U.S. Supreme Court

WHITMAN, et al. v. AMERICAN TRUCKING ASSOCIATION, INC., et al.*

531 U.S. 457 (2001)
No. 99-1257
Argued November 7, 2000
Decided February 27, 2001

Court's Decision: 9-0
Majority: Scalia, Rehnquist, O'Connor, Kennedy, Souter, Ginsburg Concurring: Stevens, Thomas, Breyer

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Justice Scalia, delivered the opinion of the Court.

¶1 These cases present the following questions: . . . Whether § 109(b)(1) of the Clean Air Act (CAA) delegates legislative power to the Administrator of the Environmental Protection Agency (EPA). . . .

I

¶2 Section 109(a) of the CAA, as added, 84 Stat. 1679, and amended, 42 U. S. C. § 7409(a), requires the Administrator of the EPA to promulgate NAAQS [national ambient air quality standards] for each air pollutant for which "air quality criteria" have been issued under § 108, 42 U.S.C. § 7408. Once a NAAQS has been promulgated, the Administrator must review the standard (and the criteria on which it is based) "at five-year intervals" and make "such revisions . . . as may be appropriate." CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). These cases arose when, on July 18, 1997, the Administrator revised the NAAQS for particulate matter and ozone. American Trucking Association, Inc., and its correspondents in No. 99-1257—which include, in addition to other private companies, the States of Michigan, Ohio, and West Virginia—challenged the new standards in the Court of Appeals for the District of Columbia Circuit, pursuant to 42 U.S.C. § 7607(b)(1).

¶3 The District of Columbia Circuit accepted some of the challenges and rejected others. It agreed with the No. 99-1257 respondents (hereinafter respondents) that § 109(b)(1) delegated legislative power to the Administrator in contravention of the United States Constitution, Art. I, § 1, because it found that the EPA had interpreted the statute to provide no "intelligible principle" to guide the agency's exercise of authority. The court thought, however, that the EPA could perhaps avoid the unconstitutional delegation by adopting a restrictive construction of § 109(b)(1), so instead of declaring the section unconstitutional the court remanded the NAAQS to the agency. . . .

¶4 The Administrator and the EPA petitioned this Court for review of the . . . questions described in . . . this opinion. . . . We granted certiorari on both petitions and scheduled the cases for argument in tandem. We have now consolidated the cases for purposes of decision.

* * * * *

* This opinion has been edited substantially, including the deletion of passages, footnotes, textual citations, and concurring and dissenting opinions.

III

¶5 Section 109(b)(1) of the CAA instructs the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health." 42 U. S. C. § 7409(b)(1). The Court of Appeals held that this section as interpreted by the Administrator did not provide an "intelligible principle" to guide the EPA's exercise of authority in setting NAAQS. "[The] EPA," it said, "lack[ed] any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much." 175 F. 3d, at 1034. The court hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine. *Id.,* at 1038. We disagree.

¶6 In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." This text permits no delegation of those powers, . . . and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394, 409 (1928). We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. Both *Fahey* v. *Mallonee,* 332 U. S. 245, 252-253 (1947), and *Lichter* v. *United States,* 334 U. S. 742, 783 (1948), mention agency regulations in the course of their nondelegation discussions, but *Lichter* did so because a subsequent Congress had incorporated the regulations into a revised version of the statute, *ibid.,* and *Fahey* because the customary practices in the area, implicitly incorporated into the statute, were reflected in the regulations, 332 U. S., at 250. The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary selfdenial has no bearing upon the answer.

¶7 We agree with the Solicitor General that the text of § 109(b)(1) of the CAA at a minimum requires that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." Tr. of Oral Arg. in No. 99-1257, p. 5. Requisite, in turn, "mean[s] sufficient, but not more than necessary." *Id.,* at 7. These limits on the EPA's discretion are strikingly similar to the ones we approved in *Touby* v. *United States,* 500 U. S. 160 (1991), which permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "'necessary to avoid an imminent hazard to the public safety.'" *Id.,* at 163. They also resemble the Occupational Safety and Health Act of 1970 provision requiring the agency to "'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health'"—which the Court upheld in *Industrial Union Dept., AFL—CIO* v. *American Petroleum Institute,* 448 U. S. 607, 646 (1980), and which even then-Justice Rehnquist, who alone in that case thought the statute violated the nondelegation doctrine, would have upheld if, like the statute here, it did not permit economic costs to be considered.

¶8 The scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." See *Panama*

Refining Co. v. *Ryan,* 293 U. S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935). We have, on the other hand, upheld the validity of § 11(b)(2) of the Public Utility Holding Company Act of 1935, 49 Stat. 821, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." *American Power & Light Co.* v. *SEC,* 329 U. S. 90, 104 (1946). We have approved the wartime conferral of agency power to fix the prices of commodities at a level that "'will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act.'" *Yakus* v. *United States,* 321 U. S. 414, 420, 423-426 (1944). And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." In short, we have "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." *Mistretta* v. *United States,* 488 U. S. 361, 416 (1989) (Scalia, J., dissenting).

¶9 It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define "country elevators," which are to be exempt from new stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy. But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." 175 F. 3d, at 1034. In *Touby,* for example, we did not require the statute to decree how "imminent" was too imminent, or how "necessary" was necessary enough, or even—most relevant here—how "hazardous" was too hazardous. 500 U. S. at 165-167. Similarly, the statute at issue in *Lichter* authorized agencies to recoup "excess profits" paid under wartime Government contracts, yet we did not insist that Congress specify how much profit was too much. 334 U. S., at 783-786. It is therefore not conclusive for delegation purposes that, as respondents argue, ozone and particulate matter are "nonthreshold" pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero, and hence require the EPA to make judgments of degree. "[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." *Mistretta* v. *United States, supra,* at 417 (Scalia, J., dissenting) (emphasis deleted). Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is "requisite"—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.

¶10 We therefore reverse the judgment of the Court of Appeals remanding for reinterpretation that would avoid a supposed delegation of legislative power. It will remain for the Court of Appeals—on the remand that we direct for other reasons—to dispose of any other preserved challenge to the NAAQS under the judicial-review provisions contained in 42 U. S. C. § 7607(d)(9).

* * * * *

¶11 To summarize our holdings in these unusually complex cases: . . . . Section 109(b)(1) does not delegate legislative power to the EPA in contravention of Art. I, § 1, of the Constitution.

¶12 The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

Justice Thomas, concurring.

¶13 I agree with the majority that § 109's directive to the agency is no less an "intelligible principle" than a host of other directives that we have approved. I also agree that the Court of Appeals' remand to the agency to make its own corrective interpretation does not accord with our understanding of the delegation issue. I write separately, however, to express my concern that there may nevertheless be a genuine constitutional problem with § 109, a problem which the parties did not address.

¶14 The parties to these cases who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on congressional grants of power to administrative agencies, see *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394, 409 (1928), the Constitution does not speak of "intelligible principles." Rather, it speaks in much simpler terms: "*All* legislative Powers herein granted shall be vested in a Congress." U. S. Const., Art. 1, § 1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."

¶15 As it is, none of the parties to these cases has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.

Justice Stevens, with whom Justice Souter joins, concurring in part and concurring in the judgment.

¶16 Section 109(b)(1) delegates to the Administrator of the Environmental Protection Agency (EPA) the authority to promulgate national ambient air quality standards (NAAQS). In Part III of its opinion, *ante,* at 472-476, the Court convincingly explains why the Court of Appeals erred when it concluded that § 109 effected "an unconstitutional delegation of legislative power." *American Trucking Assn., Inc.* v. *EPA,* 175 F. 3d 1027, 1033 (CADC 1999) *(per curiam).* I wholeheartedly endorse the Court's result and endorse its explanation of its reasons, albeit with the following caveat.

¶17 The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is "legislative" but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power."

¶18 The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it. See Black's Law Dictionary 899 (6th ed. 1990) (defining "legislation" as, *inter alia,* "[f]ormulation of rule[s] for the future"); 1 K. Davis & R. Pierce, Administrative Law Treatise § 2.3, p. 37 (3d ed. 1994) ("If legislative power means the power to make rules of conduct that bind everyone based on resolution of major policy issues, scores of agencies exercise legislative power routinely by promulgating what are candidly called 'legislative rules'"). If the NAAQS that the EPA promulgated had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of "legislative power." The same

characterization is appropriate when an agency exercises rulemaking authority pursuant to a permissible delegation from Congress.

¶19 My view is not only more faithful to normal English usage, but is also fully consistent with the text of the Constitution. In Article I, the Framers vested "All legislative Powers" in the Congress, Art. I, § 1, just as in Article II they vested the "executive Power" in the President, Art. II, § 1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others. Surely the authority granted to members of the Cabinet and federal law enforcement agents is properly characterized as "Executive" even though not exercised by the President.

¶20 It seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is "legislative." As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it. Accordingly, while I join Parts I, II, and IV of the Court's opinion, and agree with almost everything said in Part III, I would hold that when Congress enacted § 109, it effected a constitutional delegation of legislative power to the EPA.

[The opinion of Justice Breyer, concurring in part and concurring in the judgment, is omitted.]