Id. at 127. Specifically, the court held that "[t]he ‘general policy’ is ‘clearly delineated’[:] to expeditiously ‘install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry.’" Id. (quoting Mistretta v. United States, 488 U.S. 361, 372–73 (1988); 8 U.S.C.A. § 1103 note (West Supp. 2008)). The Court also specifically concluded that "the ‘boundaries’ of the delegated authority are clearly defined by Congress’s requirement that the Secretary may waive only those laws that he determines ‘necessary to ensure expeditious construction.’" Id. (Mistretta, 488 U.S. at 372–73; 8 U.S.C.A. § 1103 note).

119. Id. at 129 (quoting Sierra Club v. Gonzales, NO. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244, at *17 (S.D. Cal. Dec. 12, 2005)). The court ultimately concluded:

In sum, given the Supreme Court’s ready acceptance of the “necessity” standard as an adequate “intelligible principle” to guide a delegation of legislative authority to the Executive Branch, as well as the Executive’s independent constitutional authority in the areas of foreign affairs and immigration control, the Court is constrained to reject plaintiffs’ claim that the waiver provision of the REAL ID Act is an unconstitutional delegation.

Id.


nondelegation doctrine, and academics are left to ponder the proper application of the doctrine in light of this unprecedented delegation.

II. REAL ID ACT SECTION 102(C): CAUSE FOR KICKING THE DUST OFF THE NONDELEGATION DOCTRINE

Reasonable people may disagree whether section 102(c) of the REAL ID Act is a constitutional delegation of power, but regardless of its constitutionality, section 102(c) is certainly unprecedented—though this too is disputed. The following analysis will assert that the section 102(c) delegation is not only unprecedented, but also unconstitutional, based on the broad scope of the power delegated, the intelligibility of the principle enunciated, and the constitutional significance of truncated judicial review.

A. The Power

The scope of the power Congress delegated to the DHS Secretary under section 102(c) of the REAL ID Act is unique. The power to “waive all [legal requirements]” that impede construction of U.S.-Mexico border infrastructure is broader than any delegated power heretofore upheld by the Supreme Court.

However, the first, and fundamental, question is whether the scope of the power delegated by Congress even matters under the nondelegation doctrine. In short, the answer is yes. Throughout the Supreme Court’s nondelegation doctrine jurisprudence, the scope of the delegated power has been an important factor. The Court in Whitman v. American Trucking Ass’ns explicitly noted:


123. Compare Petition for a Writ of Certiorari at 2–3, Defenders of Wildlife, 128 S. Ct. 2962 (No. 07-1180) (arguing that section 102(c) is an unconstitutional delegation of power), with Brief for the Respondent in Opposition, supra note 114, at 11–12 (stressing that section 102(c) meets the constitutional standard for delegation).

124. This is not to say that the uniqueness of the Secretary’s waiver authority is not debated. See Plaintiffs’ Lodged Surreply to Defendants’ Renewed Motion to Dismiss at 3–4, Defenders of Wildlife, 527 F. Supp. 2d 119 (No. 07-1801) [hereinafter Plaintiffs’ Lodged Surreply]. Indeed, Congress has delegated limited waiver authority in the past. However, the scope of section 102(c) of the REAL ID Act is far broader than any prior delegation. See STEPHEN R. VIÑA & TODD TATELMAN, CONGRESSIONAL RESEARCH SERVICE MEMORANDUM ON SEC. 102 OF H.R. 418, WAIVER OF LAWS NECESSARY FOR IMPROVEMENT OF BARRIERS AT BORDERS 2–4 (2005). Although H.R. 418 was never enacted, the waiver provision is substantially the same as that which passed in section 102(c) of the REAL ID Act. See Plaintiffs’ Lodged Surreply, supra, at 3–4. Compare H.R. 418, 109th Cong. § 102 (2005), with REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 102(c)(1), 119 Stat. 231, 306 (to be codified at 8 U.S.C. § 1103(c)).

125. See VIÑA & TATELMAN, supra note 124, at 2–4; Plaintiffs’ Lodged Surreply, supra note 124, at 3–4 (asserting that the section 102(c) waiver authority is “sui generis”).

126. See VIÑA & TATELMAN, supra note 124, at 2–4.

127. See Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 475 (2001); Loving v. United States, 517 U.S. 748, 772 (1996) ("[T]he question to be asked is not whether there was any
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"the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."\textsuperscript{128}

Accordingly, the scope of the delegated power must be considered hand-in-hand with the intelligibility of the principle. Thus, the scope of the power delegated is a relevant factor in determining whether a statute constitutes an impermissible delegation of legislative power, notwithstanding the district court’s holding to the contrary in \textit{Defenders of Wildlife v. Chertoff}.\textsuperscript{129}

Having established that the scope of the delegation is a relevant consideration, the question is how to measure a delegation’s scope. In assessing a delegation’s scope, the Court has considered, among other things: (1) the nature of the power delegated,\textsuperscript{130} and (2) the officer to whom the power was delegated.\textsuperscript{131}

\textbf{1. Nature of Power Delegated}

Traditionally, Congressional delegations have conferred regulatory authority on administrative agencies,\textsuperscript{132} although there are exceptions to this general rule.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{128} \textit{Whitman}, 531 U.S. at 475.
\item \textsuperscript{129} 527 F. Supp. 2d at 129. The court held that "there is no . . . principled basis upon which a court may strike down an otherwise permissible delegation simply because of its broad scope." \textit{Id.} at 128. This statement begs the question because, in light of \textit{Whitman}, the broad scope of a delegation is itself a factor in determining whether the delegation is "permissible." \textit{Defenders of Wildlife}, 527 F. Supp. 2d at 128; \textit{see also Whitman}, 531 U.S. at 475; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935).
\item \textsuperscript{130} \textit{See}, e.g., \textit{Loving}, 517 U.S. at 772.
\item \textsuperscript{131} \textit{See}, e.g., \textit{id.} at 772–73; United States v. Mazurie, 419 U.S. 544, 556–57 (1975).
\item \textsuperscript{133} \textit{See infra} note 140.
\end{itemize}
The power delegated to the DHS Secretary under section 102(c) of the REAL ID Act is fundamentally different than any delegation considered by the Supreme Court thus far. Section 102(c) delegates to the DHS Secretary the power to unilaterally waive statutes duly enacted by Congress, which is substantially different than the regulatory authority traditionally delegated by Congress and upheld by the Supreme Court.  

Unlike the power to regulate, the power to waive is fundamentally the power to amend the scope of the waived statute—rendering the statute narrower than when Congress enacted it. And unlike other statutes that confer limited waiver authority, under section 102(c) of the REAL ID Act, the Secretary can waive any law contained within the United States Code’s fifty titles, as well as any state or local law. Local zoning ordinances and state criminal laws, federal labor and environmental laws, federal drug and human trafficking laws, as well as international treaties are all within the DHS Secretary’s reach so long as, in the lone opinion of the Secretary, they stand in the way of the expeditious construction of the U.S.-Mexico border fence.

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135. Even though the district court rejected plaintiffs’ argument that the authority to waive was tantamount to the power to repeal, Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119, 126 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008), the fact that the waiver alters the scope and effect of the statutes waived is both indisputable and relevant for determining the scope of the power delegated, see infra note 138 (supporting the relevance of the waiver’s scope).

136. See VIÑA & TATELMAN, supra note 124, at 2–4.

137. H.R. REP. NO. 109-72, at 171 (2005) (Conf. Rep.) (“[T]he provision clarifies the intent of the conference report by substituting a reference to waiver of ‘all legal requirements’ for the prior reference to waiver of ‘all laws’, clarifying Congress’ intent that the Secretary’s discretionary waiver authority extends to any local, state or federal statute, regulation, or administrative order that could impede expeditious construction of border security infrastructure.”); see also, e.g., Determination Pursuant to section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 73 Fed. Reg. 18,293 (Apr. 3, 2008).

138. REAL ID Act § 102(c). These examples were inspired by a group of law professors who concocted a number of creative, yet plausible, scenarios in their brief as amici curiae in Defenders of Wildlife v. Chertoff. They wrote:

To date, the Secretary has seen fit to waive laws protecting the environment, public health, freedom of religious exercise and historic resources. But with no more than the unsupported assertion of “necessity” that [the Secretary] has invoked to waive those laws, the Secretary also may waive any other law he [or she] desires. [The Secretary] is equally free to waive the requirements of the Fair Labor Relations Act to halt a strike, or the provisions of the Occupational Safety and Health Act to force workers to endure unsafe working conditions, or the state speed limits in California, New Mexico, Arizona and Texas to race equipment and materials to construction sites. Section 102(c) gives the Secretary the power to waive treaties with Mexico governing the location of the border, management of the border zone, and movement of water, goods and services across the border so long as [the Secretary] deems it, in his sole and unreviewable discretion, “necessary.” Indeed, under Section 102(c) the Secretary could waive the immigration laws and regulations, hire illegal aliens, and pay them less than minimum wage if [the Secretary] deems it necessary to build the fence.
Granted, Congress has delegated power, other than regulatory authority, to administrative agencies, which the Supreme Court has also upheld. For example, the Court has at least twice upheld Congress's delegation of the power to promulgate rules and regulations governing criminal sentencing. However, the DHS Secretary's power under section 102(c) dwarfs even these broad delegations of power. Though the Secretary does not have, under section 102(c), the power to promulgate aggravating factors for capital punishment as upheld in Loving, or to promulgate sentencing guidelines for federal crimes as upheld in Mistretta, the Secretary does have the power to wipe criminal statutes completely off the books so long as doing so would expedite construction of the U.S.-Mexico border fence. Certainly this power is greater.

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Defendants, in response, argued: "The waiver at issue in this case also fails to present anything remotely resembling the parade of horribles conjured by the amici law professors. To date, the waivers issued by the Secretary have focused on statutes that have implications for land use." Brief for the Respondent in Opposition, supra note 114, at 11 n.5 (citation omitted).

However, the Secretary's decision to exercise his authority to waive only laws pertaining to land use is irrelevant because, under Whitman, "[w]hether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).


140. See Loving, 517 U.S. at 773–74; Mistretta, 488 U.S. at 371. This power is arguably the most far-reaching authority delegated by Congress, at least in terms of its potential infringement on personal liberty, which is an essential consideration given the nondelegation doctrine's purpose to protect individual liberty by maintaining the separation of powers. See Clinton v. City of New York, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring); Mistretta, 488 U.S. at 371–72 (1989); THE FEDERALIST NO. 47 (James Madison), supra note 17, at 249; THE FEDERALIST NO. 48 (James Madison), supra note 17, at 256.

141. Andrea C. Sancho, Environmental Concerns Created by Current United States Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security Under the Real ID Act of 2005, 16 SE. ENVTL. L.J. 421, 445 (2008) ("[T]he breadth and scope of power delegated to the Secretary under section 102(c) of the REAL ID [Act] is unprecedented and fails to provide sufficient boundaries defining the limits of delegated authority. There is something innately wrong and even undemocratic in giving the head of an agency the sole discretion to waive any legal requirements that he or she alone deems necessary to ensure the 'expeditious construction' of infrastructure at the Border.").

142. Loving, 517 U.S. at 773–74.

143. Mistretta, 488 U.S. at 370, 374.

144. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 102(c), 119 Stat. 231, 306 (to be codified at 8 U.S.C. § 1103(c)). Moreover, the Loving Court rested its decision to uphold the
2. Officer to Whom Power Was Delegated

The unprecedented breadth of the delegation in section 102(c) of the REAL ID Act is further underscored when viewed in light of the DHS Secretary’s general authority and expertise.\textsuperscript{145} The delegations of power previously upheld by the Court all had a clear nexus with the delegate’s general authority and expertise,\textsuperscript{146} or required consultation with other agencies that are experts with a vested interest in the collateral effects of the delegation.\textsuperscript{147} There is no such nexus between the DHS Secretary and the broad section 102(c) waiver provision.\textsuperscript{148} Even after Congress enacted the Consolidated Appropriations Act of 2008, which requires the Secretary to “consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners . . . to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which [the] fencing is to be constructed,”\textsuperscript{149} the Secretary has made clear that this requirement will not deter him from waiving laws in his “sole discretion.”\textsuperscript{150} Indeed, the Department of the Interior has expressed concern about the DHS Secretary’s waiver decisions, to no apparent avail.\textsuperscript{151}

Without question, the DHS Secretary has the power to implement construction of the U.S.-Mexico border fence, and there is a clear nexus delegation on the President’s power as Commander-in-Chief, and not solely on intelligible principle grounds. \textit{Loving}, 517 U.S. at 772. The Court did not entertain whether the delegation would have been valid absent the President’s inherent authority. \textit{Id}.

\textit{Mistretta} is further distinguishable from \textit{Defenders of Wildlife v. Chertoff} because in the Sentencing Reform Act of 1984, which established the commission, Congress gave “detailed guidance to the Commission,” whereas section 102(c) of the REAL ID Act provides very little guidance. \textit{Compare Mistretta}, 488 U.S. at 362, 376, with REAL ID Act of 2005 § 102(c)(1).

145. \textit{Loving} provides express precedent for considering the delegate’s scope of authority. \textit{See Loving}, 517 U.S. at 772 (upholding a delegation to the President of the authority to prescribe aggravating factors for military capital punishment cases based, in part, on the President’s inherent constitutional authority as Commander-in-Chief); \textit{see also supra} note 91.


147. \textit{Touby v. United States}, 500 U.S. 160, 166–67 (1991) (upholding section 201(h) of the Controlled Substances Act, authorizing the U.S. Attorney General to temporarily designate a drug as a controlled substance for purposes of criminal drug enforcement, but only after giving notice to the Secretary of Health and Human Services).


between this task and the Secretary's general authority and expertise. However, there is no nexus between the Secretary's general authority and expertise and the authority to waive environmental statutes, much less any legal requirement—federal, state, or local.

The court, in *Defenders of Wildlife v. Chertoff*, stated that the demands of the nondelegation doctrine are less stringent as to section 102(c) of the REAL ID Act because "[t]he construction of the border fence pertains to both foreign affairs and immigration control—areas over which the Executive Branch traditionally exercises independent constitutional authority." There is no question that the executive branch has "independent constitutional authority" over foreign affairs and immigration, but the DHS Secretary's section 102(c) waiver authority extends far beyond these two areas of law, and far beyond the Secretary's general authority and expertise.

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155. *Id.; see also* Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (citations omitted).

156. *See supra* Part I.E.

157. *See Homeland Security Act of 2002*, 6 U.S.C. § 112(a)(1)–(2) (providing that the DHS Secretary "is the head of the Department and shall have direction, authority, and control over it"); *id.* § 112(a)(3)–(b)(2) (providing that "[a]ll functions of all officers, employees, and organizational units of the Department are vested in the Secretary," in addition to "the authority to make contracts, grants, and cooperative agreements, and to enter into agreements with other executive agencies, as may be necessary and proper to carry out the Secretary's responsibilities," which the Secretary may delegate, along with "any of the Secretary's functions[,] to any officer, employee, or organizational unit of the Department").

Because every DHS function is vested in the Secretary, the names of the relevant titles of the Homeland Security Act sketch a rough outline of the Secretary's scope of authority. Title II is "Information Analysis and Infrastructure Protection," title III is "Science and Technology in Support of Homeland Security," title IV is "Directorate of Border and Transportation Security," and title V is "National Emergency Management." *Id.* § 1 et seq. Clearly, the DHS Secretary has extremely broad power over issues with national security implications. However, his general statutory authority, and his attendant expertise, is far narrower than the authority to "waive all legal requirements" that impede construction of U.S.-Mexico border infrastructure. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 102(c)(1), 119 Stat. 231, 306 (to be codified at 8 U.S.C. § 1103(c)). Moreover, it is salient to note that under § 112 of the Homeland Security Act, the Secretary may delegate any of his authority "to any officer, employee, or organizational unit of the Department," including his unprecedented section 102(c) waiver authority. Homeland Security Act of 2002, 6 U.S.C. § 112(b)(1).
In light of the scope and nature of the authority delegated, arguably no principle, no matter how intelligible, could save this delegation.\textsuperscript{158} However, deferring to the Court’s majority analysis in \textit{Mistretta}, the question is whether the principle laid down by Congress in section 102(c) of the \textit{REAL ID Act} is sufficiently intelligible to render the delegation constitutionally permissible.\textsuperscript{159}

\textbf{B. The Principle}

Because "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,"\textsuperscript{160} the broader the delegation of power, the more intelligible the principle must be. The principle laid down by Congress in section 102(c) of the \textit{REAL ID Act} requires the DHS Secretary to determine, in his "sole discretion," that waiving particular legal requirements is "necessary to ensure expeditious construction" of the border infrastructure authorized by Congress.\textsuperscript{161}

The Supreme Court has held that "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding [Congress’s delegation]."\textsuperscript{162} The Court has also held that Congress need not articulate "how ‘necessary’ [is] necessary enough" in order for the delegation to pass constitutional muster.\textsuperscript{163}

Thus, under the “one-step [intelligible principle] inquiry” urged by the Government in \textit{Defenders of Wildlife v. Chertoff}\textsuperscript{164} and adopted by the court,\textsuperscript{165} section 102(c) would survive, and it did.\textsuperscript{166} However, the inquiry should not begin and end with the intelligible principle in a vacuum. Rather, the proper analysis must consider the principle in light of the power.\textsuperscript{167}

\textsuperscript{158} Cf. \textit{Mistretta v. United States}, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting) ("[A] pure delegation of legislative power is precisely what we have [in the present case]. It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation.").

\textsuperscript{159} \textit{Id.} at 372 (majority opinion).


\textsuperscript{161} \textit{REAL ID Act} of 2005 § 102(c)(1) (emphasis added).

\textsuperscript{162} \textit{Yakus v. United States}, 321 U.S. 414, 426 (1944).

\textsuperscript{163} \textit{Whitman}, 531 U.S. at 475.

\textsuperscript{164} Brief for the Respondent in Opposition, \textit{supra} note 114, at 16.


\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Whitman}, 531 U.S. at 475. In addition to the express language in \textit{Whitman} that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," \textit{id.}, the Court, on more than one occasion, explicitly chose not to foreclose the possibility that a heightened intelligible principle standard may apply to a section 102(c)-like delegation, which is exceptionally broad, directly affects individual liberty, and
Accordingly, the degree of agency discretion to exercise power as broad as that conferred by section 102(c) of the REAL ID Act should be judiciously circumscribed.\textsuperscript{168} This interpretation of the intelligible principle requirement not only finds explicit support in \textit{Whitman}, and implicit support in \textit{Loving} and \textit{Touby}, but it more accurately reflects the nondelegation doctrine's roots in Article I of the Constitution by "ensuring that Congress does not unnecessarily delegate important choices . . . to politically unresponsive administrators."\textsuperscript{169} Section 102(c) of the REAL ID Act defies this intelligible principle standard, which is intended to preserve the "separation of powers that underlies our tripartite system of Government."\textsuperscript{170}

Therefore, the Court "ought not . . . shy away from [its] judicial duty to invalidate unconstitutional delegations of legislative authority,"\textsuperscript{171} such as section 102(c). Unlike previous delegations upheld by the Supreme Court, section 102(c) combines an extremely broad delegation of authority with an exceptionally vague principle.\textsuperscript{172} Justice Scalia has correctly noted that the Court "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."\textsuperscript{173} This delegation, however, is different.

For the sake of comparison to section 102(c), the statutes previously upheld by the Supreme Court can be divided into two categories: those that delegate broad authority upon relatively concrete principles, and those that delegate specific regulatory authority on relatively vague principles. Section 102(c) fits

\begin{itemize}
\item provides the delegate power far beyond his independent authority, \textit{see} \textit{Loving v. United States}, 517 U.S. 748, 772 (1996) ("Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight."); \textit{Touby v. United States}, 500 U.S. 160, 165–66 (1991) (expressly leaving open the question of whether "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions" because such "regulations . . . pose a heightened risk to individual liberty").
\item The Supreme Court's "cases are not entirely clear as to whether [Congress must provide] more specific guidance" when delegating authority of this sort. \textit{Touby}, 500 U.S. at 166; \textit{see also} A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) ("In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.").
\item \textit{Whitman}, 531 U.S. at 475.
\item \textit{Indus. Union Dep't}, 448 U.S. at 686 (Rehnquist, J., concurring).
\item \textit{See infra} notes 175–83 and accompanying text.
\item \textit{Whitman}, 531 U.S. at 474 (quoting \textit{Mistretta}, 448 U.S. at 416 (Scalia, J., dissenting)).
\end{itemize}
neither category; it delegates exceptionally broad authority on the relatively vague principle of necessity.\textsuperscript{174} For example, the Sentencing Reform Act of 1984, which the Court upheld in \textit{Mistretta},\textsuperscript{175} delegated extremely broad authority to the U.S. Sentencing Commission to promulgate sentencing guidelines for all federal crimes.\textsuperscript{176} However, the delegation of such broad authority was upheld because it was accompanied by proportionately "detailed congressional directives channeling agency discretion."\textsuperscript{177} The penumbral principle of necessity in section 102(c) pales in comparison.\textsuperscript{178}

On the other hand, section 109(b)(1) of the Clean Air Act, which the Court upheld in \textit{Whitman},\textsuperscript{179} delegated general regulatory authority to the Environmental Protection Agency (EPA) to set air quality standards based upon the relatively vague standards of what is "requisite to protect the public health" and what "is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollution in the ambient air."\textsuperscript{180} The power delegated in the Clean Air Act is a traditional congressional delegation of regulatory authority to an agency with expertise over the subject matter.\textsuperscript{181} Section 102(c) is altogether broader.\textsuperscript{182} Furthermore, the principle laid down in section 109(b)(1) of the Clean Air Act

\textsuperscript{175} \textit{Mistretta}, 488 U.S. at 374.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Loving v. United States}, 517 U.S. 748, 772 (1996) (parenthetically citing \textit{Mistretta}). In the Sentencing Reform Act of 1984, Congress specifically charged the Commission to pursue three goals and four purposes of sentencing, and "prescribed the specific tool—the guidelines system—for the Commission to use in regulating sentencing." \textit{Mistretta}, 488 U.S. at 374. The guidelines system required the Commission to create categories of offenses and categories of defendants to be used in formulating base-line sentences. Sentencing Reform Act of 1984, Pub. L. 98-473, § 994(c)-(d), 98 Stat. 1837, 2020. In addition, Congress provided seven factors to guide the Commission in creating the categories of offenses, \textit{id.} § 994(c), and eleven factors for establishing the categories of defendants, \textit{id.} § 994(d).
\textsuperscript{178} Compare REAL ID Act § 102(c)(1), with Sentencing Reform Act of 1984 § 994(c)-(d). \textit{See also} Touby v. United States, 500 U.S. 160, 167 (1991) (upholding delegation authorizing U.S. Attorney General to temporarily designate a drug as a controlled substance for purposes of criminal drug enforcement where Congress required the Attorney General to consider (1) "the drug’s ‘history and current pattern of abuse’"; (2) "[t]he scope, duration, and significance of abuse"; and (3) "what, if any, risk there is to the public health" in order to determine whether the designation was "necessary to avoid an imminent hazard to the public safety." (citations omitted)).
\textsuperscript{181} \textit{See Whitman}, 531 U.S. at 474-75.
\textsuperscript{182} \textit{See supra} Part II.A.
is far more intelligible than that in section 102(c) of the REAL ID Act. This comparison underscores the fact that the intelligibility of the principle laid down in section 102(c) is severely disproportionate to the breadth of the power delegated.

C. Judicial Review

Moreover, the absence of judicial review effectively eliminates any standard that might exist in the statute, making it "impossible . . . to ascertain whether the will of Congress has been obeyed . . . " Indeed, by stripping courts of jurisdiction to hear claims challenging the Secretary’s exercise of section 102(c) waiver authority, except when it gives rise to a constitutional claim, Congress made the Secretary’s waiver decisions nearly untouchable. This effectively guts the nondelegation doctrine, rendering it meaningless.

The Court has repeatedly taken for granted that a primary purpose of the intelligible principle requirement is to ensure that courts can assess whether the delegate has acted within his authority. Therefore, judicial review is indispensable.

Though the Court, in evaluating the constitutionality of section 102(c), would have the opportunity to construe the statute narrowly to avoid constitutional infirmity, it would be powerless to enforce its interpretation of the statute’s limits because the Secretary’s waivers cannot be challenged on the basis of a statutory violation. Thus, it would also preclude putative plaintiffs from challenging the Secretary’s actions on the basis that the Secretary acted without express authorization from Congress, undermining the clear statement

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183. Compare REAL ID Act § 102(c)(1), with Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1) (2000). In Whitman, Justice Scalia specifically defined, under the Clean Air Act, “requisite” to mean “sufficient, but not more than necessary.” Whitman, 531 U.S. at 473 (citations omitted). And the EPA is not left to its “sole discretion” in making the air quality standards, rather the agency is required to base its decision on “published air quality criteria that reflects the latest scientific knowledge.” Id.


185. REAL ID Act § 102(c)(2)(A).

186. See Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). Then-Associate Justice Rehnquist noted that one of the “important functions” of the nondelegation doctrine is to “ensure[] that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.” Id. at 685–86 (citing Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part)).


188. See supra notes 92–96 and accompanying text; see also Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); Indus. Union Dep’t, 448 U.S. at 646 (majority opinion); Nat’l Cable Television Ass’n v. United States, 415 U.S. 336, 342 (1974).

189. REAL ID Act § 102(c)(2)(A).
rule, which the Court has used as its modern nondelegation doctrine enforcement mechanism.\(^{190}\)

Without judicial review, there is no check—neither judicial nor political—to ensure that the DHS Secretary does not exceed or abuse his power.\(^{191}\) This threat to personal liberty due to the accumulation of power in a single person is precisely what James Madison warned against,\(^{192}\) and perhaps the reason why the Court has taken for granted judicial review of discretionary exercises of congressionally delegated power.\(^{193}\)

Moreover, the jurisdiction-stripping provision rips the nondelegation doctrine from its constitutional mooring by disregarding individual liberties while blindly favoring more efficient government. Granted, persons may bring claims alleging that the DHS Secretary violated their constitutional rights,\(^{194}\) but these constitutional protections do not provide a suitable remedy to, for example, a border resident whose house will sit on the "Mexican side" of the fence.\(^{195}\) Indeed, "[p]rivate rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."\(^{196}\)

Without judicial review, the nondelegation doctrine and the separation of powers principles that the doctrine embodies are meaningless.\(^{197}\)

Therefore, section 102(c) of the REAL ID Act is an unconstitutional delegation of legislative power given the scope and nature of the power

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190. See Sunstein, supra note 96, at 316; see also supra Part I.D.3.

191. For example, the jurisdiction-stripping provision would foreclose a challenge to the DHS Secretary's decision to waive the Fair Labor Standards Act and force workers to endure unsafe working conditions, see Brief of Amici Curiae, supra note 138, at 11, or his decision regarding the placement of the fence through the middle of a university campus, see Ralph Blumenthal, Some Texans Fear Border Fence Will Sever Routines, N.Y. TIMES, June 20, 2007, at A17, or around a border resident's house, see Alicia A. Caldwell, Don't Fence Me In: Federal Fence Snarls Homeowners' Rights in Sleepy Texas Towns, CHI. SUN TIMES, Nov. 18, 2007, at E1.

192. See THE FEDERALIST NO. 47 (James Madison), supra note 17, at 249; THE FEDERALIST No. 48 (James Madison), supra note 17, at 256.

193. See supra Part I.D.3.

194. REAL ID Act § 102(c)(2)(A).

195. See Caldwell, supra note 191.


197. Justice O'Connor's majority opinion in Touby, in which she bent over backward to avoid declaring judicial review irrelevant to the nondelegation doctrine analysis, see supra notes 102–03, belies the defendants' argument in Defenders of Wildlife that judicial review of the executive branch's adherence to a congressional delegation is distinct from the question of "whether an Act of Congress is constitutionally infirm because it cedes legislative authority to the Executive Branch by failing to impose sufficient restrictions[.]" Brief for the Respondent in Opposition, supra note 114, at 18. Without judicial review there is no way to challenge the exercise of delegated authority, and thus no meaningful mechanism for ensuring the agency administrator does not become a legislator. See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). Thus, far from being separate and distinct, the presence or absence of judicial review is an important aspect of whether a delegation is unconstitutional. See id.
delegated by Congress, the unintelligibility of the principle laid down by Congress relative to that power, and the lack of judicial review. The fact that a pro forma application of the Court's present nondelegation doctrine analysis would lead to a contrary conclusion demands that the doctrine be redefined.

III. REAL ID ACT SECTION 102(c) DEMANDS REFINING THE NONDELEGATION DOCTRINE

The Supreme Court's decision to deny certiorari in *Defenders of Wildlife v. Chertoff* permitted the Court to avoid a tough decision: whether to put the final nail in the nondelegation doctrine's coffin or reaffirm the doctrine's legitimacy. Either decision would have had sweeping implications. On the one hand, if the Court upheld section 102(c) of the REAL ID Act it would give Congress a blank check to delegate an unprecedented amount of legislative authority with little consideration for individual liberty, and without fear of judicial reproof. Conversely, if the Court struck down section 102(c) under the nondelegation doctrine, it would send an important message to Congress that there is a real limit to the power that Congress can constitutionally delegate to unaccountable administrative agencies; and it could do so while preserving Congress's flexibility in the interest of workable government.

Indeed, section 102(c) is the "poster statute" for the Court to "mak[e] an example of" because it is easily distinguishable from the statutes heretofore upheld by the Court, and because it provides the perfect opportunity to articulate a more refined framework for determining whether congressional delegations have gone too far.

200. Antonin Scalia, *A Note on the Benzene Case*, 4 REGULATION 25, 28 (July/Aug. 1980). Justice Scalia, while a professor at the University of Chicago Law School, wrote: "So even with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice. The alternative appears to be continuation of the widely felt trend toward government by bureaucracy or (what is no better) government by courts." *Id.* Justice Scalia concluded: "So even those who do not relish the prospect of regular judicial enforcement of the unconstitutional delegation doctrine might well support the Court's making an example of one—just one—of the many enactments that appear to violate the principle. The educational effect on Congress might well be substantial." *Id.* Perhaps the Sentencing Reform Act of 1964, which the Court upheld in *Mistretta* over Justice Scalia's lone dissent, was "the one" Scalia had in mind, but section 102(c) of the REAL ID Act conceivably could also fit the bill. *See id.*

201. Section 102(c) is broader than prior delegations upheld by the Court in the scope and nature of the power delegated, and the lack of judicial review. *See supra* notes 132–34 and accompanying text. Because the delegation is so extreme, invalidating it under the nondelegation doctrine would not severely curtail Congress's ability to make traditional administrative delegations, with appropriately intelligible principles, in the interest of maintaining a functioning government. Rather, it would tell Congress, in no uncertain terms, that there is a limit to Congress's power to delegate, and the Court is willing and able to enforce that limit.
There are two primary factors that have prevented the Supreme Court from disinterring the nondelegation doctrine in previous cases. The first obstacle is the Court's longstanding history of upholding congressional delegations of power to the executive branch. The second, and more formidable hindrance, is the difficulty of deciding where to draw the line between a permissible delegation of power and an impermissible delegation of legislative authority. However, each of these obstacles is mitigated by the uniqueness of the section 102(c) delegation, as well as the real and potential negative consequences of concentrating section 102(c) waiver authority in the hands of a single, unelected agency administrator.

A. The First Obstacle: Precedent

The first, and most obvious, impediment to invalidating a congressional delegation under the nondelegation doctrine is the Supreme Court's nearly two-hundred-year tradition of upholding delegations with very little scrutiny. While the Court did invalidate two sections of the NIRA in *Panama Refining* and *Schechter*, these cases have been treated with less judicial deference because of their association with "discredited constitutional doctrines of the pre-New Deal Era." Even though the Court has upheld every delegation challenged since 1935, section 102(c) is sufficiently different than the delegations previously upheld by the Court such that the Court could invalidate it without violating established principles of stare decisis.

B. The Second Obstacle: Where to Draw the Line

If, then, the nondelegation doctrine is revived to invalidate section 102(c) of the REAL ID Act, the question remains where to draw the line between a permissible delegation in which a "certain degree of discretion, and thus of..."
lawmaking, inheres,\textsuperscript{211} and a delegation of legislative power that violates the Constitution.

1. Making an Example of Section 102(c): The Court’s Choice Between Activism and Irrelevance

The Court’s hands-off approach to the nondelegation doctrine evinces a reasonable fear of returning to the judicial activism that characterized the Court in 1935.\textsuperscript{212} Indeed, drawing lines clearly defining the scope of the nondelegation doctrine is difficult, and perhaps inadvisable. However, the Court’s failure to “mak[e] an example of\textsuperscript{213} section 102(c)—an exceptionally broad delegation that strips the courts of judicial review—may empower Congress to further limit the important role of the judiciary in maintaining the Constitution’s balance of power. If so, the Court would be faced with a difficult choice: either invalidate the delegation, or stand idly by as the separation-of-powers doctrine further deteriorates under the increasing weight of an administrative state.

Thus far, the Court has avoided this choice by applying the clear statement rule, narrowly construing agency discretion instead of invalidating an entire statute under the nondelegation doctrine.\textsuperscript{214} However, section 102(c) does not permit the Court the luxury to enforce a narrow statutory construction because no court has jurisdiction to adjudicate statutory claims under section 102(c).\textsuperscript{215} Therefore, Congress has left the Court little choice: either activism, by invalidating the statute, or irrelevance, by sitting on the sidelines while Congress delegates unprecedented and unconstitutional discretion to unaccountable administrative agencies.

2. Effective Government at the Expense of Individual Liberty

On one extreme, some argue that Article I only restricts legislators from delegating their authority to vote and act as legislators.\textsuperscript{216} On the other extreme, some commentators argue that all delegations of discretionary authority violate Article I of the Constitution, and advocate demolition of the

\textsuperscript{211} Whitman, 531 U.S. at 475 (quoting Mistretta v. United States, 448 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasis omitted)).

\textsuperscript{212} See Indus. Union Dep’t, 448 U.S. at 686 (Rehnquist, J., concurring); see also Gilbert Paul Carrasco, Congressional Arrogation of Power: Allen Constellation in the Galaxy of Equal Protection, 74 B.U. L. REV. 591, 629 (1994) (“Critics of the nondelegation doctrine argue that the doctrine has fallen into desuetude since 1935 because it is impossible for Congress to follow strict guidelines in all its delegations, and because a resurgence could easily provide a vehicle for judicial activism.”).

\textsuperscript{213} Scalia, supra note 200, at 28.


\textsuperscript{216} Posner & Vermeule, supra note 27, at 1723.
Neither of these extreme principles, it is fair to say, would be palatable to the current Court. Yet, the status quo is flawed as well. Under the Court's modern nondelegation doctrine jurisprudence, congressional delegations of power are afforded a virtually irrebuttable presumption of validity so long as there is any principle, no matter how vague, that may be construed as guiding the exercise of the delegated authority, no matter how broad. This hands-off approach emphasizes the need for workable government with little consideration of the expense to individual liberty.

The United States District Court for the District of Columbia's decision in *Defenders of Wildlife v. Chertoff*, and the Supreme Court's subsequent denial of certiorari, is the most recent, and arguably most extreme, example of the effect of applying the Court's modern nondelegation jurisprudence to its logical end. As such, that case highlights the need for re-drawing the line between permissible delegations of discretionary authority and impermissible delegations of legislative power; in other words, re-striking the balance between individual liberty and effective government.

The adjustment need not be extreme. Rather, simply moving toward a more meaningful application of the precedent to which the Court rotely pays lip service in each of its nondelegation cases would suffice. The result would be a more refined analysis of the nondelegation doctrine that considers the scope and nature of the delegated power, as well as the availability of judicial review—each of which is crucial in actually determining whether Congress has unconstitutionally delegated its legislative authority.

C. Consequences of the Status Quo

The consequences of maintaining the Court's hands-off approach to congressional delegation are brought into sharp focus by section 102(c) of the REAL ID Act. Under this authority, the DHS Secretary has the power to render any law—local, state, or federal—inapplicable to the U.S.-Mexico border simply because the Secretary decides it is "necessary." This means the Secretary could waive speed limit regulations on border town roads in order to expedite the shipment of fence materials, or employ illegal immigrants or child laborers to help build the fence more quickly. If these hypothetical

221. *See supra note 137 and accompanying text.*
222. *See Brief of Amici Curiae, supra note 138, at 11.*
Refining the Nondelegation Doctrine

proposals seem outlandish, consider what DHS has actually done. DHS sought to build the fence through the middle of the University of Texas at Brownsville’s campus, and planned to fence-out houses, pinning them between the Rio Grande and an eighteen-foot-tall border fence. Meanwhile, Congress is able to avoid feeling the heat of fiery outrage growing among residents of border towns whose way of life is being dramatically altered.

D. Revised Intelligible Principle Requirement

This refined analysis should begin with a determination of whether the statute contains a principle, as presently defined by the Court, to guide the agency’s exercise of delegated authority. However, the analysis should not end there. Rather, the intelligibility of the principle should be determined by next considering the scope and nature of the authority delegated. Instead of relying solely on comparing the statutory language of one principle to another, which at times can seem like comparing apples and oranges, the Court should also consider the scope of the delegation in light of: (1) the nature of the power delegated; (2) the officer or agency to which the power is delegated, including its independent authority; and (3) the availability of judicial review.

This framework of analysis is not wildly different than the Court’s present nondelegation doctrine jurisprudence. In fact, the primary difference is simply that it gives meaning to the prior law the Court restates in each of its nondelegation cases. The result, however, is an analysis that properly strikes the balance between individual liberty and workable government.

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223. Blumenthal, supra note 191.
227. See, e.g., id. at 474–76.
228. See, e.g., id. (comparing the power to regulate air quality standards to the power to regulate holding company structures for utilities, set commodities prices at a certain level, or regulate railroad mergers).
229. See supra Part I.D.1.
231. See supra Part I.D.3. The importance of judicial review will vary based upon the other factors—the scope of the power delegated and the intelligibility of the principle laid down. Thus, full-blown judicial review will not be necessary in every case. See Touby v. United States, 500 U.S. 160, 168 (1991).
IV. CONCLUSION

Perhaps it is necessary for citizens living along the U.S.-Mexico border to sacrifice for the good of the United States. If so, they should be called upon to make whatever sacrifice is necessary. Indeed, Congress should spare no expense when it comes to keeping America safe. But, it is Congress that should make that decision to waive its laws—not the DHS Secretary.

In this case, a well-meaning Congress went too far. The fact that the district court upheld the delegation speaks volumes as to how far the nondelegation doctrine has been removed from its roots in the separation of powers. For this reason, the Supreme Court should re-examine the nondelegation doctrine, its roots, and its precedents, as Justice Thomas has encouraged the Court to do.\(^2\)\(^3\)\(^2\) In doing so, the Court should begin to define the outer limits of the nondelegation doctrine by invalidating extreme delegations such as that in section 102(c) of the REAL ID Act.

\(^{232}\) Whitman, 531 U.S. at 487 (Thomas, J., concurring).