



## ARTICLES

### AMERICAN TRUCKING V. EPA: UNJUSTIFIED REVIVAL OF THE NONDELEGATION DOCTRINE

By  
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#### I. INTRODUCTION

In *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, the D.C. Circuit court shocked both the environmental and legal communities by holding that the Clean Air Act unconstitutionally delegates legislative power to the Environmental Protection Agency (EPA) to revise public health standards for certain air pollutants.<sup>1</sup> Instead of striking the Clean Water Act as unconstitutional, the D.C. Circuit split decision (2–1) remanded the Act

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<sup>1</sup> 175 F3d 1027 (D.C. Cir. 1999).

back to the EPA to adopt an "intelligible principle" to restrict the Agency's discretion, thereby avoiding a violation of the long-dormant Nondelegation Doctrine.<sup>2</sup>

The court's revival of the Nondelegation Doctrine to reach its decision contradicts the last six decades of jurisprudence sustaining similar, if not broader, legislative delegations of power. Furthermore, the court fails to acknowledge that its real inquiry is not whether Congress articulated an "intelligible principle" in the Clean Air Act, but whether EPA articulated an intelligible basis for its decision. If not reversed, the court's holding may severely thwart EPA's ability to carry out the legislative purpose of the Clean Air Act to protect public health.

This Article analyzes the D.C. Circuit's decision in *American Trucking* and discusses its effect on EPA's ability to implement its Clean Air Act mandate to protect public health. Part II discusses the law controlling judicial review of agency discretion. Specifically, it explains the theory and development of both the Nondelegation Doctrine and the "arbitrary and capricious" standard. Part III discusses the facts, rationale and holding in *American Trucking*. Part IV analyzes the *American Trucking* decision and argues that the opinion contradicts Supreme Court and the D.C. Circuit's own case law on the Nondelegation Doctrine and is therefore erroneous. Part IV further argues that the real inquiry is not whether the Clean Air Act contained an intelligible principle to cabin EPA's discretion, but whether EPA's decision itself was intelligible.

## II. THE LAW

When reviewing an agency's decision, the courts must consider two questions. The first is whether the agency had the authority to make the decision in the first place.<sup>3</sup> The second is whether the decision was reasonable.<sup>4</sup> While the Nondelegation Doctrine technically comes into play in the first question, it has been interpreted so loosely by the courts over the past six decades that it is, for all practical purposes, useless in this determination. The second, and usually

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<sup>2</sup> *Id.*

<sup>3</sup> *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 2000 WL 289576, \*2 ("an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress").

<sup>4</sup> *Greater Boston Tel. Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 850 (D.C. Cir. 1970) (noting that the function of the court is to assure that the agency has articulated with reasonable clarity its reasons for its decision).

more relevant question is governed by the “arbitrary and capricious” standard.<sup>5</sup> This standard requires that if a court is satisfied that an agency has articulated a reasonable basis for its decision, then the court must uphold the agency’s decision even if it would have made a different decision itself.<sup>6</sup>

### *A. The Nondelegation Doctrine*

Article I of the Constitution vests all lawmaking power in Congress.<sup>7</sup> From this provision, the Supreme Court has derived the Nondelegation Doctrine. The Doctrine states that Congress may not delegate its legislative authority to another branch of government.<sup>8</sup> A major function of the doctrine is to ensure that the key choices of social policy are made by Congress, the branch of government most responsive to the people.

The Supreme Court has interpreted the Nondelegation Doctrine loosely to allow Congress to seek assistance from executive branch agencies as long as this assistance is confined within proper limits.<sup>9</sup> The Supreme Court held in 1928 that Congress does not violate the Constitution when it legislates broadly, leaving a certain degree of discretion to other branches, so long as Congress articulates an “intelligible principle” to confine such discretion.<sup>10</sup> The Court reconfirmed and expanded this understanding of the Nondelegation Doctrine a few years later, concluding that Congress may set broad statutory goals and allow administrative officers the “power to fill up the details” by promulgating rules and regulations as long as Congress sets forth a “primary standard” to guide the agency’s discretion.<sup>11</sup>

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<sup>5</sup> 5 U.S.C. § 706 (requiring reviewing courts to “hold unlawful and set aside agency action, findings and conclusions found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>6</sup> See *Franklin v. Massachusetts*, 505 U.S. 788, 823 (1992), citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (“the basis for the agency’s decision need not appear with ‘ideal clarity’ as long as it is reasonably discernible”); *Motor Vehicle Mfrs. Ass’n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“the scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”).

<sup>7</sup> U.S. Const. art. 1, § 8.

<sup>8</sup> See *Field v. Clark*, 143 U.S. 649, 692 (1892).

<sup>9</sup> See *Clinton v. New York*, 524 U.S. 417, 484 (1998) (Breyer, J. dissenting) (stating that Congress may delegate its legislative power under the limitation of a prescribed standard), citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. at 406.

<sup>10</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 at 409 (1928).

<sup>11</sup> 287 U.S. 77, 82, 85 (1932).

Only twice in its history, and not since 1935, has the Supreme Court held delegations of legislative power to the Executive Branch unconstitutional.<sup>12</sup> Both decisions were made in the same year, involved the same statute, and arguably stemmed from strong skepticism about Congress' own authority to enact legislation comprising the New Deal, President Roosevelt's revolutionary economic recovery program after the Great Depression.<sup>13</sup> In *Panama Refining*, the Court invalidated a delegation of power that enabled the President to prohibit the transportation of petroleum and petroleum products in interstate commerce under the National Industrial Recovery Act.<sup>14</sup> The Supreme Court later noted that this was a special case because the particular exercise of power, the promulgation of a Petroleum Code, did not contain any legally operative sentence.<sup>15</sup> In *Schechter Poultry*, the Court struck down a delegation of power authorizing the President to adopt codes of "fair competition" under the National Industrial Recovery Act because the Act lacked an adequate standard to govern the President's discretion in drafting the codes.<sup>16</sup> This authority was not only extremely broad ("fair competition"), it was delegated to private parties engaged in the very industry to be regulated.<sup>17</sup> The *Panama Refining* and *Schechter Poultry* decisions both thwarted President Roosevelt's New Deal and ultimately lead to his threatened court-packing plan. While never overturned, neither decision reflects the law today.<sup>18</sup>

Since 1935, the Supreme Court has consistently upheld broad delegations of legislative authority with minimal guiding standards.<sup>19</sup> Agency authority to regulate under broad standards such as "excessive profits," "fair and equitable prices," "just and reasonable rates" and "public interest, convenience, and necessity" have all been sustained as sufficiently confining agency discretion.<sup>20</sup> In *Tagg Bros. & Moorhead v. United States*, the Court upheld legislation delegating

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<sup>12</sup> *Clinton*, 524 U.S. at 485-6.

<sup>13</sup> KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.6, 70-71 (3d ed. 1994).

<sup>14</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>15</sup> *Clinton*, 524 U.S. at 486.

<sup>16</sup> *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935).

<sup>17</sup> *Clinton*, 524 U.S. at 486.

<sup>18</sup> KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.6, 71-72 (3d ed. 1994).

<sup>19</sup> See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J. dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard.").

<sup>20</sup> *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (upholding delegated authority to determine "excessive" profits); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding delegated authority to fix commodity prices that would be "fair and equitable"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (sustaining delegated authority to determine "just and reasonable" rates); *National Broad. Co. v.*

authority to the Secretary of Agriculture to establish and enforce "just and reasonable" rates and charges for the furnishing of stockyard services.<sup>21</sup> In *New York Central Securities Corp. v. United States*, the Court upheld legislation delegating authority to consolidate carriers when "in the public interest."<sup>22</sup> In *National Broadcasting Co. v. United States*, the Court upheld legislation delegating authority to license radio communications "as public convenience, interest or necessity requires."<sup>23</sup> In *FPC v. Hope Natural Gas Co.*, the Court upheld the delegated authority to issue "just and reasonable" rates for natural gas.<sup>24</sup> In *Mistretta v. United States*, the Court upheld the delegated authority to promulgate federal sentencing guidelines to provide "certainty, fairness, and sufficient flexibility" amongst other broad goals.<sup>25</sup>

The Supreme Court's decision in *Yakus v. United States* signaled the change towards a more relaxed view of the Nondelegation Doctrine. In *Yakus*, the Court upheld the delegated authority to the Office of Price Administration under the Emergency Price Control Act to fix commodity prices that would be "fair and equitable" and decide when they should be imposed.<sup>26</sup> This decision acknowledged that the Constitution does not deny Congress "the necessary resources of flexibility and practicality . . . to perform its function."<sup>27</sup> The Court recognized that Congress itself is not required to make the detailed determinations it has declared are prerequisite to the application of legislative policy to particular facts and circumstances. As long as Congress defines some guiding standard to shape rule-making determinations, it can delegate this responsibility to an executive office or agency instead.<sup>28</sup> The Court concluded that "fair and equitable" was a sufficient standard to guide the Agency in fixing commodity prices and thus did not result in an unconstitutional delegation of power.<sup>29</sup>

Since *Yakus*, the Nondelegation Doctrine has faded as the Supreme Court and other courts have recognized the practical necessity of broad delegation of

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United States, 319 U.S. 190, 225-26 (1943) (upholding delegated authority to regulate broadcast licensing for "public interest, convenience, or necessity").

<sup>21</sup> 280 U.S. 420, 435, 442-43 (1930).

<sup>22</sup> 287 U.S. 12, 24, 53 (1932).

<sup>23</sup> 319 U.S. 190, 225-26 (1943).

<sup>24</sup> 320 U.S. 591, 600-04 (1944).

<sup>25</sup> 488 U.S. 361, 373 (1989).

<sup>26</sup> *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>27</sup> *Id.* at 425, quoting, *Curran v. Wallace*, 306 U.S. 1, 15 (1939).

<sup>28</sup> *Id.* at 426.

<sup>29</sup> *Id.*

legislative authority to administrative agencies. The Supreme Court has recognized that, given our increasingly complex society riddled with rapidly changing and highly technical problems, Congress simply cannot do its job without the ability to delegate power under broad general goals.<sup>30</sup>

In 1974, the First Circuit rejected the same nondelegation challenge to the Clean Air Act that *American Trucking* sustained, stating that agencies must have sufficient discretion to implement their congressional mandates.<sup>31</sup> The court held that EPA's authority to reduce pollution to levels "requisite to protect public health" was an adequately defined task that, while broad, was not an excessive delegation of power.<sup>32</sup> In reaching their decision, the First Circuit noted that because Congress cannot physically acquire the information needed to implement its statutory directives, administrative agencies must be given sufficient flexibility to promulgate rules and regulations necessary to implement their congressional mandates.<sup>33</sup>

Many commentators have noted that the Supreme Court is unwilling to revive the Nondelegation Doctrine as a check on administrative discretion.<sup>34</sup> Today, the courts reserve the Nondelegation Doctrine for the most extreme instances of delegations "run riot."<sup>35</sup> In fact, Justice Thurgood Marshall stated that the non-delegation doctrine "has been abandoned for all practical purposes."<sup>36</sup> Instead, the Supreme Court has chosen to construe statutes narrowly to avoid the allegedly overbroad and unconstitutional delegation.<sup>37</sup>

The D.C. Circuit itself has acknowledged that the Supreme Court has invalidated only the most egregious delegations of authority that provide absolutely no standards to constrain administrative discretion.<sup>38</sup> In accord with this

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<sup>30</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989), citing, *Opp Cotton Mills, Inc. v. Adm'r, Wage and Hour Div. of Dept. of Labor*, 312 U.S. 126, 145 (1941); *United States v. Robel*, 389 U.S. 258, 274 (1967).

<sup>31</sup> *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1<sup>st</sup> Cir. 1974).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> RICHARD PIERCE ET AL., *ADMINISTRATIVE LAW AND PROCESS* 54 (2d ed. 1992); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 *CARDOZO L. REV.* 989, 990 (1999).

<sup>35</sup> *AFL-CIO v. Connally*, 337 F. Supp. 737, 763 (D.C. Cir. 1971).

<sup>36</sup> *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J. dissenting).

<sup>37</sup> See *Mistretta v. United States*, 488 U.S. 391, 373 (1989); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 *MICH. L. REV.* 1223, 1233 (1985).

<sup>38</sup> *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir.), cert. denied, 488 U.S. 966 (1988).

understanding, the D.C. Circuit has sustained broad congressional delegations of power to administrative agencies. In *Milk Industries Foundation v. Glickman*, the court upheld a delegation of power to the Secretary of Agriculture to approve interstate compacts upon a finding of "compelling public interest."<sup>39</sup> In *International Union, UAW v. Occupational Safety & Health Administration II*, the court upheld OSHA's interpretation of its mandate to enact a safety standard that provides "a high degree of worker protection" from identified significant risks.<sup>40</sup>

### B. "Arbitrary and Capricious" Standard of Review

The usual court inquiry when reviewing an administrative agency's decision, is not whether the statute delegating the authority to make that decision contains an "intelligible principle," but whether the agency decision itself is intelligible. It is well established that courts must defer to an agency's decision unless it is arbitrary and capricious. In other words, if an agency has taken a "hard look" at the problem and has supported its decision with reasons and standards, the court will uphold the decision even if it is "of less than ideal clarity."<sup>41</sup>

Furthermore, the D.C. Circuit has held that when the purpose of a statute is precautionary in nature, the evidence is uncertain or conflicting, and the agency regulation is designed to protect public health, the court will give the agency more leeway in substantiating its decision.<sup>42</sup> The court will not require the agency to provide "rigorous step-by-step proof of cause and effect."<sup>43</sup> Instead, the agency is permitted to base its decisions on conclusions drawn from evidence "not yet certifiable as fact" such as theoretical projections, preliminary data, and suspected trends.<sup>44</sup> A primary reason for this allowance is that in the case of statutes whose purpose is to prevent adverse health effects, if the agency waits until the

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<sup>39</sup> 132 F.3d 1467, 1475 (D.C. Cir. 1998).

<sup>40</sup> *International Union v. Occupational Safety & Health Admin.*, 37 F.3d 665, 669 (D.C. Cir. 1994).

<sup>41</sup> *Greater Boston Tel. Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 851 (D.C. Cir. 1970); see also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 361 (1989) ("court must defer to the informed discretion of the responsible agency"); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 ("a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute").

<sup>42</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

evidence is completely certifiable as fact before acting, the precautionary purpose of the statute may well be defeated.<sup>45</sup>

Specifically, the D.C. Circuit has held that when there is uncertainty about the health effects of a particular pollutant within a defined range of concentrations, EPA may use its discretion to set health standards for that pollutant at a particular point within the range.<sup>46</sup> As long as the Agency's decision is reasonable when examined in light of the evidence on record, the court must defer to the EPA's discretion to choose one standard rather than another.<sup>47</sup>

### III. THE AMERICAN TRUCKING DECISION

After nearly three decades on the books, the Clean Air Act succumbed to an almost unheard of constitutional challenge by industrial polluters, long frustrated with the Act's restrictions on the industry's emissions of airborne pollutants. The D.C. Circuit held that EPA's authority under the Clean Air Act to set air quality standards for certain pollutants was not sufficiently confined by EPA's mandate to set these standards at a level "requisite to protect public health."<sup>48</sup> Without an intelligible principle to confine its discretion, the court held that EPA's authority to implement the Act violated the Nondelegation Doctrine.<sup>49</sup>

#### A. Background: The Clean Air Act

The primary purpose of the Clean Air Act, passed in 1970, is to protect the public health and welfare of Americans by decreasing airborne pollutants in the outside air.<sup>50</sup> To implement this goal, section 109 of the Act directs EPA to promulgate and periodically revise national ambient air quality standards (NAAQS).<sup>51</sup> These standards must be adequate to keep pollutants at a level "requisite to protect public health" within "an adequate margin of safety" taking into account the latest scientific knowledge.<sup>52</sup> The D.C. Circuit has construed section 109 to

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<sup>45</sup> *Id.*

<sup>46</sup> See *NRDC v. EPA*, 902 F.2d 962, 969 (D.C. Cir. 1990); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Indus. Ass'n v. EPA*, 647 F.2d at 1161 (D.C. Cir. 1980).

<sup>47</sup> See *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 457, 475-476 (D.C. Cir. 1973).

<sup>48</sup> *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

<sup>49</sup> *Id.*

<sup>50</sup> 42 U.S.C. §§ 7408-09 (1994).

<sup>51</sup> *Id.* § 7409

<sup>52</sup> *Id.* §§ 7408-09



require EPA to set NAAQS at a level at which there are no adverse effects on sensitive individuals, including children and asthmatics.<sup>53</sup> EPA is required to review these standards every five years in consultation with an independent scientific advisory body called CASAC (Clean Air Act Advisory Committee) to ensure that they are maintaining their purpose.<sup>54</sup>

The polluting industry has unsuccessfully argued that EPA should consider costs when setting air quality standards. The D.C. Circuit not only rejected this argument, but held that the Clean Air Act expressly prohibits EPA from considering economic costs or technical feasibility in setting air quality standards.<sup>55</sup> The court's reasoning was that the health of the public should be EPA's sole concern, not the health of the polluting industry, which always overstates its costs.<sup>56</sup>

Once EPA has established or revised its air quality standards, individual states have primary responsibility for ensuring that industrial polluters attain and maintain EPA's standards.<sup>57</sup> This requires the states to set and enforce emissions controls for particular industrial sources.<sup>58</sup> The tougher the air quality standards are, the tighter the emission controls must be to meet those standards.

### *B. Factual and Procedural Setting of American Trucking*

In July of 1997, EPA revised its air quality standards for two common listed pollutants, ground-level ozone and particulate matter (PM). EPA's long overdue revisions were based on thousands of peer-reviewed scientific studies conducted primarily by outside scientists.<sup>59</sup> These studies were presented to CASAC, which concluded, after 125 hours of public discussion, that EPA's current ozone and PM standards did not adequately protect public health and should therefore be strengthened.<sup>60</sup> EPA estimates that, among other benefits, the new standards would prevent approximately one million cases of significantly de-

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<sup>53</sup> *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1979).

<sup>54</sup> 42 U.S.C. § 7409 (1994).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 42 U.S.C. § 7410 (1994).

<sup>58</sup> *Id.*

<sup>59</sup> National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856-57 (1997).

<sup>60</sup> See 62 Fed. Reg. 38,856; 62 Fed. Reg. 38,652.

creased lung function in children every year, 15,000 premature deaths, and 350,000 cases of aggravated asthma.<sup>61</sup>

Ozone and particulate matter are both regarded as non-threshold pollutants.<sup>62</sup> This means that there is some possibility of an adverse health impact from both ozone and particulate matter at any concentration.<sup>63</sup> However, because ozone and PM occur in the environment naturally to some degree, and therefore have some possibility of affecting public health even in the absence of human activity, EPA cannot practically eliminate all adverse health effects of these pollutants. Rather than setting the air quality standards at the unattainable level of zero parts per million (ppm), EPA instead minimized their maximum allowable concentrations. While the standard for coarse particulate matter is maintained at the prior level of PM<sub>10</sub>, the 1997 NAAQS revisions add a new standard for fine particulate matter (PM<sub>2.5</sub>) and reduce the existing ozone standard of 0.09 ppm to 0.08 ppm.<sup>64</sup>

A coalition of industrial representatives, and the states of Ohio, Michigan and West Virginia challenged the revised air quality standards in *American Trucking*.<sup>65</sup> This challenge rested on a number of grounds, including a claim that EPA's authority to promulgate the revised air quality standards violated the Non-delegation Doctrine.<sup>66</sup> They argued that EPA had unfettered discretion to set the air quality standards at any level it pleased and therefore Congress' law making authority was essentially usurped.<sup>67</sup>

The states of New York, Connecticut, Massachusetts, Vermont, New Hampshire and New Jersey, along with the American Lung Association and several environmental organizations, joined the EPA in defending the new standards.<sup>68</sup> The defendants argued that their discretion to revise the air quality standards was adequately confined by the standard "requisite to protect public health."

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<sup>61</sup> Margaret Kritz, *Why the EPA's Wheezing a Bit*, NAT'L J. (Jul. 24, 1999).

<sup>62</sup> *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d at 1033, citing, Ozone Final Rule, 62 Fed. Reg. at 38,863/3; National Ambient Air Quality Standards for Ozone and Particulate Matter, 61 Fed. Reg. 65,637, 65,651/3 (1996) (proposed rule).

<sup>63</sup> *American Trucking*, 175 F.3d at 1033; Stephen L. Kass and Jean M. McCarroll, *Judicial Review of EPA Air Quality Standards*, 222 N.Y. L.J. 3 (1999).

<sup>64</sup> *American Trucking*, 175 F.3d at 1035; see also EPA's *Updated Air Standards: A Common Sense Primer* (last visited Mar. 8, 2000) <<http://www.epa.gov/oar/primer/law.htm>> (on file with author).

<sup>65</sup> *American Trucking*, 175 F.3d at 1031-33; see also Kass & McCarroll, *supra* note 63.

<sup>66</sup> *American Trucking*, 175 F.3d at 1027.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1031-33; see also Kass & McCarroll, *supra* note 63.

*C. The Court's Rationale and Holding in American Trucking*

The D.C. Circuit agreed with the industry representatives and held that EPA had failed to articulate an "intelligible principle" to confine its discretion in revising air quality standards for ozone and particulate matter.<sup>69</sup> This failure, the court held, resulted in an unconstitutional delegation of power.<sup>70</sup>

In reaching its decision, the court found that in the case of non-threshold pollutants, where the pollutant has a possible adverse impact on public health at any concentration level, the "requisite to protect public health" standard is not sufficient to confine the EPA's discretion.<sup>71</sup> The court concluded that where EPA cannot identify a threshold where no adverse effects are likely to occur, it must explain intelligibly the degree above zero permitted.<sup>72</sup>

The court found that EPA used valid criteria to assess *whether* NAAQS should be revised: the severity of the health effects involved, the certainty of the health effects involved, and the size of the populations affected.<sup>73</sup> But these criteria did not provide a basis for *what* the new NAAQS should be.<sup>74</sup> The criteria merely serve, the court said, to support the generic assertion that adverse health effects are less certain and less severe at lower levels of exposure, and more certain and more severe at higher levels of exposure.<sup>75</sup> The criteria do not provide EPA with any guidance in determining where specifically to set the threshold of allowable pollutant concentrations and therefore EPA is free to pick any threshold level it pleases.<sup>76</sup> The court concluded that EPA "has failed to state intelligibly how much is too much."<sup>77</sup> Such unbridled discretion, the court held, is an unconstitutional delegation of power.<sup>78</sup>

Instead of striking the Clean Air Act as unconstitutional, the D.C. Circuit remanded it back to EPA.<sup>79</sup> The court directed EPA to articulate an "intelligible

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<sup>69</sup> *American Trucking*, 175 F.3d at 1033.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1033-37 ("[EPA] offers no intelligible principle by which to identify a stopping point").

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1033.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1037.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1033.

<sup>79</sup> *Id.* at 1038 ("[w]here (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may

principle" that would cabin its discretion in setting air quality standards and thereby avoid an unconstitutional delegation of power.<sup>80</sup> The court noted that the obvious "intelligible principle" would involve a cost/benefit analysis. The court acknowledged, however, that such an analysis would contravene the court's own rule barring EPA from considering any factor other than the health effects of airborne pollutants.<sup>81</sup> The court suggested that one intelligible principle could be "a generic unit of harm" that would factor in the population affected, the severity, and probability that the pollutants in question would impact public health.<sup>82</sup> The court concluded that if EPA could not articulate an intelligible principle to determine where to draw the line in setting NAAQS, it could seek legislation by Congress ratifying its choice.<sup>83</sup>

Instead of appealing directly to the Supreme Court, EPA and the Department of Justice filed a petition for rehearing *en banc* on June 28, 1999, asking the entire DC Circuit to reverse the decision of the panel. On October 29, 1999, the D.C. Circuit, with Judges Tatel, Silberman, Edwards and Garland dissenting, denied the petition on October 29, 1999 with respect to the nondelegation issue.<sup>84</sup> Petition for certiorari was filed on January 27, 2000.<sup>85</sup>

#### IV. ANALYSIS OF THE AMERICAN TRUCKING DECISION

The D.C. Circuit Court's 2-1 decision in *American Trucking* to revive the Nondelegation Doctrine as a means to restrict EPA's discretion surprised even the decision's proponents.<sup>86</sup> The Nondelegation Doctrine is an outdated means to bridle agency discretion. Furthermore, even if there were a case warranting the Doctrine's revival, *American Trucking* is not that case. Since 1935, both the

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be available, our response is not to strike down the statute, but to give the agency an opportunity to extract a determinate standard on its own.").

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1038.

<sup>82</sup> *Id.* at 1039.

<sup>83</sup> *Id.* at 1040 (saying that EPA is "free to pick any point between zero and a hair below concentrations yielding London's Killer Fog").

<sup>84</sup> *American Trucking Ass'n., Inc. v. EPA*, 195 F.3d 4, 5 (D.C. Cir. 1999) (*en banc*).

<sup>85</sup> *American Trucking Ass'n., Inc. v. EPA*, 68 USLW 3496 (Jan. 27, 2000).

<sup>86</sup> Edward Warren of Kirkland & Ellis, who argued the case on behalf of a group of small business petitioners, admitted how surprising the court's nondelegation rationale was saying that last year only three people in Washington believed in the Nondelegation Doctrine, himself and two other co-counsel. Steve France, *Administrative Law Rulemaking: EPA, Lawyers, Scholars Take Measure of 'Nondelegation' Theory in Ozone Ruling*, 67 USLW 2739 (June 15, 1999).

Supreme Court and the D.C. Circuit have sustained equally broad if not broader delegations of power than the delegation at issue in *American Trucking*.<sup>87</sup>

The relevant inquiry therefore, is not whether EPA's *authority* was properly restricted by an "intelligible principle," but whether its *decision* was intelligible. Unless reversed, the *American Trucking* decision will have a grave impact on EPA's ability to implement its mandate to protect public health from the adverse impacts of air pollution.

*A. American Trucking Decision Contradicts Case Law Sustaining  
Equally Broad Delegations of Power*

Section 109 of the Clean Water Act authorizes EPA to adopt air quality standards, which in EPA's judgement, are "requisite to protect public health" with an "adequate margin of safety" taking into consideration the latest scientific knowledge.<sup>88</sup> The majority argued that this language does not qualify as an "intelligible principle" to adequately confine EPA's discretion in setting the allowable standards for non-threshold pollutants. The court held that because the Clean Water Act does not contain an "intelligible principle" and EPA does not articulate one, the Agency's authority granted under section 109 of the Act is an unconstitutional delegation of power.<sup>89</sup>

While EPA's discretion under section 109 of the Clean Air Act is admittedly broad, case law clearly supports such broad grants of legislative power to administrative agencies. The "requisite to protect public health" standard con-

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<sup>87</sup> See *Mistretta v. United States*, 488 U.S. 361, 373 (1989) (stating that since *Schechter Poultry and Panama Refining*, "we have upheld . . . without deviation, Congress' ability to delegate power under broad standards"); see also, e.g., *National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding authority to regulate broadcast licensing for "public interest, convenience, or necessity"); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding authority to fix commodity prices that would be "fair and equitable" and would effectuate purpose of Emergency Price Control Act of 1942); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (sustaining authority to determine "just and reasonable" rates); *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (upholding authority to determine "excessive profits"); *Mistretta*, 488 U.S. 361 (upholding delegated authority to promulgate federal sentencing guidelines to provide "certainty, fairness, and sufficient flexibility" amongst other broad goals); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (sustaining authority to approve interstate compacts upon a finding of "compelling interest"); *International Union v. Occupational Safety & Health Admin.*, 37 F.3d 665, 669 (D.C. Cir. 1994) (upholding authority to enact a safety standard "requisite to provide a high degree of worker protection" from identified risks).

<sup>88</sup> 42 U.S.C. § 7409(b)(1) (1994).

<sup>89</sup> *Id.*

tained in section 109 of the Clean Water Act is well within the wide definition of "intelligible principles" that courts, including the D.C. Circuit, have previously defined as sufficient to satisfy the Nondelegation Doctrine.<sup>90</sup> However, the majority fails to adequately address this conflicting jurisprudence.

The majority does not even mention, let alone distinguish, the long line of Supreme Court cases contradicting the D.C. Circuit's *American Trucking* decision.<sup>91</sup> The Supreme Court has sustained numerous similar, if not broader, delegations of power that grant other executive agencies a wide range of discretion.

The Clean Air Act's "requisite to protect public health" standard falls comfortably within the range of standards the Supreme Court has approved as satisfying the Nondelegation Doctrine. The standards found adequate by the Supreme Court include "just and reasonable," "in the public interest," "as public convenience, interest or necessity requires," "certainty, fairness, and sufficient flexibility," and "fair and equitable."<sup>92</sup> These standards arguably confer even broader agency discretion than the Clean Water Act standard "requisite to protect public health" that the *American Trucking* court held inadequate. Therefore, if appealed, it is highly unlikely that the Supreme Court would contradict its own jurisprudence and sustain the *American Trucking* decision.

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<sup>90</sup> See cases cited, *supra* note 87.

<sup>91</sup> In deciding whether to rehear the case, the D.C. Circuit attempts to remedy this failure by claiming that this line of Supreme Court cases is outdated by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984). *American Trucking Ass'n., Inc. v. EPA*, 195 F.3d 4, 5 (D.C. Cir. 1999). The court argues that in these cases, the Supreme Court looked to the purpose of the Act, its factual background and its statutory context in order to find an "intelligible principle." *Id.* However, the D.C. Circuit says that this practice was essentially a policy decision that *Chevron* made clear was not the role of the judiciary. *Id.* The court's application of *Chevron* here is erroneous. *Chevron* holds that when confronted with a challenge to an agency's interpretation of a statute, a court may not substitute its own construction of the statute. *Chevron U.S.A., Inc.*, 467 U.S. at 866. Neither the line of Supreme Court cases the court cites, nor *American Trucking*, address agency interpretations; they address whether the language of the statute on its face contains an "intelligible principle" by which to confine agency discretion. In his dissent, Judge Silberman points out that the court held that "there are no intelligible principles 'apparent from the statute' that brought EPA's discretion within constitutionally acceptable limits." *American Trucking*, 195 F.3d at 14. Silberman argues that if the court believed this were so, it should have held the Clean Water Act unconstitutional instead of remanding it back to the EPA to come up with "an artificially narrow" interpretation. *Id.* Remand contravenes the purpose of the nondelegation doctrine: "to ensure that Congress makes the crucial policy decisions." *Id.* Silberman concludes that "by treating this case as a statutory interpretation question laden with constitutional implications the panel implicitly asserts a greater role for a reviewing court than is justified." *Id.* at 15

<sup>92</sup> E.g., *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 435, 442-43 (1930); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24, 53 (1932); *National Broad.*, 319 U.S. 190 at 225-26; *Mistretta*, 488 U.S. at 373; *Yakus*, 321 U.S. at 414.

While the D.C. Circuit cites to the Supreme Court's *Schechter* and *Panama Refining* holdings in support of their *American Trucking* decision, these decisions have essentially been supplanted by a more flexible interpretation of the Nondelegation Doctrine that the Supreme Court has adhered to without deviation since 1935.<sup>93</sup> Furthermore, *Schechter* and *Panama Refining* provided no standards whatsoever to govern the delegated authority and, in *Schechter*, the authority was granted, not to an executive agency or public official, but to private individuals engaged in the industries to be regulated.<sup>94</sup> In addition both decisions were a negative reaction to the New Deal and ultimately questioned Congress' own authority to exercise let alone delegate the power it was granting to executive agencies to soften the economic blow of the war.

Furthermore, the D.C. Circuit fails to adequately address its own decisions to sustain delegations of power as broad or broader than the delegation it rejected in *American Trucking*. In *AFL-CIO v. Connally*, the court permitted presidential stabilization of prices, rents, wages, and salaries with such adjustments as might be "necessary to prevent gross inequities."<sup>95</sup> In *Milk Industries Foundation v. Glickman*, the court sustained the Secretary of Agriculture's authority to approve interstate compacts upon a finding of "compelling public interest."<sup>96</sup> In *International Union, UAW v. OSHA (Lockout Tagout II)*, the court held that OSHA's mandate to enact a safety standard requisite to provide "a high degree of worker protection" from identified significant risks, adequately confined the agency's discretion to satisfy the Nondelegation Doctrine.<sup>97</sup>

While the *American Trucking* court does mention *Lockout Tagout II*, it fails to distinguish between the Clean Water Act standard it found inadequate in *American Trucking*, and the OSHA standard it upheld in *Lockout Tagout II*. In *Lockout Tagout II*, the D.C. Circuit held that the standard "requisite to provide a high degree of worker protection" was adequate to satisfy the Nondelegation Doctrine's requirement of an "intelligible principle."<sup>98</sup> The *American Trucking*

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<sup>93</sup> *Mistretta*, 488 U.S. at 373; see also *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, 1056 (D.C. Cir. 1999) (Tatel, J. dissenting) ("[s]ection 109's delegation of authority is narrower and more principled than delegations the Supreme Court and this court have upheld since *Schechter Poultry*"); *American Trucking Ass'n, Inc. v. EPA*, 195 F.3d 4 (D.C. Cir. 1999), *reh'g denied*, ("[t]he [nondelegation] doctrine, . . . is at this stage of constitutional 'evolution' not in particularly robust health.").

<sup>94</sup> See *Yakus*, 321 U.S. at 424.

<sup>95</sup> 337 F. Supp. at 764.

<sup>96</sup> *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998).

<sup>97</sup> *International Union v. Occupational Safety & Health Admin.*, 37 F.3d 665, 669 (D.C. Cir. 1994).

<sup>98</sup> *Id.*

court does not explain how the standard “requisite to provide a high degree of worker protection” is any more confining than the standard “requisite to protect public health with an adequate margin of safety” which it dismissed as inadequate to satisfy the intelligible principle requirement of the Nondelegation Doctrine. The only technical difference between the standards is that OSHA’s duty to protect workers must be carried out to a “high degree” whereas EPA’s duty to protect public health must provide “an adequate margin of safety.” The court seems to suggest that the term “high degree” is somehow more constraining but it does not explain why. On their face, both standards appear to require the same thing — ensure protection to the greatest extent possible.<sup>99</sup>

The *American Trucking* court briefly refers to a First Circuit decision upholding a similar nondelegation challenge to the Clean Air Act’s “requisite to protect public health” language in 1974.<sup>100</sup> In *South Terminal Corp. v. EPA*, the First Circuit held that the power granted to EPA to reduce pollution to levels “requisite to protect the public health” was not unconstricted but well defined.<sup>101</sup> In reaching its decision, the court acknowledges that EPA is given considerable flexibility in its discretion. However, it notes that this flexibility is required to meet the complex and unprecedented nature of EPA’s task, where, due to evolving data and scientific knowledge, appropriate standards could not have been anticipated by Congress.<sup>102</sup>

The *American Trucking* court dismissed the First Circuit decision as a challenge to EPA’s enforcement of already established NAAQS, not the promulgation of the NAAQS themselves.<sup>103</sup> However this distinction is irrelevant because the same standard, “requisite to protect public health,” governs both the enforcement and the promulgation of NAAQS and it is this standard that is challenged. The Nondelegation Doctrine concerns the adequacy of the *standard* to confine agency discretion, not the *nature* of the agency’s discretion.

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<sup>99</sup> *American Trucking Ass’n, Inc. v. EPA*, 175 F3d 1027, 1059 (D.C. Cir. 1999) (Judge Tatel, J. dissenting).

<sup>100</sup> *South Terminal Corp. v. EPA*, 504 F2d 646, 677 (1<sup>st</sup> Cir. 1974).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *American Trucking*, 175 F3d at 1037.



*B. "Arbitrary and Capricious" is the Proper Standard of Review*

In rejecting the nondelegation challenge to EPA's authority to reduce pollution levels "requisite to public health," the *South Terminal* court noted that there are other methods than the outdated Nondelegation Doctrine to determine whether an agency has exceeded its powers.<sup>104</sup> The most routine of these methods, the court said, is testing the rationality of the agency's chosen means against the defined goals of the statute.<sup>105</sup> The court is referring to the arbitrary and capricious standard that requires courts to defer to agency discretion if the court determines that the agency took a "hard look" at the issue in question and based its decision on a reasonable analysis of the relevant factors.<sup>106</sup>

While the *American Trucking* court purported to review EPA's discretion under the Nondelegation Doctrine, its rationale for its decision was almost entirely based on the arbitrary and capricious standard of review. The Nondelegation Doctrine faults Congress for failing to articulate an intelligible principle to restrict agency discretion. However, the court barely mentions Congress' role and instead blames EPA for not articulating an intelligible principle to confine its own discretion.<sup>107</sup>

Instead of scanning the Clean Air Act for an intelligible principle articulated by Congress, the court scrutinizes EPA's decision for an intelligible basis. This is an arbitrary and capricious standard of review, not review under the Nondelegation Doctrine. While the court generally approves of the factors EPA used in reaching its decision, it says that the factors, in and of themselves, do not explain why EPA chose to pick one threshold rather than another.<sup>108</sup> The court argues that EPA's explanation that health effects are more certain and more severe at higher levels of exposure may indicate that air quality standards need to be revised but not does adequately explain why EPA chose the particular air quality standards it did. In effect, the court is saying that EPA's decision fails because it is arbitrary and capricious, not because it violates the Nondelegation Doctrine.

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<sup>104</sup> *South Terminal Corp.*, 504 F.2d at 677.

<sup>105</sup> *Id.*

<sup>106</sup> *Greater Boston Tel. Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 850 (D.C. Cir. 1970).

<sup>107</sup> *American Trucking*, 175 F.3d at 1033, 1036.

<sup>108</sup> *Id.* at 1033.

By remanding the Clean Air Act back to the EPA, instead of to Congress, the court undermines the entire purpose of the Nondelegation Doctrine: to ensure that Congress itself makes the key policy decisions.<sup>109</sup> The remand makes it clear that the court's real concern is not the Clean Air Act's lack of an intelligible principle as required by the Nondelegation Doctrine that it purports to uphold. The court's real concern is EPA's failure to provide an intelligible basis for its revised air quality standards as required by the arbitrary and capricious standard of review.

The court may have disguised its arbitrary and capricious standard of review under the Nondelegation Doctrine in order to avoid compliance with its own jurisprudence. Holding that EPA's decision was arbitrary and capricious would conflict with its prior rulings allowing an agency broad discretion when the purpose of a statute is precautionary in nature, the evidence is uncertain or conflicting, and the agency regulation is designed to protect public health.<sup>110</sup> Specifically, such a ruling would conflict with the D.C. Circuit holding that when there is uncertainty about the health effects of a particular pollutant within a defined range of concentrations, EPA may use its discretion to set health standards for that pollutant at a particular point within the range.<sup>111</sup>

By relying, erroneously, on the Nondelegation Doctrine the court excused itself from complying with its own case law by simply saying that the nondelegation had not been raised in those cases and therefore they had no opportunity to address it. This tactic allowed the court to assert a greater role in reviewing EPA's revised air quality standards than was truly justified.<sup>112</sup>

## V. CONCLUSION

In *American Trucking*, the D.C. Circuit not only contradicts Nondelegation Doctrine jurisprudence, it hides behind the Nondelegation Doctrine to avoid conflicting with its own case law on the "arbitrary and capricious" standard. This tactic allows the court to attack EPA's revised air quality standards and

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<sup>109</sup> *American Trucking Ass'n., Inc. v. EPA*, 195 F3d 4, 14 (D.C. Cir. 1999), *reh'g denied in part*, (Silberman, J. dissenting) ("I believe the panel undermines the purpose of the nondelegation doctrine. That purpose is to ensure that Congress makes the crucial policy decisions.").

<sup>110</sup> *Ethyl Corp. v. EPA*, 541 F2d 1, 28 (D.C. Cir) (en banc), *cert. denied*, 426 U.S. 941 (1976).

<sup>111</sup> See *NRDC v. EPA*, 902 F2d 962, 969 (D.C. Cir. 1990); *American Petroleum Inst. v. Costle*, 665 F2d 1176, 1185 (D.C. Cir. 1981); *Lead Indus. Ass'n v. EPA*, 647 F2d at 1161 (D.C. Cir. 1979).

<sup>112</sup> *American Trucking*, 195 F3d at 15 (Silberman, J. dissenting).

assert a greater role than was justified for a reviewing court. Not only is the decision doubly erroneous, if not overturned, it will have grave implications on EPA's ability to comply with its congressional mandate: reduce air pollution at a level "requisite to protect public health."<sup>113</sup>

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<sup>113</sup> *Id.* at 16 (Tatel, J. dissenting) ("[n]ot only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by hundreds of millions of people.").

