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Why the "New Non-delegation" May Not Be So New

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ESSAY: WHY THE "NEW NON-DELEGATION" MAY NOT BE SO NEW

Anthony S. Winer[†]

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A recent federal appellate case, shortly to be argued on certiorari before the Supreme Court, has interpreted the non-delegation doctrine in a way that to certain commentators has seemed controversial, and quite novel. This essay considers a little-remembered aspect of one of the early non-delegation precedents, and suggests that the "new" development in the non-delegation doctrine may not be completely new.

I. THE NON-DELEGATION DOCTRINE

For many generations the Supreme Court and the federal courts have acknowledged the existence and applicability of a "non-delegation doctrine."¹ In its broadest terms, the doctrine prohibits

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1. It is commonly suggested that the earliest Supreme Court appearance of the non-delegation doctrine was in 1813, with the Court's brief opinion in *The Brig Aurora*, 7 Cranch 382, 11 U.S. 382, 382 (1813). That case involved a Congressional delegation to the President to make certain determinations of fact regarding the trade practices of foreign countries. The doctrine made another appearance in the early nineteenth century with the case of *Wayman v. Southard*, 23 U.S. (10 Wheat. 1, 23 U.S. 1, 1 (1825), involving a delegation to the Supreme Court to modify certain procedural rules for the federal courts. For the most part, however, further substantive development of the doctrine did not occur until the end of the nineteenth and the first quarter of the twentieth century, with cases such as *Mahler v. Eby*, 264 U.S. 32, 32 (1924); *United States v. Grimaud*, 220 U.S. 506, 506 (1911); *Buttfield v. Stranahan*, 192 U.S. 470, 470 (1904) *Field v. Clark*, 143 U.S. 649, 649 (1892). After the first quarter of the twentieth century, the doctrine was

Congress from delegating its legislative power to any person or entity outside the Legislative Branch.² As such, the doctrine has served primarily as a check on the legislative activity of Congress. If a federal statute delegates excessive legislative authority to an executive officer or administrative agency, the Supreme Court could invalidate the statute as violating the non-delegation doctrine.³

For a brief two-year period during Franklin D. Roosevelt's New Deal, the non-delegation doctrine experienced the apex of its influence. In the years 1935 and 1936, in three separate cases, the Supreme Court invalidated three federal statutory provisions as violations of the non-delegation doctrine.⁴ Throughout most of the last seventy years, however, the doctrine has fallen into relative desuetude. During this period, the Court's interpretation of the doctrine became substantially permissive toward the Congress. Indeed, no federal statute has been invalidated under the non-delegation doctrine since 1936.⁵

In the years since then, the Court has relied on liberalized in-

developed principally through the cases discussed in greater detail in the text, *infra*. However, in all of these earlier cases, through 1934, the Supreme Court upheld each challenged governmental action against attack under the non-delegation doctrine. *E.g.*, RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 50-56 (3d ed. 1999); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 977-82 (3d ed. 2000) (for general discussions of the early history of the non-delegation doctrine).

2. *Mistretta v. U.S.*, 488 U.S. 361, 371-72 (1989) (stating "the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch") (internal quotation marks omitted); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) (stating "it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch..."); *see also* TRIBE, *supra* note 1, at 977 (quoting the previous excerpt from *Mistretta*).

3. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 66 (3d ed. 1994) (stating "[t]he Court has interpreted Article I...as a prohibition on congressional delegation of legislative power to any other institution"); WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 32-33 (3d ed. 1997) (stating that the non-delegation doctrine "is based on the express language of Article I, § 1," and suggests "tensions that have persisted for nearly two hundred years" with the scope of Congress's legislative authority.).

4. *Carter v. Carter Coal Co.*, 298 U.S. 238, 261 (1936) (invalidating elements of section four of the Bituminous Coal Conservation Act of 1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 401 (1935) (invalidating section 9(c) of the National Industrial Recovery Act of 1933); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 503 (1935) (invalidating section three of the same Act). *See also* TRIBE, *supra* note 1, at 978 n.4.

5. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 178 n.10 (6th ed. 2000); TRIBE, *supra* note 1, at 978, 980.

terpretations of the doctrine to minimize its impact on legislation. For example, in *J.W. Hampton, Jr. & Co. v. United States*,⁶ the Court addressed a federal statute that delegated to the President the authority to increase or decrease tariff rates on the basis of factual findings that he himself was to make. (The findings involved the extent to which such alterations would equalize differences in costs of production between foreign-produced goods and corresponding domestic goods.) The Court declared that: "[i]f 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."⁷ Also, in *Yakus v. United States*,⁸ the Court allowed that:

Only if we could say that there is an absence of standards for the guidance of [administrative] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose.⁹

Since 1936, the Court has used formulations such as these to sustain every statute before it that has been attacked on non-delegation grounds.¹⁰

Some commentators and jurists have complained that the non-delegation doctrine has not been sufficiently vigorously enforced in recent years.¹¹ It is sometimes asserted, for example, that a more

6. 276 U.S. 394 (1928).

7. *Id.* at 409. Although this formulation was first stated in a case that occurred before 1936, it has been influential in cases since that time. *E.g., Mistretta*, 488 U.S. at 372 (quoting the passage quoted in text).

8. 321 U.S. 414 (1944).

9. *Id.* at 426. In more modern times, the Court has sometimes used the non-delegation doctrine as a tool of statutory interpretation, occasionally choosing to interpret statutes so as to not create a non-delegation problem. *E.g., Kent v. Dulles*, 357 U.S. 116, 123-29 (1958) (construing a federal passport statute narrowly so as not to include a broad scope of delegation to the Secretary of State that the Court felt would have violated the non-delegation doctrine had it been discerned within the statute). However, such cases have lesser impact, since they allow for the continued effectiveness of the statute in some form.

10. *E.g., Mistretta*, 488 U.S. at 373-74 (upholding the Sentencing Reform Act of 1984); *Yakus*, 321 U.S. at 427 (upholding the Emergency Price Control Act of 1942).

11. Comparatively recent examples are a lengthy and earnestly stated polemic by David Schoenbrod and an earlier (and more moderate) argument by Sotirios Barber. DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993); SOTIRIOS A. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* (1975). Then-Justice Rehnquist also argued for a more vigorous application of the non—

robust application of the doctrine could improve the accountability of Congress.¹² Others seem just as pleased that the doctrine has not been more prominent.¹³ It has been noted more than once that a doctrinaire approach to non-delegation could render impossible many of the workings of the modern administrative state.¹⁴

Regardless of the variety of views concerning the desirability of the non-delegation doctrine, at least one point concerning it had seemed relatively clear until recently. The non-delegation doctrine had usually been viewed as serving as a restraint on Congress. As noted above, the Supreme Court conceived of the doctrine as a means of limiting the discretion that Congress accords to executive officers and administrative agencies. It had usually been the understanding that if the non-delegation doctrine was being violated, it was because a *statute* included too broad a delegation.¹⁵ With re-

delegation doctrine in his one-man concurrence to a 1980 decision involving OSHA rulemaking covering worker exposure to benzene. *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 675 (1980) (the "*Benzene*" case) (Rehnquist, J., concurring).

12. *E.g.*, SCHOENBROD, *supra* note 11, at 99-106 (arguing that "delegation weakens democracy" by allowing both the Congress and the President to escape a significant amount of accountability); *see also* DAVIS & PIERCE, *supra* note 3, at 78 (noting that some may argue that legislatures "decline to resolve most policy disputes because they know that voting in favor of any policy option will cost them more constituent support than delegating policy decisions to agencies.").

13. *E.g.*, JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE 131-57 (1997) (arguing that "public choice" critics of legislative delegation "are wrong", and making an "affirmative case for broad delegation"); Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 ADMIN. L. REV. 63, 94-95 (No. 1, 2000) (arguing explicitly that "Broad Delegations of Power Are Not a Threat to Constitutional Democracy.").

14. Courts and commentators have repeatedly noted that if Congress were to try itself to specify with the required particularity all the requirements that its desired national policies impose, it would be impossible for Congress to fulfill its functions. *E.g.*, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928) ("If Congress were to be required to fix every rate, it would be impossible to exercise the power [of regulating interstate freight rates] at all."); FOX, *supra* note 3, at 33 (stating that "heavy-handed application of the non-delegation principle could have stopped the executive branch in its tracks," even if applied in the early years of the doctrine's development); PIERCE, *supra* note 13, at 80 (stating that "Congress is plagued by a combination of characteristics that render it totally unsuited to the task of drawing quantitative lines in the context of [air pollution] toxic risk regulation.").

15. All three Supreme Court opinions invalidating statutes on non-delegation grounds addressed their non-delegation analyses primarily to examinations of the statutory texts; which is to say, to the legislative actions of Congress. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 298, 310-12 (1936); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 412-20 (1935); *A.L.A. Schechter Poultry Corp. v. Ryan*, 295 U.S. 495, 529-41 (1935). Furthermore, the modern Supreme Court practice of interpreting stat-

cent action by the District Court of Appeals for the District of Columbia Circuit, it appears that understanding may be changing.

II. THE AMERICAN TRUCKING DECISION

In May of 1999, the Circuit Court of Appeals for the District of Columbia Circuit decided *American Trucking Associations, Inc. v. EPA*.¹⁶ The decision incorporates a seemingly novel application of the non-delegation doctrine, and has generated substantial interest among commentators. The Supreme Court has granted certiorari, and arguments will be heard before the Court this term.¹⁷

The case involves regulations promulgated by the Environmental Protection Agency ("EPA") issuing revised National Ambient Air Quality Standards for Ozone¹⁸ and Particulate Matter.¹⁹ The EPA believed it was authorized to promulgate these regulations by sections 108 and 109 of the Clean Air Act.²⁰ The D.C. Circuit found fault with the regulations, detecting a violation of the non-delegation doctrine.²¹ The court's analysis was unorthodox, however, because it detected the non-delegation violation not in the terms of the Clean Air Act, but within the regulations themselves.²²

utes so as to not run afoul of the non-delegation doctrine further attests to the doctrine's primary concern with the validity of statutes, per se. See also *supra* note 9 (referencing this trend).

16. 175 F.3d 1027 (D.C. Cir. 1999); *petitions for rehearing granted in part and denied in part; suggestion and petitions for rehearing en banc denied*, 195 F.3d 4 (1999).

17. *Am. Trucking Ass'ns, Inc. v. Browner*, No. 99-1426, 120 S.Ct. 2193 (2000); *Browner v. Am. Trucking Ass'ns Inc.*, No. 99-1257, 120 S.Ct. 2003 (2000).

18. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997).

19. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997).

20. 42 U.S.C. §§ 7407, 7408 (1995 & Supp. 2000); see also 62 Fed. Reg. at 38,653, 18,857 (July 18, 1997) (each referencing the statutory sections).

21. *Am. Trucking Ass'ns, Inc.*, 175 F.3d at 1033-40.

22. Some of the language that the D.C. Circuit uses to introduce its non-delegation analysis fits superficially into the conventional pattern of the doctrine. "[W]e find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power." *Id.* at 1033. Additionally, the "EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power." *Id.* at 1034. However, these statements are mere formulations designed to make it look like the court is adhering to the conventional analytical framework. What the court really does throughout its opinion is apply the "intelligible principle" standard of *J.W. Hampton* directly to the EPA's regulations. Sometimes the court also addresses the need for the statute to contain the *J.W. Hampton* "intelligible principles," and sometimes the court simply expects the regulation to contain them alone. But repeatedly the court applies the "intelligi-

As noted above, the non-delegation doctrine had for many generations served primarily as a check on Congress. If the Supreme Court detected a non-delegation problem, it was viewed as being in the statute, and the Court would strike down the statute as containing an excessive delegation. In *American Trucking*, however, the D.C. Circuit's focus is almost exclusively on the regulation. Indeed, the court's opinion contains none of the searching examinations of statutory text that were characteristic of all the Supreme Court cases that invalidated laws on non-delegation grounds.²³ In this opinion, the D.C. Circuit seems to treat non-delegation as an issue primarily limiting agency action, not Congressional legislation.²⁴

Some of the commentators addressing *American Trucking* have focused to a significant degree on its environmental aspects.²⁵

ble principle" test to the regulations, when the conventional analysis would have applied it to the statute. The "EPA appears to have articulated no 'intelligible principle' to channel its application of the [relevant] factors; nor is one apparent from the statute. The non-delegation doctrine requires such a principle." *Id.* "[W]hat the EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much." *Id.* "Thus, the agency rightly recognizes that the question is one of degree, but offers no intelligible principle by which to identify a stopping point." *Id.* at 1037.

23. At several points in the opinion, the court cites sections 108 and 109 of the Clean Air Act and briefly discusses their terms. *E.g.*, *Am. Trucking Ass'ns, Inc.*, 175 F.3d at 1033 (citing and paraphrasing 42 U.S.C. § 7409(b)); *Id.* at 1034 (referencing both sections in summarizing petitioners' arguments); *Id.* at 1035 (citing and paraphrasing § 109(b)(1), from the Session Law text). These citations and short quotations include the statute's directive to the EPA that it set "primary standards" that are "requisite to protect the public health" while "allowing an adequate margin of safety," and "secondary standards" that are "requisite to protect the public welfare." *Id.* A plain-language reading of these provisions would well lead one to believe that Congress had imposed a broad delegation on the EPA, and that the delegation was initially effected in the statutory language, rather than in the regulations that followed it. However, nowhere in the opinion does the court squarely attack the indeterminacy of the statutory language, as the conventional non-delegation doctrine might encourage a court to do. Rather, the court reserves virtually all of its appellate disapproval for the subsequent actions of the EPA in promulgating its regulations.

24. It can seem nonsensical to attack agency regulations *themselves* as violations of the non-delegation doctrine. After all, agencies are the delegates of responsibility under statutes. They generally have no one to delegate authority to. Their actions are themselves the results of Congressional delegation, not the other way around. The implications of this paradox are examined later in this essay. However, it is a paradox to which the D.C. Circuit seems fairly oblivious in its *American Trucking* opinion.

25. *E.g.*, Pierce, *supra* note 13 (setting forth a thorough and well-articulated argument to the effect that the demands that *American Trucking* places on the EPA are unrealistic, if not impossible, as a matter of scientific practice); Lorna Jorgensen, *An Appeals Court Breathes Life into the Nondelegation Doctrine*, 20 J. LAND,

However, a substantial number have descended squarely on the novelty of the court's approach to non-delegation.²⁶ Some of these commentators are favorably disposed to the court's innovation,²⁷ and some are not.²⁸ Some see support for the approach, as does the court, in some of the D.C. Circuit's prior rulings.²⁹ Nevertheless, there is near-unanimity on the point that what the D.C. Circuit is doing is *new*. Some of the commentators even go so far as to coin descriptive phrases to emphasize the perceived innovative character of the court's approach. For example, some commentators have termed the D.C. Circuit's formulation "the New Non-Delegation,"³⁰ while another commentator has called it "Weak Delegation."³¹

RESOURCES & ENVTL. L. 97, 97 (2000) (emphasizing environmental consequences and cost issues).

26. See Liza Schultz Bressman, *Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L. J. 1399, 1399 (2000); Gabriel Clark, *The Weak Nondelegation Doctrine and American Trucking Associations v. EPA*, 2000 BYU L. REV. 627, 632; Michael Richard Dimino, *D.C. Circuit Revives Nondelegation Doctrine...or Does It?*, 23 HARV. J.L. & PUB. POL'Y 581, 581 (2000); Patricia Ross McCubbin, *The D.C. Circuit Gives New Life and New Meaning to the Nondelegation Doctrine in American Trucking Ass'ns v. EPA*, 19 VA. ENVTL. L.J. 57, 57 (2000); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 303 (1999).

27. *E.g.*, Clark, *supra* note 26, at 627 (arguing that courts should adopt the approach to non-delegation illustrated by the *American Trucking* opinion as a workable and desirable alternative to conventional non-delegation doctrine); Bressman, *supra* note 26, at 1402 (arguing that the *American Trucking* approach to non-delegation is beneficial in that it reinforces the values of democracy and accountability without having to prohibit delegation or approving it wholesale).

28. *E.g.*, McCubbin, *supra* note 26, at 71-79 (arguing, *inter alia*, that the treatment of non-delegation in *American Trucking* was inconsistent with prior cases and contravenes the purposes of the non-delegation doctrine); Sunstein, *supra* note 26, at 380 (asserting in conclusion that "[t]he new delegation doctrine is a large mistake."); Dimino, *supra* note 26, at 583 (arguing that the Supreme Court should invalidate the Clean Air Act provisions involved in *American Trucking*, requiring Congress, rather than the EPA, to cure the non-delegation defect).

29. References are made to Int'l. Union, United Auto., Aerospace & Agric. Implement Workers v. OSHA, 938 F.2d 1310, 1310 (D.C. Cir. 1991) [the "*Lock-Out/Tag-Out*" case], *petition for review dismissed*, 37 F.3d 665, 665 (D.C. Cir. 1994). References are also made to *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F. Supp. 737, 737 (D.D.C. 1971); *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d at 1037-38. See also McCubbin, *supra* note 26, at 62 (denominating the *Lock-Out/Tag-Out* case the "first example" of a pattern that "would be repeated in *American Trucking*").

30. Bressman, *supra* note 26, at 1402 (referring to the concept as the "New Delegation Doctrine"); Sunstein, *supra* note 26, at 340.

31. Clark, *supra* note 26, at 628.

III. A CONFLATION OF ADMINISTRATIVE LAW AND CONSTITUTIONAL PRECEPT

Perhaps the most significant objection to this “New Non-Delegation” is that it confuses a rule of administrative law for a constitutional doctrine. This conflation has been noted by commentators,³² and was also pointed out by the dissenting judges in *American Trucking*.³³

As noted above, the D.C. Circuit’s new variation on non-delegation addresses itself to the precision of the regulations involved rather than the statute. In continually calling for a “determinate criterion for drawing lines”³⁴ and an “intelligible principle by which to identify a stopping point”³⁵ in the regulation, the D.C. Circuit is setting forth a rule for the sufficiency of the substantive content of the regulation. But such a rule already exists—it is the “arbitrary and capricious” test³⁶ from the Administrative Procedure Act.³⁷

The Administrative Procedure Act (“APA”), originally enacted into federal law in 1946, serves as framework legislation for much of the administrative operation of the federal government.³⁸ In

32. *E.g.*, McCubbin, *supra* note 26, at 79 (stating “the [*American Trucking*] court confused a constitutional inquiry with an administrative law inquiry”); Sunstein, *supra* note 26, at 351 (noting “[t]his [‘new non-delegation’] idea converts the non-delegation doctrine into...a general requirement of administrative transparency, a requirement with no obvious constitutional foundation...”); *Id.* at 361 (stating that “the work done by the *American Trucking* court under the rubric of the non-delegation doctrine is far more reasonably done under the review of agency action for arbitrariness”). *See also id.* at 340, 344, 355.

33. *Am. Trucking Ass’ns, Inc.*, 175 F.3d at 1061 (Tatel, J., dissenting) (stating that “[w]hether the EPA arbitrarily selected the studies it relied upon or drew mistaken conclusions from those studies...has nothing to do with our inquiry under the non-delegation doctrine. Those issues relate to whether the [regulations] are arbitrary and capricious.”); *Id.* at 15 (Silberman, Circuit J., dissenting from denial of rehearing en banc) (referring to the Administrative Procedure Act).

34. *Am. Trucking Ass’ns, Inc.*, 175 F.3d at 1034.

35. *Id.* at 1037.

36. 5 U.S.C. § 706(2)(A) (1996 & Supp. 2000) (a reviewing court shall hold unlawful and set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

37. Pub. L. No. 07-404, 60 Stat. 237 (1946).

38. *E.g.*, FOX, *supra* note 3, at 25 (indicating that the Administrative Procedure Act is the “primary federal procedural statute,” which serves as “a uniform procedure applicable to most” federal agencies, adding that “[f]or most agencies, ...the APA has a strong bearing on the process by which the agency makes decisions.”).

connection with the present discussion, section 706(A)(2)³⁹ of the APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be...arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."⁴⁰ Although this language by its terms is somewhat vague, case law in recent years has provided some indication of its currently prevalent meaning. Under cases such as *Citizens to Preserve Overton Park v. Volpe*,⁴¹ the courts employ what has become known as the "hard look" standard⁴² in reviewing agency regulations for cogency, logic, clarity, adequacy of supporting material, and the relationship between supporting evidence and regulatory text and effect.

A reviewing court applying this approach to regulations such as the air quality standards at issue in *American Trucking* might well ask itself, as part of its "hard look" review, whether the regulations contained a "determinate criterion for drawing the lines" drawn by the regulation. Similarly, it might well ask itself if the agency had "failed to state intelligibly how much is too much." If any subject regulations were lacking in either respect, the court would most likely rule against their legality under the "arbitrary and capricious" standard of the APA. And yet these very formulations, it will be remembered, were among those the D.C. Circuit used in applying what it termed the non-delegation doctrine to the EPA's air quality standards.⁴³

The D.C. Circuit accordingly used particular concepts of regulatory precision and conformity to evidence, which have been developed over the years as a statutory test for legality under the APA, to instead define a constitutional violation under the non-delegation doctrine. This conflation of statutory standards with a constitutional concept is significant. As noted above,⁴⁴ the confla-

39. Practitioners refer to the numbers of the codified sections of the APA (which appear in Title 5 of the U.S. Code) as though they were the section numbers used in the original act as it appeared in the Session Laws. That practice is employed in this essay as well. The "arbitrary and capricious" test actually appeared in section 10(e)(2)(A) of the APA as enacted by Congress.

40. 5 U.S.C. § 706(2)(A) (1996 & Supp. 2000).

41. 401 U.S. 402 (1971).

42. FOX, *supra* note 3, at 319; PIERCE, *supra* note 1, at 327-28 (referencing the Court's prescription in *Overton Park* for "searching and careful" review) for a discussion on the *Overton Park* "hard look" approach.

43. *Am. Trucking Assn's., Inc. v. EPA*, 175 F.3d 1027, 1034 (containing both previously quoted phrases).

44. *Supra* notes 18-24 and accompanying text.

tion is based on an unconventional view of the non-delegation doctrine, which would normally be used to gauge the permissibility of statutes, rather than regulations. But additionally, there is a substantial change in functional impact if the "hard look" approach to the "arbitrary and capricious" standard is made a constitutional norm rather than a statutory one. And that, of course, is the extent to which it is subject to variation by statute.

As long as the "arbitrary and capricious" standard is recognized to be based in statutory language, its language and impact can be altered by Congress. If, on the other hand, the standard (or an analytical test resulting in its functional equivalent) is viewed as constitutionally based, then Congress does not have the power to alter it. In that event, the scope and application of the standard would be finally determinable only by the federal courts. To emphasize this point, only a brief reference is necessary to the recent line of Supreme Court cases restricting the extent to which Congress can interpret and enforce Constitutional provisions.⁴⁵

Accordingly, among the various other problems with the "new non-delegation" adduced elsewhere,⁴⁶ prominently among them is this subtle re-assignment of searching standards of regulatory review from the status of statutory rule to constitutional norm, and the attendant immunization of the standards from Congressional variation. Whether this re-assignment of the standards (or conflation, if one prefers) is desirable or not from the standpoint of policy, it could be important to realize that there may be a historical precursor. There was another point in the Supreme Court's history when the non-delegation doctrine may have encouraged the Court to regard the substantive sufficiency of regulations as a constitutional norm. That occasion was not a happy one, and it is not very far from the law and analysis of *American Trucking*.

IV. A POSSIBLE PRECURSOR IN *PANAMA REFINING*

*Panama Refining Co. v. Ryan*⁴⁷ was one of the three New-Deal cases mentioned above⁴⁸ in which the Supreme Court struck down

45. *E.g.*, *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000) (concluding that Congress could not supersede *Miranda v. Arizona* legislatively); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress exceeded its power when it enacted the Religious Freedom Restoration Act of 1993, 107 Stat. 1488).

46. *Supra* note 28 and accompanying text.

47. 293 U.S. 388 (1935).

48. *Supra* note 4 and accompanying text.

a federal statute as violative of the non-delegation doctrine. It is for this aspect of the case that it is usually remembered. However, it is significant for this discussion because in its final paragraphs it sets forth a discussion that foreshadows, to a degree, the D.C. Circuit's discussion in *American Trucking*.

Panama Refining involved the National Industrial Recovery Act ("NIRA"),⁴⁹ New-Deal legislation designed to halt the depression of the early 1930's and re-invigorate the national economy.⁵⁰ The case pertained to section 9(c) of the NIRA, which authorized the President "to prohibit the transportation in interstate and foreign commerce of petroleum...produced or withdrawn from storage in excess of the amount permitted...by any State law."⁵¹ Uncontrolled overproduction from newly discovered oilfields in Texas had resulted in depressed petroleum prices.⁵² Texas authorities had attempted to legally limit production, in an attempt to stem the downward spiral of prices. Their efforts had proven unsuccessful, however, so Congress enacted section 9(c) as part of the NIRA. The apparent aim was to make petroleum production above the state limits not merely a violation of state law, but a federal crime as well,⁵³ thus increasing the incentive for producers to comply.

The plaintiffs in *Panama Refining* attacked the constitutionality of section 9(c) as an invalid delegation to the President of legislative power,⁵⁴ and in his opinion for the Court, Chief Justice Hughes agreed. In analyzing the applicability of the non-delegation doctrine to this case, the Chief Justice devoted himself entirely to the text of the NIRA. First he observed that:

Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum...produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. ...it gives to the President an unlim-

49. Act of June 16, 1933, ch. 90, 48 Stat. 195.

50. Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 653-64 (1946).

51. Act of June 16, 1933, ch. 90, § 9(c), 48 Stat. 195, 200.

52. Stern, *supra* note 50, at 654. The remaining discussion of this aspect of the NIRA in this textual paragraph is also based on the Stern article.

53. Section 10(a) of the NIRA made the violation of the regulations promulgated pursuant to its terms punishable by a fine not to exceed \$500 or six months' imprisonment. Act of June 16, 1933, ch. 90, § 10(a), 48 Stat. 195, 200.

54. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 411 (1935).

ited authority to determine the policy and lay down the prohibition, or not to lay it down, as he may see fit.⁵⁵

This, then, was the gravamen of the defect of section 9(c); in its text it contained no restraining criterion the President was to use in guiding his discretion for the implementation of the transportation ban. This would be as expected, given the explanation of the non-delegation doctrine earlier in this essay.⁵⁶ Since the doctrine exists primarily to limit the scope of authority that statutes give to administrators, it is to be expected that (at least classically) the doctrine is implemented upon a close review of what the statute says.

The Chief Justice went on to search the other portions of the NIRA for limiting language that could have the effect of so guiding or restraining the President's discretion. He turned particular attention to section 1 of the statute, which set forth a "declaration of policy" containing a long list of policy goals and objectives, such as removing "obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof," and eliminating "unfair competitive practices."⁵⁷

He found this list of goals and objectives wanting, however, because it "contains nothing as to the circumstances or conditions in which transportation of petroleum...should be prohibited."⁵⁸ He determined that "[i]t is manifest that this broad outline is simply an introduction to the act," rather than a substantive list of conditions defining the circumstances in which the statute would authorize the President to act.⁵⁹ He concluded that "Congress left the matter to the President without standard or rule,...essentially commit[ting] to the President the functions of a Legislature," and that the Court could "find nothing in section 1 which limits or controls the authority conferred in section 9(c)."⁶⁰

Dissatisfied with section 1, the Court then went on to examine the remaining sections of the statute. Then, after completing this comprehensive review, the Chief Justice declared that "[n]one of these provisions can be deemed to prescribe any limitation of the grant of authority in Section 9(c)."⁶¹

55. *Id.* at 415.

56. *Supra* note 15 and accompanying text.

57. *Pan. Ref. Co.*, 293 U.S. at 416 n.6 (quoting NIRA § 1).

58. *Id.* at 417.

59. *Id.* at 418.

60. *Id.* at 418-19.

61. *Id.* at 420.

Arriving at this principal holding occupied the *Panama Refining* Court throughout the large majority of its opinion. The Court's opinion is divided into six parts, headed "First" through "Sixth" in the opinion's text,⁶² and the statutory analysis consumes the first five of these six parts. However, in the part headed "Sixth,"⁶³ in a little-discussed portion of the opinion, the Court's attention shifts from the sufficiency of the NIRA itself to that of the Executive Order promulgated under it.

In this sixth part of *Panama Refining*, the Court criticizes the Executive Order because it "contains no finding, no statement of the grounds of the President's action in enacting the prohibition."⁶⁴ The Court considered it critical that, if a delegation of the type attempted in *Panama Refining* were to occur, not only would the declarations of policy set forth in the statute need to be more precise than those in the NIRA, but also that the administrative orders issued under them would need to plainly fall within the scope of such declared policies. Accordingly, the Court next noted that even regarding a statute that contained adequately limited anterior "circumstances and conditions" as requirements for administrative action, "the President could not act validly without having regard to those circumstances and conditions."⁶⁵ Furthermore, "findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion...."⁶⁶

This element of the opinion was presented as a distinct aspect of the Court's non-delegation analysis. Thus, in this case as well, sixty-four years before *American Trucking*, and in the course of striking down governmental action on non-delegation grounds, the Supreme Court applied non-delegation analysis directly to a regulation, as well as the statute under which it was promulgated.

There were, nevertheless, two key differences between the analytical approaches used in *Panama Refining* and those used in *American Trucking*. First, the terms that the two opinions use for the requisite standard to which the relevant regulations are to conform differ. *American Trucking* uses the *J.W. Hampton* formulation of "in-

62. *Id.* at 412-30.

63. *Id.* at 431-33.

64. *Id.* at 431.

65. *Id.*

66. *Id.*

telligible principle”⁶⁷ as the standard of review for the regulation. The Supreme Court in *Panama Refining*, on the other hand, requires “findings” by the President as to the applicability of the anterior “circumstances and conditions.”

Secondly, the directional focus of the application of the non-delegation doctrine is different between the two cases. In *American Trucking*, the court directs the non-delegation inquiry (expressed in terms of the need for an “intelligible principle”) toward the regulation itself, so that the regulation itself is required to contain the necessary intelligible principles. By contrast, in *Panama Refining*, the Supreme Court directs the non-delegation inquiry back toward the statute, seeking to determine whether the regulation contains adequate “findings” substantiating that the anterior circumstances and conditions, specified in the statute, have occurred. In spite of these differences, however, it is nevertheless clear that the Supreme Court in *Panama Refining*, no less than the D.C. Circuit in *American Trucking*, uses the delegation doctrine as a means of evaluating the constitutionality, not merely of the statute, but of the regulation itself.

The similarity that thus exists between the approach in the “Sixth” part of *Panama Refining*, and that in *American Trucking*, should not be a happy one for partisans of the later decision. Surely, if one of the two opinions in *Panama Refining* is to be considered the stronger at this point in time, it would be Justice Cardozo’s opinion in dissent. As pointed out by Justice Cardozo, there was in fact relatively little that was indefinite in the authorization to the President constituting section 9(c) of the NIRA:

In the laying of his interdict he is to confine himself to a particular commodity, and to that commodity when produced or withdrawn from storage in contravention of the policy and statutes of the states. He has choice, though within limits, as to the occasion, but none whatever as to the means. The means have been prescribed by Congress. There has been no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases. His act being thus defined, what else must he ascertain in order to regulate his discretion and bring the power into play?⁶⁸

Indeed, it seemed even to some contemporary eyes that the as-

67. *Supra* notes 6-10 and accompanying text.

68. *Pan. Ref. Co.*, 293 U.S. at 435 (Cardozo, J., dissenting).

sertion that section 9(c) bestowed substantial discretion on the President was better characterized as requiring a drafting adjustment than a constitutional correction.⁶⁹

The passing years have made the point even more plainly. The Court has sustained over the years since 1935 delegation language that by most accounts would seem quite vague, including language limiting delegated authority by the somewhat open-ended "public interest" standard.⁷⁰ If these nebulous standards are adequate to satisfy the requirements of today's non-delegation, then it should be fairly clear that the standards in section 9(c) should satisfy them as well.

So the Sixth part of *Panama Refining* could bode ill for the credibility of the D.C. Circuit's approach in *American Trucking* simply because the major thrust of the non-delegation application in *Panama Refining* seems so problematic by modern terms. However, even apart from this, there is more direct reason to consider the regulatory focus in *Panama Refining* to be a factor that weakens the credibility of the similar focus in *American Trucking*. It is clear from the discussion in the Sixth part of *Panama Refining* that the Court considered its non-delegation regulatory focus to be tied to its view of the role of the Due Process Clause. In this respect, then, the Court's regulatory focus in *Panama Refining* is related to the early-New-Deal Court's much-derided notions of substantive due process.

As noted earlier,⁷¹ the Court in the Sixth part of *Panama Refining* emphasized the need for the President to show that he had acted pursuant to his consideration of anterior circumstances and conditions. In doing so, the Court cited the Fifth Amendment Due Process Clause as a source of his requirement to do so:

If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, *due process of law* requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on deter-

69. Stern, *supra* note 50, at 658 ("It would have been simple enough for the draftsmen of the Act to have added the qualifications 'when the President finds' that hot oil shipments wasted the Nation's petroleum resources, or demoralized interstate competition, or broke the price structure, all of which facts were known to be true.").

70. *Mistretta v. Unites States*, 488 U.S. at 416 (Scalia, J., dissenting) (citing *Nat'l Broad. Co. v. Unites States*, 319 U.S. 190, 216-17 (1943)).

71. *Supra* notes 64-66 and accompanying text.

minations of fact, those determinations must be shown.⁷²

It should be noted in passing that, to the extent that the Supreme Court was really saying that an action by the President in excess of his statutory authority must be a due process violation by virtue of its being beyond his authority, subsequent Supreme Court doctrine may be contrary.⁷³

But the major implication of the Court's statement on this point may have even greater significance. By this time, the early-New-Deal Court had developed its distinctive notions of substantive due process, and these were no doubt of substantial importance to the Court. It seems quite reasonable to view the reach of the Due Process Clause adduced in this part of the *Panama Refining* analysis as being characteristic of the broad scope of due process restrictions seen as appropriate by the early-New-Deal Court. Indeed, the Court seemed at great pains to make it clear that its reference to the Due Process Clause in this respect was integrally linked to its regulatory non-delegation approach.⁷⁴ Given the disrepute with which this kind of substantive due process is now regarded, this should hardly be an encouraging observation for proponents of the *American Trucking* approach.

And so it seems that in the first Supreme Court case invalidating a federal statute on non-delegation grounds, there was included the germ of an analysis that might serve as a precursor to the approach recently employed by the D.C. Circuit in *American Trucking*. However, the historical and jurisprudential circumstances of *Panama Refining* are such that little, if any, comfort can

72. *Pan. Ref. Co.*, 293 U.S. at 432 (emphasis added). It is possible, of course, that the phrase "due process of law" was meant in a non-technical sense, and not as a reference to the Fifth Amendment Due Process Clause. However, due to the structurally precise character of the Court's doctrine on this point, to say nothing of the character of its rhetoric, it is quite unlikely that the reference was meant to be merely impressionistic. It is also possible that the reference to due process was meant to signal the kind of idea developed more fully later in cases such as *Holmes v. N.Y. City Hous. Auth.*, 398 F.2d 262,

(2d Cir. 1968) (cited in Sunstein, *supra* note 26, at 342). However, this doctrine related to the need to generate procedures for administrative action and notify affected persons of those procedures. It did not necessarily concern the relationship between regulations and statutes and notice that might be required to relate one as being authorized by the other.

73. *Dalton v. Specter*, 114 S. Ct. 1719, 1726 (1994) (stating that "we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority.").

74. 293 U.S. at 432 (stating "[t]o repeat, we are concerned with the question of the delegation of legislative power.").

be derived by the supporters of *American Truckers* from the example.
