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American Trucking Associations, Inc. v. United States Environmental Protection Agency: A Speed-Bump along the Highway of Judicial Deference to Agency Determinations

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AMERICAN TRUCKING ASSOCIATIONS, INC. v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY: A SPEED-BUMP ALONG THE HIGHWAY OF JUDICIAL DEFERENCE TO AGENCY DETERMINATIONS

I. INTRODUCTION

For the greater part of the twentieth century, the practice of judicial deference to agency determinations has cruised along with few significant obstacles - until now.[1] On May 14, 1999, the Court of Appeals for the District of Columbia Circuit decided the immensely controversial case of *American Trucking Associations, Inc. v. United States Environmental Protection Agency*.[2] In Part I of its opinion, the D.C. Circuit determined that the Environmental Protection Agency (hereinafter "EPA"), in revising national ambient air quality standards (hereinafter "NAAQS") pursuant to the Clean Air Act (hereinafter "CAA"), had construed its authority under the CAA so loosely "as to render the relevant provisions unconstitutional delegations of legislative power."[3] Accordingly, the *American Trucking*

1. *See* James C. Thomas, *Fifty Years With the Administrative Procedure Act and Judicial Review Remains an Enigma*, 32 TULSA L.J. 259, 262 (1996) (stating that "[w]ith a little more than a decade of *Chevron* behind us, it seems appropriate . . . to reexamine that doctrine of expansive deference to administrative agencies").

2. *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999); *see also Nondelegation: The D.C. Circuit Resurrects Lazarus (Maybe)*, 20 No. 8 JUD./LEGIS. WATCH REP. 1, 1 (1999) (noting that because most administrative lawyers thought nondelegation doctrine had passed out of usage, "[i]t came as a surprise when a panel of the D.C. Circuit not only asserted continuing validity of nondelegation doctrine, but used it as the basis of a decision throwing out EPA's revised National Ambient Air Quality Standards ('NAAQS') for ozone and particulate matter ('PM')"). EPA is committed to fighting the D.C. Circuit decision, more than 250 environmental groups are calling for the government to appeal, and "regulatory buffs are now scrambling to figure out if the case bodes a true revival or a last spasm of energy before the nondelegation doctrine finally expires." *Id.*

3. *American Trucking*, 175 F.3d at 1034. For a discussion of the nondelegation doctrine, see *infra* notes 28-34 and accompanying text. Although this Note only addresses Part I of the opinion, the D.C. Circuit also ruled on other matters. *See id.* at 1033-34. In Part II of the *American Trucking* opinion, the court rejected the following claims: 1.) that § 109(d) of the Clean Air Act ("CAA") allows EPA to consider costs in its decision-making process; and 2.) "that EPA should have considered the environmental damage likely to result from the NAAQS' financial impact on the Abandoned Mine Reclamation Fund; that the NAAQS revisions violated the National Environmental Policy Act, Unfunded Mandates Reform Act and Regulatory Flexibility Act." *Id.* at 1033. In Part III, the *American Trucking* court decided "two ozone-specific statutory issues, holding that the 1990 revisions to the Clean Air Act limit EPA's ability to enforce new ozone NAAQS and that EPA can-

decision limits the practice of judicial deference to agency determinations (hereinafter "judicial deference") and resurrects the long dormant nondelegation doctrine.[4]

The nondelegation doctrine was created to prohibit Congress from abdicating its responsibilities as the legislative branch of the federal government.[5] Time and practice, however, have seldom found occasion to invoke this constitutional provision.[6] In reality Congress quite often delegates expansive authority to administrative agencies, and the judiciary consistently defers to agency determinations made pursuant to such delegations.[7]

American Trucking tackles the need to maintain a delicate balance between the widely utilized practice of judicial deference, embodied in the decision of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. ("Chevron")*,[8] and the forbiddance by the nondelegation doctrine of excessive delegations of legislative authority.[9] The *American Trucking* court afforded little weight to the

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not ignore the possible health benefits of ozone." *Id.* at 1033. In Part IV, the court resolves various challenges to the PM NAAQS. *See id.* The court agreed with the petitioners that EPA's choice of indicator for PM was arbitrary and capricious. *See id.* at 1033-34. The court also rejected "petitioners' claims that EPA must treat PM sub2.5 as a 'new pollutant.' " *Id.* at 1034.

4. *See* Stephen L. Kass & Jean M. McCarroll, *Environmental Law: Judicial Review of EPA Air Quality Standards*, N.Y.L.J., July 12 1999, at 1 (stating "the *American Trucking* decision has been condemned as an effort by panel's majority to resuscitate long discredited 'anti-delegation' doctrine of *Schecter Poultry v. U.S.*, 295 U.S. 495 (1935)").

5. *See* Jerry L. Mashaw et al., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 56, 56 (4th ed. 1998) (stating that "[f]or at least 150 years the Supreme Court's decisions were replete with categorical statements suggesting that Congress may not relinquish any of its power to enact legislation through grants of policy making power to administrators"); U.S. CONST. art. I, § 1 (setting forth language of nondelegation doctrine). For a further discussion of the nondelegation doctrine, see *infra* notes 28-34 and accompanying text.

6. *See* Mashaw, *supra* note 5, at 61 (suggesting argument that few cases in which nondelegation doctrine has been invoked were "better explainable in terms of the politics of the justices of the Supreme Court [at time cases were decided] than in terms of the legal doctrine").

7. *See id.* (noting that Supreme Court has consistently upheld grants of administrative authority, despite arguable ambiguity). For a discussion regarding the practice of judicial deference, see *supra* notes 35-100 and accompanying text.

8. 467 U.S. 837 (1984).

9. *See* Randall Lutter & Christopher DeMuth, *Ozone and the Constitution at EPA* (visited Oct. 31, 1999) <http://www.aei.org/oti/oti10602.htm. This fragile balance may be described as the following:

> When de facto legislative power resides in the executive branch, political accountability and the separation of powers are undermined. So too is the rule of law: if Congress permits regulators to do pretty much as they please, judicial review of regulatory decisions-the law's protection of individual rights against arbitrary administrative power-is lost. At the same

practice of agency deference.[10] In so doing, the D.C. Circuit tipped the balance in favor of the nondelegation doctrine.

This Note analyzes the *American Trucking* decision in the context of the long-standing practice of judicial deference. Part II of this Note briefly states the relevant factual and procedural history of the *American Trucking* case. Part III discusses the pertinent case law, statutory history and the climate in which the *American Trucking* decision was made.[11] In Part IV, the rationale of the D.C. Circuit is examined.[12] Next, Part V scrutinizes the analysis of the *American Trucking* majority, with an emphasis on the intelligible principle requirement.[13] Finally, Part VI considers the potentially sweeping and powerful effect the *American Trucking* decision will have on the CAA, as well as other areas of agency rulemaking.[14]

II. FACTS

In *American Trucking*, small business petitioners challenged EPA's interpretation of sections 108 and 109 of the CAA in revising NAAQS for ozone and particulate matter (hereinafter "PM").[15] The Court of Appeals for the District of Columbia agreed with the petitioners and determined that the NAAQS chosen by EPA were

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> time, however, regulators are not robots on statutory autopilot; they must be permitted some latitude for judgment. . . .

Id.

10. *See American Trucking*, 175 F.3d at 1034. For a discussion of the judicial deference principle, see *infra* notes 35-100 and accompanying text.

11. For a discussion regarding the statutory and case law creating the context in which *American Trucking* was decided, see *infra* notes 20-100 and accompanying text.

12. For a detailed description of the *American Trucking* court's analysis, see *infra* notes 101-139 and accompanying text.

13. For a critique of the D.C. Circuit's rationale in the *American Trucking* case, see *infra* notes 140-187 and accompanying text.

14. For a discussion of the extraordinary impact the *American Trucking* decision will have on various aspects of administrative lawmaking, see *infra* notes 189-201 and accompanying text.

15. *See American Trucking*, 175 F.3d at 1033 (D.C. Cir. 1999) (setting forth petitioners' argument that new NAAQS set by EPA were achieved by violating nondelegation doctrine); *see also* Clean Air Act of 1970 ("CAA") §§ 108-09, 42 U.S.C. §§ 7408-09 (1998) (establishing criteria, requirements and procedure for setting and revising NAAQS). For the relevant text of § 108 of the CAA, see *infra* note 20. For the relevant text of § 109 of the CAA, see *infra* note 22. The "small business petitioners" included industrial and electric utility interests, transportation interests, and Midwestern states that would allegedly bear the brunt of compliance with the new standards. *See* Kevin Covington, *Review of ATA v. EPA, Remanding Federal Air Standards Back to EPA*, THE ENVIRONMENTAL & LAND USE LAW SECTION OF THE FLORIDA BAR, (February 7, 2000) <http://www.eluls.org/june1999_covington_r.html (providing supplemental information regarding various organizations involved in challenge to EPA decision).

not justified by the record and, therefore, amounted to an unconstitutional delegation of legislative power.[16]

EPA was able to persuade the D.C. Circuit that the factors the agency used to determine the public health concern associated with different ozone levels were reasonable.[17] Nonetheless, the D.C. Circuit concluded that, because EPA had articulated no "intelligible principle" to channel these factors, and since none was apparent from the statute, EPA had violated the Constitution vis a vis the nondelegation doctrine.[18] In order to provide EPA an opportunity to articulate the requisite "intelligible principle," the *American Trucking* court remanded the case to EPA for further consideration.[19]

III. BACKGROUND

A. Clean Air Act

Section 108 of the CAA requires the Administrator of EPA to publish a list of pollutants for which NAAQS must be established.[20] NAAQS are the "nationally applicable numerical values by which EPA determines whether the ambient air (air outside of buildings) is safe and healthy."[21] In promulgating NAAQS for designated pollutants, the Administrator must adhere to the criteria set forth in section 109(b)(1) of the CAA, mandating that each standard be set

16. *See American Trucking*, 175 F.3d. at 1034 (agreeing with petitioners' argument that EPA had exceeded its constitutional authority).

17. *See id.* (stating that, although the criteria are somewhat vague, they appropriately focus on pollution's effects on public health). For a discussion of the criteria used by EPA in setting NAAQS, see *infra* note 104 and accompanying text.

18. *See id.* (concluding that if EPA is not forced to confine its field of possible determinations, its authority will be limitless). For a discussion of the "intelligible principle," see *infra* notes 156-171 and accompanying text.

19. *See id.* at 1038. Regarding the "intelligible principle" requirement, the D.C. Circuit stated that "[i]f the agency develops determinate, binding standards on itself, it is less likely to exercise the delegated authority arbitrarily." *Id.*

20. *See* Clean Air Act, 42 U.S.C. § 108. Section 108(a)(1)(A) of the CAA states:

> (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall . . . publish, and shall from time to time thereafter revise, a list which includes each air pollutant-
> (A) emissions of which, is his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.

Id.

21. Andrew S. Bergman & Susan E. Ashbrook, *D.C. Circuit Remands Ozone and Particulate Matter Air Quality Standards: American Trucking Association v. U.S. Environmental Protection Agency*, 5 NAAG NAT'L ENVTL. ENFORCEMENT J. 3 (1999) (discussing impact of American Trucking decision on agency decision-making process).

at a level "requisite to protect public health" with an "adequate margin of safety."[22]

Among those pollutants listed pursuant to § 108 of the CAA are ozone (smog) and PM (soot).[23] EPA regards ozone and PM as nonthreshold pollutants.[24] For pollutants classified as such, zero is the only guaranteed safe level of pollution, with respect to direct health impacts.[25] Due to the specific language in § 109(b)(1) of the CAA, the only NAAQS EPA could set to ensure the satisfaction of that language for ozone and PM is zero.[26] For any non-zero level, EPA must explain the degree of deviation.[27]

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22. Clean Air Act, 42 U.S.C. § 109. The language of section 109(b)(1) of the CAA provides:

> (B) Protection of public health and welfare
> (1) National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

Id.

23. *See* Bergman & Ashbrook, *supra* note 18, at 3 (critiquing promulgation of NAAQS regarding ozone and PM in *American Trucking*).

24. *See American Trucking*, 175 F.3d at 1034 (stating that "EPA regards ozone definitely, and PM likely, as non-threshold pollutants"). For the purposes of the *American Trucking* decision, both ozone and PM are regarded as nonthreshold pollutants. *See id.*

25. *See id.* (describing nonthreshold pollutants as "ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero"). The status of ozone and PM as nonthreshold pollutants creates problems when promulgating NAAQS because *any* level of exposure of these substances has some possible adverse health effects. *See* Kass & McCarroll, *supra* note 4, at 2.

26. *See id.* at 1034 (emphasizing that only concentration for ozone and PM that is "utterly risk free" is zero). For the relevant text of § 109 of the CAA, see *supra* note 22. The criteria set forth in Section 109(b)(1) of the CAA are also those which are used in promulgating new standards. *See* 42 U.S.C. § 109(d)(1) (stating that EPA shall "promulgate such new standards as may be appropriate in accordance with . . . § 109(b)").

27. *See American Trucking*, 175 F.3d at 1034. This "explanation" is the core of the dispute in *American Trucking*. *See id.* According to the D.C. Circuit, EPA's explanation was devoid of an "intelligible principle" and was, therefore, inadequate. *See id.* An "intelligible principle" is a guideline set forth by Congress and used by administrative agencies in order to limit the agencies' discretion in interpreting particular statutes. *See id.* This concept was articulated when the Supreme Court first struck down a congressional enactment pursuant to the nondelegation doctrine in *Panama Refining Co. v. Ryan*. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935). With respect to delegations of legislative authority from Congress to an administrative agency, the Supreme Court stated in *Panama Refining*:

> [t]he Legislature, to prevent . . . a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action.

B. Nondelegation Doctrine

The nondelegation doctrine was established in Article I, section 1 of the United States Constitution, which states: "All legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and a House of Representatives."[28] Thus, Congress is not permitted to grant policy making power to agencies when doing so would be an abdication of its constitutional duty to enact legislation.[29]

Despite the Constitution's seemingly clear meaning, the Supreme Court did not once, during the early years of decisions on the issue, invalidate any congressional delegation of authority.[30] It was not until 1935 that the Supreme Court struck down congressional enactments as unlawful delegations of legislative power in two separate cases within four months of each other.[31]

Id. For further discussion of *Panama Refining*, see *infra* note 31 and accompanying text.

28. U.S. CONST. art. I, § 1.

29. *See* Mashaw, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM at 58. First Justice Harlan aptly articulated this policy stating: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892).

30. *See id.* at 56-58. Despite first Justice Harlan's words underscoring Congress's constitutional obligation to refrain from delegating its legislative authority, the Court in *Field* upheld a provision of the Tariff Act of 1980, permitting the President to make arguably legislative decisions. *See id.* By the early 1930s the nondelegation doctrine was logically considered an "empty formalism." *Id.* at 58. (citing L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 51-62 (1965)).

31. *See id.* at 58-60. The first case in which the Court invalidated congressional delegation of authority was *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). *See* Mashaw, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, at 58-59. The source of controversy in *Panama Refining*, was a provision in the National Industrial Recovery Act ("NIRA") which gave the President expansive authority to exclude various oil products from interstate commerce. *See id.* According to the Supreme Court, the NIRA provided no criteria on which the President was to base his action. *See id.* The Court reasoned:

> Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9(c) [of the National Industrial Recovery Act] goes beyond those limits . . . [C]ongress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

Id. at 59 (quoting *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935)).

The second case in which the Court invalidated a statute as relinquishing too much of Congress's legislative power was *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See* Mashaw, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, at 59-60. In *Schecter Poultry*, the Court invalidated another section of the NIRA, which "empowered the President to approve industry codes of fair competition upon submission by trade associations or business groups." *Id.* at 59. Justice Cardozo, the sole dissenter in *Panama Refining*, joined the *Schecter Poultry* majority

Equally noteworthy is the fact that since 1935, not one statute has been invalidated by the Supreme Court on the basis of excessive delegation.[32] On the contrary, the Court has upheld numerous grants of administrative authority when faced with charges that such grants were no more specific than those invalidated in 1935.[33] In fact, many have assumed that "[t]he [nondelegation] doctrine was on life support and that eventually the plug would be pulled."[34]

C. Chevron

Judicial review of administrative actions involves the challenge of balancing, on one hand, the deeply ingrained notion that it is the judiciary's duty to interpret the law and, on the other hand, the long-standing practice of deference to agency determinations.[35] For years prior to the landmark decision in *Chevron*, the trend of the Supreme Court was to defer to administrative interpretations.[36] *Chevron* not only reaffirmed this principle, but it also strengthened it.[37]

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in concluding that this code was "delegation running riot." *Schecter Poultry*, 295 U.S. 495, 553 (1935) (Cardozo, J. concurring). In Cardozo's words, "[t]he delegated power of legislation which has found expression in this code is not canalized within the banks that keep it from overflowing. It is unconfined and vagrant. . . ." *Id.* at 551 (quoting *Panama Refining*, 293 U.S. at 440).

32. *See* Mashaw, *supra* note 5, at 60 (discussing history of nondelegation doctrine).

33. *See id.* at 61 (stating that "[C]ourt's reiteration of the nondelegation principle, coupled with its very sparing use to strike down legislation, illustrates a continuing judicial effort to harmonize the modern administrative state with traditional notions of representative government and the rule of law"); *see also Nondelegation*, 20 No. 8 JUD./LEGIS. WATCH REP., at 1 (stating that "[d]elegations of epic scope have been upheld").

34. Nondelegation, 20 No. 8 JUD./LEGIS. WATCH REP., at 1 (stating that *American Trucking* may signify resurrection of nondelegation doctrine, necessitated by negative impact of *Chevron* decision).

35. *See* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG., 283, 283-85 (1986) (discussing impact of *Chevron* on judicial review of administrative actions). The fundamental principle that it is the judiciary's duty to interpret the laws was articulated by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Marshall insisted that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* This duty becomes difficult to employ when met with the fact that there is "[a] long line of Supreme Court precedent reminding lower federal courts of their obligation to defer to an agency's reasonable construction of any statutes administered by that agency." Starr, at 284 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984)).

36. *See* Starr, 3 YALE J. ON REG., at 292 (noting that, at first glance, *Chevron* decision did little more than apply this long-accepted approach); *See, e.g., Gray v. Powell*, 314 U.S. 402 (1941) (upholding Agency's interpretation of the statutory term "producer," as used in National Bituminous Coal Act).

37. *See* Starr, 3 YALE J. ON REG., at 292. Among the most significant ways in which *Chevron* reenforced the deference principle is the following:

Chevron involved a dispute over the definition of a "stationary source," an important term in both the 1970 and 1977 amendments to the CAA.[38] The action was brought by the Natural Resources Defense Council ("NRDC") in reaction to EPA's ultimate decision to define this term according to the bubble standard, which is more lenient on industry.[39] In overturning the decision of the court of appeals, the Supreme Court unanimously decided that EPA's determination to employ the bubble concept was a reasonable one.[40]

> First, it removed a long-standing ambiguity in the law resulting from the existence of two distinct lines of cases, one calling for deference, the other disregarding deference altogether. Second, it eliminated much of the courts' authority to invalidate agency interpretations based on perceived inconsistencies with congressional policies. Third, it specified certain conditions under which courts are required to give controlling weight to agency interpretations. Fourth, it seemingly rendered the longevity of an agency's interpretation irrelevant in determining how much weight the interpretation should be given.

Id.

38. *See id.* at 285-86. Starr states that "EPA's view of what constituted a 'stationary source' was . . . of critical importance." *Id.* at 286. Part D to Title I of the 1977 CAA Amendments was an attempt by Congress to facilitate the achievement of NAAQS in areas of the country which had thus far been unable or unwilling to do so. *See id.* at 285-86. Part D requires cumbersome "permit programs 'for the construction and operation of new or modified major stationary sources' of pollution" for those areas to which the section applies. *See Id.* (quoting CAA, 42 U.S.C. § 7502(b)(6) (1982)). With regard to this provision, the definition of a "stationary source" takes on significant importance. *See id.* at 286.

39. *See id.* at 286-87 (explaining that in employing "bubble approach," those states which had thus far not achieved NAAQS could use this more lenient approach in their respective state implementation plans (hereinafter "SIPs")). The "bubble approach" considers the total emissions from a given plant, rather than considering the emissions from each source within the plant individually. *See id.* at 286. It is a more lenient approach than the alternatives because it exempts certain pieces of equipment from being replaced according to EPA requirements as long as the plant's total emissions do not exceed the designated limit. *See id.* Because the "bubble approach" affords industry relative leniency, the Natural Resources Defense Council (hereinafter "NRDC") challenged the decision to employ that approach. *See Chevron*, 467 U.S. at 837, 841-42 (1984). According to NRDC, one purpose of the CAA was to bring particularly polluted regions into compliance with clean air laws. *See id.* NRDC further argued that such a purpose could not be achieved as long as the causes of the pollution were permitted to perpetuate. *See id.*

40. *See* Starr, 3 YALE J. ON REG., at 287 (quoting *Chevron*, 104 S. Ct. at 2783) (stating Justice Stevens chastised lower court for "misconceiv[ing] nature of its role in reviewing regulations at issue"). In striking down the bubble approach the Court of Appeals for the D.C. Circuit reasoned that, because Congress had not articulated a definition of "stationary source," the purposes of the non-attainment program should determine the definition. *See id.* at 286-87. The Supreme Court criticized the Court of Appeals for rendering its own *de novo* interpretation. *See id.* at 287. According to the Supreme Court, the proper inquiry was whether the interpretation of the Administrator of EPA was reasonable. *See id.*

To arrive at this conclusion, the Supreme Court set forth a two-step approach for judicial review of administrative actions.[41] According to this approach, two questions must be asked by the reviewing court:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the issue, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[42]

Utilizing this test, the Supreme Court in *Chevron* first determined that neither the specific language of the statute, nor the legislative history compelled any interpretation of "stationary source."[43] Turning to the second step of the test, the Supreme Court concluded that EPA's interpretation of the statute was reasonable.[44] The EPA decision passed the *Chevron* test and, therefore, was upheld.[45]

Chevron permeated the practice of judicial review of administrative actions with a resounding reverence for agency deference.[46]

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41. *See Chevron*, 467 U.S. at 837, 842-45 (1984) (upholding EPA's definition of "stationary source" as reasonable interpretation of CAA).

42. *Id.* at 842-43.

43. *See id.* at 860, 862, 865. Although the Supreme Court noted possible meanings of the statutory language itself, they were unconvinced that any particular interpretation was correct. *See id.* at 860.

44. *See id.* at 865-66 (stating "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail").

45. *See id.* at 866 (giving deference to EPA's interpretation of statute).

46. *See, e.g., American Legion v. Derwinski*, 54 F.3d 789 (D.C. Cir. 1995) (according deference to agency as required by *Chevron*); *Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991) (holding that "[b]ecause the Congress left it unclear whether the remedy . . . is available . . . we are constrained to defer to the EPA's reasonable interpretation of the statute"); *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981) (affirming agency determination based on finding that relevant studies supporting decision were undertaken in reasonable manner); *see also* Starr, 3 YALE J. ON REG., at 312 (stating that *Chevron* chastens excessive intrusion of courts into business of agency policy-making); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. J.L. AM. U.

In the mere fifteen years since the Supreme Court decided *Chevron*, this decision has become one of "great importance, one of a small number of cases that every judge bears in mind when reviewing agency decisions."[47] Despite the powerful influence *Chevron* has ostensibly had on the judiciary, the extent of the *Chevron* decision, and the circumstances under which it is triggered, remain uncertain and controversial.[48]

D. The Character of Judicial Review of Agency Determinations Over the Past Twenty-Five Years

1. Pre-Chevron

The decision in *Chevron* comes as little surprise when viewed in the context of the trend in the judiciary during the years prior to its decision.[49] Among the cases reinforcing the agency deference principle, was *South Terminal Corporation v. Environmental Protection Agency*.[50] *South Terminal* involved a dispute arising out of the CAA requirement that EPA set NAAQS and states implement plans to achieve the NAAQS.[51] When Massachusetts failed to submit its plan, EPA, as mandated by Congress, implemented a plan for that state.[52] The plan, determined necessary by the Administrator in order to meet NAAQS, was the focus of the controversy.[53] Disagree-

187, 187 (1992) (noting that Chevron is "cited with extraordinary frequency [and] seems actually to be affecting lower court decisions (perhaps too much so)").

47. *See* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG., 283, 284 (1986).

48. *See* Thomas, 32 TULSA L.J. at 296 (stating that although many things have already been written on *Chevron*, a deal remains to increase understanding of case); Herz, 6 ADMIN. J.L. AM. U., at 187 (noting that Chevron created heavy debate over its interpretation).

49. *See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. J.L. AM. U. 187, 187 (1992) (noting that "Chevron merely refines longstanding principles").

50. 504 F.2d 646 (1st Cir. 1974). For a discussion of *South Terminal* as an integral part of Justice Tatel's dissent in *American Trucking*, see *infra* notes 147-55 and accompanying text.

51. *See South Terminal*, 504 F.2d at 654 (citing CAA, 42 U.S.C. §§ 109(b)(1),(2), 110(c)) (emphasizing inevitable controversy over emissions standards because they "come between the citizen and his automobile"). In *South Terminal*, various entities and individuals attacked the EPA emissions standards with the support of the City of Boston. *See id.* at 655. The vehement and unified opposition to these standards was a response to the strict limits the plan imposed on vehicle use. *See id.*

52. *See id.* at 654 (stating that plan, which proposed to vastly reduce emissions of hydrocarbons and carbon monoxide in Boston area, was necessary to meet compliance date set by Congress).

53. *See id.* (noting that plan was controversial from outset, as it attempted to control automobile use).

ing with the petitioners that the plan set by the Administrator reflected an unconstitutional delegation of legislative power, the *South Terminal* court stated:

> The power granted to EPA is not 'unconfined and vagrant'. . . . Perhaps because the task is both unprecedented and of great complexity, and because appropriate controls cannot all be anticipated pending the Agency's collection of technical data in different regions, the Act leaves considerable flexibility to EPA in the choice of means.
>
> . . . [t]he agency must have flexibility to implement the congressional mandate. Therefore, although the delegation to EPA was a broad one, . . . we have little difficulty concluding that the delegation was not excessive.[54]

Two years later, in *Ethyl Corp. v. Environmental Protection Agency*,[55] the D.C. Circuit was called upon to determine whether the EPA correctly interpreted the scope of its authority under the CAA.[56] Like the First Circuit in *South Terminal*, the D.C. Circuit concluded that the Administrator's interpretation was proper.[57] The dispute in *Ethyl* arose out of § 211(c)(1)(A) of the CAA, which authorizes the Administrator of EPA to regulate gasoline additives whose emission products "will endanger the public health or welfare."[58] Acting pursuant to this delegation of authority by Congress, EPA promulgated regulations to reduce the lead content in

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54. *Id.* at 677. The standard of review in *South Terminal* was governed by the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §706. *See id.* at 655. Under § 706, the First Circuit was to decide whether EPA acted within its authority and whether the plan was constitutional. *See id.* (citing 5 U.S.C. § 706 (2)(A)). If so, then the court could only set aside the plan if it found it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* (quoting 5 U.S.C. § 706(2)(A)).

55. 541 F.2d 1 (D.C. Cir. 1976).

56. *See Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1, 7 (D.C. Cir. 1976). In *Ethyl Corp.*, the Administrator of EPA was authorized under section 211(c)(1)(A) of the CAA to regulate gasoline additives whose emissions products "will endanger the public health or welfare . . . ." *Id.* (quoting 42 U.S.C. § 211(c)(1)(A)). The D.C. Circuit was required to determine whether the Administrator properly interpreted the meaning of section 211(c)(1)(A) of the CAA and the scope of his power thereunder. *See id.* The Court then turned to determine if the evidence adduced in the rulemaking proceedings supported the regulations the Administrator ultimately promulgated. *See id.*

57. *See id.* (affirming Administrator's determination on all grounds).

58. *Id.* (quoting CAA, 42 U.S.C. § 211(c)(1)(A))(setting forth language by which Administrator must act).

leaded gasoline.[59] Concluding that this action by EPA was within the scope of its authority, the D.C. Circuit emphasized that "[r]egulators . . . must be accorded flexibility, a flexibility that recognizes the special interest in favor of protection of the health and welfare of the people, even in areas where certainty does not exist."[60]

In the 1978 case of *Weyerhaeuser Co. v. Costle*,[61] the D.C. Circuit reviewed EPA's application of "comparison factors" and "consideration factors" in issuing effluent limitations on pollutants, pursuant to the Clean Water Act (hereinafter "CWA").[62] After analyzing the relevant statutory language and legislative history, the *Weyerhaeuser* court concluded that § 304(b)(2)(B) of the CWA evidenced Congress's intent to mandate a particular structure and weight for the comparison factors.[63] Regarding the consideration factors, however, the D.C. Circuit found that Congress gave EPA discretion in deciding how to account for, and the amount of weight to give to, the consideration of these factors.[64] The *Weyerhaeuser* court determined that, because the CWA only directs the Agency to take the consideration factors into account, this legislation "cannot logically be interpreted to impose on EPA a specific structure of considera-

59. *See id.* at 7 (clarifying that Administrator made final determinations only after having decided that automotive emissions caused by leaded gasoline present "significant risk of harm" to public health).

60. *Id.* at 24. Focusing on this frequent uncertainty surrounding EPA decisions, the D.C. Circuit went on to note the following: "[t]he regulators entrusted with the enforcement of . . . laws have not thereby been endowed with a prescience that removes all doubt from their decision-making. Rather, speculation, conflicts in evidence, and theoretical extrapolation typify their every action." *Id.*

61. 590 F.2d 1011 (D.C. Cir. 1978).

62. *See Weyerhausen Co. v. Costle*, 590 F.2d 1011 at 1045. Section 304(b)(1)(B) of the CWA identifies two groups of factors to be considered in determining effluent standards. *See id.* (citing Federal Water Pollution Control Act Amendments of 1972 (the "Clean Water Act"), § 304(b)(1)(B) 33 U.S.C. § 304(b)(1)(B)). The first group includes "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." *Id.* (quoting the Clean Water Act, 33 U.S.C. §304(b)(1)(B)). These are termed by the *Weyerhaeuser* court as "comparison factors." *See id.* The second group takes into account the "age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact . . . and such other factors as the Administrator deems appropriate." *Id.* (quoting the CWA, 33 U.S.C. § 1314(b)(1)(B)). This group is termed "consideration factors." *See id.*

63. *See Wayerhausen*, 590 F.2d at 1045-46 (explaining that comparison factors are set of two, making it easier to define structure and weight to consider them and thus prevent extraneous factors from intruding).

64. *See id.* at 1046 (stating that because Congress "gave EPA authority . . . to exercis[e] its discretion to add new factors to the mix" it is logical to conclude that Congress intended to impose no specific structure of consideration or set of weights on EPA).

tion or set of weights."[65] Although § 304(b)(1)(B) of the CWA instructs that EPA utilize consideration factors in issuing effluent limitations, the *Weyerhaeuser* court gave EPA considerable deference in determining how the Agency applied them.[66]

Another noteworthy case among those decided shortly before *Chevron* was *Lead Industries Assoc. v. EPA*.[67] The *Lead Industries* conflict arose as a result of EPA's promulgation of ambient air quality standards for lead.[68] In December 1977, the Administrator proposed new standards as a result of various studies and findings from myriad sources.[69] After the required period for public comment, the Administrator issued the final air quality standards, which were the same as the proposed standards.[70] When called upon to determine whether the EPA exceeded its authority under the CAA, the D.C. Circuit concluded that EPA adequately complied with both the substantive and procedural requirements of the CAA, and it had adequately supported its determinations by evidence in the re-

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65. *See id.* at 1046 (noting that listing factors seems to be effort by Congress to name all matters considered worthy of study before making limitation decisions without precluding EPA from developing additional factors).

66. *See id.* at 1045. The D.C. Circuit refused to limit EPA's discretion regarding treatment of the relevant factors:

> [O]ur scrutiny of the Agency's treatment of the several consideration factors seeks to assure that the Agency informed itself as to their magnitude, and reached its own express and considered conclusion about their bearing. More particularly, we do not believe that EPA is required to use any specific structure such as a balancing test in assessing the consideration factors, nor do we believe that EPA is required to give each consideration factor any specific weight.

Id.

67. 647 F.2d 1130 (D.C. Cir. 1980).

68. *See id.* at 1135 (stating that issue was whether EPA Administrator acted within scope of statutory authority in promulgating regulations). The challenge to EPA air quality standards in *Lead Industries* was brought by the Lead Industry Association, Inc. (hereinafter "LIA"), a nonprofit trade organization whose 78 members included most of the country's producers and commercial consumers of lead. *See id.* LIA filed suit against EPA, arguing that the air quality standards set by EPA were more stringent than necessary to protect public health. *See id.* at 1148.

69. *See id.* at 1138-41 (noting that proposed national primary ambient air quality standard was issued simultaneously with publication of Lead Criteria Document). The lead criteria document was intended as a reflection of the current state of knowledge regarding lead. *See id.* at 1138. In composing this document, EPA considered a number of factors including, but not limited to, the effects of lead exposure on the blood-forming system and the central nervous system. *See id.* at 1138-39.

70. *See id.* 1142-44 (noting that, although final standards were same as proposed standards, final standards were arrived at through somewhat different analysis). According to the CAA, the Administrator is required to submit proposed air quality standards for public comment, for which the procedure is prescribed under section 307(d). *See id.* at 1137 (citing CAA, 42 U.S.C. § 307(b)).

cord.[71] Most significantly, the D.C. Circuit determined that when promulgating air quality standards EPA was neither required, nor permitted, by Congress to consider economic or technological feasibility.[72] Furthermore, had the Administrator considered such factors, it would have amounted to a "trespass beyond the bounds of [the Administrator's] statutory authority."[73]

In 1981, the Court of Appeals for the D.C. Circuit reinforced the principle of agency deference in *American Petroleum Institute v. Costle*.[74] Petitioners in *American Petroleum* challenged ozone NAAQS set by EPA pursuant to the CAA. In particular, the petitioners opposed a revision to both the primary and secondary standards for ozone, which increased the level of stringency.[75] One of the many attacks made against the EPA NAAQS revisions was based on the idea that the new standards were not supported by substantial evidence.[76] The Court of Appeals rejected this argument because it found that the studies upon which the determination was based

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71. *See id.* at 1184 (noting D.C. Circuit's particular devotion toward combination of careful scrutiny of evidence in record and deference to Administrator's judgment). *See id.* The *Lead Industries* court acknowledges that the need for the court to conduct a "substantial inquiry" into the facts, may thereby require it to delve into scientific literature. *Id.* at 1145. This scrutiny, however, must be balanced with some degree of deference to EPA, as they are the experts on the subject. *See id.* at 1146. Only after establishing this balance did the D.C. Circuit conclude that the Administrator's action was within his scope of authority. *See id.* at 1184.

72. *See Lead Industries*, 647 F.2d at 1150 (citing *Union Electric Co. v. EPA*, 427 U.S. 246, 257 (1976) (stating that "[t]he 'technology-forcing' requirements of the Act 'are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible' "). In *Lead Industries*, the petitioners argued for the requirement that economic and technological feasibility be taken into account when promulgating emissions standards. *See Lead Industries*, 647 F.2d at 1148. Under such a requirement, proposed standards which are beyond the economic and technological capability of industry at that time would have to be modified for industry compliance. *See id.* at 1148-49. Such procedure promotes accommodation to industry and, according to the *Lead Industries* court, it is contrary to the CAA. *See id.*

73. *Lead Industries*, 647 F.2d at 1150. According to the *Lead Industries* court, the language of the CAA does not permit the consideration of economic or technological feasibility in promulgating air quality standards. *See id.* Because Congress prohibited such consideration through the statutory construction, EPA would have exceeded its authority under the CAA if it proceeded to factor economic and technological feasibility into its analysis. *See id.*

74. 665 F.2d 1176 (D.C. Cir. 1981).

75. *See id.* at 1183 (quoting 44 Fed. Reg. 8216 (1979)) (stating Administrator's position that "the most probable level for adverse health effects in sensitive persons, as well as in healthier (less sensitive) persons who are exercising vigorously, falls in [a] range [slightly higher than the new 0.12 standard]").

76. *See id.* at 1185 (rejecting argument regarding lack of substantial evidence because record was filled with support for final standards).

constituted a rational basis for the finding.[77] Ultimately the *American Petroleum* court concluded that, because the determinations by EPA were supported by a rational basis in the record, the D.C. Circuit was not in a position to invalidate them.[78]

Although the case law reinforces the principle of agency deference, the Supreme Court demonstrated in *Industrial Union Dept. v. American Petroleum Institute* (hereinafter "*Benzene*"),[79] that the judiciary may not blindly uphold an agency determination which is not supported by appropriate findings.[80] *Benzene* involved § 3(8) of the Occupational Safety and Health Act of 1970, which empowers the Secretary of the Occupational Safety and Health Administration ("OSHA") to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[81] Pursuant to this provision, the Secretary of OSHA lowered the permissible exposure limit of airborne concentrations of benzene from ten parts per million ("ppm") to one ppm.[82] In reviewing this action, the Supreme Court determined that, before the agency could promulgate standards to achieve a safe work environment, it must first make the threshold determination that the work environment is currently unsafe.[83] The Supreme Court concluded that, in promulgating new standards without first

77. *See id.* (emphasizing that court does not have to find every study accurate and reliable). The Court of Appeals in *American Petroleum* viewed its role as limited to determining whether the Administrator made a rational judgment, rather than "weigh[ing] the evidence anew and mak[ing] technical judgments." *Id.* The rationale of the *American Petroleum* court in determining that the Administrator's judgment was rational, may be summarized as follows:

> The court finds no reason to hold that the Administrator abused his discretion in crediting the various studies relied on, even given the acknowledged uncertainties in some of the conclusions. The Administrator noted that "a clear threshold of adverse health effects cannot be identified with certainty for ozone." 44 Fed. Reg. 8213 (1979). Because the Administrator acknowledged the uncertainty of his task and made a rationale judgment, we cannot second-guess his conclusion.

Id.

78. *See id.* at 1192 (exemplifying practice of judicial deference to EPA determinations in context of promulgation of NAAQS under CAA).

79. 448 U.S. 607 (1980).

80. *See Industrial Union Dept. v. American Pertoleum Institute*, 448 U.S 607, 659 (1980) (stating that standard must be based on Agency's findings, rather than findings the court believes Agency might have made).

81. *Id.* at 662 (quoting Occupational Safety and Health Act of 1970, § 3(8), 29 U.S.C. § 652(8)).

82. *See id.* at 613 (noting that decision to reduce permissible exposure limit on airborne concentrations of benzene was result of finding of causal connection between benzene and leukemia).

83. *See id.* at 607 (interpreting section 3(8) of Occupational Safety and Health Act to imply that, before any standard can be promulgated pursuant to that section, workplaces in question must be found to be unsafe).

making this threshold determination, the Secretary had exceeded his power.[84]

2. *Post-Chevron*

In the years since *Chevron*, scholars and students continue to "follow[ ] a twisted, perhaps even tortured, path in the area of judicial review."[85] Likewise, the judiciary itself has been attempting to honor the notion of agency deference without abdicating its duty under the separation of powers principle to determine what the laws set by Congress actually mean.[86] For the most part, *Chevron* has left a strong tone of agency deference in its wake.[87]

On the other hand, the decision of *International Union v. Occupational Safety & Health Administration* (hereinafter "Lockout/Tagout I")[88] demonstrated the judiciary's refusal to defer to agency authority where agency determinations appeared to be unreasonably broad.[89] The dispute in *Lockout/Tagout I* evolved from OSHA's extension of special industry safety procedures governing especially dangerous equipment to include virtually all equipment in almost

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84. *See Benzene*, at 659 (emphasizing Secretary's tactics in avoiding responsibility of establishing need for more stringent standards). The *Benzene* court notes that the record clearly demonstrates the Secretary's reliance on a policy which places the burden of proving a safe level of exposure on industry. *See id.* In doing this, the Secretary avoided the threshold responsibility of establishing the need for more stringent standards. *See id.* Accordingly, the Supreme Court concluded that OSHA exceeded its power. *See id.*

85. James C. Thomas, *Fifty Years With the Administrative Procedure Act and Judicial Review Remains an Enigma*, 32 TULSA L.J. 259, 259 (1996).

86. *See* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283, (1986) (stating that "[l]argely because of this tension between the judiciary's law-declaring function and the need to defer to congressional delegation, application of the deference doctrine in the federal courts has been rather erratic"). Separation of powers is a "structural manifestation" in the United States Constitution and has, for the most part, been acknowledged and respected by the Supreme Court. See Thomas, 32 TULSA L.J. at 267. As stated in section 1 of Article III of the U.S. Constitution, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish." U.S. CONST. Art. III., § 1.

87. *See, e.g., Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991) (reaffirming *Chevron* rule that, where Congress is silent or ambiguous regarding issue, agency determination must be given deference so long as it is reasonable); *American Legion v. Derwinski*, 54 F.3d 789 (D.C. Cir. 1995) (giving deference to agency interpretation because neither plain language nor structure of statute makes Congress's intent clear).

88. 938 F.2d 1310 (D.C. Cir. 1991).

89. *See id. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. ("UAW") v. Occupational Safety and Health Admin.* ("Lockout/Tagout I"), 938 F.2d 1310, 1313 (D.C. Cir. 1991) (remanding case to OSHA for further review, as it currently violates nondelegation doctrine).

every industry.[90] In promulgating the new standards, OSHA first acknowledged its duty, pursuant to the *Benzene* decision, to identify a "significant risk" within industry which created a need for more stringent standards.[91] After OSHA concluded that such a need existed, the agency then promulgated standards, using economic and technological feasibility as a ceiling (rather than a floor) to the standards' permissible level of stringency.[92] In so doing, OSHA opened a window, for setting standards, far wider than had been used in other areas of OSHA's authority.[93]

In reviewing the agency's determination, the D.C. Circuit in *Lockout/Tagout I* rejected OSHA's interpretation of its authority because it was too broad.[94] The court of appeals went on to state that OSHA failed to provide justification for its radical decision.[95] For this reason, the D.C. Circuit remanded the issue, ordering OSHA to identify an intelligible principle for controlling the Agency's discretion under the Occupational Safety and Health Act.[96]

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90. *See id.* at 1312 (indicating increased burden on industry as result of revised standards). A "Lockout" is the placement of a lock on an energy isolating device so that the device will not start up before the lock is removed. *See id.* A "Tagout" is a warning on equipment that the equipment may not be operated until the tag is removed. *See id.* Lockout/Tagout was formally reserved for especially dangerous equipment, and its extension to a wider range of equipment was met with vehement industry opposition. *See id.*

91. *See id.* at 1317, 1325 (noting that OSHA's reasoning lacks nexus between "significant risk" and the standard designed to ameliorate that risk). For a discussion of the *Benzene* decision, see *supra* notes 79-84 and accompanying text.

92. *See id.* at 1317 (acknowledging OSHA's view of feasibility as a ceiling to be implicit). The determination of whether OSHA ought to have considered economic and technological feasibility as a ceiling or as a floor when setting standards was not for the Agency to make. *See id.* Such a determination would be made by Congress in the legislation itself. *See id.* Because OSHA was unable to articulate where in the Occupational Safety and Health Act Congress had delegated that authority to the Agency, such authority presumably had not been given. *See id.*

93. *See Lockout/Tagout I*, 938 F.2d at 1317, 1325 (noting that OSHA's assumption of broad authority in this case has effect of imposing strict standards, even where risk appears to be diminutive or zero).

94. *Id.* at 1317-18, 1325 (stating that OSHA's presumed power would permit Agency to "require precautions that take the industry to the verge of economic ruin . . ., or [at the other extreme,] to do nothing at all). The *Lockout/Tagout I* court went on to clarify that under OSHA's interpretation, any decision by the Agency which falls within these two extreme poles would also be equally valid. *See id.* at 1317. Furthermore, the D.C. Circuit stressed that "OSHA's proposed analysis would give the executive branch untrammeled power to dictate the vitality and even survival of whatever segments of American business it might chose." *Id.* at 1318.

95. *See id.* at 1325 (stating that OSHA's reasoning on many issues was "extremely obscure," partly because of failure to identify intelligible principle).

96. *See id.* at 1325 (expressing uncertainty as to whether correction of defects would alter ultimate rule).

On remand the D.C. Circuit affirmed OSHA's revised interpretation of its statutory authority in *International Union v. OSHA* (hereinafter "*Lockout/Tagout II*").[97] In *Lockout/Tagout II* OSHA listed several sections of the Occupational Safety and Health Act and explained how the Agency's interpretations of these sections limited its discretion.[98] OSHA's explanations of its interpretations changed nothing for industry regarding the potentially strict standards originally promulgated.[99] Nonetheless, the D.C. Circuit found OSHA's interpretations to be reasonable and, therefore, consistent with the nondelegation doctrine.[100]

IV. NARRATIVE ANALYSIS

In Part I of the *American Trucking* opinion, the Court of Appeals for the District of Columbia addressed the issue of whether, in promulgating NAAQS for PM and ozone, EPA interpreted its power to regulate too broadly and, as a result, created an unconstitutional delegation of legislative power.[101] At the heart of the controversy in Part I of *American Trucking*, is EPA's explanation for the non-zero level it designated in revising ozone and PM NAAQS.[102] In particular, petitioners argued, and the court of appeals agreed, that EPA's explanation is flawed because it failed to identify an intelligible principle to guide, and limit, the Agency in setting standards.[103]

97. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA* ("Lockout/Tagout II"), 37 F.3d 665 (D.C. Cir. 1994) (dismissing petition for review).

98. *See id.* at 668-69. The explanations of OSHA's interpretations revealed that the Agency read the Occupational Safety and Health Act as requiring the Agency to provide a high degree of worker protection. *See id.* at 669. It became apparent that this limited OSHA's discretion because the Agency was in fact not permitted to "do nothing at all" as was suggested in *Lockout/Tagout I*. *See id.*

99. *See id.* at 668-69 (listing interpretations describing why selected standards were necessary to provide high degree of worker protection).

100. *See id.* at 669 (stating that, "as construed by OSHA, the [Occupational Health and Safety Act] guides [OSHA's] choice of safety standards enough to satisfy the demands of the nondelegation doctrine"); *see generally Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) at *supra* notes 35-48 and accompanying text (setting forth "reasonableness" test in judicial review of agency determinations).

101. *See American Trucking*, 175 F.3d at 1034 (discussing issue in context of nondelegation doctrine).

102. *See id.* at 1034-35 (stating that "[f]or EPA to pick any non-zero level [for ozone and PM NAAQS] it must explain the degree of imperfection permitted").

103. *See id.* at 1034-35. The D.C. Circuit created this analogy:

> Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

Although the D.C. Circuit agreed with EPA that the factors selected to examine for the purpose of revising the NAAQS did not themselves present any problem, the court determined that no criterion was presented as a boundary on the results obtained from these factors.[104] According to the *American Trucking* court, EPA's failure to place limits on its authority under the statute was a violation of the nondelegation doctrine.[105]

After contemplating the language used by EPA to explain its rationale in revising the NAAQS, the D.C. Circuit found itself unable to ascertain whether the revised NAAQS satisfied § 109(b)(1) of the CAA.[106] The *American Trucking* court insisted that EPA's rationale for changing the previous 0.09 ppm level of ozone NAAQS to the new 0.08 ppm level did no more than confirm the intuitive conclusion that a less stringent standard would allow a relevant pollutant to inflict more harm to public health, and a more stringent standard would result in less harm.[107] This rationale failed to explain why the 0.08 ppm level was the exposure level which was "requisite to protect public health" mandated by § 109(b)(1) of the CAA.[108]

After the general rejection of EPA's reasoning, the D.C. Circuit next examined each of EPA's supporting arguments.[109] First, EPA presented the argument that the 0.08 ppm level was superior to the

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Id.

104. *See id.* The factors EPA considered in setting NAAQS were "'the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed.'" *Id.* (quoting National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,883/2 (1997)). Although the D.C. Circuit noted that these factors are somewhat vague, they have already been approved by the judiciary in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1161 (D.C. Cir. 1980). *See American Trucking*, 175 F.3d 1034, 1035 (D.C. Cir. 1999). Thus, these factors are not at issue in the present controversy. *See id.*

105. *See id.* at 1036-37 (stating that EPA correctly assesses the question as one of degree, but offers no intelligible principle by which to identify an end point); *see also* CAA, § 42 U.S.C. 109(b)(1) (stating that EPA must set each standard at level "requisite to protect public health" with an "adequate margin of safety").

106. *See American Trucking*, 175 F.3d at 1035 (reasoning that EPA's explanation for NAAQS does not adequately indicate why designation at any other level would have been inappropriate).

107. *See id.* According to the D.C. Circuit, EPA's arguments only support the proposition that "more pollution will not benefit public health, not that keeping pollution at or below any particular level is 'requisite' or not requisite to 'protect public health' with an 'adequate margin of safety,' the formula set out by § 109(b)(1)." *Id.*

108. *See id.* (concluding that EPA's logic fails to adequately support its conclusion). For the complete text of § 109(b)(1) of the CAA, see *supra* note 22.

109. *See id.* (explaining its rationale for rejecting each of EPA's arguments individually).

existing 0.09 level because at 0.09 more people are exposed to more serious adverse health effects than those at 0.08.[110] The *American Trucking* court noted, however, that, although EPA decided not to further reduce NAAQS to 0.07, the Agency did not contradict the proposition that such a reduction would bring about changes comparable to those by the reduction from 0.09 to 0.08.[111]

EPA provided three reasons for why it did not decide to further reduce ozone NAAQS to 0.07.[112] The principle substantive reason was that at lower levels of exposure, effects are less certain and less severe.[113] The *American Trucking* court dismissed this argument as providing nothing more than an affirmation of the theory that lower exposure levels are associated with lower risks to public health.[114]

The second reason EPA offered to justify the decision not to reduce ozone NAAQS to 0.07 was the Agency's reliance on the consensus of the Clean Air Scientific Advisory Committee (hereinafter "CASAC") that the standard should not be set below 0.08.[115] This justification, however, was not enough to persuade the *American Trucking* court because CASAC failed to provide any cogent reasons

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110. *See id.* (citing EPA, "Review of National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information: OAQPS Staff Paper," at 156 (June 1996)).

111. *See American Trucking*, 175 F.3d at 1035 (indicating D.C. Circuit's reliance on this fact to conclude that 0.08 ppm level selected by EPA was arbitrary number, rather than designation achieved as result of pre-defined field). The proposal of a further reduction in NAAQS to 0.07 ppm was offered to demonstrate that EPA was unable to articulate why it chose the 0.08 standard, rather than any other level lower than the current standard, 0.09 ppm. *See id.*

112. *See id.* (rejecting all three arguments set forth by EPA despite fervent support by dissent of EPA rationale).

113. *See id.* (citing Ozone Final Rule, 62 Fed. Reg. at 38, 868/2). According to EPA, the health effects at lower levels of exposure, particularly exposure levels below 0.08 ppm, are "transient and reversible;" and therefore, they are less severe than the effects at greater levels of exposure. *See id.* EPA further argued that at lower levels of exposure, "the more serious effects with greater immediate and potential long-term impacts on health are less certain, both as to the percentage of individuals exposed . . . who are likely to experience such effects and as to the long-term medical significance of these effects." *Id.*

114. *See id.* The D.C. Circuit also rejected the dissent's argument that, in setting the standard at 0.08, EPA relied on evidence that health effects occurring below that level are " 'transient and reversible.' " *Id.* (quoting Tatel, J., dissenting). It denied that the language of the EPA itself supports the "categorical distinction" that the dissent says it does, and it is "far from apparent that any health effects existing above the [0.08] level are permanent or irreversible." *American Trucking*, 175 F.3d at 1035.

115. *See American Trucking*, 175 F.3d at 1035-36 (rejecting dissent's support for reliance on authority of CASAC).

for its recommendations.[116] The D.C. Circuit also noted that, although the intelligence and prestige of CASAC members were undisputed, the issue of whether EPA acted in accordance with lawfully delegated authority was not a scientific one.[117]

EPA's final argument in defense of its position regarding a further reduction of ozone NAAQS to 0.07 was that such a standard would be "closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O sub3 precursors, and thus more likely to be inappropriately targeted in some areas on such sources."[118] The D.C. Circuit dismissed this theory, stating that this logic is equally as effective in striking down EPA's decision to reduce NAAQS to 0.08 from the present 0.09 standard.[119]

Next, the *American Trucking* court addressed the argument in EPA's defense that it will frequently refuse to set a standard at a lower level simply because there is greater uncertainty that health effects exist at levels below that of the standard.[120] The D.C. Circuit deemed this argument to be useful only if some principle reveals how much uncertainty is too much.[121] According to the *American Trucking* court, EPA failed to limit the possible results of its determinations, and, although the Agency recognized that the question is

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116. *See id.* (reasoning that, because CASAC gave no specific reasons for its recommendations, appeal to its authority "adds no enlightenment").

117. *See id.* at 1036. In his dissent, Judge Tatel afforded great weight to the opinions and recommendations of CASAC. *See id.* at 1059 (Tatel, J., dissenting). He argued that, by "bringing their scientific methods to their evaluation of [EPA's documentation] CASAC provide[d] an objective justification for the pollution standards the Agency select[ed]." *Id.* at 1059 (Tatel, J., dissenting). In addition, Judge Tatel noted that other federal agencies working in technical fields rely heavily on the recommendations, policy advice, and critical review that scientific advisory committees provide when making rules. *Id.* at 1059 (Tatel, J., dissenting).

118. *Id.* (quoting Ozone Final Rule, 62 Fed. Reg. 38,868/3 (1997)).

119. *See id.* The D.C. Circuit interpreted the dissent's argument regarding this point to mean that, "given the national character of the NAAQS, it is inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively *extracting* chemicals from nature." *Id.* Though it alludes to the possibility that such a reading of the Clean Air Act might be appropriate, the *American Trucking* court notes that EPA has not explicitly adopted it. *See id.*

120. *See id.* (rejecting dissent's argument as incomplete).

121. *See American Trucking*, 175 F.3d at 1036 (stating that no principle is articulated by EPA to clarify how much uncertainty is too much). The *American Trucking* court goes on to explain that EPA is applying the stated factors and concluding that higher pollutant concentrations are resulting in larger harms to public health. *See id.* Furthermore, EPA relies on the theory that it is "possible, but not certain" that health effects exist at that level as the principle guiding the increments in stringency. *See id.* The D.C. Circuit responds to this with the reasoning that such a principle may justify a standard of zero for any nonthreshold pollutant. *See id.*

one of degree, it failed to identify an intelligible principle indicating a stopping point.[122]

The D.C. Circuit then compared the breadth of EPA's interpreted authority with that asserted by OSHA in *Lockout/Tagout I*.[123] Here the *American Trucking* court stated that EPA's interpretation of its power to regulate is comparable to the broad authority OSHA claimed it had in *Lockout/Tagout I*, where the case was remanded to the agency to identify an intelligible principle.[124] The *American Trucking* court reasoned that, like *Lockout/Tagout I*, the present situation lacks special conditions requiring a relaxed application of the nondelegation doctrine.[125] Since the standards would affect the whole economy, they demanded a "more precise" delegation than would otherwise be necessary.[126]

In its defense, EPA cited a number of examples where the judiciary had upheld EPA's use of discretion to make a "policy judgment" when there is uncertainty about the health effects of concentrations of a pollutant within a particular range.[127] Among

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122. *See id.* at 1036-37. The nondelegation doctrine requires the agency to identify an intelligible principle. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also* Herz, 6 ADMIN. J.L. AM. U. at 201 (stating "[N]ot only does Congress hand over legislative authority to an agency guided only by the vaguest 'intelligible principle,' but the agency itself determines what that principle is"). Thus, the failure to do so is a violation of the nondelegation doctrine and, thereby, an unconstitutional delegation of legislative authority. *See American Trucking* 175 F.3d at 1034.

123. *See American Trucking*, 175 F.3d at 1037 (citing *Int'l Union, UAW v. OSHA* ("Lockout/Tagout I"), 938 F.2d 1310, 1317 (D.C. Cir. 1991)) (asserting that EPA's interpretation of its authority appears even broader than that claimed by OSHA in Lockout/Tagout I).

124. *See id.* "In that case, OSHA thought itself free either to 'do nothing at all' or to 'require precautions that take the industry to the brink of ruin,' with 'all positions . . . evidently equally valid.'" *Id.* (quoting *Lockout/Tagout I*, 938 F.2d at 1317). The *American Trucking* court likened EPA's consideration of its authority to that which OSHA assumed it had. *See American Trucking*, 175 F.3d at 1037. It states that, "[h]ere, EPA's freedom of movement between the poles is equally unconstrained, but the poles are even farther apart—the maximum stringency would send industry not just to the brink of ruin but hurtling over it, while the minimum stringency may be close to doing nothing at all." *Id.*

125. *See id.* Such "special conditions" would be the war powers of the President or the sovereign attributes of the delegatee. *See id.*

126. *See id.* (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935)) (noting that there is no "inherent characteristic" in promulgation of NAAQS under CAA which renders EPA unable to develop more determinate basis for decision).

127. *See American Trucking*, 175 F.3d at 1037 (citing *NRDC v. EPA*, 902 F.2d 962, 969 (D.C. Cir. 1990)); *Am. Petroleum v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Indus. Assoc., Inc. v. EPA*, 647 F.2d 1130, 1176 (D.C. Cir. 1980)) (indicating that, as agency specifically trained to address environmental concerns, EPA is well suited to make reasonable policy decisions within its realm of expertise).

those cited were the decisions of *NRDC v. EPA*,[128] *American Petroleum Inst. v. Costle*,[129] and *Lead Industries Association, Inc. v. EPA*.[130] Although the D.C. Circuit did not contest the decisions in those cases cited by EPA, it sought to distinguish them from *American Trucking* by noting that, unlike *American Trucking*, they did not involve claims of undue delegation.[131] For this reason, the courts in *NRDC*, *American Petroleum* and *Lead Industries* did not require the agency to identify an intelligible principle.[132]

The *American Trucking* court also dismissed EPA's argument that a nondelegation challenge similar to this one was rejected in *South Terminal Corp. v. EPA*.[133] *South Terminal* was distinguished from the present controversy because it involved the adoption of a plan to prevent violations of existing NAAQS, rather than the promulgation of NAAQS themselves.[134]

After concluding that the revisions to the NAAQS set by EPA were determined by means beyond the scope of EPA's authority, the D.C. Circuit decided to remand the case to give the Agency an opportunity to identify an intelligible principle.[135] The *American*

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128. 902 F.2d 962, 969 (D.C. Cir. 1990).

129. 665 F.2d 1176, 1185 (D.C. Cir. 1981).

130. 647 F.2d 1130, 1176 (D.C. Cir. 1980).

131. *See American Trucking*, 175 F.3d at 1037 (explaining that, where no claim of undue delegation is made, no request by court for Agency to articulate "intelligible principle" in making "policy judgment" is necessary).

132. *See id.* (emphasizing that agency authority to make "policy judgment" is not "a self-sufficient justification for every refusal to define limits").

133. *See id.* (distinguishing issue in *American Trucking* from that disputed in *South Terminal*); *see also South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974) (upholding EPA regional air quality control plan against challenge by various entities and individuals because such plan was authorized by Congress through CAA and represented reasonable delegation of legislative power). For further discussion of *South Terminal*, see *supra* notes 50-54 and accompanying text.

134. *See American Trucking*, 175 F.3d at 1037 (stating that the " 'means' were the plan's provisions . . . and the 'fairly precise[ly] defin[ed]' goals were the NAAQS themselves").

135. *See id.* at 1038 (citing *Int'l Union, UAW v. OSHA*, 938 F.2d 1310, 1313 (D.C. Cir. 1991)). The D.C. Circuit articulates possible "intelligible principles" that EPA might adopt. *See id.* at 1038-39. Each of these suggestions, however, is immediately followed by an explanation of why it would not be an appropriate "intelligible principle" in this context. *See id.* The discussion begins by rejecting the possibility of a cost-benefit analysis, as section 109(b)(1) of the CAA has been interpreted to allow EPA to consider only factors concerning "health effects relating to pollutants in the air." *See id.* at 1038 (*citing Natural Resources Defense Council v. United States Environmental Protection Agency*, 902 F.2d 962, 973 (D.C. Cir. 1990)). The D.C. Circuit went on to explain that, if EPA were to make its criterion the "eradication of any hint of direct health risk," it would require permissible levels of both ozone and PM to be set at zero, which is a solution neither side advocates. *See American Trucking*, 175 F.3d at 1037. Furthermore, the *American Trucking* court regarded a "one-size-fits-all" criterion as inappropriate considering that "the possible

Trucking court explained that this approach served at least two of the three basic rationales of the nondelegation doctrine.[136] First, if the agency sets determinate, binding standards for itself, it is less likely to arbitrarily exercise the authority delegated to it.[137] Second, such standards would increase the likelihood that meaningful judicial review will prove feasible.[138] Furthermore, the ultimate benefit, articulated by the *American Trucking* court, from the decision to remand is that the courts will not hold unconstitutional a statute that an agency is well equipped to salvage.[139]

V. CRITICAL ANALYSIS

The decision in *American Trucking* has caused explosive controversy among environmental groups, private industry and the federal government.[140] In the environmental camp, *American Trucking* is

effects of pollutants vary from death to trivialities." *Id.* at 1039. After exhausting its own ideas for a potential "intelligible principle," the D.C. Circuit concluded that EPA was adequately suited to make this determination based on the relevant factors. *See. id.* The rationale employed by the court is that "[a]n agency wielding the power over American life possessed by EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability." *Id.*

136. *See American Trucking*, 175 F.3d at 1037. Remanding the case does not serve the third purpose of the nondelegation doctrine, to "ensure[ ] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Id.* (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980)).

137. *See American Trucking*, 175 F.3d at 1037 (citing *Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737, 758-59 (D.D.C. 1971)) (emphasizing argument that a pre-determined field of possible outcomes reduces possibility that agency will exceed authority specifically delegated to it by Congress).

138. *See American Trucking*, 175 F.3d at 1037 (citing *Amalgamated Meat Cutters*, 337 F.Supp. at 759) (omitting further elaboration of this rationale).

139. *See American Trucking*, 175 F.3d at 1038 (stating that EPA ought to be able to use its "special expertise" to save CAA from invalidation resulting from violation of nondelegation doctrine).

140. *See D.C. Circuit Remands EPA Air Regulation in Widely Noted Decision Relying on the Nondelegation Doctrine*, 24 ADMIN. & REG. L. NEWS 6, 6 (1999) (stating that a court of appeals decision on a matter of administrative law merits rarely gets editorial coverage in the New York Times, but *American Trucking* accomplished that distinction); *see also Spotlight Story - Clean Air: Court Strikes Down 1997 EPA Regulations*, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999) <http://www.cloakroom.com/pubs/greenwire/> (quoting Matthew L. Wald, N.Y.TIMES, May 15)(remarking that "The EPA's got to justify its numbers; it can't pull them out of thin air"); *Court Halts New Smog and Soot Standards*, 4 ENV'T, ENERGY & TRANSP. PROGRAM: CLEAN AIR NEWSL. (Nat'l Conf. St. Legislature, Wash. D.C.), July 1999, at 3 (noting that environmental groups were "enraged by the decision"). The Sierra Club called the ruling "chemical warfare on the lungs of our children." 24 ADMIN. & REG. L. NEWS at 6. Other environmental groups point out that "the American public strongly supported the standards . . ., and will continue to fight for protection of public health from smog and soot pollution." *Id.*

deemed a "contradiction of federal law going back to the 1930s."[141] On the other side, private industry hails the decision, which pulls the reigns on "regulatory excess," claiming that it was long overdue.[142] Because the *American Trucking* decision appears to defy the well documented practice of judicial deference, the underlying rational invites a barrage of scrutiny.[143]

The *American Trucking* court's decision that the EPA promulgations under review failed the second prong of the *Chevron* test is

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On the other side, industry groups, such as the American Trucking Association (which brought the lawsuit) and coal-fired electric utility groups (which were the biggest targets under the ozone standard . . .) reveled in this victory. *Id. See also NAM Applauds Ruling by Federal Appeals Court Exposing EPA's Overreaching Authority*, MANUFACTURING CENTRAL (Nat'l Ass'n Manufacturers, Wash. D.C.), at 1. Jan Amundson, general counsel for the National Association of Manufacturers stated:

> The NAM is relieved that a federal court, acting impartially and nonpolitically, has stopped the EPA from assuming arbitrary authority. Manufacturers have long complained about the EPA setting standards that are unrealistically strict and that are not reasonably related to a clear health benefit . . . .
>
> We are delighted that the court has ruled that this EPA rule is fundamentally flawed.

24 ADMIN. & REG. L. NEWS

The controversy has also permeated the federal government, as the *American Trucking* decision currently impedes one of President Clinton's "signature environmental achievements." Spotlight Story, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999). Furthermore, the revisions of NAAQS, which were the subject of this controversy, "drew a level of bipartisan opposition [in Congress,] unprecedented for clean air rules." Ben Lieberman, *Clearing the Air on Regulatory Excess* (May 19,1999) <http://www.junkscience.com/may99/libermn.htm>.

141. Spotlight Story, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999) at 1 (describing *American Trucking* as an "extremely bizarre decision"). Since the *Panama Refining* and *Schechter Poultry* decisions in 1935, not one statute has been invalidated on the basis of the nondelegation doctrine. *See* Jerry L. Mashaw et al., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 56, 60 (4th ed. 1998). Instead, the judiciary has consistently deferred to agency interpretations of statutes. *See id.* at 61. For this reason, critics of the *American Trucking* decision argue that the D.C. Circuit's refusal to defer to EPA's interpretation of the CAA is out of character, given the overwhelming trend to the contrary. *See* Spotlight Story, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999) at 1.

142. *See Id.* (quoting Competitive Enterprise Institute release, May 14, 1990 (stating that regulatory agencies get away with regulatory excess and outrageous interpretations of their authority too often, and EPA is guilty of that here).

143. *See* 4 ENV'T, ENERGY & TRANSP. PROGRAM: CLEAN AIR NEWSL. at 1. The *American Trucking* court seems to be second-guessing years of judicial deference to agency determinations: "According to EPA, Congress has relied on delegation of authority to federal agencies for the purpose of establishing and enforcing public health and safety standards, and the Supreme Court and Court of Appeals have sustained such delegation in court cases dating back 64 years to 1935." *Id.* Furthermore, Judge Tatel argues in his dissent to the *American Trucking* decision that "the court ignores the last half-century of Supreme Court nondelegation jurisprudence . . . ." *American Trucking* 175 F.3d at 1057 (Tatel, J., dissenting).

questionable.[144] First, although the rationale of the D.C. Circuit in distinguishing the *South Terminal* case appears to be cogent, the reliance by the *American Trucking* court on the precedent of the *Lockout/Tagout* decision results in an erroneous application of the intelligible principle concept.[145] Furthermore, in determining whether the intelligible principle articulated by EPA was reasonable under the *Chevron* test, the D.C. Circuit ignores overwhelming case law, dictating judicial deference.[146]

A. The *American Trucking* Court Properly Distinguished *South Terminal*

In Judge Tatel's dissent, he drew an analogy between *American Trucking* and the First Circuit case of *South Terminal v. EPA*[147] because both cases involve nondelegation claims against EPA action under the CAA.[148] The *South Terminal* court rejected the nondelegation challenge, stating that the power granted to EPA is not "unconfined and vagrant."[149] Tatel further tried to validate EPA's actions by relying on the *South Terminal* reasoning, stating that, "[t]he rationality of the means can be tested against goals capable of fairly precise definition in the language of science."[150]

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144. *See American Trucking*, 175 F.3d at 1037 (stating that EPA's failure to define an intelligible principle necessarily means that its interpretation of its authority under the Act was unreasonable). For a further discussion of the *Chevron* test, see *supra* notes 35-45 and accompanying text.

145. *See American Trucking*, 175 F.3d at 1037 (basing much of rationale in *American Trucking* on *Lockout/Tagout* and distinguishing *South Terminal* from *American Trucking*).

146. *See American Trucking*, 175 F.3d at 1033-40 (failing to mention *Chevron* in analysis of EPA's interpretation of CAA, thereby indicating lack of deference accorded to second-prong of *Chevron* test).

147. 504 F.2d 646 (1st Cir. 1974).

148. *See American Trucking*, 175 F.3d at 1058 (Tatel, J., dissenting) (quoting *Schecter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring)) (stating that "[g]iven [the] Supreme Court precedent sustaining general congressional delegation, no wonder the First Circuit rejected a similar nondelegation challenge to the Clean Air Act's 'requisite to protect the public health' language"). For a further discussion of *South Terminal*, see *supra* notes 50-54 and accompanying text.

149. *See American Trucking*, 175 F.2d at 1058 (quoting *Schecter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring)). The *South Terminal* court concluded that, because the "Agency must have flexibility to implement the congressional mandate," the First Circuit had "little difficulty concluding that the delegation was not excessive." *See South Terminal*, 504 F.2d at 677.

150. *American Trucking*, 175 F.3d at 1058 (Tatel, J. dissenting) (quoting *Schecter Poultry*, 295 U.S. at 551 (Cardozo J., concurring)) (stating that "[t]he Clean Air Act outlines the approach to be followed by the Agency and describes in detail many of its powers . . . . [Y]et there are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers").

In response to this argument, the *American Trucking* majority noted that, in *South Terminal*, the challenge was against an EPA plan for halting violations of NAAQS already in place.[151] Comparatively, in *American Trucking* the challenge was to the promulgation of the NAAQS themselves.[152] In *South Terminal*, the "means" were the plan's provisions, and the "fairly precisely defin[ed] goals" were the NAAQS which were already in place.[153] In *American Trucking*, the "means" were the criteria and analysis relied on by EPA, and the "fairly precisely defin[ed] goals" were the revisions of the NAAQS to more stringent standards.[154] As the *American Trucking* majority correctly concluded, the rationale in *South Terminal*, which Judge Tatel deems convincing, is entirely inapposite.[155]

B. The Reliance by the *American Trucking* Court on *Lockout/Tagout* Results in an Erroneous Application of the Intelligible Principle Requirement

Although the majority in *American Trucking* was able to distinguish the most compelling case law offered by Judge Tatel in his dissent, the reliance by the majority on the *Lockout/Tagout* cases provided an equally unstable foundation.[156] Although the issues under review in *Lockout/Tagout* and *American Trucking* are concededly quite similar, the *American Trucking* court incorrectly applies the intelligible principle requirement, based on the rationale of the

151. See *American Trucking*, 175 F.3d at 1037. In *South Terminal*, the challenge was against the Secretary's determination that the magnitude of reductions chosen were necessary if the region's air was to comply with the national standard by the compliance date set by Congress. *See South Terminal*, 504 F.2d at 654.

152. *See American Trucking*, 175 F.3d at 1037 (distinguishing *South Terminal* from *American Trucking* based on the nature of the Administrator's action).

153. *See Id.* at 1037 (alterations in original). The only reason the Administrator was taking this action regarding the Massachusetts SIP was because Massachusetts failed to submit a timely transportation control plan. *See South Terminal*, 504 F.2d at 654. Had the State performed its duty, there would be no need for a challenge to the Agency. *See id.*

154. *See American Trucking*, 175 F.3d at 1037. In contrast to *South Terminal*, the duty of EPA in *American Trucking* was assigned by § 109 of the CAA, rather than assumed by it through a default provision in the CAA. *See* CAA, § 109 (b), 42 U.S.C. § 7409(b). In particular, § 109 of the CAA specifically assigns the Administrator the task of determining NAAQS. *See id.* Under § 110 of the CAA, however, the Administrator assumes the responsibility of implementing a SIP for a state only in the event of that state's failure to implement the SIP itself. *See* CAA, § 110, 42 U.S.C. § 7401.

155. *See American Trucking* 175 F.3d at 1037 (rejecting, as distinguishable, dissent's argument that *American Trucking* should follow analysis of *South Terminal*).

156. *See id.* at 1057 (Tatel, J., dissenting) (stating that, although in *Lockout/Tagout*, issue was remanded for agency to sufficiently articulate intelligible principle, this decision does not imply that intelligible principle in *American Trucking* is likewise insufficient).

Lockout/Tagout court.[157] In particular, the *American Trucking* court read *Lockout/Tagout I* and *Lockout/Tagout II* to require that the intelligible principle establish a range within which the ultimate standards must fall.[158] This reading fails to recognize that the agency determination was approved in *Lockout/Tagout II* only after the agency identified specific provisions in the statute as the intelligible principle.[159] The manner in which the standards were promulgated, rather than the scope of possible outcomes, determined the adequacy of the intelligible principle.[160]

In comparing *Lockout/Tagout II* with *American Trucking*, Judge Tatel concluded in his dissent that EPA's discretion was limited in revising the NAAQS, by its actions taken pursuant to the language in the CAA.[161] Judge Tatel pointed out that in *Lockout/Tagout I* and *Lockout/Tagout II*, the section of the Occupational Safety and Health Act, for which OSHA was directed to articulate an intelligible principle, required that OSHA enact workplace safety standards "reasonably necessary or appropriate" to provide safe or healthful employment places.[162] Comparably, the CAA directs EPA to fashion standards that are "requisite" to protect public health.[163] Judge

157. *See id.* at 1037 (implying from *Lockout/Tagout II* decision that EPA must establish a maximum and minimum point, within which it can set standards). For further discussion of the *Lockout/Tagout I* and *Lockout/Tagout II* decisions, see *supra* notes 88-100 and accompanying text.

158. *See American Trucking*, 175 F.3d 1037 (citing *Lockout/Tagout II*, 37 F.3d 665) (contrasting EPA's failure to confine its field of possible outcomes before it began to make determinations with OSHA's ability to articulate language in Occupational Safety and Health Act which limited Agency's field of ultimate determinations).

159. *See Lockout/Tagout II*, 37 F.3d at 669 (noting that, in *Lockout/Tagout II* court approved of OSHA's standards only after OSHA listed various sections of Occupational Safety and Health Act, from which it reasonably concluded that "overriding purpose" of Statute was "to provide a high degree of worker protection"). For a further discussion of *Lockout/Tagout I* and *Lockout/Tagout II*, see *supra* notes 88-100 and accompanying text.

160. *See id.* (concluding that Occupational Safety and Health Act, as interpreted by OSHA, guided Agency's safety standards enough to satisfy demands of nondelegation doctrine).

161. *See American Trucking*, 175 F.3d at 1058-59 (Tatel, J., dissenting) (stating that "[t]he principles constraining EPA discretion are at least as specific as those [the D.C. Circuit] sustained in *Lockout/Tagout II*").

162. *See id.* at 1058 (quoting Occupational Safety and Health Act of 1970, § 3(8), 29 U.S.C. § 652(8)) (comparing this language to that in § 109 of CAA).

163. *See American Trucking*, 175 F.3d at 1058 (quoting CAA, § 109, 42 U.S.C. § 7409 (noting that, unlike the Secretary of OSHA in *Lockout/Tagout*, Administrator of EPA does not have freedom to do whatever is "reasonably necessary and appropriate" to protect public health).

Tatel intimated that the latter standard leaves a more limited discretion to the EPA.[164]

In response to this argument, the *American Trucking* majority stated that after remand, OSHA "allowed itself to set standards falling somewhere between maximum feasible stringency and some 'moderate' [sic] departure from this level."[165] Based on this language, the *American Trucking* majority translated the *Lockout/Tagout II* court's opinion to mean that it approved of the intelligible principle articulated by OSHA because it limited the range, within which possible standards might fall.[166] The *American Trucking* majority went on to reason that "EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog."[167] Accordingly, the D.C. Circuit concluded that EPA had articulated no intelligible principle to "channel its application" of the relevant factors.[168]

According to *Webster's New World Dictionary*, a "channel" is "[a] course through which something moves or is transmitted, conveyed, expressed, etc."[169] By its own definition, the *American Trucking* court should have judged the intelligible principle articulated by EPA according to the elements which facilitated the determination of the NAAQS, not by the possible end results.[170] If EPA's interpretation of the CAA identifies a reasonable "channel" for the NAAQS it chose, then it passes the second prong of the *Chevron* test, regardless of what the end result might have been.[171]

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164. *See id.* (stating that, unlike more relaxed language of the Occupational Safety and Health Act, under the CAA, "EPA must set pollution standards at levels *necessary* to protect the public health, whether 'reasonable' or not, whether 'appropriate' or not").

165. *Id.* at 1037 (citing *Lockout/Tagout II*, 37 F.3d at 669).

166. *See American Trucking*, 175 F.3d at 1037 (expressing *American Trucking* court's hope that on remand, like *Lockout/Tagout II*, EPA will be able to define a range within which it requires itself to set revised standards).

167. *Id.* at 1037.

168. *See id.* at 1034.

169. WEBSTER'S NEW WORLD DICTIONARY 234 (3d College ed. 1988).

170. *See generally American Trucking*, 175 F.3d at 1059-61 (Tatel, J., dissenting) (discussing elements leading to EPA's ultimate determination).

171. *See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984) (setting forth test, requiring inquiry of whether Congress has spoken to issue directly, and if not, whether agency's interpretation is based on permissible construction of statute).

C. In Its Application of the *Chevron* Test, the D.C. Circuit Ignored Overwhelming Case Law Dictating Judicial Deference

According to the *American Trucking* court, the CAA, on its face, provided no guidance regarding EPA's authority in promulgating NAAQS.[172] Since the first prong of the *Chevron* test could not be satisfied, the proper analysis was whether EPA's interpretation of its authority to promulgate NAAQS was a reasonable interpretation of the statute.[173]

EPA offered a number of factors, which cabined its discretion in determining a standard.[174] First, the *American Trucking* court expressly stated that the factors used by EPA in its determination present no source of contention.[175] Second, EPA's decision to reduce the NAAQS to 0.08 ppm was based on the determination that, although the health effects below 0.08 were adverse, they were "transient and reversible."[176] Third, EPA explained that it selected the 0.08 standard, rather than lowering it even further to 0.07, because its data revealed that peak background levels sometimes occurred at 0.07 and not at 0.08.[177] Finally, EPA explained that it relied on

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172. *See American Trucking*, 175 F.3d at 1034 (stating that no "intelligible principle" is apparent from statute).

173. *See Chevron*, 467 U.S. at 844 (noting that Supreme Court has long recognized that it should give considerable weight to executive department's construction of statutes they are entrusted to administer, and principles of deference to administrative interpretations).

174. *See American Trucking*, 175 F.3d at 1059 (Tatel, J., dissenting). Judge Tatel stressed the legitimacy of EPA's decision-making process:

> Although this court's opinion might lead one to think that section 109's language permitted EPA to exercise unfettered discretion in choosing NAAQS, the record shows that EPA actually adhered to a disciplined decision making process constrained by the statute's directive to set standards "requisite to protect the public health" based on criteria reflecting the "latest scientific knowledge."

Id. For a discussion of the factors used by EPA in determining NAAQS, see *supra* note 104 and accompanying text.

175. *See id.* at 1035 (citing *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1161 (D.C.Cir. 1980)) (stating that these criteria have long ago been approved by judiciary and, therefore, do not speak to the issue of degree).

176. *See American Trucking*, 175 F.3d at 1059 (Tatel, J., dissenting) (quoting National Ambient Air Quality Standards for Ozone, 62 Fed.Reg. 38,856, 38,868/2 (1997)). Judge Tatel addressed the point, made by the *American Trucking* majority, that EPA's argument simply means that lower exposure levels are associated with lower risk to public health: "EPA did not find simply that public health risks decrease at lower levels. Instead, it found that public health effects *differ* below .08 ppm, i.e., that they are 'transient and reversible.' " *Id.*

177. *Id.* at 1059-60 (Tatel, J., dissenting)(citing U.S. Environmental Protection Agency, Responses To Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Ozone 94-96 (July 1997))(showing

the expert, objective recommendations of the CASAC. These devices, considered together, constitute EPA's justification for the NAAQS it chose.[178]

By concluding that EPA's determinations amounted to an unconstitutional delegation of legislative authority, the *American Trucking* decision threw a wrench into the wheels of the machine of judicial deference.[179] Judicial deference was the accepted *modus operandi* for fifty years, until the 1984 *Chevron* decision laid down a two-part test, giving the judiciary a framework by which to defer to agency judgment and expertise.[180] This practice did not evolve accidentally, for judges know well that, as capable and learned as they are in the field of law, agency administrators are equally well trained in their respective fields.[181] For example, many cases involving environmental subject matter are replete with technical jargon and complex scientific concepts, and it would be self-defeating to require a judge to act as if she were equipped to make educated determinations.[182]

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range of background concentrations to extend from .042 ppm to .075 ppm, but none greater than .075).

178. *See American Trucking*, 175 F.3d at 1059 (Tatel, J. dissenting). Section 108(a)(2) and § 109(b)(1) of the CAA collectively direct the EPA Administrator to set standards "requisite to protect public health" relying on criteria reflecting the "latest scientific knowledge." *See* CLEAN AIR ACT §§ 108 (a)(2), 109 (b)(1), 42 U.S.C. §§ 7408(a)(2), 7409(b)(1). Pursuant to these provisions, EPA relied on guidelines published by the American Thoracic Society. *See American Trucking*, 175 F.3d at 1059 (Tatel, J., dissenting). Furthermore, the ozone and PM standards chosen by EPA were based on recommendations by the CASAC. *See id.* Those representing CASAC in this case were: at least one member of the National Academy of Sciences, one physician, one person representing state air pollution control agencies, medical doctors, epidemiologists, toxicologists and environmental scientists from leading universities and research institutes throughout the country. *See id.* at 1059 (Tatel, J., dissenting). Not one member of CASAC recommended selecting a standard below .08 ppm. *See id.* (Tatel, J., dissenting).

179. *See Update on the Impact of American Trucking Associations vs. EPA* (visited Oct. 31, 1999) <http://www.emi.org/public_policy/clean_air_atavsepa.htm> (noting one view, denouncing D.C. Circuit decision and claiming that, "by diverging from precedents that typically uph[o]ld Congressional delegations of authority, the [*American Trucking*] court [is] engaging in the vary act of 'free-lancing' that it [is] accusing EPA of").

180. *See* Thomas, 32 TULSA L.J. at 295 (stating that *Chevron* fails to diverge in any material way from judicial balance that courts struck between scope of judicial review and the level of delegation permitted").

181. *See Natural Resources Defense Council, Inc. v. EPA*, 902 F.2d 962 (D.C. Cir. 1989)(quoting *State of N.Y. v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988)) (stating that "[i]t is simply not the court's role to 'second-guess the scientific judgments of the EPA").

182. *See Lead Industries Assoc., Inc. v. Environmental Protection Agency*, 647 F.2d 1130, 1145-46 (D.C. Cir. 1980). It is the obligation of the reviewing court to "understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions

Complicating this long-standing tradition in American jurisprudence, however, is the need to balance it with the constitutional bar against excessive delegation of legislative authority from the legislature to agencies.[183] The *American Trucking* decision upset this delicate balance in its refusal to defer to EPA's judgment.[184] Years of case law establish a resounding standard of judicial deference to EPA expertise.[185] Furthermore, the Supreme Court has upheld equally broad delegations of authority to other agencies when faced with claims of undue delegation of legislative authority.[186] Given

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addressed by the agency and those bypassed; the choices open to the agency and those made." *Id.* at 145 (quoting *Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1, 36 (D.C. Cir. 1976). The court goes on to note caution about limits of this exercise: "[w]e would be less than candid if we failed to acknowledge that we approach the task of examining some of the complex scientific issues presented in cases of this sort with some diffidence." *Id.* at 146 (citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973)).

183. *See* Andrew S. Bergman & Susan E. Ashbrook, *D.C. Circuit Remands Ozone and Particulate Matter Air Quality Standards: American Trucking Association v. U.S. Environmental Protection Agency*, 5 NAAG NAT'L ENVTL. ENFORCEMENT J. 3 (1999) (noting the "tension between the requirement that Congress guide the making of environmental public policy with definite standards and the need for EPA to have the flexibility to implement Congress' [sic] public policy choices, especially in such a highly technical field").

184. *See id.* at 4 (stating that court was not satisfied with EPA's heavy use of deference to the agency and court worried unchecked agency control would undermine court authority to review agency actions with any meaning).

185. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984) (setting forth two-part test for judiciary to utilize in determining whether judiciary should defer to agency interpretation); *see also NRDC v. EPA*, 902 F.2d at 971 (deferring to EPA determinations because, although evidence of conflicting data was present, EPA conclusions were reasonable); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981) (stating that "[b]ecause the Administrator acknowledged the uncertainty of his task and made a rational judgment, we cannot second-guess his conclusion); *Lead Industries Assoc., Inc. v. Environmental Protection Agency*, 647 F.2d 1130, 1147 (D.C. Cir. 1980) (acknowledging that EPA's construction of CAA has been accorded considerable deference by courts); Train v. Natural Resources Defense Counsel, Inc., 421 U.S. 60, 75 (1975) (stating that "[w]ithout going so far as to hold that the Agency's construction of the Act was the only one it permissably could have adopted, we conclude that it was at the very least sufficiently reasonable [sic] it should have been accepted by the reviewing courts"); *Ethyl Corporation v. Environmental Protection Agency*, 541 F.2d 1, 12 n.16 (D.C. Cir. 1976) (noting that, "even if [the court] did not agree fully with the Administrator's interpretation of the Act, [the court] would be obliged to accord it considerable deference").

186. *See American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, 1057 (D.C. Cir. 1999) (Tatel, J., dissenting) (citing *National Broadcast Co. v. U.S.*, 319 U.S. 190, 225-26 (1943) (sustaining FCC's authority to regulate broadcast licensing in the "public interest")); *see also U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (upholding FCC's general authority to issue regulations "as public convenience, interest, or necessity requires"); *Yakus v. United States*, 321 U.S. 414, 426-27 (upholding Price Administrator's authority to fix "fair and equitable" commodities prices); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (sustaining Federal Power Commission's authority to determine "just and

the substantial history of judicial deference to EPA determinations, coupled with the support of the Supreme Court regarding discretion to other agencies facing nondelegation claims, the *American Trucking* decision functions as a speed-bump along the highway of judicial deference.[187]

VI. IMPACT

If the defeat handed to EPA in *American Trucking* is not overturned, its colossal impact will resonate throughout the American government, private industry and public interest groups alike.[188] At the executive level, the "hardfought victory to promulgate new NAAQS standards for ozone and particulate matter was considered one of the most significant environmental victories for the Clinton administration and EPA Administrator Carol Browner."[189] For this reason, EPA has vehemently vowed to challenge the May, 1999 decision of the three-judge panel of the D.C. Circuit.[190]

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reasonable" rates); *Lichter v. United States*, 334 U.S. 742, 778-86 (1948) (sustaining War Department's authority to recover "excessive profits" earned on military contracts); *Touby v. United States*, 500 U.S. 160, 165 (1991) (upholding Attorney General's authority to regulate new drugs that pose an "imminent hazard to public safety"); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (upholding delegation to Secretary of Agriculture to approve interstate compacts upon a finding of "compelling public interest")).

187. *See* Stephen L. Kass & Jean M. McCarroll, *Environmental Law: Judicial Review of EPA Air Quality Standards*, N.Y.L.J., July 12, 1999, at 3 (arguing *American Trucking* opinion gives a very rigid view of administrative rulemaking that may paralyze effect an agency's actions generally and create major implications for legislative authority and judicial oversight).

188. *See Court Halts New Smog and Soot Standards*, 4 ENV'T, ENERGY & TRANSP. PROGRAM: CLEAN AIR NEWSL. (Nat'l Conf. St. Legislature, Wash. D.C.), July 1999, at 2 (stating that *American Trucking* decision represents significant setback for EPA); *see also Spotlight Story - Clean Air: Court Strikes Down 1997 EPA Regulations*, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999) <http://www.cloakroom.com/pubs/greenwire/> at 1 (noting industry's relief at what it believes to be halt to EPA's assumption of arbitrary authority, as well as disappointment among environmental groups regarding defeat).

189. 4 ENV'T, ENERGY & TRANSP. PROGRAM: CLEAN AIR NEWSL. at 2 (stating that, despite set back, " 'EPA stands by the need for health protections embodied by the clean air standards and the science behind them' ").

190. *See id.* On June 28, 1999, the Department of Justice, on behalf of EPA filed a petition for rehearing *en banc* with the D.C. Circuit Court of Appeals. *See id.* This request, however, was denied by the court, pursuant to a vote in which five of the eleven judges voted in favor of a rehearing, four voted against, and two did not vote. *See D.C. Circuit Again Rejects EPA's New Ozone and particulate Standards*, 5 VA. ENVTL. COMPLIANCE UPDATE 5, 5 (November 1999). A successful petition for rehearing requires a majority of the judges voting in favor. *See id.* Following the D.C. Circuit's denial of EPA's petition for a rehearing in front of the entire court, EPA administrator, Carol Browner, confirmed that EPA will undoubtedly file a petition for review with the U.S. Supreme Court. *See id.* Any ruling by the Supreme Court, however, would be months in the future. *See id.*

If the *American Trucking* decision is able to withstand further review, the effects will be immense.[191] First, and most obvious, is the consequential delay in EPA's efforts to regulate ambient air quality.[192] The delay may last a number of years, while the Agency regroups to come forth with the "intelligible principles," which guided it in determining the new standards.[193] Second, the process for state implementation plans to incorporate the new standards will remain ambiguous.[194] Although EPA is currently forbidden from enforcing the new standards, states are being told by EPA to continue planning to meet the new limits.[195] Third, the *American Trucking* decision has important implications "for environmental regulation generally - indeed, for all delegations of congressional authority to agencies."[196] For example, the D.C. Circuit appears to

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191. *See* Stephen L. Kass & Jean M. McCarroll, *Environmental Law: Judicial Review of EPA Air Quality Standards*, N.Y.L.J., July 12, 1999, at 1 (stating that it is clear that the "*American Trucking* decision and the majority's dicta are likely (unless reversed or modified) to complicate both legislative and administrative agency efforts to deal with complex environmental and other social problems for years to come.")

192. *See Update on the Impact of American Trucking Associations vs. EPA* (visited Oct. 31, 1999) <http://www.emi.org/public_policy/clean_air_atavsepa.htm> at 1 (articulating number of effects of *American Trucking* decision).

193. *See id.* (stating that in addition to direct impact on ambient air quality regulation, decision could also have rippling effect on certain clean air regulations not specifically addressed in litigation); *see also Spotlight Story - Clean Air: Court Strikes Down 1997 EPA Regulations*, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999) <http://www.cloakroom.com/pubs/greenwire/> (quoting Ann Kellan, CNN, May 17, 1999) (stating that "[i]t could take years before the political smoke clears on clean air laws"); Andrew S. Bergman & Susan E. Ashbrook, *D.C. Circuit Remands Ozone and Particulate Matter Air Quality Standards: American Trucking Association v. U.S. Environmental Protection Agency*, 5 NAAG NAT'L ENVTL. ENFORCEMENT J. 3, 3 (1999) (stating that *American Trucking* decision is critically important to future to ambient standards program, as EPA will have to justify future standards in light of the intelligible principle criteria).

194. *See* 4 ENV'T, ENERGY & TRANSP. PROGRAM: CLEAN AIR NEWSL. at 1 (discussing unfirm deadlines regarding various aspects of SIPS).

195. *See Spotlight Story - Clean Air: Court Strikes Down 1997 EPA Regulations*, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999) <http://www.cloakroom.com/pubs/greenwire/> (quoting Traci Watson, USA TODAY, May 17, 1999) (describing confusion regarding incorporation of new standards into SIPS); *see generally Court Halts New Smog and Soot Standards*, 4 ENV'T, ENERGY & TRANSP. PROGRAM: CLEAN AIR NEWSL. (Nat'l Conf. St. Legislature, Wash. D.C.), July 1999, at 3 (describing reaction among various states to *American Trucking* decision). Those states, which would have the most difficulty complying with the new NAAQS would most likely support the D.C. Circuit ruling. *See id.* at 1. In contrast, "[n]ortheastern states will likely oppose the court decision, because they believe more stringent national controls, including those on midwestern states, will reduce the amount of ozone precursers that migrate eastward, thus making it easier for them to attain NAAQS." *Id.*

196. Robert Meltz and James E. McCarthy, *The D.C Circuit Remands the Ozone and Particluate Matter Clean Air Standards*: American Trucking Associations v. EPA,

have made all agencies vulnerable to nondelegation challenges regarding technical and scientific rulemakings.[197]

Finally, an ultimate impact of the *American Trucking* decision is that Congress may be compelled to revisit the CAA.[198] The finding that, through the nondelegation doctrine, the Constitution has been violated "casts doubt on the authorizing statute itself, not just on an agency's application of the statute."[199] If EPA is unable to articulate an "intelligible principle," Congress may be required to revise the CAA and provide the Agency with adequate guidance in its interpretation.[200]

Although private industry appears to have won the battle in *American Trucking*, EPA's vocal and overt disapproval of the decision indicates that the war is not yet over.[201] Should the ruling of the

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CRS ISSUE BRIEF CONG., (Committee for the Nat'l Inst. for the Env't, Washington D.C.) June 10, 1999.

197. *See* Eliza A. Dolin and Kerry E. Rodgers, *D.C. Circuit Rules on Clean Air Act Amendments: Ozone, Particulate Matter NAAQS Remanded to EPA*, 1 ENVTL. COMPLIANCE & LITIG. STRATEGY 3 (June 1999) (contrasting *American Trucking* decision with preferred use of environmental litigation to resolve specific challenges to implementation of environmental statutes); *see also* Andrew S. Bergman & Susan E. Ashbrook, *D.C. Circuit Remands Ozone and Particulate Matter Air Quality Standards: American Trucking Association v. U.S. Environmental Protection Agency*, 5 NAAG NAT'L ENVTL. ENFORCEMENT J. 3 (1999) (arguing that "[t]his decision may have wide-ranging implications not just on how EPA promulgates the NAAQS, but on how administrative agencies generally make decisions"); *see also Nondelegation: The D.C. Circuit Resurrects Lazarus (Maybe)*, 20 No. 8 JUD./LEGIS. WATCH REP. 1, 2 (1999) (applauding *American Trucking* decision as properly constraining agency rulemaking). If the *American Trucking* decision successfully revives the nondelegation doctrine, "the effects [will] be enormous, across the regulatory spectrum[,] [as] EPA is not the only agency taking advantage of vague statutory language to expand its demands." *Id.* Furthermore, it is argued that the survival of the *American Trucking* decision will serve as a hindrance to the race among regulatory agencies for the successful usurpation of power over the private sector. *See id.*

198. *See Update on the Impact of American Trucking Associations vs. EPA* (visited Oct. 31, 1999) <http://www.emi.org/public_policy/clean_air_atavsepa.htm> at 1 (stating that, if the *American Trucking* opinion is upheld, and "EPA's authority to regulate PM and ozone conflicts with the Constitution's separation of powers, then Congress would have to act to set those levels").

199. *See* Randall Lutter and Christopher DeMuth, *Ozone and the Constitution at EPA*, AEI ON THE ISSUES (Am. Enter. Inst. For Pub. Pol'y Res.), July 1999, at 1 (stating that *American Trucking* decision could have "profound implications for regulatory programs affecting telecommunications, financial markets, and much else").

200. *See American Trucking*, 175 F.3d at 1040 (stating that "if EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice").

201. *See Spotlight Story - Clean Air: Court Strikes Down 1997 EPA Regulations*, NAT'L J. GREENWIRE: ENVTL NEWS DAILY, (May 17, 1999) <http://www.cloakroom.com/pubs/greenwire/> at 1 (quoting H. Josef Hebert, AP/Philadelphia Inquirer/others, May 15, 1999) (stating that EPA "will continue to do everything in [its]

D.C. Circuit survive further review, its impact on environmental protection and agency rulemaking will be profound. At the very least, the *American Trucking* decision serves as a challenge to the practice of judicial deference to agency determinations.

Amy Quandt

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power to ensure that the American people are adequately protected against . . . harmful air pollutants").