

# DELEGATION AND DISCRETION: STRUCTURING ENVIRONMENTAL LAW TO PROTECT THE ENVIRONMENT

MICHAEL N. SCHMIDT<sup>?</sup>

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## INTRODUCTION

The District of Columbia Circuit Court (D.C. Circuit) “sent shock waves through the environmental community”<sup>1</sup> by reviving the non-delegation doctrine, after sixty years of dormancy, in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*.<sup>2</sup> The D.C. Circuit used the nondelegation doctrine to restrict the Environmental Protection Agency’s (EPA) discretionary decision making capacity, which could have a sweeping effect on Congress’ authority to defer to agency decision making in general.<sup>3</sup> The

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1. Steven L. Kass & Jean M. McCarroll, *Judicial Review of EPA Air Quality Standards*, N.Y. L.J., July 12, 1999, at 7.

2. 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g* by 195 F.3d 4 (D.C. Cir. 1999), *modified by* Michigan v. United States EPA, 213 F.3d 663 (D.C. Cir. 2000) (limiting the scope of American Trucking, stating “[w]here the scope increases to immense proportions ... the standards must be correspondingly more precise”) (citations omitted) *cert. granted sub nom.* American Trucking Ass’ns, Inc. v. Browner, 120 S. Ct. 2193 (2000).

3. See Kass & McCarroll, *supra* note 1, at 7.

decision in *American Trucking*, however, may have a limited effect if it is only applied to narrowly construed circumstances.<sup>4</sup>

The United States Constitution grants the legislative power exclusively to Congress, not to the President, courts, or governmental agencies.<sup>5</sup> Nonetheless, the Supreme Court has long recognized that Congress may delegate legislative power to governmental agencies, provided that the legislative act limits the delegated power and provides a standard to guide the agency's actions.<sup>6</sup> Thus, agencies are not creating law, they are executing the law within specific parameters in accordance with legislative intent.<sup>7</sup> Delegating legislative power in this circumscribed manner allows Congress to be flexible in areas of law that require expertise, without violating the constitutional separation of power.<sup>8</sup> Congress has delegated legislative power to the EPA under the Clean Air Act

4. See *id.*

5. See U.S. Const. art. I, § 1.

6. See U.S. Const. art. I, § 8, cl. 18 (authorizing Congress to make all laws necessary and proper to execute Congressional power); see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (stating that power Congress delegated to the President was constitutional because Congress qualified the delegated power); *infra* Part II.A.

7. See *J.W. Hampton*, 276 U.S. at 407. Quoting Judge Ranney of the Ohio Supreme Court, the Court stated:

[t]he true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

*Id.* (quoting *Cincinnati, Wilmington & Zanesville, R.R. Co., v. Comm'rs. Ohio State* 77, 88 (852).

8. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (recognizing Congress' need to adapt to complex situations). As noted in section II of this article, *Panama Ref Co.* has been repeatedly distinguished in subsequent Court decisions.

9. See Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1).

10. See Clean Air Act § 101(b)(1), 42 U.S.C. § 7401(b)(1). The CAA aspires to prevent pollution, see *id.* at § 101(c), 42 U.S.C. § 7401(c), through its main four purposes, provided in part:

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).

Despite the statute's multiple purposes, agencies tend to simplify and emphasize only one main purpose. See also *Howard Latin, Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 *Envtl. L.* 1647, 1652 (1991).

(CAA) to revise national ambient air quality standards (NAAQS).<sup>9</sup> The main legislative purpose behind the CAA is to “promote the public health,”<sup>10</sup> a job more suited for the EPA to implement than Congress because of the scientific criteria involved in determining health effects of air pollutants and the NAAQS.<sup>11</sup> This delegation has presented problems when courts must rule on how much discretion the EPA should have. The EPA needs flexibility to address scientific uncertainty about the health effects of air pollution, yet if Congress delegated legislative authority to achieve that flexibility, the delegation may be unconstitutional.<sup>12</sup>

Denying broad discretion by the EPA may frustrate the legislative intent of protecting the public health underlying the CAA. Arguably, the public health was not protected when the court denied the EPA discretion in *American Trucking*.<sup>13</sup> In *American Trucking*, the EPA promulgated a rule that lowered the ozone NAAQS from 0.09 parts per million (ppm) to 0.08 ppm.<sup>14</sup> The rule was challenged and the District of Columbia Circuit Court struck down the rule, holding the EPA’s interpretation of the CAA was an unconstitutional delegation of legislative power.<sup>15</sup> The court stated that the 0.08 ppm level for ozone must be based on an “intelligible principle,” a standard higher than “reasonableness.”<sup>16</sup> Thus, the ozone NAAQS remains at 0.09 ppm where the EPA had determined that severe health effects are more certain than at 0.08 ppm.<sup>17</sup> By not allowing the EPA to lower the NAAQS, the court arguably prevented the EPA from promoting the CAA’s policy of protecting the public health.

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11. Cf. *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 690 (1980) (“The Benzene Case”) (5-4 decision) (Marshall, J., dissenting) (stating that the Secretary of Labor, not the courts, has the expertise to interpret OSHA in order to protect workers’ health and safety). Delegating power to an agency is more cost economical. See Gregory C. Ward, *Lussier v. Maryland Racing Commission: Maryland’s Court of Appeals Upholds a Fine Imposed by an Administrative Agency Despite a Lack of Specific Authorization to Fine from the General Assembly*, 27 U. Balt. L. Rev. 515, 529 (1998); see also Thomas J. Byrne, *The Continuing Confusion Over Chevron: Can the Nondelegation Doctrine Provide a (Partial) Solution?*, 30 Suffolk U. L. Rev. 715, 722 (1997) (explaining that “the agency will have the resources to continuously monitor the activities of the complex institutions that characterize our modern industrial society”).

12. See, e.g., *J.W. Hampton*, 276 U.S. at 409.

13. See *American Trucking*, 175 F.3d 1027 (D.C. Cir 1999).

14. See *id.* at 1035.

15. See *id.* at 1033.

16. See *id.* The court noted that if the EPA set the ozone NAAQS at a zero ppm level, this level would eliminate all health effects and satisfy the intelligible principle requirement despite being unreasonable. See *id.* at 1038.

17. See *id.* at 1035, 1059.

Although *American Trucking* contrasts with federal courts' general reluctance to apply the nondelegation doctrine, many state courts have adhered to a strict nondelegation doctrine.<sup>18</sup> In Florida, courts require the state legislature to provide specific guidelines so that the legislative intent is clear and focused.<sup>19</sup> While federal statutes are generally allowed to have broad standards,<sup>20</sup> more specific guidelines may be more effective to ensure that legislative intent is followed.

This Note compares governmental agencies' need for discretion with the need for strict legislative guidelines in an effort to promote legislative policies of protecting the public from potentially severe health effects. Part II discusses the Supreme Court's judicial development in the "intelligible principle," as the standard for a constitutional delegation of legislative power. Part III discusses agency discretion in interpreting statutes in Supreme Court decisions, focusing on health and environmental agencies. Part IV discusses the D.C. Circuit's analysis comparing the nondelegation doctrine with statutory interpretation. Part V comments on whether application of a strict nondelegation doctrine will impede or improve environmental protection.

## I. THE NONDELEGATION DOCTRINE

### A. *The Intelligible Principle*

The constitutional principle of separation of powers underlies the United States federal system of government.<sup>21</sup> To keep Congress' legislative power separate from the executive and judicial branches of government, the Constitution limits Congressional delegation of

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18. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1196-97 (1999) (noting that the courts of Florida, Texas, Arizona, Illinois, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, South Carolina, Virginia, and West Virginia all ascribe to a strict nondelegation doctrine).

19. See *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1979) (holding that environmental regulation allowing local governments to designate areas of critical concern violated the nondelegation doctrine because it failed to clarify the legislative policy). Florida land use law has gained national importance because its state comprehensive plan is "intended to be a direction-setting document." JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW*, § 13.7 (1998) (quoting FLA. STAT. § 187.101(2)).

20. See *infra* note 60.

21. See generally *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (discussing whether the Sentencing Commission's sentencing guidelines violated the separation of powers principle).

legislative power to the other branches of government; courts have referred to this principle as the nondelegation doctrine.<sup>22</sup> The nondelegation doctrine, however, does not entirely prevent Congress from delegating legislative power because the Supreme Court has recognized Congress' need for assistance.<sup>23</sup> When, then, can Congress delegate its legislative power?

The Supreme Court first answered this question in *J.W. Hampton, Jr., & Co. v. United States*.<sup>24</sup> In *J.W. Hampton*, Congress, under the Tariff Act, delegated power to the President to regulate foreign commerce by adjusting rates of duty.<sup>25</sup> This delegation of legislative power was protested as being unconstitutional because "[t]here was no specific provision by which action by the President might be invoked under this act."<sup>26</sup> Arguably, Congress violated the constitutional principle of separation of powers by giving its legislative power to the President.<sup>27</sup> Regardless, the Court held that the Tariff Act satisfied the nondelegation doctrine because it was based on an "intelligible principle," which makes a congressional delegation permissible.<sup>28</sup> Although Congress cannot simply give the President legislative power to regulate foreign commerce, "[i]f Congress shall lay down by legislative act an intelligible principle to which the

22. See *id.*; see also David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 735-36 (1999). The delegation of legislative power may be undemocratic if laws emerging from agencies do not reflect legislative ideologies. See *id.* at 743-44. Furthermore, judicial review of agency decision making is inconsistent with our representative form of government because judicial ideologies may conflict with legislative ideologies. See Byrne, *supra* note 11, at 716-17.

23. See *Mistretta*, 488 U.S. at 371-72; see also sources cited *supra* note 11.

24. See *J. W. Hampton*, 276 U.S. 394 (1928).

25. See *id.* at 401. Section 315(a) of the Tariff Act provides, in relevant part:

That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same.

*Id.*

26. *Id.* at 405.

27. See *Mistretta*, 488 U.S. at 371-72. The separation of powers doctrine does not typically allow Congress to delegate its legislative power to other branches of the government. See *id.*

28. See *J.W. Hampton*, 276 U.S. at 409. One commentator explains that Congress is allowed to delegate legislative power under the Necessary and Proper Clause of the Constitution. See Ward, *supra* note 11, at 520-21.

person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”<sup>29</sup> Thus, the “intelligible principle” represents the guidelines that Congress must establish when delegating legislative power.

The *J.W. Hampton* Court gave several reasons for holding that the Tariff Act contained an “intelligible principle.”<sup>30</sup> First, the congressional intent was clear; Congress intended for the President to impose customs duties on imported foreign merchandise to equalize the difference between the cost of production in a foreign country and the cost of sales in the United States.<sup>31</sup> The tariffs would allow domestic producers to compete with foreign producers.<sup>32</sup> Second, because of changing future conditions inherent in a fluctuating market, Congress was not able to set fixed tariff rates.<sup>33</sup> This fact justified the Tariff Act provision allowing the President to adjust tariff rates as necessary.<sup>34</sup> Third, the Tariff Act required the President to investigate tariff rates with the assistance of the United States Tariff Commission, a commission “appointed under Congressional authority.”<sup>35</sup> Fourth, the Tariff Act provided specific criteria that the President must consider.<sup>36</sup> Thus, Congress had authority to delegate legislative power by providing an “intelligible principle” that sufficiently limited and guided the President.<sup>37</sup>

### B. Violating the Constitution

Only a few years after *J.W. Hampton*, the Court decided two cases holding Congressional acts to be unconstitutional delegations of

29. *J.W. Hampton*, 276 U.S. at 409. The theory is that “Congress retains the power to enact a statute.” Schoenbrod, *supra* note 22, at 738-39.

30. *See J.W. Hampton*, 276 U.S. at 401-02, 404, 407-08.

31. *See id.* at 404-05.

32. *See id.* at 404.

33. *See id.* at 404-05.

34. *See id.* The Court noted that Congress was making the law to be executed by the President. *See id.* at 407.

35. *Id.* at 409.

36. *See id.* at 401-02. The criteria provided, in relevant part:

1. the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries;
2. the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States;
3. advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and
4. any other advantages or disadvantages in competition.

*Id.*

37. *See id.* at 409.

legislative power.<sup>38</sup> At issue in *Panama Refining Co. v. Ryan*, was congressional authorization for the President to “prohibit the transportation in interstate and foreign commerce of petroleum” under section 9(c) of the National Industrial Recovery Act (NIRA).<sup>39</sup> By executive order, the President approved the “Petroleum Code” which provided quotas for producing petroleum.<sup>40</sup> Panama Refining Company, an oil refining plant, argued that section 9(c) of NIRA exceeded Congress’ constitutional power.<sup>41</sup> The Court agreed.<sup>42</sup> Acknowledging that the general policy under NIRA was clear and that Congress needed flexibility to adapt to complex conditions,<sup>43</sup> the Court still held section 9(c) of NIRA to be unconstitutional.<sup>44</sup> Policy and the need for flexibility alone did not sufficiently establish an “intelligible principle.”<sup>45</sup> The Court stated that section 9(c) of NIRA was unconstitutional because it failed to qualify or limit the power delegated to the President.<sup>46</sup> In other words, section 9(c) of NIRA failed to provide criteria that would guide the President’s discretion.<sup>47</sup>

Within a year of *Panama Refining*, the Court again held a legislative act to be an unconstitutional delegation of legislative power because Congress failed to provide the President with a guiding intelligible principle. In *A.L.A. Schechter Poultry Corp. v. United States*,<sup>48</sup> the President approved the “Live Poultry Code” pursuant to section 3 of NIRA.<sup>49</sup> Section 3 authorized the President to approve “code of fair competition,” it failed, however, to define

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38. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). As noted in section II of this article, both of these cases have been repeatedly distinguished in subsequent decisions.

39. See *Panama Ref. Co.*, 293 U.S. at 406.

40. See *id.* at 410.

41. See *id.* at 410-11, 433.

42. See *id.* at 433.

43. See *id.* at 417. The policy of the National Industrial Recovery Act was to prevent unemployment, increase consumer and industrial spending, raise labor standards, and promote conservation. See *id.*

44. See *id.* at 415.

45. See *id.*

46. See *id.* The Court suggested if the President were merely an agent of Congress, the delegation of legislative power would be constitutional; but not if the President had unlimited power to make the law. See *id.* at 426.

47. See *id.* at 415. Arguably, even if agencies are constrained, there is no guarantee that what they produce will be good. See Schoenbrod, *supra* note 22, at 763.

48. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). As noted in section II of this article, *Schechter Poultry* has been repeatedly distinguished in subsequent Court decisions.

49. See *id.* at 521-22.

“fair competition.”<sup>50</sup> Hence, the Court compared section 3 of NIRA to section 5 of the Federal Trade Commission Act (FTCA), which authorized the Federal Trade Commission to approve “unfair methods of competition.”<sup>51</sup> Although section 5 of the FTCA was constitutional, the Court held that section 3 of NIRA was not.<sup>52</sup>

The Court explained section 5 of the FTCA created a commission to review any action taken under the Act.<sup>53</sup> Moreover, section 5 of the FTCA set up a special procedure including hearings and appropriate findings of fact that would only apply in particular circumstances.<sup>54</sup> In contrast, section 3 of NIRA had a much broader range than section 5 of the FTCA.<sup>55</sup> The broad policy of NIRA itself did not sufficiently restrict the President.<sup>56</sup> Section 3 of NIRA failed to provide a standard to guide the President; specifically, it did not require an administrative procedure for the President to follow nor a commission to assist the President as FTCA did.<sup>57</sup>

After *Schechter Poultry* in 1935, the Court appeared not only to have created a standard for delegating legislative power, but also appeared prepared to apply that standard strictly. Thus, despite clear legislative intent to guide the exercise of delegated power and Congress’ need for flexibility, the intelligible principle appeared to require something more.<sup>58</sup> When Congress delegates legislative power, it must provide specific criteria to constrain the delegated power and satisfy the nondelegation doctrine.<sup>59</sup> Lastly, after *J.W. Hampton, Panama Refining*, and *Schechter Poultry*, the Court seemed

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50. *See id.* at 523 n.4, 531. The National Industrial Recovery Act provided, in relevant part: “[u]pon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof.” *Id.* at 523 n.4.

51. *See id.* at 532-33.

52. *See id.* at 533-34.

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.* at 538-39. The NIRA did provide two restrictions on the President’s delegated power, but the Court found these restrictions insufficient. *See id.* at 538. First, when approving a code of fair competition, the President must find that the applicant group or association imposes no inequitable restrictions on admission to the group. *See id.* The Court found this restriction applied only to applicants and did not limit the scope of the President’s delegated power. *See id.* Secondly, the codes the President approves must not promote monopolies. *See id.* The Court found this second restriction insufficient as well because it left open too many legislative possibilities for the President. *See id.*

57. *See id.* at 539.

58. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 401-02, 408 (1928); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538-39 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935). As noted in section II of this article, *Schechter Poultry* and *Panama Ref. Co.* have been repeatedly distinguished in subsequent Court decisions.

59. *See J.W. Hampton*, 276 U.S. at 404-05.

most concerned about Congress delegating power solely to the President; yet when a legislative act required a commission to assist the President, the Court seemed much more willing to uphold the act's constitutionality.<sup>60</sup>

## II. STATUTORY INTERPRETATION

*Schechter Poultry*, however, was the last in that series of cases in which the Court held a delegation of legislative power unconstitutional.<sup>61</sup> In the 1940's, the Court decided several cases addressing the nondelegation doctrine with much more leniency, practically making the nondelegation doctrine a non-issue.<sup>62</sup> However, in all these cases the Court upheld the delegation of legislative power to governmental agencies rather than the President, as in *Panama Refining* and *Schechter Poultry*.<sup>63</sup> The Court seemed to prefer that Congress delegate authority to agencies rather than the President, continuing the trend that began in 1928 with *J.W. Hampton* and the Court's emphasis on whether a mandatory commission assisted the President.

Beginning in the 1970's, Congress passed numerous health and environmental acts.<sup>64</sup> Even though Congress permissibly delegated power to health and environmental agencies, some courts held that an agency's interpretation of the relevant statute was impermissible.<sup>65</sup> Thus, even if a statute with broad guidelines survives an improper delegation attack, an agency's interpretation of

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60. See *id.* at 407-08 (upholding a delegation of legislative power to the President where Congress required a commission to assist the President); see also *Schechter Poultry*, 295 U.S. at 538-39 (rejecting a delegation of legislative power to the President where the assistance of a commission was optional).

61. See *Ward*, *supra* note 11, at 529.

62. See, e.g., *Lichter v. United States*, 334 U.S. 742, 785 (1948) (stating that when Congress "lay[s] down by legislative act an intelligible principle," a specific formula is not necessary so long as an agency interprets the act by considering the act's purpose within statutory context) (quoting *J.W. Hampton Co. v. United States*, 276 U.S. 394, 409 (1928)); *Yakus v. United States*, 321 U.S. 414, 420, 426 (1944) (stating that the standards of the Emergency Price Control Act are sufficiently definite and precise to be a constitutional delegation of legislative power); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944) (stating the "just and reasonable" standard of the Natural Gas Act was a constitutional delegation of legislative power despite the act's failure to express a specific rule).

63. Compare *supra* note 62 with *supra* Part II.B.

64. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et. seq.* (1994); Clean Water Act of 1972, 33 U.S.C. §§ 1251, *et. seq.* (1994); Clean Air Act of 1977, 42 U.S.C. §§ 7401, *et. seq.* (1990).

65. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that EPA permissibly defined a statutory term of the CAA) *rev'g* *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982); *The Benzene Case*, 448 U.S. 607 (1980) (holding Secretary of Labor's interpretation of OSHA to be invalid).

that statute may be subject to close scrutiny because the statutory guidelines are so broad. The statutory interpretation issue is closely related to the issue of whether Congress should provide more specific guidelines under the nondelegation doctrine.

#### A. Broad Agency Discretion

The leading case addressing an agency's interpretation of a legislative act is *Chevron v. Natural Resources Defense Council, Inc.*, where the EPA's interpretation of an undefined term was challenged.<sup>66</sup> Congress amended the CAA in 1977 to require permits regulating "stationary sources."<sup>67</sup> The EPA defined "stationary sources" using a plant-wide definition (the "bubble concept"); thus, if a plant installed a new pollution-emitting device that violated permit conditions by itself, the plant could still obtain a permit so long as the total emissions from the plant satisfied the permit conditions.<sup>68</sup> Even though the EPA's definition merely maintained air quality rather than improving it, the Court held that the EPA acted reasonably.<sup>69</sup>

Attempting to settle the issue of an agency's discretion to interpret statutes, the Court established a two-part test for reviewing an agency's interpretation of a legislative act.<sup>70</sup> First, if Congress has directly addressed the issue under review, there is nothing for the agency to interpret.<sup>71</sup> However, in *Chevron*, "stationary source" was not defined, which prompted step two of the *Chevron* test.<sup>72</sup> If Congress is silent on a particular issue, the agency must then interpret the statute.<sup>73</sup> Courts should not overrule an agency's interpretation if the interpretation is reasonable.<sup>74</sup> Oftentimes, however, the legislative delegation is implicit and the agency should then have broad discretion in interpreting the act.<sup>75</sup>

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66. See *Chevron*, 467 U.S. at 841.

67. See *id.* at 848.

68. See *id.* at 847-48.

69. See *id.* at 845. The Court acknowledged that the EPA's interpretation failed to promote the CAA's purpose of improving air quality, yet the Court avoided this problem by stating that the EPA's interpretation, in this particular permit program within the CAA, was reasonable. See *id.*

70. See *id.* at 842-43.

71. See *id.* at 842.

72. See *id.* at 843.

73. See *id.*

74. See *id.* at 845.

75. See *id.* at 862.

### B. Scientific Uncertainty

Broad discretion can be an important tool for agencies in furthering legislative intent, even though the EPA arguably failed to use its discretion for this purpose in *Chevron*.<sup>76</sup> Health and environmental statutes are generally designed to protect the public against adverse health effects that are often scientifically uncertain.<sup>77</sup> With broad discretion, agencies can account for the uncertainty in assessing health effects by providing a margin of error and by providing adequate protection for public health and the environment, consistent with the general purpose of such health and environmental statutes. Additionally, agencies, rather than courts, have the knowledge to determine the margin of safety from adverse health effects.

Scientific uncertainty about adverse health effects was a major issue in the *Benzene*<sup>78</sup> decision, which the Court decided four years before *Chevron*. In *Benzene*, the Occupational Safety and Health Administration (OSHA) promulgated a standard that lowered workers' permissible exposure to benzene because OSHA determined that a causal connection between benzene and leukemia existed.<sup>79</sup> The Occupational Safety and Health Act (Act) mandated that OSHA promulgate standards "to provide safe or healthful employment."<sup>80</sup> OSHA's standard was challenged and the Court struck it down because OSHA failed to show that the pre-existing standard created a risk of harm that rendered the revised standard "necessary," even though OSHA had more expertise than the Court to make that determination.<sup>81</sup> Thus, the Court concluded that to justify lowering permissible exposure levels OSHA must provide some certainty of a risk of harm; and that reducing exposure levels was impermissible without proof of the existence of harm and

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76. See *id.* at 845.

77. See Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. Ill. L. Rev. 181, 192 (1999). Often scientific knowledge is not definitive because experiments on animals must be extrapolated to humans, and effects of high doses found in experiments must be extrapolated to realistic dose exposure. See *id.*; see also Thomas O. McGarity, *A Cost-Benefit State*, 50 Admin. L. Rev. 7, 12-13 (1998) (discussing the scientific uncertainty in assessing health risks).

78. See *The Benzene Case*, 448 U.S. 607 at 625. See *Chevron v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984).

79. See *The Benzene Case* at 613.

80. *Id.* (citations omitted).

81. See *id.* at 634-35.

demonstrating the need for a lower permissible exposure level to achieve a minimum level of safety.<sup>82</sup>

Justice Marshall recognized, in his dissent, that when assessing health risks agencies often consider issues on which there is no present scientific certainty when assessing health risks.<sup>83</sup> Justice Marshall also noted that after extensive hearings where OSHA rigorously questioned “epidemiologists, toxicologists, [and] physicians,”<sup>84</sup> OSHA determined that no safe level of benzene existed and that the health risks declined as the level of exposure declined.<sup>85</sup> Courts could not expect OSHA to find a safe exposure level that avoided a definitive risk of harm if one did not exist. If OSHA had had the benefit of broad discretion established in *Chevron*, decided after *Benzene*, OSHA arguably could have promoted the Act’s policy of protecting workers’ health with its interpretation of the statute as requiring a reduction in exposure to benzene to achieve an acceptable level of safety.<sup>86</sup> Instead, the *Benzene* majority effectively left workers exposed to higher levels of benzene and a greater risk of leukemia, despite OSHA’s scientific studies.<sup>87</sup> In essence, the Court substituted its determination of an appropriate level of scientific certainty for that of the agency’s.<sup>88</sup>

The Supreme Court in *Benzene* and *Chevron* reviewed agency discretion in the interpretation of statutes where the nondelegation doctrine was not an issue. In *Benzene*, OSHA arguably was not accorded enough discretion to effectively promote the purpose of the Act;<sup>89</sup> whereas in *Chevron*, the EPA had so much discretion that it was not required to strictly follow the purpose of the CAA.<sup>90</sup> Part of the problem is that statutes rarely have one single, clear purpose.

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82. *See id.* The Court stated that absolute certainty was not necessary; nonetheless, by requiring a minimum level of safety, the Court required at least some certainty. *See id.* at 642.

83. *See* The Benzene Case, 448 U.S. 607, 690, 706 (Marshall, J., dissenting).

84. *Id.* at 696.

85. *See id.* at 707.

86. Although science may not be able to provide certainty regarding safe exposure levels, it can help narrow down the search for safe levels. *See* Wagner, *supra* note 77, at 187.

87. *See* The Benzene Case, 448 U.S. at 706-07 (Marshall, J., dissenting).

88. *See generally id.* at 712-13 (Marshall, J., dissenting).

89. *See id.* at 705-07 (Marshall, J., dissenting).

90. *See Chevron*, 467 U.S. 837 at 845 (stating “Once [The Court of Appeals] determined after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was ... whether the Administrator’s view that it is appropriate in the context of this particular problem is a reasonable one.”).

Thus, both courts and agencies may have difficulty in determining whether legislative policy has been promoted.<sup>91</sup>

Although neither *Benzene* nor *Chevron* addressed the non-delegation doctrine, doing so may have helped to avoid the problem of agency decisions potentially disregarding the environment and the public health. A strict nondelegation doctrine may have helped to clarify legislative policy by requiring the legislature to provide specific guidelines articulating legislative policy.<sup>92</sup> For example, the Supreme Court of Florida has suggested when enacting statutes that the state legislature should prioritize policies to help agencies determine how heavily to weigh various factors when considering environmental and health effects.<sup>93</sup> Hence, the nondelegation doctrine appears to have an impact beyond the separation of powers doctrine by affecting an agency's statutory interpretation of legislative intent.

### III. THE DISTRICT OF COLUMBIA CIRCUIT COURT'S INTERPRETATION OF STATUTORY INTERPRETATION

#### A. *Separating the Issues*

The nondelegation issue and the statutory interpretation issue overlap. Courts may choose to avoid the nondelegation issue and decide a case by addressing an agency's interpretation of a statute for two reasons. First, in federal courts, the nondelegation doctrine has appeared to be a non-issue since *Schechter Poultry*, although it has not been completely ignored.<sup>94</sup> Secondly, the canon of judicial restraint provides courts with a means of avoiding constitutional issues if a case can be decided on non-constitutional grounds.<sup>95</sup> A court's rejection of an agency's statutory interpretation where the statutory language is broad and open-ended, however, stems from the similar problem of a determination that the statute lacks an intelligible principle.<sup>96</sup> Whether the issue is considered to be constitutional or not may affect what standard of review applies.<sup>97</sup> The District of

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91. See Latin, *supra* note 10, at 1648 (stating that "the gap between the text and implementation of environmental laws has grown so wide that most regulatory practices cannot be understood by studying the applicable legislation").

92. See *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1979).

93. See *id.* at 919-21.

94. See *Ward*, *supra* note 11, at 529.

95. See *id.* at 534-35.

96. See *id.* at 535-36.

97. Compare *American Trucking*, 175 F.3d at 1034 (stating the nondelegation doctrine requires an intelligible principle, a standard higher than reasonableness), with *Rust v. Sullivan*,

Columbia Circuit Court (D.C. Circuit), which reviews administrative law issues regularly and more frequently than the Supreme Court,<sup>98</sup> may help to illustrate the similarities between the nondelegation doctrine and statutory interpretation.

In *Lead Industries Association v. EPA*, the D.C. Circuit reviewed the EPA's promulgation of ambient air quality standards under the CAA.<sup>99</sup> One issue was whether the EPA had the authority to institute revised standards.<sup>100</sup> The court stated that the issue was one of statutory interpretation, and that the EPA's interpretation of the CAA to allow only the consideration of health factors was reasonable, thus according the EPA broad discretion.<sup>101</sup>

In comparison, the *Lead Industries* court could have addressed the same issue as a nondelegation issue. The court stated that the underlying question was whether the EPA had the authority to promulgate the revised standards.<sup>102</sup> For the EPA to have authority, Congress must have properly delegated legislative power to the EPA by providing an intelligible principle.<sup>103</sup> The court even referred to specific statutory guidelines that could be considered an intelligible principle.<sup>104</sup>

### B. Confusing the Issues

Similar to *Lead Industries*, the issue in *American Trucking* was EPA interpretation of the CAA.<sup>105</sup> However, the *American Trucking* court addressed the issue as a nondelegation problem instead of as a statutory interpretation problem.<sup>106</sup> The *American Trucking* court held that the EPA's interpretation of the CAA violated the

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500 U.S. 173, 189-90 (1991) (stating that the Secretary of Health and Human Services' statutory construction was sufficient because the Secretary's interpretation was reasonable).

98. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1262-63 (1997) (discussing statutory interpretation under Chevron).

99. See *Lead Industries*, 647 F.2d 1130 (D.C. Cir. 1980).

100. See *id.* at 1148.

101. See *id.* at 1147-49.

102. See *id.* at 1147.

103. See *supra* Part II.

104. See *Lead Industries*, 647 F.2d at 1147-49, 1161. The court stated that under the CAA the EPA can only consider health factors, and not cost or technology. See *id.* at 1147-49. Furthermore, the court upheld three specific health factors: "the amount of uncertainty involved, the size of the population affected, and the severity of the effect." *Id.* at 1161.

105. See *American Trucking* 175 F.3d 1033 (D.C. Cir. 1999), *modified on reh'g by* 195 F.3d 4 (D.C. Cir. 1999), *modified by* *Michigan v. United States EPA*, 213 F.3d 663 (D.C. Cir. 2000) (limiting the scope of *American Trucking*, stating "[w]here the scope increases to immense proportions ... the standards must be correspondingly more precise") (citations omitted) *cert. granted sub nom.* *American Trucking Ass'ns, Inc. v. Browner*, 120 S. Ct. 2193 (2000).

106. See *id.* at 1034-40.

nondelegation problem because the EPA failed to articulate an intelligible principle.<sup>107</sup> The court seemed to be confusing the nondelegation doctrine with statutory interpretation.

Typically, when the nondelegation doctrine is violated, Congress, and not the EPA, has failed to articulate an intelligible principle.<sup>108</sup> Hence, if a court determines that the nondelegation doctrine is violated, the court will strike the unconstitutional statutory provision.<sup>109</sup> The *American Trucking* court instead stated that the EPA failed to articulate an intelligible principle and struck the EPA's interpretation.<sup>110</sup>

In addressing the constitutional issue of nondelegation, the court stated that the EPA failed to articulate an intelligible principle, a standard higher than reasonableness.<sup>111</sup> If the issue was statutory interpretation, under *Lead Industries* and *Chevron* the standard would merely have been reasonableness.<sup>112</sup> Arguably, because the EPA was interpreting the CAA, the court should have applied a non-constitutional standard of reasonableness applicable to statutory interpretation.

#### IV. CONCLUSION

In effort to further the legislative policies of protecting the environment and the public health, the amount of discretion a court accords an agency may determine whether an agency is successful. In *Lead Industries*, the EPA successfully revised the NAAQS to reduce air pollution because the court was deferential to the EPA's interpretation of the CAA.<sup>113</sup> Yet in a similar case, the *American Trucking* court rejected the EPA's interpretation of the CAA, which left the pre-existing NAAQS intact.<sup>114</sup> In comparison, the *Benzene* Court effectively substituted its own interpretation for OSHA's.<sup>115</sup> The *Benzene* dissent argued that OSHA should have been accorded more discretion because OSHA has more scientific expertise than the courts, which was needed to address the problem of scientific uncertainty.<sup>116</sup> The Court's majority, however, was not deferential to

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107. See *id.* at 1034.

108. See *supra* Part II.

109. See *id.*

110. See *American Trucking*, 175 F.3d at 1034-40.

111. See *id.* at 1034.

112. See *supra* Parts III.A and IV.A.

113. See *Lead Industries*, 647 F.2d at 1147-49.

114. See *American Trucking*, 175 F.3d at 1034-40.

115. See generally *The Benzene Case*, 448 U.S. 607.

116. See *id.* at 690 (Marshall, J., dissenting).

OSHA's interpretation despite OSHA's attempt to protect the public health.<sup>117</sup>

Nonetheless, if agencies are accorded broad discretion, they will not necessarily use it to benefit the environment.<sup>118</sup> In *Chevron*, the EPA had broad discretion yet it chose to interpret the CAA in a manner that merely maintained the air quality rather than promote cleaner air.<sup>119</sup> Despite its policy of promoting air quality, the CAA also contains other purposes and policies.<sup>120</sup> Broad discretion allows an agency the freedom to interpret the hierarchy of multiple purposes and policies. Therefore, because the CAA has several broad policies, the *Chevron* decision suggests that the EPA has the power to mold its actions to fit within any one of the CAA's policies.<sup>121</sup>

The *American Trucking* court's attempt to revive the non-delegation doctrine could be used to guide agencies to protect the environment and the public health. If legislative policy is too broad, as it arguably was in *Chevron*, a strict nondelegation doctrine may help to focus legislative policy by requiring the legislature to articulate an intelligible principle.<sup>122</sup> For example, some state courts have suggested that the legislature prioritize its policies.<sup>123</sup>

While the nondelegation doctrine may address the problem of broad, unclear legislative policy, it may create other problems. One problem the nondelegation's revival may cause is the confusion of constitutional and non-constitutional issues.<sup>124</sup> The non-delegation doctrine is generally an issue when statutory language is broad, yet this can also be viewed as a statutory interpretation issue that should be within an agency's discretion. Although these two issues are similar, the intelligible principle standard of the nondelegation doctrine is a standard higher than the reasonableness standard of statutory interpretation.<sup>125</sup>

Another problem with reviving the nondelegation doctrine is that it may defeat the purpose of allowing Congress to delegate the

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117. See generally *id.*

118. See *supra* note 47.

119. See *Chevron*, 467 U.S. at 862-63; see also *Latin*, *supra* note 10, at 1648 (stating that effective environmental regulation requires "good implementation, not good legislative intentions").

120. See *supra* note 10.

121. See *Latin*, *supra* note 10, at 1654, 1657, 1666-67 (noting agencies often act according to political and social pressures as well as personal motives).

122. See *Askew v. Cross Keys Waterways*, 372 So. 2d 913, 918-19 (Fla. 1979).

123. See *id.* at 919-21.

124. See *supra* Part IV.

125. See *American Trucking*, 175 F.3d at 1034.

need for agency expertise and flexibility. The intelligible principle requires more than just a prioritization of legislative policies, Congress must provide specific guidelines.<sup>126</sup> Thus, the revival of the nondelegation doctrine could force Congress to provide standards that would more appropriately be determined by an agency because of the agency's expertise.<sup>127</sup>

The conflicting concepts of delegation and discretion each have advantages and disadvantages that may be used towards protecting the environment and public health. Whether or not the nondelegation doctrine is revived, environmental protection will likely depend on the interplay between Congress, agencies, and the courts. Congress has the power to determine the shape of agency discretion.<sup>128</sup> Agencies with broad discretion have the power to interpret broad statutory language.<sup>129</sup> Courts have the power to strike either a statutory provision or an agency's interpretation of that provision.<sup>130</sup> Therefore, although a revived nondelegation doctrine may confirm environmentalists' worst fears regarding environmental protection, the doctrine could have the opposite effect by forcing Congress to strengthen environmental law.<sup>131</sup>

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126. See *supra* Part II.

127. See Latin, *supra* note 10, at 1653 (more detailed statutes will not necessarily solve the problem of discrepancies between the policy and the implementation of environmental laws).

128. See *supra* Part II.A.

129. See *supra* Part III.A.

130. See *supra* Part IV.B.

131. To some extent, the D.C. Circuit has already mitigated the impact of *American Trucking*. See *Michigan v. United States EPA*, 213 F.3d 663, 680 (D.C. Cir. 2000) (limiting the scope of *American Trucking*, stating "[w]here the scope increases to immense proportions ... the standards must be correspondingly more precise") (citations omitted).

