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Joined at the Hip: The Nondelegation Doctrine and the Principles of Deference-The Struggle for Power has the EPA Caught in the Middle

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I. INTRODUCTION

Since when did the nondelegation doctrine[1] apply to statutory interpretation? According to the United States Supreme Court, as well as the D.C. Circuit, the nondelegation doctrine, as the name implies,

1. One author describes the nondelegation doctrine this way:
The Congress may delegate both rulemaking and administrative functions to the executive branch or agencies it establishes.
Today the Supreme Court will allow Congress to share its legislative power with the executive branch by delegating aspects of that power to executive agencies. Such legislative delegations will be upheld unless Congress abdicates one of its powers to the executive agency or fails to give legislative definition of the scope of the agency's power.

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states that the legislature may not delegate authority vested in Congress by the Constitution.[2] In other words, only Congress can legislate. It has been held, however, that other branches of the government may assist Congress and even promulgate subordinate rules or regulations which implement or execute the law as written by Congress.[3]

On May 14, 1999,[4] however, the Court of Appeals for the D.C. Circuit applied a contorted version of the nondelegation doctrine. In *American Trucking Ass'ns v. EPA*, the D.C. Circuit struck down the EPA's revised National Ambient Air Quality Standards[5] (NAAQS) ruling that "the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS . . . effects an unconstitutional delegation of legislative power."[6] The court did not find that the Clean Air Act itself was unconstitutional. Instead, the court stated that the statutory language lent itself to an interpretation involving an unconstitutional delegation of power.[7]

In *American Trucking*, the court ruled that although the EPA's chosen construction of the Clean Air Act constituted an excessive delegation of legislative authority, a permissible construction was available.[8] Assuming arguendo this is true, even a permissible construction would not remedy an unconstitutional delegation because it is not merely a matter of interpretation. If a delegation of authority transcends the Constitution, Congress is the only body that may render the delegation valid by amending the Act to conform to constitutional requirements. To hold otherwise would be to allow the artful pleader to cleverly disguise his disagreement with a statutory interpretation as an argument against an excessive delegation, which has not in fact occurred. Moreover, the judiciary, in such a case, by forcing the admin-

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JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 156–57 (5th ed. 1995).

2. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971).

3. *See A.L.A. Schechter Poultry*, 295 U.S. at 530 (reasoning that the Constitution is flexible and allows Congress to utilize selected instrumentalities in making subordinate rules); *Pan. Ref. Co.*, 293 U.S. at 421 (stating that without the ability to elicit help from "selected instrumentalities," exertion of legislative power would in many instances be futile); *see also Amalgamated Meat Cutters*, 337 F. Supp. at 746 (reasoning that the delegation is permissible so long as Congress has provided an "intelligible principle" to guide the agency).

4. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir.) (per curiam), *reh'g denied per curiam on nondelegation issue,* 195 F.3d 4 (D.C. Cir. 1999).

5. National standards that are set by the EPA and which are designed to improve air quality and protect the public health and welfare. *See* Clean Air Act § 109, 42 U.S.C. § 7409 (1994). While the standards are nationally applicable, the states are responsible for their attainment and enforcement. *Id.* § 7401(a)(3).

6. *Am. Trucking Ass'ns*, 175 F.3d at 1033.

7. *Id.* at 1038.

8. *See id.*

istrative agency to "try again," is, in effect, legislating and imposing its own judgment for that of the agency.

Unfortunately, in *American Trucking* the Court did not address the constitutionality of the Clean Air Act itself by applying the test set out in *A.L.A. Schechter Poultry Corp. v. United States*[9] to determine if in fact an unconstitutional delegation was present.[10] Rather, the court remanded the NAAQS to the EPA to be revised in accordance with a permissible interpretation of the statute.[11] Put another way, the court did not agree with the NAAQS and remanded them so that the EPA could find a more agreeable solution. The court in *American Trucking* clearly misapplied the nondelegation doctrine, making clear that the case should have been decided on the principle of deference articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[12] It is the deference principle that applies to statutory interpretations made by administrative agencies, not the nondelegation doctrine.

Prior to the landmark decision in *Chevron*, the conflicting pronouncements of the lower federal courts created an ambiguity in the law and, essentially, a struggle for power between the judiciary and administrative agencies.[13] This conflict may be resolved and clarity achieved by acknowledging that the nondelegation doctrine should not be applied to statutory interpretation, regardless of how it has been used, or misused, by the judiciary since 1935.[14] The nondelegation doctrine applies only to the legislature and serves as a safeguard against abdication of its law-making responsibility.[15] Where a statute confers legislative power not violative of the Constitution and where it is the agency's interpretation of that statute that is called into doubt, the deference doctrine articulated in *Chevron* should apply.

The courts that have used, or misused as the case may be, the nondelegation doctrine to attack statutory interpretations made by administrative agencies have exercised what has been called "result-

9. 295 U.S. 495 (1935).

10. In that case, the Supreme Court stated that, in determining whether an unconstitutional delegation has occurred, the court must look to the statute to see if Congress has "established the standards of legal obligation, thus performing its essential legislative function." *Id.* at 530. In other words, has Congress laid down an intelligible principle, or framework, to which the EPA must conform?

11. *Am. Trucking Ass'ns*, 175 F.3d at 1033.

12. 467 U.S. 837 (1984).

13. *See* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 283–84 (1986). While the author of this Note recognizes that the nondelegation doctrine is not the sole basis for this discontent and that other doctrines have been frequently invoked by the courts to attack agency interpretations, she seeks here only to emphasize that the nondelegation doctrine is not a proper means for doing so.

14. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).

15. *See supra* note 1 and accompanying text.

oriented" jurisprudence.[16] In other words, they use whatever means necessary to achieve the desired result. In the process, the judiciary has attempted to impede the growth of administrative authority and, as a result, has bound the hands of Congress in areas where agency expertise is essential, in an attempt to regain control of its once exclusive territory of determining what the law is.[17] As final arbiters of the

16. Starr, *supra* note 13, at 293–94.

17. *See* United States v. Swank, 451 U.S. 571, 585–86 (1981) (White, J., dissenting) ("The Court today rejects the Internal Revenue Service's interpretation of §§ 611 and 613 and the applicable regulation because it has not 'suggested any rational basis for linking the right to a depletion deduction to the period of time that the taxpayer operates a mine.'"); Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam) (invoking nondelegation doctrine and remanding case for EPA to interpret § 109 in a manner consistent with the constitution); Int'l Union v. OSHA, 938 F.2d 1310, 1313 (D.C. Cir. 1991) (Lockout/Tagout I) (finding that, in light of nondelegation principles, the Secretary's interpretation was too broad); Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 728 (D.C. Cir. 1982) (vacating EPA regulations redefining the term "stationary source"), *rev'd sub nom.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); ASARCO, Inc. v. EPA, 578 F.2d 319, 325 (D.C. Cir. 1978) (rejecting the EPA's plantwide definition—the bubble concept—of "stationary source" under § 706(2)(C) of the Administrative Procedure Act); Hearst Publ'ns v. NLRB, 136 F.2d 608, 612 (9th Cir. 1943) (reasoning that, in the absence of a statutory definition, it "is exclusively a judicial function" to determine the meaning of a statute (citation omitted)), *rev'd*, 322 U.S. 111 (1944); *see also* Starr, *supra* note 13, at 294. *But see* Touby v. United States, 500 U.S. 160, 165 (1991) ("Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors."); Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[T]he separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches."); Lichter v. United States, 334 U.S. 742, 785 (1948) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."); Yakus v. United States, 321 U.S. 414, 425 (1944) ("[T]he doctrine of separation of powers [does not] deny to Congress power to direct that an administrative officer . . . have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command."); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 617–18 (1944) ("Congress has entrusted the administration of the Act to the [Federal Power] Commission, not to the courts. Apart from the requirements of judicial review it is not for us to advise the Commission how to discharge its functions."); Nat'l Broad. Co. v. United States, 319 U.S. 190, 224 (1943) ("We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." (quoting Bd. of Trade v. United States, 314 U.S. 534, 548 (1942))); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) ("Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution . . . ." (citations omitted)); Field v. Clark, 143 U.S. 649, 694 (1892) ("'There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.'" (quoting Commonwealth *ex rel.* McClain v. Locke, 72 Pa. 491, 499 (1873))); Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1478 (D.C. Cir. 1998) ("Under the arbitrary and capricious standard of review, 'an agency's predictive judgments about areas that are within the agency's field of discretion and expertise' are entitled to 'particularly deferential' review, as

Constitution,[18] the judiciary has essentially twisted the nondelegation doctrine into new form, in effect overriding Congress and promoting judicial legislation.

As will be shown, the facts of this case and application of the *Schechter* test support the conclusion that the Clean Air Act, insofar as promulgation of the NAAQS is concerned, does not contain an excessive delegation of legislative power to the EPA. The EPA is not free to act in any manner it chooses. The Administrator must answer to Congress,[19] the President,[20] and the people.[21] Moreover, according to section 307 of the Clean Air Act, in reviewing the EPA's construc-

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long as they are reasonable." (quoting Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 821 (D.C. Cir. 1983))); Int'l Union v. OSHA, 37 F.3d 665, 669 (D.C. Cir. 1994) (Lockout/Tagout II) (reasoning that, on remand, OSHA's interpretation of the Act "guides its choice of safety standards enough to satisfy the demands of the nondelegation doctrine"); LaRouche v. Fed. Election Comm'n, 28 F.3d 137, 141 (D.C. Cir. 1994) ("It is precisely when a statute 'does not expressly address' the issue at hand that the Supreme Court requires deference to an agency's filling of a statutory gap." (citing *Chevron U.S.A. Inc.*, 467 U.S. at 843)); Natural Res. Def. Council, Inc. v. EPA, 902 F.2d 962, 971 (D.C. Cir. 1990) ("It is simply not the court's role to 'second-guess the scientific judgments of the EPA.'" (quoting New York v. EPA, 852 F.2d 574, 580 (D.C. Cir. 1988))); Am. Petroleum Inst. v. Costle, 665 F.2d 1176, 1184 (D.C. Cir. 1981) ("The[ ] provisions of the [Clean Air] Act assign this court a restricted role in reviewing air quality standards. The Administrator's construction of the Act will be upheld if it is reasonable.") (citation omitted); Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1145 (D.C. Cir. 1980) ("[T]he reviewing court may not substitute its judgment for the agency's, and must affirm the agency's decision if a rational basis for it is presented.") (citations omitted); Envtl. Def. Fund v. EPA, 598 F.2d 62, 90 (D.C. Cir. 1978) ("Under the substantial evidence standard of review, EPA is not required to 'prove' its case in the reviewing court 'in some sense of weight of the evidence.' . . . It suffices that EPA's conclusions are supported by . . . 'relevant evidence as a reasonable mind might accept as adequate to support [them].'") (citations omitted); Ethyl Corp. v. EPA, 541 F.2d 1, 24 (D.C. Cir. 1976) ("Regulators such as the Administrator must be accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist." (citing Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971))); S. Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974) ("Administrative agencies are created by Congress because it is impossible for the Legislature to acquire sufficient information to manage each detail in the long process of extirpating the abuses identified by the legislation; the Agency must have flexibility to implement the congressional mandate."); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745 (D.D.C. 1971) ("[Administrative] officials may lawfully be given far greater authority than the power to recognize a triggering condition. . . .").

18. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

19. The Administrator derives her authority from Congress and may only act in accordance with Congress' legislative mandates. Where Congress has not enabled the Administrator to regulate, the Administrator is powerless to do so.

20. The Administrator is appointed by the President and may be removed by the President. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Dec. 2, 1970), *reprinted as amended in* 5 U.S.C. app. at 1551 (1994), *and in* 84 Stat. 2086 (1970); U.S. CONST. art. II, § 2, cl. 2; *see also* PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 89–90 (1989).

21. The Administrator, although not directly accountable, is indirectly accountable to the people through the President. A change in political control of the White House will inevitably lead to a change in the EPA Administrator.

tion of the Act, a reviewing court must apply the "arbitrary and capricious" standard of review as well as the rational basis test.[22] This did not occur in *American Trucking*.

Part II of this paper discusses the background of both the nondelegation doctrine and the judicial deference doctrine. With respect to the nondelegation doctrine, this section discusses the role of *A.L.A. Schechter Poultry Corp. v. United States* in determining whether or not an unlawful delegation has in fact occurred. Moreover, this section will discuss the purpose of the nondelegation doctrine. With respect to the deference doctrine, this section discusses the benefits of the deference doctrine, particularly in regards to administrative agency expertise and preservation of political accountability. Section II also discusses separation of powers in relation to both of these doctrines, specifically, the relationship between an administrative agency and the executive branch and that interrelation with the judiciary.

Part III sets forth a statement of the case for *American Trucking*, stating the relevant facts, procedural history, reasoning and dissent. Part IV analyzes how the nondelegation doctrine was applied in *American Trucking*, and how it should have been applied using the test set out in *A.L.A. Schechter Poultry Corp.* After establishing that no unlawful delegation was present, this section goes on to apply the *Chevron* test and identifies the need to defer to the EPA. Part V discusses the Supreme Court's holding on the nondelegation issue.

Lastly, Part VI concludes that the judiciary should remain true to the Constitution by refraining from applying the nondelegation doctrine to statutory interpretations. Additionally, due to the complexity of many of our modern statutes, namely the Clean Air Act, Congress necessarily must rely on an expert body to effectively carry out the will of the people. Moreover, showing deference to administrative agency interpretations does not grant the EPA, or any other administrative agency, power to make law as it sees fit. As long as Congress provides adequate restraint on agency action, and as long as the agency does not exceed its delegated authority, no constitutional infirmity can be found.

II. BACKGROUND

A. *The Nondelegation Doctrine*

Although the nondelegation doctrine dates back to 1892,[23] the first and last time it was applied by the Supreme Court to strike down leg-

22. Clean Air Act § 307(d), 42 U.S.C. § 7607(d) (1994); *Lead Indus. Ass'n*, 647 F.2d at 1145 (citing Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 290 (1974)).

23. *See* Field v. Clark, 143 U.S. 649 (1892).

islation was in 1935.[24] In *A.L.A. Schechter Poultry Corp. v. United States*,[25] the United States Supreme Court looked to see what limits were placed on delegated authority in the National Industrial Recovery Act and considered several factors to determine whether a delegation of power was in fact unconstitutional.[26] For instance, has Congress provided standards to guide the administrative agency's actions?[27] Does the act apply to a particular activity?[28] Does the act provide for review of agency decisions, such as notice and hearing?[29] Does the act require that all standards be based on findings of fact, which are supported by an evidentiary record?[30]

Where a court can answer these questions in the affirmative, no unconstitutional delegation exists.[31] Moreover, where an agency acts pursuant to legislative purpose and intent and proper procedural safeguards are present, the court should not second-guess its judgment.[32] Where a delegation satisfies the Constitution, it is only when an agency acts contrary to congressional will or where its actions are found to be arbitrary and capricious that a court may overrule its decisions.[33]

Today, most courts and commentators agree that "Congress can delegate to an agency only if the power is constrained by an intelligible principle that guides the decision maker."[34] The Supreme Court has upheld broad delegations guided by such standards as "public convenience, interest, or necessity,"[35] "fair and equitable" prices,[36] "just and reasonable" rates,[37] and "excessive" profits,[38] while the Court of Appeals for the District of Columbia Circuit has upheld equally broad

24. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935); *see also Nondelegation: The D.C. Circuit Resurrects Lazarus (Maybe)*, 20 No. 8 JUD./LEGIS. WATCH REP. 1 (1999), WL 20 No. 8 NLCPINEWS 1 [hereinafter *Nondelegation*].

25. 295 U.S. 495 (1935).

26. *See id.* at 539–40.

27. *See id.* at 540.

28. *See id.*

29. *Id.* at 539–40.

30. *Id.*

31. *See id.* at 539–41.

32. "[A]s long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence." Natural Res. Def. Council, Inc. v. EPA, 902 F.2d 962, 972 (D.C. Cir. 1990) (quoting Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986)).

33. *See* Clean Air Act § 307(d)(9), 42 U.S.C. § 7607(d)(9) (1994); Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1145 (D.C. Cir. 1980).

34. *Nondelegation*, *supra* note 24, at 1; J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

35. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

36. Yakus v. United States, 321 U.S. 414, 427 (1944).

37. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944).

38. Lichter v. United States, 334 U.S. 742, 778 (1948).

delegations such as "compelling public interest."[39] Therefore, as long as Congress legislates and provides the standards of legal obligation, i.e., what must be done or what the statute must accomplish, and merely requires the assistance of an expert body in the implementation of the statute, the nondelegation doctrine has not been violated.[40]

Today, Congress relies heavily on administrative agencies to promulgate subordinate rules or standards that have the binding force of law. Recognizing the expertise necessary to effectively carry out its mandate, Congress delegates that responsibility to administrative agencies that, through specialized knowledge and experience, are more able to identify and address the minute details that could inhibit effective enforcement of Congressional will.[41]

Undoubtedly, there will be some that abhor *any* delegation of legislative power. In fact, the Supreme Court has held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested. [The Court has, however,] repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly."[42] Moreover, the Court has recognized that:

> the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[43]

In fact, as long as Congress lays down an intelligible principle to which the person or body must conform, the action is not an unconstitutional delegation of legislative power.[44]

B. *Judicial Deference Doctrine*

In *Chevron*, the Supreme Court breathed new life into the judicial deference doctrine. Recognizing the need to provide Congress with the freedom to elicit specialized help from the executive branch, through administrative agencies, the Court sought to reign in lower federal courts whose goal seemed to be to restrict administrative

39. Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1475 (D.C. Cir. 1998).

40. *See* Touby v. United States, 500 U.S. 160, 165 (1991); Mistretta v. United States, 488 U.S. 361, 372–73 (1989); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).

41. *See Mistretta*, 488 U.S. at 372.

42. *A.L.A. Schechter Poultry*, 295 U.S. at 529–30. *Accord* Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

43. *A.L.A. Schechter Poultry*, 295 U.S. at 530 (citing *Pan. Ref. Co.*, 293 U.S. at 421).

44. *See Touby*, 500 U.S. at 165; *Mistretta*, 488 U.S. at 372; *Pan. Ref. Co.*, 293 U.S. at 429–30; J.W. Hampton, Jr., & Co., v. United States, 276 U.S. 394, 409 (1928).

agency authority.[45] While lower courts have found new ways to get around this doctrine, such as applying the nondelegation doctrine to statutory interpretations, *Chevron* remains good law.

Although "[a]n important function of the modern judiciary is to ensure that decisions by administrative agencies remain within statutory boundaries . . . federal courts sometimes defer to statutory interpretations made by the implementing agencies"[46] due to the agencies' extensive knowledge and experience in working with the particular statute. As recognized by one commentator, this deference should lend comfort to a judiciary that may be fraught with fear that their decisions involving complex technical data and scientific uncertainty are incorrect.[47] Other courts, however, detest the very fact that an administrative agency is allowed to carry out an essentially judicial function—saying what the law is through interpreting the complex statutes they are charged with administering.[48] Herein lies the problem. While the Constitution does not forbid delegations guided by congressional will, some courts remain overprotective of the territory once within their exclusive domain and deny proper consideration to agency interpretations.

To ease the tension between lower federal courts and administrative agencies, in *Chevron* the Supreme Court resolved the question of when deference was appropriate. In that case, the Court held that, when reviewing an agency's construction of a statute it is charged with administering, the Court must ask two questions.[49] First, "[W]hether Congress has directly spoken to the precise question at issue."[50] If Congress has spoken on the issue and its intent is clear, its intent is controlling.[51] If, however, Congress has not spoken on the precise question at issue, the court may not substitute its own construction for that of the agency.[52] Second, "[I]f 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 stat-

45. *See* Starr, *supra* note 13, at 294.

46. *Id.* at 283.

47. *See* Patricia G. Chapman, *Has the* Chevron *Doctrine Run Out of Gas? Senza Ripieni Use of* Chevron *Deference or the Rule of Lenity*, 19 MISS. C. L. REV. 115, 158 (1998). "[T]he CWA is a lengthy and complex statute . . . [which] often require[s] the evaluation of sophisticated data. . . . [I]n reviewing EPA's actions, . . . this court does not sit as a scientific body, meticulously reviewing all data under a laboratory microscope." *Id.* at n.284 (quoting Natural Res. Def. Council, Inc. v. EPA, 16 F.3d 1395, 1401 (4th Cir. 1993)).

48. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

49. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

50. *Id.*

51. *Id.* at 842–43.

52. *Id.* at 843.

ute."[53] Again, the legislative intent and the purpose of the statute are controlling.

Moreover, the *Chevron* Court recognized the necessity for administrative agencies that are charged with administering congressional programs to formulate policy and provide rules or regulations to fill in the gaps left by Congress.[54] Where Congress expressly delegates this gap-filling function to the agency, the agency's "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[55] Here, the relevant inquiry is whether the agency stayed within the framework laid out by Congress, giving its intent full effect.

A long line of Supreme Court cases admits that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[56] Moreover, the Court recognizes that the principle of deference has been consistently applied to administrative interpretations involving matters dependant upon extraordinary knowledge.[57] According to one commentator:

> *Chevron* not only reaffirmed the deference principle but buttressed it in several ways. 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

53. *Id.* The Court goes on to state that it "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at n.11.

54. *Id.* (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

55. *Id.* at 844.

56. *Id.* & n.14.

57. *See id.*; *see also* NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 346 (1953) ("In fashioning remedies . . . , the Board must draw on enlightenment gained from experience."); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945) ("One of the purposes which lead to the creation of such boards is to have decisions . . . made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." (citing NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 479 (1941); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944))); *Hearst Publ'ns, Inc.*, 322 U.S. at 131 (stating that since the Board is familiar with various employment relationships, its determination of the meaning of a "broad statutory term" will be upheld if it "has 'warrant in the record' and a reasonable basis in law"), *overruled by* Labor Management Relations Act, 1947, ch. 120, sec. 101, § 2, 61 Stat. 136, 137–40 (1947) (amending statutory definition of employee, overruling *Hearst* by explicitly excluding independent contractors and supervisory employees); Nat'l Broad. Co. v. United States, 319 U.S. 190, 224 (1943) (stating that the Court's "duty is at an end when [it] find[s] that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress"); SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) (stating that "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency").

under which courts are required to give controlling weight to agency interpretations.[58]

"Despite its strengthening of the deference principle, however, *Chevron* has not made judicial review a dead letter. On the contrary, as the Court's own post-*Chevron* decisions demonstrate, application of the *Chevron* framework—particularly its first step—continues to be a potent check on agency interpretations."[59] In effect, the purpose of *Chevron* was to narrow the scope of judicial review of agency interpretations of complex statutes and remind lower courts that their role is not one of supervision.[60] In fact, as one author suggests, *Chevron* actually redistributed powers among Congress, administrative agencies, and the courts.[61]

C. *Separation of Powers*

The framers of the Constitution created three separate branches—the legislative,[62] the executive,[63] and the judicial[64]—which together form our national government. Over the years, the lines separating these branches have blurred as increasingly complex times have called for increased governmental coordination.[65] One of the byproducts of this governmental coordination is the administrative state. The EPA, for example, is answerable to the Executive while it is responsible for implementing the laws written by Congress. In any event, policy, or politics if you will, plays an important role in agency decisions. Consequently, the EPA, its Administrator, and the President are politically accountable for decisions rendered by the agency.[66] This political accountability is an important facet of our democratic system of government.

Although statutory interpretation was formerly conducted exclusively by the judiciary, even when determinations of policy were involved, some saw the rise of the administrative state as a repudiation of judicial regulation.[67] Not only did the courts lack flexibility, expertise, and powers of coordination, but they also lacked democratic ac-

58. Starr, *supra* note 13, at 292.
59. *Id.* at 298.
60. *See id.* at 284.
61. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).
62. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1.
63. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.
64. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1.
65. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989).
66. *See supra* notes 20–21 and accompanying text.
67. *See* Sunstein, *supra* note 61, at 2079.

countability.[68] The new administrative state combined all of these, but most importantly, it preserved democratic accountability.

While *Marbury v. Madison*[69] was the premier case for determining the scope of judicial authority, *Chevron* is the premier case for determining the scope of administrative agency authority, and the limitations of judicial review in this regard.[70] Not only is *Chevron* a check on administrative agency authority, but it also serves as a check on judicial legislating. In *Chevron*, the Supreme Court sought to remove the unelected judiciary from decisions that were essentially political. "Judges 'are not part of either political branch,' and they 'have no constituency.' On the other hand, although agencies are 'not directly accountable to the people,' they are subject to the general oversight and supervision of the President, who is a nationally elected public official."[71]

Because federal judges lack democratic accountability, one commentator says that they "have a duty voluntarily to exercise 'judicial restraint,' that is, to avoid intrusions not clearly mandated by Congress or the Constitution into the processes and decisions of any other branch."[72] This is especially true where agency decisions result from policy judgments. Hence, "[u]nelected judges should leave the executive branch free to pursue, within appropriate bounds, what it perceives to be the will of the people. If Congress disagrees . . . , the proper response lies . . . in drafting clearer laws and amending vague ones."[73] In this regard, *Chevron* maintains the balance of power and prevents the scales from tipping in favor of either the courts or administrative agencies.

As Supreme Court Justice Jackson once wrote, "Some clauses [of the Constitution] could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times."[74] Moreover, in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson wrote:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches

68. *See id.*

69. 5 U.S. (1 Cranch) 137 (1803).

70. *See generally* Sunstein, *supra* note 61, at 2075.

71. Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1244 (1996) (citations omitted).

72. Starr, *supra* note 13, at 308.

73. *Id.* at 312.

74. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

> separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[75]

Therefore, recognizing that the decisions of administrative agencies are in large part a result of political push-and-pull and, as a result, may be temporary, the judiciary should not intervene unless the tools used by the judiciary will ensure that they do not impinge on the political processes. In fact, where an agency is carrying out its lawfully delegated functions and, in the process, must use its discretion in furtherance of national policy, the deference doctrine articulated in *Chevron* is an essential tool. *Chevron* will prevent an administrative agency from exceeding its delegated authority while ensuring that the judiciary does not usurp legislative power.

III. STATEMENT OF THE CASE

A. *Relevant Facts*

In July 1997, the EPA issued final rules revising the NAAQS for particulate matter and ozone.[76] Numerous petitions for review were filed for each rule.[77] "Certain 'Small Business Petitioners' [have] argue[d] in each case that EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power."[78] The court agreed.[79]

In setting the NAAQS for non-threshold pollutants, the EPA uses several criteria for assessing health effects. "They are [1] 'the nature and severity of the health effects involved, [2] the size of the sensitive population(s) at risk, [3] the types of health information available, and [4] the kind and degree of uncertainties that must be addressed.'"[80] Although the court found these criteria reasonable, they also found them to be incomplete.[81]

The court also reasoned that the level of uncertainty apparent in the EPA's reasoning allows the EPA to set the standard at zero or as high as the level "associated with London's 'Killer Fog' of 1952."[82] Due to this presumed lack of constraint, the court stated that the "EPA's formulation of its policy judgment leaves it free to pick any point be-

75. *Id.* at 635.

76. National Ambient Air Quality Standards for Particulate Matter, 40 C.F.R. § 50.7 (2000); National Ambient Air Quality Standards for Ozone, 40 C.F.R. §§ 50.9, 50.10 (2000).

77. Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999), *reh'g denied on nondelegation issue,* 195 F.3d 4 (D.C. Cir. 1999).

78. *Id.* at 1034.

79. *Id.*

80. *Id.* at 1034–35; *see also* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,883 (July 18, 1997) (codified at 40 C.F.R. pt. 50).

81. *Am. Trucking Ass'ns.*, 175 F.3d at 1034.

82. *Id.* at 1036.

tween zero and a hair below the concentrations yielding London's Killer Fog."[83]

Because the court found that the agency had failed to articulate an "intelligible principle" constraining its actions,[84] it held that the EPA's interpretation of the Clean Air Act amounted to an unconstitutional delegation of power.[85] In response, the court remanded the rules to the EPA so the agency could "develop a construction of the act that satisfies [the] constitutional requirement."[86]

B. *Procedural History*

Numerous petitions for review were filed with the Court of Appeals for the D.C. Circuit with respect to the revised NAAQS.[87] The court held that the NAAQS were promulgated pursuant to an unconstitutional delegation of legislative power and remanded the rules to the EPA for an interpretation consistent with the Constitution.

A Petition for Rehearing and a Petition for Rehearing En Banc was filed on June 28, 1999 by the United States Department of Justice on behalf of the EPA.[88] Although the EPA was granted a rehearing, which was filed on October 29, 1999,[89] the court declined to rule on the nondelegation issue.[90]

The United States Supreme Court, however, granted certiorari to hear the case.[91] Arguments were heard on November 7, 2000.[92] As this Note was being prepared for publication, the Supreme Court decided the case.[93] The case was affirmed in part and reversed in part.[94]

C. *Reasoning*

The court reasoned that the criteria used by the EPA to assess health effects when setting the NAAQS for non-threshold pollutants are so imprecise that they only "support the intuitive proposition that more pollution will not benefit public health, not that keeping pollu-

83. *Id.* at 1037.
84. *Id.* at 1034.
85. *Id.* at 1033–34.
86. *Id.* at 1033.
87. *Id.*
88. *See* Petition for Rehearing and Petition for Rehearing En Banc for the United States Environmental Protection Agency, Am. Trucking Ass'ns v. EPA), 195 F.3d 4 (D.C. Cir. 1999) (No. 97-1440), *at* http://www.epa.gov/ttn/oarpg/gen/concstat.pdf.
89. Am. Trucking Ass'ns v. EPA, 195 F.3d 4 (D.C. Cir. 1999).
90. *Id.* at 6.
91. Am. Trucking Ass'ns v. EPA 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted*, Browner v. Am. Trucking Ass'ns, 68 U.S.L.W. 3719 (U.S. May 23, 2000) (No. 99-1257), *and* Am. Trucking Ass'ns v. Browner, 68 U.S.L.W. 3735 (U.S. May 30, 2000) (No. 99-1426). Both cases were consolidated for oral argument. 68 U.S.L.W. at 3739.
92. Browner v. Am. Trucking Ass'ns, 69 U.S.L.W. 3351 (U.S. Nov. 28, 2000) (Nos. 99-1257 and 99-1426).
93. Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).
94. *Id.* at 919.

tion at or below any particular level is 'requisite' or not requisite to 'protect the public health' with an 'adequate margin of safety.'"[95] Furthermore, the court said that "[f]or EPA to pick any non-zero level it must explain the degree of imperfection permitted."[96] While the court found no inherent nondelegation problem with "[t]he factors that EPA has elected to examine for this purpose,"[97] the court reasoned that the "EPA lacks . . . any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much."[98]

By using these factors in its analysis, the court reasoned, the "EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm."[99] Furthermore, the court seemed to hint at the lack of support for the EPA's decisions.[100]

The court also stated that the question whether or not the EPA was acting pursuant to lawfully delegated authority was not grounded in science.[101] In essence, the court argued that whether or not the revised NAAQS were promulgated according to sound medical studies and scientific evidence on the effects of ozone and particulate matter on humans was irrelevant in the absence of a clearly articulated "intelligible principle" derived from the Clean Air Act itself.[102]

Moreover, according to the court, "[t]he principle EPA invokes for each increment in stringency . . . —that it is 'possible, but not certain' that health effects exist at that level, —could as easily, for any non-threshold pollutant, justify a standard of zero. The same indeterminacy prevails in EPA's decisions *not* to pick a still more stringent level."[103] While the court recognized that it is a question of degree, the court stated that the EPA "offers no intelligible principle by which to identify a stopping point."[104]

The court also distinguished the cases relied upon by the EPA that held the "EPA may use its discretion to make the 'policy judgment' to set the standards at one point within the relevant range rather than another."[105] The court dismissed the relevance of the cases because they did not involve a claim of unlawful delegation.[106]

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95. *Am. Trucking Ass'ns*, 175 F.3d at 1035.
96. *Id.* at 1034.
97. *Id.*
98. *Id.*
99. *Id.* at 1035.
100. *See id.* at 1035–36.
101. *Id.* at 1036.
102. *See id.*
103. *Id.* (emphasis in original) (citation omitted).
104. *Id.* at 1037.
105. *Id.*
106. *Id.* (discussing Natural Res. Def. Council, Inc. v. EPA, 902 F.2d 962, 969 (D.C. Cir. 1990); Am. Petroleum Inst. v. Costle, 665 F.2d 1176, 1185 (D.C. Cir. 1981), and Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1161 (D.C. Cir. 1980)).

While the court acknowledged that the EPA may only consider "health effects relating to pollutants in the air,"[107] it advised that "an 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."[108] In the alternative, the court stated that the EPA could look to Congress for ratification of its choice.[109]

D. *Dissent*

In his dissent, Judge Tatel admonished the majority for "ignor[ing] the last half-century of Supreme Court nondelegation jurisprudence."[110] The dissent also argued that section 109 does cabin the EPA's discretion, and reminded the majority that the D.C. Circuit has reviewed the Act at least ten times and has "delineat[ed] EPA authority in the NAAQS setting process."[111]

The dissent also pointed out sections of other acts containing even broader delegations that were sustained by the D.C. Circuit, as well as the Supreme Court.[112] As Judge Tatel points out:

> The Agency has been given a well defined task by Congress—to reduce pollution to levels "requisite to protect the public health", in the case of primary standards. The Clean Air Act outlines the approach to be followed by the Agency and describes in detail many of its powers . . . . Yet there are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers, not the least of which is that the rationality of the means can be tested against goals capable of fairly precise definition in the language of science.[113]

The dissent also pointed out that the EPA's discretion in setting standards "requisite to protect the public health" is not unlimited.[114] Judge Tatel stated that:

> [t]he Clean Air Act directs EPA to base standards on "air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities."[115]

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107. *Id.* at 1038.
108. *Id.* at 1039.
109. *Id.* at 1040.
110. *Id.* at 1057 (Tatel, J., dissenting).
111. *Id.*
112. *See id.*; *supra* notes 35–39 and accompanying text.
113. *Am. Trucking Ass'ns*, 175 F.3d at 1058 (Tatel, J., dissenting) (citing S. Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974)).
114. *Id.*
115. *Id.* at 1057.

Furthermore, added Judge Tatel, "the principles constraining EPA discretion are at least as specific as those this court sustained in *International Union, UAW v. OSHA*."[116]

Not only was the EPA constrained by the statute, but it also used the guidelines published by the American Thoracic Society to identify which health effects were "significant enough" to warrant protection.[117] Furthermore, the EPA "set the ozone and fine particle standards within ranges recommended by CASAC, the independent scientific advisory committee created pursuant to section 109 of the Act."[118] While the majority concluded that the EPA must explain any non-zero standard,[119] the dissent added that the "EPA must explain any departures from CASAC's recommendations. Bringing scientific methods to their evaluation of the Agency's Criteria Document and Staff Paper, CASAC provides an objective justification for the pollution standards the Agency selects."[120]

IV. ANALYSIS

A. *The Nondelegation Doctrine – As Applied*

In applying the nondelegation doctrine in *American Trucking*, the court failed to address any of the factors articulated in *Schechter*. Instead, the court only sought to prove that the EPA did not articulate an "intelligible principle" constraining its actions.[121] Specifically, the court opined that no intelligible principle guided the EPA's policy judgments in choosing among alternative standards.[122] Furthermore, it rejected the EPA's argument that the major principle guiding its promulgation of the NAAQS was the requirement that the standards be set at a level "requisite to protect the public health" with an "adequate margin of safety."[123] As recognized by the dissent, the court rejected this principle even though it "is narrower and more principled than delegations the Supreme Court and [the D.C. Circuit] have upheld since *Schechter Poultry*."[124] By not allowing the EPA to use its expertise to apply the scientific data in choosing among standards, the court eliminated the need for Congress to elicit help from the agency in the first place.

According to the court in *American Trucking*, there are three basic rationales under the nondelegation doctrine for applying the "intelli-

116. *Id.* at 1058–59; *see also* Int'l Union, UAW v. OSHA, 37 F.3d 665, 669 (D.C. Cir. 1994) ("Lockout/Tagout II").
117. *Am. Trucking Ass'ns*, 175 F.3d at 1059.
118. *Id.*
119. *See id.* at 1034.
120. *Id.* at 1059 (citations omitted).
121. *Id.* at 1034.
122. *See id.* at 1036–37.
123. *See id.* at 1034–35.
124. *Id.* at 1057.

gible principle" standard to an administrative agency.[125] First, "[i]f the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. [Second], such standards enhance the likelihood that meaningful judicial review will prove feasible."[126] Finally, according to the court, "the third key function of [the] non-delegation doctrine, [is] 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.'"[127]

The very essence of the nondelegation doctrine is that Congress may not abdicate its law-making responsibility to another branch of the government.[128] The Constitution does not require that every action taken by an agency be guided by an intelligible principle. All the Constitution requires is that Congress provide an intelligible principle, a framework, to guide the agency in implementing the act.[129] Therefore, for the nondelegation doctrine to be brought in issue, Congress must first delegate authority and that authority must be contrary to the Constitution. Where, as here, an administrative agency must promulgate rules pursuant to a complex statutory scheme, and the administrative agency must base its standards on complex scientific and technical data, the court should not endeavor to interpret the data to determine whether the agency is acting pursuant to constitutionally delegated authority. Instead, it should look first to the statute to determine whether a delegation is present. Second, if a delegation is present, it should determine whether the delegation is properly restrained.

B. *The Nondelegation Doctrine – A Systematic Approach*

In 1935, the Supreme Court established standards for reviewing congressional delegations to determine their constitutionality.[130] According to the Court, Congress must establish the standards of legal obligation for the agency to prevent the delegation from offending the Constitution.[131] To determine whether these legal obligations are present, the court should look at: (1) whether Congress prescribed stan-

125. *See id.* at 1038.

126. *Id.* (citation omitted).

127. *Id.* (quoting Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980)).

128. Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); *see* Touby v. United States, 500 U.S. 160, 165 (1991); Mistretta v. United States, 488 U.S. 361, 371–72 (1989); Yakus v. United States, 321 U.S. 414, 424–25 (1944); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 408 (1928); Field v. Clark, 143 U.S. 649, 692 (1892); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971).

129. *See J.W. Hampton, Jr., & Co.*, 276 U.S. at 409; *Nondelegation*, *supra* note 24, at 1.

130. *See A.L.A. Schechter Poultry*, 295 U.S. at 530–40.

131. *See id.* at 530.

dards for the agency's conduct;[132] (2) whether the administrative agency is required to act on notice and hearing, or some other form of review;[133] and (3) whether the agency's decisions are supported by findings of fact which are supported by evidence.[134] Moreover, the Court reasoned that where the "authority conferred has direct relation to the standards prescribed" by the act, an "intelligible principle" is present.[135]

1. Statutorily Prescribed Standards

In the present case, the Court must evaluate the Clean Air Act to determine if the above limitations are present. The overriding standard can be found in the congressional declaration of purpose.[136] In relation to the Air Quality Criteria and Control Techniques,[137] which are used in promulgating the NAAQS, numerous standards guide agency action. First, EPA must issue an air quality criteria document which must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities."[138] Second, Congress also specifies the information that should be included in the criteria document.[139] Third, Congress provides for the creation of a scientific advisory committee to provide confirmation of scientific evidence and to make recommendations therefrom.[140] Specifically, the Clean Air Scientific Advisory Committee (CASAC) is responsible for

> (i) advis[ing] the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised [NAAQS], (ii) describ[ing] the research efforts necessary to provide the required information, (iii) advis[ing] the Administrator on the relative contribution to air pollution concentrations of

132. *See id.*
133. *See id.* at 539
134. *Id.*
135. *Id.* at 540.
136. The purposes of this subchapter are—

> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
>
> (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
>
> (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
>
> (4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

Clean Air Act § 101(b), 42 U.S.C. § 7401(b) (1994).
137. *Id.* § 7408.
138. *Id.* § 7408(a)(2).
139. *Id.* § 7408(a)(2).
140. *See id.* § 7409(d)(2).

> natural as well as anthropogenic activity,[141] and (iv) advis[ing] the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS].[142]

Section 109 of the Act provides for promulgation of the National Primary and Secondary Ambient Air Quality Standards.[143] In this section, Congress requires the EPA to set the primary standards at levels "requisite to protect the public health" with an "adequate margin of safety."[144] Additionally, secondary standards must be set at levels "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."[145] Moreover, Congress requires that the standards be based on evidence contained in the criteria document.[146] Also, this section mandates that the EPA "shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies."[147] Moreover, Congress places the burden of review of the criteria on the scientific review committee and also mandates that the committee "shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards."[148]

Not only is the EPA constrained by the above-mentioned provisions of the Clean Air Act, it is also constrained by section 103 of the Act.[149] This section lays the groundwork for EPA environmental research and investigation.[150] Most notably, this section directs the Administrator to "conduct a research program on the short-term and long-term effects of air pollutants, including wood smoke, on human health."[151]

2. Review Process

Starting first with section 108, Congress directs the EPA to publish a list of air pollutants that may pose a threat to human health or welfare.[152] Next, Congress requires that the agency provide state pollu-

141. Anthropogenic activity is man-made activity, as opposed to that activity occurring in nature. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 59 (David B. Guralnik ed., 2d College ed. 1986).
142. 42 U.S.C. § 7409(d)(2)(C).
143. *Id.* § 7409(a)(1)(A).
144. *Id.* § 7409(b)(1).
145. *Id.* § 7409(b)(2).
146. *See id.* § 7409(a)–(b).
147. *Id.* § 7409(d)(2)(A).
148. *Id.* § 7409(d)(2)(B).
149. *Id.* § 7403.
150. *See id.*
151. *Id.* § 7403(d)(1).
152. *Id.* § 7408(a)(1)(A).

tion control agencies information on pollution control techniques that will be helpful in attaining the NAAQS.[153] Moreover, this section requires that the "issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public."[154]

Next, section 109 states that the EPA shall publish its proposed NAAQS and allow a maximum of ninety days for public comment.[155] At the expiration of the 90-day period, the EPA is directed to promulgate the proposed rules.[156] Last, but not least, the states have the last laugh. It is the states that are responsible for the implementation of the NAAQS and the states get to decide on the method of attainment, time of attainment, and who bears the costs.[157]

3. Evidentiary Support

As noted above, the creation of the criteria document provides the findings of health effects from the various air pollutants.[158] The criteria document is a compilation of scientific studies documenting the various health effects caused by the pollutants listed pursuant to section 108(a)(1).[159] Moreover, the studies incorporated into the criteria document are themselves findings of fact.

To add to the weight of the evidence, CASAC reviews the evidence and makes recommendations for EPA action in the standard setting process.[160] Therefore, as long as the NAAQS are promulgated in accordance with the criteria document, they are supported by the evidence.

4. Is an "Intelligible Principle" Present?

Yes! Adequate standards exist to prevent the EPA from usurping legislative power. As discussed above, the Clean Air Act commands the Administrator of the EPA to promulgate and periodically revise the NAAQS. The Act also tells the EPA how to do it, leaving only discretion in choosing the standard. Furthermore, the standards laid out above are directly related to this task and constrain the EPA decision-making authority.

C. *An Exercise in Judicial Deference*

The leading authority on analyzing an administrative agency's statutory interpretation, *Chevron, U.S.A. Inc. v. Natural Resources Defense*

153. *See id.* § 7408(b)(1).
154. *Id.* § 7408(d).
155. *Id.* § 7409(a)(1).
156. *Id.* § 7409(a)(1)(B).
157. *See id.* § 7401(a)(3); *id.* § 7410(a).
158. *Id.* § 7408(a)(2).
159. *Id.*
160. *Id.* § 7409(d)(2)(B).

Council, Inc.[161] was not even mentioned by the court in its analysis, nor was its two-part test applied. Although the nondelegation doctrine does require articulation of an "intelligible principle," that responsibility lies with Congress, not with the administrative agency it is meant to guide. In other words, Congress must articulate a framework or set of guidelines within which the administrative agency may act. They are not required to spell out every step the Agency may take within that framework.

In *Chevron*, the Supreme Court developed a two-part test for reviewing agencies' statutory interpretations.[162] In this landmark decision, the Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. 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 statute, 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.[163]

1. Has Congress Spoken on the Precise Issue?

a. *The Statute on its Face*

The Clean Air Act does not speak to the level of uncertainty, or degree of imperfection, that is permitted in the formulation of the NAAQS. With respect to the primary NAAQS, all that Congress requires is that they be set at levels requisite to protect the public health with an adequate margin of safety.[164] With respect to the secondary standards, Congress requires that they be set at levels "requisite to protect the public welfare."[165] Congress does, however, explicitly delegate discretionary authority to the EPA to fill in this gap. According to the statute, the standards chosen must be those which, "*in the judgment of the Administrator*," are sufficient to provide for the level of safety demanded by Congress.[166]

161. 467 U.S. 837 (1984).
162. *Id.* at 842–43.
163. *Id.* (footnotes omitted).
164. 42 U.S.C. § 7409(b)(1).
165. *Id.* § 7409(b)(2).
166. *Id.* § 7409(b) (emphasis added).

b. *Congressional Intent*

Through the Clean Air Act Amendments of 1977,[167] Congress sought to clarify the role of the EPA Administrator in promulgating the NAAQS. The Committee on Interstate and Foreign Commerce (to whom the bill for amendment was referred),[168] in section 102[169] of the Bill, summarized its reasons for adopting section 102 as follows:

> A. To emphasize the preventive or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs; to emphasize the predominant value of protection of public health;
>
> B. *To authorize the Administrator to weigh risks and make reasonable projections of future trends*; thus, to find a middle road between those who would impose a nearly impossible standard of proof on the Administrator before he may move to protect public health and those who would shift the burden of proof for all pollutants to make the pollution source prove the safety of its emissions as a condition of operation;
>
> . . . .
>
> F. To reflect awareness of the uncertainties and limitations in the data which will be available to the Administrator in the foreseeable future to enable him to execute his rulemaking duties under this act, *because of the limitations on research resources and the fact that decisionmaking about the risks to public health from air pollution falls on "the frontiers of scientific and medical knowledge"; to provide for adequate judicial review of the reasonableness of the Administrator's judgment in assessing risks, while restraining the courts from attempting to act "as the equivalent of a combined Ph.D. in chemistry, biology, and statistics" or from applying a standard of review which is appropriate only to review of adjudications or formal fact finding.*[170]

Moreover, the Committee stated that these purposes are in line with most judicial interpretations of the Clean Air Act.[171] According to the Committee, the reason they included the words "in the judgment of the Administrator" in section 109 of the Act was to affirm this view.[172] In fact, the committee has rejected efforts to have this language removed[173] and stated that "the . . . language is intended to emphasize the necessarily judgmental element in the task of predict-

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167. Pub. L. No. 95-95, 91 Stat. 685 (1977).

168. H.R. REP. No. 95-294 at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1079.

169. This section is titled "Basis of Administrative Standards." *Id.* at 43, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1121.

170. H.R. REP. No. 95-294 at 49–50 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1127–28 (emphasis added) (footnote omitted).

171. *Id.* at 50, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1128.

172. *Id.* at 51, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1129.

173. *Id.*

ing future health risks of present action and to confer upon the Administrator the requisite authority to exercise such judgment."[174]

For the foregoing reasons, the court's review should proceed to an evaluation based in reason. Although legislative intent is silent with respect to the degree of imperfection permitted in the NAAQS, what is clear is that Congress intended to confer discretionary authority to the EPA for exactly this purpose.

2. Is the EPA's Decision Based on a Permissible[175] Construction of the Clean Air Act?

According to the Committee on Interstate and Foreign Commerce, yes! In its report, the Committee affirmed the view that "[m]ost other courts have held that a substantial element of judgment, including making comparative assessment[s] of risks, . . . extrapolating from limited data, etc., are necessary *and permissible* under the act in order to protect public health and encourage development of new technology."[176]

Since choosing among standards necessarily involves making comparative assessments of risks, and therefore discretionary judgment on the part of the EPA, actions in this regard are permissible under the Act. Hence, under the Committee's view, choosing between standards is a judgment call for the Administrator, not for the courts.

V. U.S. SUPREME COURT DISPOSITION

On February 27, 2001, the Supreme Court decided this case[177] and addressed the nondelegation issue in part III of the opinion.[178] Writing for the Court, Justice Scalia stated that "[i]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency."[179] Moreover, he wrote that "[the Court has] never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[180] Rather, he emphasized that Congress is

174. *Id.*

175. According to the Court, "permissible" is a test of reasonableness, i.e., is the agency's interpretation reasonable. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

176. H.R. REP. NO. 95-294 at 50–51 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1128–29 (emphasis added).

177. Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001), *rev'g on nondelegation issue* 175 F.3d 1027 (D.C. Cir. 1999).

178. *Id.* at 911–14.

179. *Id.* at 912.

180. *Id.* Justice Scalia further stated:

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.

the body that must "lay down by legislative act an intelligible principle."[181]

The Court further concluded that the level of discretion allowed by section 109(b)(1) was well within the limits set by its previous decisions. As Justice Scalia put it, the Court has "'almost never felt qualified to second guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[182] Moreover, although the Court recognized that the scope of the power conferred on the agency is determinative of the level of agency discretion allowed, it also noted that "even in sweeping regulatory schemes [it has] never demanded, as the Court of Appeals did here, that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[183]

VI. CONCLUSION

The contorted version of the nondelegation doctrine applied by the D.C. Circuit in *American Trucking* finds support, not in the Constitution, but in the judicial legislation that created it. Not only does it prevent Congress from eliciting help from the EPA on complex environmental issues, issues that the EPA is better equipped to handle, but it also diminishes the democratic accountability that the framers of the Constitution sought to protect.

To remedy this injustice, use of the nondelegation doctrine should be restricted to delegations originating in Congress. As Supreme Court Justice Antonin Scalia indicated, administrative agencies have no power to correct unlawful delegations.[184] That responsibility lies with Congress.[185] As long as Congress performs its essential legislative functions, the nondelegation doctrine has not been violated. This is particularly true where Congress has made it clear that the judiciary must allow the administrative agency some degree of latitude.

Where, as in *American Trucking*, an administrative agency interpretation is at issue, the reviewing court should apply the *Chevron* test to determine if the agency is acting pursuant to legislative intent. Not only does *Chevron* allow the court to strike down any rules not in conformity with congressional intent, but it also ensures that congressional will, the free will of the people, will prevail. But in no event should a court strike down rules promulgated by an administrative

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> Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

Id.

181. *Id.* (citation omitted).

182. *Id.* at 913 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting); *id.* at 373 (majority opinion)).

183. *Id.* (quoting Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (per curiam) (second alteration in original)).

184. *Id.* at 912.

185. *See id.*

agency on the basis of the nondelegation doctrine without consulting the statute itself. The proper course of action is to apply the *Chevron* test. The first prong of this test necessarily requires an examination of the statute and will reveal any excessive delegations present. Where none is present, the court should determine whether the rules promulgated are consistent with congressional intent. If they are, the court should only concern itself with whether the agency's interpretation is reasonable. If they are not, the actions of the agency in promulgating the rules may be deemed arbitrary and capricious and the rules should be struck down on those grounds.

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