Michigan v. U.S. Environmental Protection Agency

Nathan J. Brodeur

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38J7Z72

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jceralaw.berkeley.edu.
Michigan v. U.S. Environmental Protection Agency

Nathan J. Brodeur*

The U.S. Court of Appeals for the District of Columbia Circuit largely upheld an Environmental Protection Agency (EPA) rule mandating that twenty-two states and the District of Columbia revise their state implementation plans (SIPs) to reduce nitrogen oxide emissions in order to mitigate nonattainment of ozone standards in downwind states. Although ostensibly a major legal victory for the EPA, the decision may in fact be a mixed blessing for the agency. The court's approval of EPA's consideration of emissions reduction costs in formulating the rule, coupled with the court's failure to adequately address the federalism concerns raised by the rule, may ultimately undermine the agency's ability to protect public health and the environment.

CONTENTS

Introduction ........................................................... 276
I. Procedural History/Statutory Background .................. 277
II. The Decision ....................................................... 279
   A. Majority Opinion ........................................... 279
       1. EPA's Definition of a "Significant Contribution".. 280
           a. Consideration of Costs .......................... 281
           b. Nondelegation .................................... 282
       2. Federalism ................................................. 285
   B. Judge Sentelle's Dissent .................................... 286
III. Analysis .......................................................... 287
   A. EPA's Definition of "Significant Contribution"....... 287
       1. Consideration of Costs: The Majority's Flawed
          Interpretation of CAA Section 110(a)(2)(D) ....... 287

Copyright © 2001 by The Regents of the University of California

* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2002; B.S., Cornell University, 1996. I am grateful to Professor Peter Menell and ELQ Editors Jeff Brax, Sunny Knight, Christiana Coop, and Cinnamon Gilbreath for their work on this Note.
INTRODUCTION

In response to complaints by northeastern states that they were unable to meet national ambient air quality standards (NAAQS) for ground-level ozone due to transport of ozone and its precursors\(^1\) from upwind states, in 1998, the U.S. Environmental Protection Agency (EPA) promulgated a rule seeking to mitigate the effects of the long-standing ozone transport problem.\(^2\) Several states in the Ohio River Valley challenged the EPA rule, leading to a review by the D.C. Circuit Court of Appeals in Michigan v. EPA.\(^3\) The court granted the northeastern states and EPA a major legal victory, upholding the key aspects of the rule.

---

1. Ozone, the primary ingredient in photochemical smog, is not emitted directly into the air, but rather, results from the complex interaction in sunlight of volatile organic compounds (VOCs) and nitrogen oxides (NO\(_x\)). See Am. Petroleum Inst. v. Costle, 665 F.2d 1176, 1181 (D.C. Cir. 1981). Because ozone forms most readily in the presence of warm, stagnant air, the creation of ozone can be viewed as a seasonal phenomenon, with concentrations peaking in the summer, and as a diurnal occurrence, with concentrations peaking in the afternoon and falling at night. See Virginia v. EPA, 108 F.3d 1397, 1400 (D.C. Cir. 1997). When inhaled, even at low levels, ground-level ozone can cause acute respiratory problems and decreased lung capacity, and can lead to increased hospital admissions and emergency room visits for respiratory problems. See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 62 Fed. Reg. 60,318, 60,321 (1997) (to be codified at 40 C.F.R. pt. 52) (proposed Nov. 7, 1997). In addition, ground-level ozone has adverse effects on plant growth and reproduction. See id. There are also health risks associated with nitrogen oxides themselves. See OFFICE OF AIR AND RADIATION, UNITED STATES ENVTL. PROT. AGENCY, NITROGEN OXIDES: IMPACTS ON PUBLIC HEALTH AND THE ENVIRONMENT 75-111 (Aug. 1997).

2. Interstate transport of air pollution has made it difficult for some states to achieve the NAAQS set by EPA pursuant to the Clean Air Act. See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 62 Fed. Reg. at 60,319 ("Many States have found it difficult to demonstrate attainment of the NAAQS due to the widespread transport of ozone and its precursors."). Interboundary transport is particularly troublesome in the case of ozone pollution. See id. Essentially, ozone transport results when precursor- and ozone-laden air slowly moves downwind. As the air mass moves, ozone levels often increase, in part because the complex reaction that forms ozone has more time to occur, and in part because the air mass picks up additional ozone precursors along the way. See Virginia v. EPA, 108 F.3d at 1400. This process can ultimately result in high ozone levels hundreds of miles downwind of the pollution sources. See id.

3. 213 F.3d 663 (D.C. Cir. 2000).
While the D.C. Circuit’s decision in *Michigan v. EPA* represented a much-needed triumph for EPA, especially in light of its recent defeat in the same court in *American Trucking Ass’ns v. EPA*, closer inspection reveals that, ironically, it may represent a setback for EPA in the long-term. The precedent created, based on the court’s questionable legal analysis, could potentially undermine future efforts by EPA to formulate policy protecting the environment and public health. Furthermore, the failure of the court to adequately deal with the federalism issues presented could disrupt the already fragile relationship between the federal and state governments with respect to the administration of the Clean Air Act (CAA).

I

PROCEDURAL HISTORY/STATUTORY BACKGROUND

Federal and state government agencies share substantial power under the CAA. EPA promulgates NAAQS for a number of air pollutants. States, in turn, are required to adopt state implementation plans (SIPs) that provide for the implementation, maintenance, and enforcement of the NAAQS, subject to EPA approval. Finally, even if initially approved, EPA may later call

---


5. The primary statutory provisions that govern the process for setting NAAQS are Sections 108 and 109 of the CAA. See 42 U.S.C. §§ 7408-7409 (1994). Section 108(a) requires EPA to list certain air pollutants that “may reasonably be anticipated to endanger public health or welfare” and issue “air quality criteria” for them. *Id.* § 7408(a)(1)(A). Based on the air quality criteria established under Section 108, EPA then must promulgate, under Section 109 of the CAA, “primary” standards that “in the judgment of the Administrator . . . [a]llowing an adequate margin of safety, are requisite to protect the public health.” *Id.* § 7409(b)(1). Under Section 109, EPA must also set “secondary” standards “requisite to protect the public welfare.” *Id.* § 7409(b)(2).

6. The CAA establishes air quality control regions that comprise entire states, portions of individual states, or interstate regions. See 42 U.S.C. § 7407(c). Each state has the responsibility of submitting to EPA a SIP that details how a state plans to achieve and maintain the NAAQS for every air quality control region within the state’s jurisdiction. See 42 U.S.C. § 7407(a). If a state refuses or is unable to design a satisfactory SIP, EPA then has the power to formulate a federal implementation plan (FIP) for the air quality control regions within that state’s jurisdiction. See 42 U.S.C. § 7410(c)(1). It seems highly unlikely that a state would refuse to design a SIP, thereby relinquishing control over state-specific emissions reduction decisions to the federal government. However, it is possible that a state may submit an inadequate SIP, which would leave an implementation vacuum and necessitate the formulation of a FIP by EPA. See, e.g., Delaney v. EPA, 898 F.2d 687 (9th Cir. 1990), cert. denied, 498 U.S. 998 (1990) (ordering EPA to disapprove Arizona’s SIP and to prepare a FIP).

7. See CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1). In actuality, EPA has minimal discretion to disapprove a SIP. The components that a valid SIP must contain are
for a state to revise a SIP found to be "substantially inadequate to attain or maintain the relevant [NAAQS]." or if revisions are necessary "to otherwise comply with any requirement of [the CAA]."³

Such a call for revision by EPA prompted the suit in Michigan v. EPA. In October 1998, EPA issued a final rule mandating that twenty-two states and the District of Columbia revise their SIPs to more effectively mitigate interstate ozone transport.⁹ EPA issued this "SIP Call" pursuant to a 1990 amendment to the CAA (known as the "good neighbor" provision) which requires that SIPs contain "adequate provisions" prohibiting "any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [primary or secondary NAAQS]."¹⁰ EPA required that each state produce a revised SIP that would reduce nitrogen oxides (NOₓ), an ozone precursor, by the amount achievable through what EPA termed "highly cost-effective controls."¹¹ EPA defined highly cost-

 enumerated in CAA § 110(a)(2)(A-M) and further defined in 40 C.F.R. § 51. For example, a valid SIP must include enforceable emission limitations and schedules for compliance with air quality standards. See 42 U.S.C. § 7410(a)(2)(A). As long as a SIP meets the enumerated statutory requirements, EPA "shall" approve of the SIP. See 42 U.S.C. § 7410(k)(3).


10. 42 U.S.C. § 7410(a)(2)(D)(ii)(l) (emphasis added). The "good neighbor" provision was an effort by Congress to address the long-standing problem of interboundary, and more specifically, interstate, transport of pollution. Issues arising out of interboundary pollution transport have been precipitating legal conflicts for almost 100 years. For example, in 1907, the U.S. Supreme Court granted a request by Georgia for an injunction against a copper plant in Tennessee that was emitting "sulfurous fumes" into the state. See Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907).

11. It is important to note that the SIP Call does not require the effected states to implement these "highly cost-effective controls." EPA began with a 1995 NOₓ emissions inventory for each state, assembled from a variety of data sources. However, 2007 was the target date for implementation of the revised SIPs required by the SIP Call. As such, EPA used the 1995 inventory to develop a 2007 "base" NOₓ emissions inventory by projecting the total amount of NOₓ emissions that sources in each covered state would emit in light of expected growth through 2007. EPA then developed a 2007 "controlled" NOₓ emissions inventory by projecting the total amount of NOₓ emissions each of those states would emit if the state controlled its large stationary NOₓ-emitting sources by implementing "highly cost-effective controls." This
effective controls as those capable of removing NO\textsubscript{x} at a cost of $2,000 or less per ton.\textsuperscript{12}

In response to this action by EPA, a number of NO\textsubscript{x}-producing states (collectively, Petitioners) filed petitions for review challenging various aspects of the SIP Call.\textsuperscript{13} These petitions led the U.S. Court of Appeals for the District of Columbia Circuit to review the rule in \textit{Michigan v. EPA}.\textsuperscript{14}

II

THE DECISION

A. Majority Opinion

The D.C. Circuit, in a 2-1 per curiam decision issued March 3, 2000, largely upheld\textsuperscript{15} EPA's SIP Call.\textsuperscript{16} The first issue before

\begin{itemize}
\item[12.] See Final Rule, supra note 9, at 57,377-78.
\item[13.] While the state of Michigan and the state of West Virginia were the named petitioners, the states of Ohio, North Carolina, Alabama, Indiana, South Carolina, and Virginia were also parties to the challenge of the SIP Call.
\item[14.] 213 F.3d 663 (D.C. Cir. 2000).
\item[15.] While the court for the most part upheld the validity of the EPA rule, there were portions of the rule that were remanded and reversed. The court held that EPA "acted unlawfully by including Wisconsin in a SIP Call limited by statute to states contributing significantly to nonattainment in any other state and therefore set aside Wisconsin's inclusion in the SIP call." \textit{Michigan v. EPA}, 213 F.3d at 681. According to the court, EPA failed to explain how Wisconsin contributes to nonattainment in any other state. See \textit{id}. In addition, the court found that EPA failed to articulate why NO\textsubscript{x} budgets based on a state's total NO\textsubscript{x} emissions were warranted in Missouri and Georgia, when there only appeared to be evidence that emissions from portions of those two states "contributed" to downwind nonattainment. See \textit{id}. at 684-85. Accordingly, the court vacated EPA's rule with respect to Missouri and Georgia, and remanded that portion of the rule to EPA for reconsideration. See \textit{id}. at 685. Finally, the court also held that EPA failed to provide adequate notice of a change in the definition of an electric generating unit, and that EPA did not provide adequate notice of a change in the control level assumed for large stationary internal combustion engines. See \textit{id}. at 692-95. The court remanded the rule to EPA for reconsideration in light of these findings of inadequate notice. See \textit{id}. at 695. A detailed discussion of these portions of the court's opinion is beyond the scope of this Note.
\item[16.] The case was heard by Circuit Judges Stephen Williams, David Sentelle, and Judith Rogers. Judge Williams wrote Parts I.B-I.C and II.B of the per curiam opinion.
\end{itemize}
the court centered on EPA's determination of what constitutes a "significant contribution" to downwind nonattainment of an air quality standard. In addition, the court addressed whether the SIP Call violated principles of federalism by trammeling upon the right of states to fashion their own SIP submissions.

1. EPA's Definition of a "Significant Contribution"

The CAA provision at issue, Section 110(a)(2)(D)(i)(I), applies only to states that "contribute significantly" to nonattainment of a primary or secondary ambient air quality standard in a downwind state. Petitioners challenged EPA's determination of what constitutes a "significant contribution" on several grounds. First, they argued that EPA impermissibly took the costs of reducing ozone concentrations into consideration in defining "significance." Alternatively, they alleged that EPA's determination of "significant contribution" was so devoid of intelligible principles that it violated the nondelegation doctrine. The court, however, rejected each of these arguments and upheld the action taken by EPA.

Judge Rogers wrote Parts III.B and IV of the opinion. Judge Sentelle wrote Parts I.A, II.A, II.C, and III.A of the per curiam opinion, and also filed a dissenting opinion.


18. Petitioners also argued that in determining what constitutes a "significant contribution," EPA irrationally imposed uniform NOx controls on the states, thereby implicitly defining "significance" in terms of gross amounts of emissions differently for each state. Petitioners claimed that the uniform controls were irrational in two ways. First, even though states differ considerably in their respective contributions to downwind nonattainment, the rule required that even small contributors make reductions equivalent to those achievable by "highly cost-effective controls." Second, the system of uniform controls failed to differentiate between NOx emissions sources, despite the fact that reductions from sources near nonattainment areas are more valuable than reductions from distant sources. See Michigan v. EPA, 213 F.3d at 679.

The court nevertheless upheld the uniform controls implemented by EPA, rejecting both of Petitioners' contentions. In response to Petitioners' first contention, the court held that its conclusion that EPA could consider costs in determining what constitutes a "significant" contribution to nonattainment necessarily entailed upholding the consequence of both large and small contributors having to make reductions equivalent to those achievable by highly cost-effective measures. See id. In rejecting Petitioners' second contention, the court found that EPA had investigated non-uniform regional approaches to emissions reductions and found that they "did not 'provide either a significant improvement in air quality or a substantial reduction in cost.'" Id. (quoting Final Rule, supra note 9, at 57,423). Since the agency had considered and rejected the alternative in good faith, the court held that EPA's decision to impose a uniform control strategy was well reasoned and not irrational.
a. Consideration of Costs.

By its terms, CAA Section 110(a)(2)(D)(i)(I) is concerned with "amounts" of "emissions activity" that "contribute significantly to nonattainment." Based on this, Petitioners argued that EPA must set a flat permissible contribution threshold, based solely on public health, and define a significant contribution as any amount exceeding that threshold. The court rejected this argument, holding that the statute permitted EPA to consider the costs of emission reductions in its calculus, such that "after reduction of all that could be cost-effectively eliminated, any remaining 'contribution' would not be considered 'significant.'"20

In deciding that it was permissible for EPA to consider costs in its determination of "significance," the court noted that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs."21 According to the court, the "text, structure, [and] history" of CAA Section 110(a)(2)(D) did not evidence such Congressional intent.22 It concluded, relying on *Industrial Union Dept., AFL-CIO v. American Petroleum Institute* ("Benzene"),23 that in some contexts the inclusion of the word "significant" in statutory language in fact "begs a consideration of costs."24 According to the court, the Benzene decision established that insertion of the adjective "significant" into statutory language required "a consideration of which risks are worth the cost of elimination."25

19. See *Michigan v. EPA*, 213 F.3d at 676.
20. Id. at 677.
21. Id. at 678 (quoting *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)). According to the court, it is the settled law of the D.C. Circuit that "preclusion of cost consideration requires a rather express congressional direction." Id. (citing *NRDC v. EPA*, 824 F.2d at 1163 (holding that the language of CAA § 112, requiring EPA to set an air quality standard for hazardous pollutants with a an "ample margin of safety" to protect the public health, did not preclude a consideration of costs); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 622-24 (D.C. Cir. 1998) (holding that EPA was not precluded from considering the effects of a proposed rule for reformulated gasoline on the price and supply of gasoline, even though the statutory scheme at issue had the overall goal of improving air quality and contained no allusions to effects of the rule on gasoline prices); *Grand Canyon Air Tour v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998) (holding that under a statute requiring the FAA to devise a plan for "substantial restoration of the natural quiet" in the Grand Canyon area, FAA could permissibly consider the costs to the air tourism industry in determining the level of restoration required by the statute)).
25. Id.
b. Nondelegation

Relying on the holding in *American Trucking Ass'ns, Inc. v. EPA*, Petitioners in *Michigan v. EPA* sought to invalidate EPA's SIP Call under the nondelegation doctrine. They argued that neither the language of CAA Section 110(a)(2)(D) nor EPA's interpretation of that section adequately articulated a guiding "intelligible principle" for defining what constituted a "significant" contribution to downwind nonattainment. Petitioners asserted that this failure left EPA with almost limitless discretion to determine what level of contribution warranted a call for revision of SIPs, and therefore constituted a violation of the nondelegation doctrine.

While nondelegation challenges to agency rules have been infrequent in recent jurisprudence, the D.C. Circuit's invocation of the doctrine in *American Trucking* appears to have resurrected this separation of powers principle. In *American Trucking*, the court examined the validity of EPA's July 1997 final rules revising the primary and secondary NAAQS for ozone and particulate matter. In setting NAAQS, the CAA obligates EPA to set primary standards at concentration levels "requisite to protect the public health" with an "adequate margin of safety." 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." The CAA further directs EPA to set these primary and secondary standards based on "air quality criteria" that "accurately reflect the latest scientific knowledge" regarding the

27. See *Michigan v. EPA*, 213 F.3d at 680.
28. The nondelegation doctrine stems from separation of powers concerns and limits the ability of Congress to transfer its legislative authority to other branches of the government, especially the executive branch. Theoretically, delegation is permitted only if Congress prescribes an "intelligible principle" to guide the executive agency in making policy. In reality, however, courts have frequently upheld broad delegations of power to executive agencies by Congress. See, e.g., Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding the Federal Communications Commission's ("FCC") authority to regulate broadcast licensing in the "public interest"); United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (sustaining the FCC's general authority to issue regulations "as public convenience, interest, or necessity requires"); Yakus v. United States, 321 U.S. 414, 426-27 (1944) (upholding the Price Administrator's authority to fix "fair and equitable" commodities prices).
31. Id. § 7409(b)(2).
effects of pollutants. Based on these requirements, EPA developed a number of criteria that it considers in setting standards, including "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed."

Despite the fact that EPA promulgated the final rules revising the primary and secondary NAAQS for ozone and particulate matter after a thorough analysis based on these accepted criteria, the court in American Trucking struck down the revised standards as effecting "an unconstitutional delegation of legislative power." The court then remanded the standards to EPA to "develop a construction of the act that satisfies the constitutional requirement."

In invalidating the revised NAAQS, the American Trucking court did not object to the criteria used by EPA in developing the standards, but rather, to EPA's failure to develop an "intelligible principle by which to identify a stopping point." In essence, the court found that neither the statutory language of the CAA nor the interpretative regulations of the agency had articulated any justifiable explanation for why the standards were set at the chosen level, as opposed to at levels that would permit higher or

32. Id. § 7408(a)(2).
34. American Trucking, 175 F.3d at 1033.
35. Id.
36. Id. at 1037. "The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much." Id. at 1034.

The "intelligible principle" language invoked by the court comes from the Supreme Court's decision in the 1928 case of J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). In Hampton, the Court upheld the Tariff Act of 1922, which authorized the President to modify customs duties "when he determines . . . that the differences in costs of production have changed or no longer exist." Id. at 402. The Court held this delegation by Congress to the President to be constitutional: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Id. at 409 (emphasis added).
lower emissions. Therefore, the court found that EPA had violated the nondelegation doctrine by exercising unfettered discretion in the promulgation of the revised NAAQS.

Petitioners in *Michigan v. EPA* invoked *American Trucking*, arguing that EPA's definition of the "significant contribution" text of Section 110(a)(2)(D) left the agency with unfettered discretion in violation of the nondelegation doctrine. The court rejected Petitioners' argument, however, distinguishing *American Trucking* and its immediate predecessor, *International Union, UAW v. OSHA* ("Lockout/Tagout I"), based on the scope of discretionary power at issue. In *American Trucking*, the NAAQS revisions promulgated by EPA applied nationally, and thus had the potential to affect all sources of ozone and particulate pollution across the nation. In other words, EPA's "'claimed power to roam' was 'immense, encompassing all American enterprise.'" In contrast, the SIP Call at issue in *Michigan v. EPA* applied only to sources of NO\textsubscript{x} in twenty-two states and the District of Columbia. According to the court, the more limited scope of EPA's discretion in issuing the SIP Call allowed the rule to survive a nondelegation doctrine challenge.

---

37. See *Am. Trucking*, 175 F.3d at 1037.
38. *Id.* at 1038.
40. 938 F.2d 1310 (D.C. Cir. 1991). *Lockout/Tagout I* involved OSHA regulations limiting industry's operation of equipment undergoing maintenance. OSHA had interpreted the portion of the Occupational Safety and Health Act at issue to allow the agency, upon finding that a workplace practice posed a "significant" risk, to require steps to minimize the risk. See *id.* at 1317. The D.C. Circuit Court held that OSHA's interpretation of the statute gave the agency unfettered discretion in deciding how stringently to regulate and therefore raised a "serious nondelegation issue." *Id.*
41. See *Michigan v. EPA*, 213 F.3d at 680-81.
42. See *Am. Trucking*, 175 F.3d at 1037 ("The standards in question affect the whole economy . . . .").
44. *Id.* at 669.
45. Although the court acknowledged that theoretically CAA § 110(a)(2)(D) could have extremely far-reaching effects, as a practical matter, the court found that the statutory provision is confined to a "modest role." See *id.* at 680. According to the court, application of EPA's discretion under Section 110(a)(2)(D) is restricted because EPA must make a number of threshold determinations before assessing the "significance" of contribution to downwind nonattainment. See *id.* "Before assessing 'significance,' EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment." *Id.* Because of the complexity of these threshold determinations, EPA's regulatory activity under Section 110(a)(2)(D) has been limited to the promulgation of only one rule, the SIP Call. See *id.* Therefore, the court seems to define the scope of an agency's discretion under a statutory provision at least in part by the number of rules that an agency can
2. Federalism

In addition to challenging EPA's determination of what constitutes a "significant contribution" to downwind nonattainment, Petitioners also argued unsuccessfully that the SIP Call violated principles of federalism. Petitioners asserted, relying on *Virginia v. EPA,* 46 that the NO\textsubscript{x} budget program "impermissibly intrudes on the statutory right of the states to fashion their SIP submissions." 47 *Virginia v. EPA* involved an EPA rule that required several states to reduce ozone precursors by a particular program, with the only alternative or substitute being an even more stringent program. 48 The D.C. Circuit struck down the rule in that case, holding that the "EPA may not use a section 110(k)(5) SIP call to order states to adopt a particular approach to achieving the SIP requirements listed in section 110." 49 Its decision was mandated by the Supreme Court's holding in *Train v. NRDC,* 50 which made clear that CAA Section 110 "left to the states the power to [initially] determine which sources would be burdened by regulation and to what extent." 51

The court in *Michigan v. EPA,* on the other hand, rejected Petitioners' argument and held that EPA's NO\textsubscript{x} budget rule did not violate the federalism principles established in *Virginia v. EPA* and *Train.* 52 According to the court, the NO\textsubscript{x} budget rule simply set the levels to be achieved by state-determined compliance mechanisms, leaving the states free to implement whatever measures they deem appropriate to meet these levels,

promulgate under the provision, as opposed to the effects of those rules that are issued.

48. *Virginia v. EPA,* EPA had promulgated a rule under the authority of CAA § 110(k)(5) requiring twelve states and the District of Columbia to revise their SIPs to correct inadequacies which led to a failure to attain the ozone NAAQS. See *Virginia v. EPA,* 108 F.3d at 1401. The EPA rule required the states in question to adopt California's "Low Emission Vehicle" standards, which are considerably more restrictive than the federal vehicle emissions standards, and include ceilings on motor vehicle emissions of nitrogen and VOCs, the two chief ozone precursors. See id. at 1401-02. EPA purported to offer the states the option of implementing their own mix of emissions reduction programs as an alternative to enacting the California program. See id. at 1403. However, the only acceptable "substitute programs" were those that would reduce ozone precursors from 3.5 to 6.5 times more than the California program. Id.
50. 421 U.S. 60 (1975).
52. See id. at 688.
in light of local needs or preferences.\textsuperscript{53} The EPA NO\textsubscript{x} budget rule thus satisfied the requirement of state control over implementation mandated by \textit{Virginia v. EPA} and \textit{Train} and therefore, according to the court, did not violate the principles of federalism.\textsuperscript{54}

\textbf{B. Judge Sentelle's Dissent}

In a sharply worded dissent, Judge Sentelle argued that EPA exceeded its statutory authority by considering costs of emission reductions in determining what constituted a "significant" contribution to downwind nonattainment of a NAAQS:

It would appear to me that Congress clearly empowered EPA to base its actions on amounts of pollutants . . . . Instead, EPA has chosen . . . to assert authority to require the SIPs to contain provisions based not on the amounts of pollutants, nor even on the significance of the contributions of such pollutants to downwind nonattainment, but on the relative cost effectiveness of alleviation . . . . [I]t is undeniable that EPA has exceeded its statutory authority.\textsuperscript{55}

Judge Sentelle questioned the majority's textual analysis and their conclusion that EPA could consider costs in defining a significant contribution to downwind nonattainment. He instead argued that "no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily-defined authority."\textsuperscript{56} Accordingly, he insisted, the majority's analysis of Section 110(a)(2)(D) failed because it centered solely on the term "significant," thereby obscuring the meaning of the section as a whole.\textsuperscript{57} In Judge Sentelle's opinion, a correct interpretation of Section 110(a)(2)(D) leads to the conclusion that EPA must focus solely on controlling the \textit{amount of emissions} that contribute

\textsuperscript{53} See id.
\textsuperscript{54} See id.
\textsuperscript{55} See id. at 695 (Sentelle, J., dissenting).
\textsuperscript{56} Id. at 696 (Sentelle, J., dissenting).
\textsuperscript{57} See id. (Sentelle, J., dissenting) ("The majority makes a fundamental mistake by divorcing the adverb 'significantly' from the verb it modifies, 'contribute.' The majority compounds its error by divorcing significantly from the rest of the statutory provision in issue. [citation omitted] By focusing on 'significance' or what it means to be 'significant,' the majority ignores the fact that the statute permits EPA to address that which is 'contribut[ed] significantly.' [citation omitted] And what should EPA look for as being contributed significantly? Congress clearly answered that question for the agency as being an 'amount' of an 'air pollutant.'").
significantly to downwind nonattainment of an air quality standard, and regulate that amount down to permissible levels.58

III
ANALYSIS

A. EPA's Definition of "Significant Contribution"

1. Consideration of Costs: The Majority's Flawed Interpretation of CAA Section 110(a)(2)(D)

In determining that EPA could permissibly consider the costs of emissions reductions in defining a "significant contribution" to downwind nonattainment, the majority relied on an accepted principle of statutory construction of the D.C. Circuit: that "preclusion of cost consideration requires a rather express congressional direction."59 The majority examined CAA Section 110(a)(2)(D) in light of this principle and found no Congressional intent to preclude consideration of cost in the section's "text, structure, [and] history."60 In light of D.C. Circuit precedent,61 the court correctly required evidence of Congressional intent. The majority's conclusion that the text of Section 110(a)(2)(D) fails to indicate such intent, however, is flawed.

The difficulty with the majority's textual analysis is that it hinges almost entirely on the term "significant." According to the court, "[t]he term 'significant' does not in itself convey a thought that significance should be measured in only one dimension—here, in the petitioners' view, health alone."62 It finds support for this interpretation in the Supreme Court's decision in Benzene, which made clear that the insertion of the adjective "significant" into a statute necessitates an inquiry into which risks are worth the cost of elimination.63 This interpretation in and of itself is unproblematic. The flaw lies not in the court's interpretation of the term "significant," but rather, in its narrow focus on the term. As Judge Sentelle pointed out in his dissent, a textual

58. See id. at 695 (Sentelle, J., dissenting).
59. Id. at 678 (quoting Natural Resources Defense Council v. EPA, 824 F.2d 1146, 1163 (D.C. Cir. 1987)).
60. Id. at 679.
61. See supra note 18.
63. See id.
analysis of Section 110(a)(2)(D) that centers solely on the term "significant" obscures the meaning of the section as a whole.

Section 110(a)(2)(D) grants EPA authority to ensure that SIPs contain adequate provisions to prevent any source within a state from emitting "any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other state." The majority's focus on the single term "significantly" ignores the rest of the section's language, namely the terms "amount" and "air pollutant." When taken in its entirety, EPA's mandate under the section is to ensure that states do not produce amounts of air pollutants that contribute to downwind nonattainment. While the contribution of these pollutants to downwind nonattainment must be significant, Judge Sentelle correctly concludes that EPA's statutory authority under Section 110(a)(2)(D) is limited to controlling amounts of emissions, and does not permit consideration of the costs of those emissions reductions.

If the text of Section 110(a)(2)(D) is viewed in its entirety, Michigan v. EPA falls squarely within the precedent established by the D.C. Circuit in Ethyl Corp. v. EPA. There, the court held that where "the plain language of a provision makes clear that . . . decisions are to be based on one criterion, the EPA cannot base its decision on other criteria." Michigan v. EPA presented just such a situation. Congress drafted statutory language requiring EPA to focus on the amount of pollutant emissions that contribute significantly to downwind nonattainment. EPA instead chose to focus on a different criteria, the cost effectiveness of emissions reductions. Therefore, under Ethyl Corp., the court in Michigan v. EPA should have deemed EPA's consideration of emission reduction costs beyond its statutory authority.

64. This textual interpretation of Section 110(a)(2)(D) as prohibiting consideration of costs is bolstered by viewing the section within the CAA as a whole: Where Congress intended the [EPA] to be concerned about economic and technological feasibility, it expressly so provided. Thus [subsections] 110(a), 110(f), 111(a)(1), 202(a), 211(c)(2)(A), and 231(b) . . . all expressly permit consideration . . . "of the requisite technology, giving appropriate consideration to the cost of compliance." . . . Section 110(a)(2) contains no such language.

65. 51 F.3d 1053 (D.C. Cir. 1995).
66. Id. at 1058.
67. As Judge Sentelle's dissent succinctly states: "Congress set forth one criterion: the emission of an amount of pollutant sufficient to contribute significantly to downwind nonattainment. EPA adopted a different criterion: the cost effectiveness of alleviation." Michigan v. EPA, 213 F.3d at 696 (Sentelle, J., dissenting).
A finding by the court that EPA exceeded its statutory authority in considering emission reduction costs would have presumably resulted in the invalidation of the SIP Call. Although a blow to EPA in the short term, in the long run such a ruling likely would have furthered EPA's broader goal of preserving the environment and protecting public health. Absent the opportunity to consider costs, EPA would be forced to consider only the protection of public health and the environment in the promulgation of future rules under Section 110(a)(2)(D).

2. Nondelegation

In an interesting retreat from the broad resurrection of the nondelegation doctrine that American Trucking seemed to presage, the court in Michigan v. EPA upheld the SIP Call, finding no violation of the nondelegation doctrine despite the broad authority granted to EPA under CAA Section 110(a)(2)(D).

The court held that American Trucking and its immediate predecessor, Lockout/Tagout I, could be distinguished from Michigan v. EPA based on the scope of the discretionary power at issue.

Unfortunately, the D.C. Circuit's decision to limit the reach of the nondelegation doctrine based on the amount of American industry affected by an agency action lacks any coherent

68. One of the great ironies of Michigan v. EPA is the role reversal undertaken by advocates of environmental protection and those of industry. Environmentalists are typically more comfortable with the promulgation of rules based solely on considerations of environmental protection and public welfare, while industry representatives normally argue that EPA must consider the costs of agency rules that force businesses to reduce emissions. See, e.g., Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1148 (D.C. Cir. 1980) (petitioner St. Joe Minerals Corporation argued that EPA erred by refusing to consider the economic costs to industry in setting NAAQS for lead); Union Elec. Co. v. EPA, 427 U.S. 246, 256-58 (1976) (petitioner electric utility company argued that economic feasibility should be considered when EPA is approving SIPs under CAA § 110(a)(2), while EPA argued that it had no statutory authority to consider economic or technological feasibility when evaluating a SIP). Industry often fears that if EPA is not constrained by cost considerations, the agency is apt to promulgate rules that protect the public health and the environment at the expense of industry, forcing businesses to adopt economically impractical or infeasible control technologies. See, e.g., Lead Indus., 647 F.2d at 1148 ("[petitioner] St. Joe [Minerals Corporation] argues that the [EPA] abused [its] discretion by refusing to consider [economic impacts] in determining the appropriate margin of safety for the lead [NAAQS], and maintains that the lead air quality standards will have a disastrous economic impact on industrial sources of lead emissions.").

69. See Michigan v. EPA, 213 F.3d at 680-81. The limited manner in which the Michigan v. EPA panel of the D.C. Circuit applies the holding in American Trucking is particularly interesting in light of the fact that Judge Williams wrote the nondelegation doctrine portion of both opinions.

70. See id.
foundation. The court's holding does illustrate that a rule affecting all sources of NOx emissions in almost half of the country may lack the scope necessary to trigger the nondelegation doctrine. It does not, however, make clear just how far-reaching the effects of a given agency rule must be in order to trigger the doctrine. Indeed, while the court applied the nondelegation doctrine in an "all-or-nothing" fashion in Michigan v. EPA, portions of the opinion suggest a theoretically difficult sliding-scale approach. Namely, the broader the scope of application of an agency rule, the more precise the standards guiding the formulation of the rule must be in order to survive a nondelegation challenge.\(^7\) Ironically, as Professor Robert W. Adler points out, the court fails to hold itself to the same standard of rationality it seeks to impose on EPA.\(^7\) The court does not articulate any guiding "intelligible principle" for determining how broad the scope of application of an agency's discretion must be before it runs afoul of the nondelegation doctrine.\(^7\)

While the court's limitation on the new nondelegation doctrine announced in American Trucking may be viewed as comforting given the possible ramifications a broader application could have on a wide range of EPA programs, and agency programs more generally, the legal rationale behind the limitation remains a mystery.\(^7\) The court never adequately explains why EPA or other federal agencies should be permitted to establish regulations based on inadequate intelligible principles simply because those regulations affect only a segment of the regulated community.\(^7\) If the court views the nondelegation doctrine as a constitutional principle arising out of separation of powers concerns,\(^7\) it is entirely unclear how a

\(^{71}\) See Michigan v. EPA, 213 F.3d at 680 ("When the scope [of application] increases to immense proportions, as in A.L.A. Schechter Poultry Corp. v. United States, the standards must be correspondingly more precise." (quoting International Union UAW v. OSHA, 938 F.2d 1310, 1317 (D.C. Cir. 1991)). A.L.A. Schechter involved the invalidation of the entire National Industrial Recovery Act as an unconstitutionally broad delegation of Congressional power over the U.S. economy to unaccountable private groups. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).


\(^{73}\) See id.

\(^{74}\) See id.

\(^{75}\) See id.

\(^{76}\) It is not entirely clear that the new nondelegation doctrine announced in American Trucking has any real foundation in the Constitution. The traditional
constitutional violation ceases to be such simply because it offends a smaller portion of the American populace.

Michigan v. EPA may represent the first in a series of attempts by advocates to challenge agency rulemaking based on American Trucking's broad interpretation of the nondelegation doctrine. The court's refusal to apply the doctrine in a situation that has far-reaching effects, but effects that fall short of reaching "all American enterprise," may limit nondelegation challenges to only those rules that have truly national implications.77 Alternatively, nondelegation challenges such as that in Michigan v. EPA may be rendered obsolete by the Supreme Court, which has granted certiorari to review the D.C. Circuit's decision in American Trucking.78

nondelegation doctrine articulated in Hampton, and applied in Schechter Poultry, prohibits the legislative branch from delegating authority with no clear and intelligible limits. In contrast, the doctrine enunciated in American Trucking and Lockout/Tagout I requires agencies that are given overly broad discretion to police themselves and interpret their statutory authority in a manner that confines their administrative power. Indeed, despite the conclusion of the court in American Trucking that the revised NAAQS promulgated by EPA "effects an unconstitutional delegation of legislative power," it is clear that the American Trucking court did not hold that Congress had violated the traditional nondelegation doctrine of Hampton and Schechter Poultry. See Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999), aff'd in part, rev'd in part sub nom., Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001). This is evidenced by the fact that the court in American Trucking did not invalidate CAA Section 109 as unconstitutional, but instead, remanded the revised NAAQS to EPA to develop and modify the NAAQS in accordance with a guiding "intelligible principle." Id. at 1034.


77. See Adler, supra note 72.


Since the initial writing of this Note, the Supreme Court has in fact handed down a decision in the American Trucking case. In Whitman v. American Trucking Ass'ns, 121 S. Ct. 903, 911-12 (2001), the Court held that the statutory language of CAA Section 109(b)(1) authorizing EPA to set primary NAAQS at concentration levels "requisite to protect the public health" with an "adequate margin of safety" did not violate the nondelegation doctrine. According to the Court, the scope of discretion Section 109(b)(1) allows is "well within the outer limits of [the Court's] nondelegation precedents." Id. at 913.

The Court then proceeded to explain that in the history of Supreme Court jurisprudence the nondelegation doctrine has been successfully invoked to invalidate only two statutes, see id., signifying that 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." Id. Furthermore, in those rare instances where Congress has run afoul of the nondelegation doctrine, 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." Id. at 912; see
B. Federalism

Although the court in Michigan v. EPA held that the SIP Call avoided federalism concerns by giving states the choice of which control strategies to employ in achieving the emissions levels set by EPA, the court failed to sufficiently examine the underlying question of whether, as a practical matter, states have an actual choice of control strategies. In focusing on the theoretical choice offered to the states, the court missed the central federalism issue presented in the case.

The court reasoned that the cost-effective emissions reduction technologies employed by EPA in calculating a state’s NOx budget are not necessarily the technologies that a state must employ. In fact, the court went so far as to say that a state could choose to employ expensive, inefficient control technologies as long as the end result was achievement of the NOx budget set by EPA for the state.

The court’s insistence that a state is free to choose unreasonable and cost-ineffective control strategies, and therefore has sufficient control over SIP formulation, is disingenuous. Despite the court’s rhetoric, a choice between cheap, efficient control technologies and expensive, inefficient ones hardly seems a choice at all. The court erred in failing to admit that states would more than likely implement the most economical control measures, and consequently, erred in failing to analyze possible federalism problems with the SIP Call in light of this underlying reality.

A brief examination of the impact of the SIP Call on the electrical utility industry is illustrative of the extent of the court’s failure to adequately address the federalism issues raised in Michigan v. EPA. The emissions reduction burden resulting from the SIP Call will inevitably fall on the cheapest source of emissions reductions, namely the electric utility industry.

supra note 76. The Court’s broad language, stressing the extremely limited application of the nondelegation doctrine and making clear that challenges based on that doctrine must focus on Congress’ statutory language as opposed to an agency’s interpretation of that language should effectively eliminate future nondelegation doctrine challenges of the type brought by Petitioners in Michigan v. EPA.


80. See id. at 79.

81. While an empirical analysis of the relative costs of emissions reductions from various sources is beyond the scope of this Note, it seems widely accepted that the SIP Call will disproportionately burden the electric utility industry. See Katherine Rizzo, Court Sides with EPA on Smog Plan, ASSOCIATED PRESS (June 23, 2000) (quoting Frank O’Donnell, executive director of the Clean Air Trust, who stated that the D.C. Circuit’s decision to uphold the SIP Call “means that big, dirty, coal-fired
itself acknowledges this.\textsuperscript{82} In fact, some commentators have argued that the SIP Call is an express effort by EPA to re-regulate the electric utility industry in light of ongoing utility deregulation across the United States.\textsuperscript{83}

Some background is necessary to fully understand this re-regulation argument. The Federal Energy Regulatory Commission (FERC) oversees public utilities under an "open access" rule which provides that utilities that own, operate, or control transmission facilities must make the use of their transmission lines available to other generators of electricity.\textsuperscript{84} Consequently, consumers are able to purchase electricity from distant generators, thereby increasing consumer choice, creating competition in the electricity generation market, and, theoretically, driving down electricity prices. However, there are environmental consequences underlying the open access rule. The most important of these consequences for the purposes of this Note is the increased use of coal-fired electricity generation facilities. In a free-market, consumers will presumably seek out the cheapest source of electricity generation. Coal-fired facilities, particular older "dirty" facilities in the Midwest, operate more cheaply than the more heavily regulated facilities in the Northeast that generate power using alternative fuels such as oil, natural gas, hydropower, or nuclear power.\textsuperscript{85}

\begin{flushleft}
\textsuperscript{82} See Office of Air Quality Planning and Standards, United States Envtl. Prot. Agency, Information on Rules for Reducing Regional Transport of Ground-Level Ozone (Smog), http://www.epa.gov/ttn/oarpg/otagsip.html (visited Dec. 12, 2000) ("The proposed rule does not mandate which sources must reduce pollution. States will have the ability to meet the requirements of this rule by reducing emissions from the sources they choose. However, utilities and large non-utility point sources would be one of the most likely sources of NO\textsubscript{x} emissions reductions.").

\textsuperscript{83} See Carter & van der Vaart, supra note 81, at 396.


\textsuperscript{85} Older coal-fired facilities can operate more cheaply because the 1970 CAA "grandfathered" existing facilities so that they would not have to comply with new source performance standards ("NSPS"). NSPS are performance standards that set categorical emissions limits for certain types of sources. See 42 U.S.C. § 7411. Because these older coal-fired facilities do not have to comply with NSPS, they have avoided the significant cost of retrofitting facilities with the technology needed to achieve these standards. See Paul D. Brown, Lofty Goals, Questioned Motives, and
Before promulgating the open access rule, FERC conducted and issued a final environmental impact statement (FEIS) in support of the rule. FERC found that open access would not increase NO\textsubscript{x} emissions; or, in the alternative, that minimal increases in NO\textsubscript{x} emissions would be outweighed by the decreased cost of electricity generation that would result from competition among generators. EPA challenged FERC's findings by referring the matter to the White House's Council on Environmental Quality (CEQ), but CEQ deferred to FERC's finding of no significant environmental impact. It is this inability on the part of EPA to force FERC to examine the environmental ramifications of open access more carefully that leads some authors to conclude that the SIP Call is an effort by EPA to re-regulate the electric utility industry in light of the open access rule.

By failing to consider the ramifications of the SIP Call for electric utilities, the court in *Michigan v. EPA* sidesteps the issue of actual choice. The court should have acknowledged that states would more than likely implement cost-effective control technologies in order to comply with the SIP Call, and requested empirical data regarding the proportion of those cost-effective measures that are applicable to the utility industry. Once the court analyzed this empirical data, it could have made an informed decision that the SIP Call did not disproportionately burden utilities and, therefore, did not infringe on the states' right to fashion their SIP submissions. Alternatively, the court could have concluded that, even though the regulatory burden fell primarily on utilities, the SIP Call did not violate the principles of federalism because, although the utilities would

---

Proffered Justifications: Regional Transport of Ground-Level Ozone and the EPA's NO\textsubscript{x} SIP Call, 60 U. PITT. L. REV. 923, 959 n.226 (1999).


88. When the EPA Administrator determines that the action of another federal agency fails to adequately protect the public health or welfare or environmental quality, she shall publish her determination and refer it to the CEQ, which acts as an arbitrator for inter-agency disputes over environmental matters. See 42 U.S.C. § 7609 (1994).

89. See Carter & van der Vaart, supra note 81, at 396.
have to reduce emissions, a variety of control options were available to them in making those reductions.

Regardless of the court's ultimate decision on the federalism issue, an intellectually honest and informed discussion of the impacts of the SIP Call on the utility industry would strengthen the court's legal reasoning by adequately addressing whether states had an actual choice in fashioning their SIP submissions, as mandated by Virginia v. EPA90 and Train.91 Surely, the court's conclusory determination that the ability of the states to choose inefficient, expensive control technologies constitutes an actual choice insufficiently addresses the legitimate federalism concerns set forth by Petitioners.

CONCLUSION

The D.C. Circuit's decision in Michigan v. EPA, while a major political and legal victory for EPA in the short-term, could ultimately be a mixed blessing for the agency. The court's decision to allow the injection of cost considerations into CAA Section 110(a)(2)(D) may come back to haunt the agency, subverting its ability to protect the environment and public health. Perhaps the court is correct in its assertion that CAA Section 110(a)(2)(D) will be used infrequently and, therefore, the injection of costs into the policy formulation calculus will have minimal future ramifications. However, given the past inability of EPA, and the country as a whole, to effectively address the problem of interboundary pollution, it seems likely that the promulgation of future rules under CAA Section 110(a)(2)(D) will occur.

The decision may also have negative implications for the relationship between the federal and state governments administering the CAA. Their power-sharing arrangement functions relatively smoothly in large part because states retain flexibility in meeting the overall policy goals established by the federal government. If states feel that the SIP Call was an attempt by the federal government to undermine this flexibility by mandating that states implement certain types of emissions reductions, the tenuous state-federal relationship may be damaged. By failing to adequately address whether the SIP Call upset the principles of federalism on which the CAA is premised, the court in Michigan v. EPA not only missed an opportunity to

assuage possible tensions between the federal government and state governments, but rather, it potentially heightened them.