Hot Oil and Hot Air: The Development of the Nondelegation Doctrine Through the New Deal, a History, 1813-1944

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"The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."[1]

– Justice Benjamin N. Cardozo

Introduction

Nondelegation as a concept is nearly as old as the Constitution itself. Its proponents have argued since the early Nineteenth Century that Articles I and II assign certain powers separately to the executive and legislative branches and that those powers, which are distinctly executive or legislative by nature, cannot be transferred from one branch to another. The doctrine is a product of the structure of the constitution, in other words. Despite its long existence, however, it has never thrived.

In 2001, Supreme Court Justice Clarence Thomas breathed yet new life into scholarly debate over the nondelegation doctrine in his

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1. Welch v. Helvering, 290 U.S. 111, 115 (1933); *also* Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COL. L. REV. 359, 359 (1947).

concurrence to *Whitman v. American Trucking Associations*.[2] In *Whitman*, the Supreme Court rejected a nondelegation challenge to a statute that authorized the Environmental Protection Agency to set air quality standards.[3] Writing for the majority, Justice Scalia articulated the current state of the doctrine. Article I, Section 1 of the Constitution forbids delegations of legislative power to any other branch of government by vesting "all legislative Powers herein granted . . . in a Congress of the United States."[4] As such, when Congress delegates its legislative power to executive branch agencies it must lay down "an intelligible principle by which the person or body authorized to [act] is directed to conform."[5] Justice Scalia then applied the test and found no constitutional violation. Justice Thomas concurred in the judgment, but provocatively called for the Court to abandon the "intelligible principle" test in cases in which "the significance of the delegated decision is simply too great" to be exercised by any governmental organ but Congress.[6] As a result, scholarly debate over the nondelegation doctrine has flourished.[7]

Current scholarship's memory of the doctrine's history, however, is neither long nor rich. It rightly recalls that the doctrine has not invalidated a statute since 1936 in *Carter v. Carter Coal*.[8] Despite having been argued before the Court at least twenty-two times from 1813 to 1944 alone,[9] however, the doctrine only ever succeeded in

2. Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001); *see also* Mistretta v. United States, 488 U.S. 361, 372 (1989) (noting that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.").

3. *Whitman*, 531 U.S. at 472.

4. *Id.* (citing Loving v. United States, 517 U.S. 748, 771 (1996) (Scalia, J., concurring in part and concurring in judgment).

5. *Id.* (quoting United States v. Hampton, 276 U.S. 394, 409 (1928)).

6. *Whitman*, 531 U.S. at 487.

7. *See, e.g.*, Patrick M. Garry, *The Unannounced Revolution: How the Court has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689 (2006); Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239 (2005); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

8. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 208 (1990); Garry, *supra* note 7, 704; Viktoria Lovei, Comment, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" With the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1058 (2006); Posner and Vermeule, *supra* note 7, 1723.

9. Cargo of the Brig Aurora v. United States, 11 U.S. 382 (1813); Field v. Clark, 143 U.S. 649 (1892); Buttfield v. Stranahan, 192 U.S. 470 (1904); Union Bridge Co. v. United

three cases, all of which were challenges to statutory components of Franklin D. Roosevelt's New Deal: *Panama Refining v. Ryan* in 1935, which is known famously as the "hot oil" case since it involved illicit oil sales, *A.L.A. Schechter Poultry Corp. v. United States* also in 1935, and *Carter v. Carter Coal* in 1936.[10] Sparse attention, if any at all, is paid to the cases before and shortly after the *Panama-Schechter-Carter* trilogy, excepting reference to *United States v. Hampton*'s "intelligible principle" test.[11] In fact, not only did the *Whitman* Court gloss over almost the entire New Deal nondelegation jurisprudence, it inexplicably omitted any mention of *Carter Coal* from its list of successful nondelegation challenges.[12] Where the entire jurisprudence is discussed, the predominating narrative has been a linear one: The Court moved from an antiquated, sometimes idealized,[13] rigid separation of powers approach, to a supple one brought about by an acceptance of the complexities of industrial life.[14] The academic focus has been on why the doctrine collapsed rather than on how it came to be in the first place. Both questions merit study. Scholars furthermore point to *Yakus v. United States*[15] in 1944 as the doctrine's effective end,[16] but the doctrine lost its momentum several years earlier. Scholars have declined, in sum, to consider the entire trajectory of the doctrine from *The Cargo of the Brig Aurora* in 1813

States, 204 U.S. 364 (1910); United States v. Grimaud, 220 U.S. 506 (1911); United States v. Hampton, 276 U.S. 394 (1928); Panama Refining v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal, 298 U.S. 238 (1936); Curtiss-Wright Export Corp. v. United States, 299 U.S. 304 (1936); Shields v. Utah Idaho Cen. R.R., 305 U.S. 177 (1936); St. Joseph Stock Yards v. United States, 298 U.S. 38 (1936); Cincinnati Soap Co. v. United States, 299 U.S. 304 (1937); Mulford v. Smith, 307 U.S. 38 (1938); United States v. Royal Rock Co-operative, Inc., 307 U.S. 533 (1939); H.P. Hood & Sons, Inc. v. U.S., 307 U.S. 588 (1939); Sunshine Anthracite Coal Co. v. Akins, 310 U.S. 381 (1940); Opp Cotton Mills v. Admin. of the Wage and Hour Div. of the Dept. of Labor, 312 U.S. 126 (1941); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941); Helvering v. Lerner, 314 U.S. 463 (1941); Hirabayashi v. United States, 320 U.S. 81 (1943); Yakus v. United States, 321 U.S. 414 (1944).

10. *Panama Refining*, 293 U.S. at 430; *Schechter*, 295 U.S. at 537-38; *Carter Coal*, 298 U.S. 311-12.

11. *See, e.g.*, HORWITZ, *supra* note 8, at 206-08, 216-217; PETER H. IRONS, THE NEW DEAL LAWYERS, 51-52 (1982); Posner and Vermeule, *supra* note 8, at 1737-40.

12. *Whitman*, 531 U.S. at 472.

13. *See* Lawson, *supra* note 7, *passim.*

14. HORWITZ, *supra* note 8, at 222-30.

15. 321 U.S. 414.

16. *See, e.g.*, Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357, 359 & n.8 (1990).

until *Yakus v. United States* in 1944. A broadened historical inquiry reflects a doctrine in constant flux.

Starting in 1813 and throughout Nineteenth Century, the doctrine lurked on the periphery of the Supreme Court's jurisprudence, only half-heartedly gaining recognition. It existed more as a nebulous idea about separation of powers than a cogent doctrine and never struck down a statute. Then, in the early Twentieth Century, the separation of powers theory coalesced and gained the test that has endured ever since: the "intelligible principle" test set forth in *Hampton* in 1922. Little more than a decade later the Court invoked the doctrine to oppose New Deal legislation, striking down the only three statutes ever on nondelegation grounds in *Panama Refining*, *Schechter Poultry*, and *Carter Coal*. These cases did not cement the doctrine's future as a formidable impediment to legislative delegations to the executive, however. The separation of powers rationale faltered immediately after these cases. After *Carter Coal*, the doctrine came to center on the judiciary's ability to police congressional delegations to ensure that the exercise of delegated power remained within statutorily defined limits. This shift in rationale paved the way for the "intelligible principle" test to develop over the late 1930s and early 1940s into the deferential stance evident in *Yakus*. By then, the separation of powers concerns that nursed the doctrine into existence had already all but evaporated.

As in any story worth telling, there were also subplots. The first was the birth and growth of what has come to be known as the "independent authority" or "cognate" exception.[17] It was a long time in the making. The "independent authority" exception took root contemporaneously with the doctrine itself in 1813 in *The Brig Aurora*, was decisive in *Field v. Clark* in 1892, gained further momentum in *Panama Refining* in 1935, but did not fully flourish until *Curtiss-Wright* in 1937. Another subplot involved parallel components of the Court's approach to executive branch delegations: what I will refer to as "what" delegations, pertaining to the substantive scope of regulatory power, and "when" delegations, pertaining to the initiation or suspension of statutory provisions. The Court was somewhat consistent in its treatment of "what" delegations throughout its history, at least in terms of outcomes. It reversed its position on "when" delegations between *Panama Refining* in 1935

17. *See* David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, U. PITT. L. REV. 1, 42 (2002); *see also* Lovei, *supra* note 8, at 1062.

and *Sunshine Anthracite Coal Co. v. Adkins* in 1940, however.[18] Finally, the Court employed two distinct analytical approaches in its industrial self-regulation jurisprudence. On one hand, the Court treated self-regulation statutes as delegations to the executive branch.[19] On the other, the Court treated similar statutes as delegations to private citizens.[20]

This note examines the doctrine's development through four key historical periods. First, it considers the nebulous separation of powers arguments in the early jurisprudence, 1813-1892. Second, this note traces the coalescence of the early separation of powers theory into *Hampton*'s "intelligible principle" test, 1904-1922. Third, this note engages the turbulent New Deal era cases and details their complex doctrinal workings, 1935-1937. Finally, this note recounts the fading importance of separation of powers as the underlying basis for the nondelegation doctrine, along with the doctrine's formal demise, 1939-1944.

I. Separation of Powers Theory in the Early Jurisprudence: 1813-1892

The nondelegation doctrine's early history in the Supreme Court was not illustrious. The doctrine failed to even gain formal recognition when it first came before the Court in 1813 in *The Brig Aurora*, in which the Court broadly upheld what amounted to a "when" delegation. The embryonic doctrine gained some momentum in a 1825 case, *Wayman v. Southard*, in which the Court first began to use the language of Congressional "delegation" of power. But then it passed the remainder of the Nineteenth Century in judicial obscurity until 1892 when the Court first overtly recognized that a nondelegation principle grew naturally from separation of powers theory in *Field v. Clark*. Even then, the nondelegation doctrine only limped into existence. Not only did the Court uphold the statute in *Field*, it created an exception to an as yet nonviable doctrine: the "independent authority" or "cognate" exception.

The Aurora v. United States,[21] an 1813 Supreme Court case, was about smuggled cargo,[22] about to whom the cargo belonged, and

18. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

19. HORWITZ, *supra* note 8, at 208; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 at 538 (1935).

20. HORWITZ, *supra* note 8, at 208; Carter v. Carter Coal, 298 U.S. 238, 283-84 (1936).

21. Cargo of the Brig Aurora v. United States, 11 U.S. 382 (1813).

22. At no point in the opinion did the Court reveal what the *Aurora's* cargo was.

about whether the cargo was even smuggled, or legally imported, in the first place. On December 16, 1810, The Brig *Aurora* sailed, laden with its purportedly hot cargo, from the port of Liverpool in Great Britain to New Orleans, arriving sometime between February 2 and 20.[23] On February 20, the cargo was seized.[24] The trouble was the Non-Intercourse Act of March 1, 1809.[25]

The Non-Intercourse Act devised a trade embargo against Great Britain and France in retaliation for those nations interfering with the "neutral commerce of the United States" by seizing American shipping vessels during the Napoleonic Wars.[26] The United States asserted a right to maintain neutral commercial relations with both Great Britain and France during the conflict.[27] The British response was to seize American shipping vessels.[28] Congress retorted with the Non-Intercourse Act, prohibiting all American shipping to either nation and prescribing forfeiture for any goods shipped in violation of the embargo.[29] The Act further provided that the President, then Thomas Jefferson, could lift the embargo against either Great Britain or France if either nation ceased its interference with United States commerce.[30] By April 19, 1809, the United States had reached a détente with Great Britain, and President Jefferson proclaimed the ban on British shipping finished.[31] But, for reasons unclear in the opinion, the deal fell through and Great Britain renewed its commercial blockade.[32] Meanwhile, the Act of March 1, 1809, expired along with the session of Congress on May 1, 1810.[33]

Congress passed another act on that day, however, that threatened to renew the March 1, 1809, embargo, subject to an ultimatum.[34] Great Britain and France would have until "the third day of March next" to "cease to violate the neutral commerce of the United States, which fact the President of the United States shall

23. *The Aurora*, 11 U.S. at 385.

24. *Id.* at 382.

25. *Id.*

26. *Id.* at 384; *also* 1 CAPTAIN A.T. MAHAN, SEA POWER IN ITS RELATIONS TO THE WAR OF 1812, 212-214 (1905).

27. MAHAN, *supra* note 26, 212-214.

28. *See id.*

29. *The Aurora*, 11 U.S. at 382-383.

30. *Id.* at 383.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 383-84.

declare by proclamation."[35] If prior to "March next" the President issued his proclamation as to one of the nations, then the other would have three months to "revoke or modify her edicts in like manner" or else face the revived embargo of the March 1, 1809, Act.[36] On November 2, 1810, the President, then James Madison, issued a proclamation that France had complied.[37] By December 13, that proclamation became known in Liverpool.[38] On December 16, the brig *Aurora* set sail.[39] When she arrived in New Orleans, sometime between February 2 and 20, three months had passed since President Madison's proclamation, but Great Britain had not changed its ways, and the Aurora's cargo was seized.[40]

The owner of the cargo was "a citizen of New Orleans" named Robert Burnside, who sued for return of the cargo in New Orleans District Court and lost.[41] On appeal before the Supreme Court, his attorney argued three issues,[42] one of which was that the Non-Intercourse Act was unconstitutional. Burnside's attorney argued that "Congress could not transfer the legislative power to the President" and that it had done so by "mak[ing] the revival of a law depend upon the President's proclamation."[43] This gave "to [the President's] proclamation the force of a law,"[44] or, in other words, allowed him to legislate. The Non-Intercourse Act therefore violated separation of powers.

The Court, however, did not see the case as one about separation of powers; in fact, neither the words "delegation" nor "transfer" appear in the opinion.[45] Instead, Justice Johnson wrote only this for the Court:

35. *Id.* It is not clear from the face of the opinion what would occur if "the third day of March next" came to pass and neither Great Britain nor France had complied.

36. *Id.* at 384.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*. at 387.

42. The other two issues were, first, whether the cargo of the ship was the property of a United States citizen and, by an 1811 act of Congress, whether it was thus exempt from forfeiture. The Court concluded that it was neither American property nor exempt from forfeiture. Second, Burnside's attorney argued over when the Non-Intercourse Act took effect. *Id.* at 388-89.

43. *Id.* at 386.

44. *Id.*

45. *Id.* at 382-89.

> [W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events.[46]

Thus ended the nondelegation doctrine's first foray into the judicial fray. Rather than seizing on the separation of powers argument, the Court broadly upheld Congress's right to condition the implementation of legislation on future occurrences, including presidential findings of fact.[47]

The nondelegation doctrine next appeared in *Wayman v. Southard*, an 1825 case. In *Wayman*, the Court considered whether Congress could delegate legislative authority to the federal courts by allowing them to regulate their own procedures.[48] The facts of that case were neither as exciting nor as clearly described in the opinion as those in *The Aurora*. The case centered on a dispute over undisclosed personal property in Kentucky.[49] The plaintiffs sought to quash both the execution of a judgment obtained in Kentucky District Court and the Marshal's taking of a bond of replevin.[50] Those are the only facts that the Supreme Court considered. In fact, Justice Marshall, writing for the Court, framed the issues so as to make the background facts irrelevant:

> The defendants also insist, that the judgment, the execution, and the return, ought to be stated, in order to enable this Court to decide the question which is adjourned.
>
> But the questions do not arise on the judgment, or the execution; and, so far as they depend on the return, enough of

46. *Id.* at 388.

47. *Id.* at 388.

48. Wayman v. Southard, 23 U.S. 1, 43 (1825). It should be noted that Posner and Vermeule, *supra* note 8, at 1737-40, point to *Wayman* as the Court's first recognition of a nondelegation principle. It did so, however, in the context of a delegation to the judiciary, rather than to the executive branch. The latter type, however, forms the remainder of the Court's nondelegation jurisprudence. *Wayman*'s bearing on delegations to the executive is therefore limited.

49. *Wayman*, 23 U.S. at 1.

50. *Id.*

> that is stated, to show the Court, that the Marshal had proceeded according to the late laws of Kentucky. In a general question respecting the obligation of these laws on the officer, it is immaterial whether he has been exact, or otherwise, in his observance of them. It is the principle on which the Judges were divided, and that alone is referred to this Court.[51]

The case was certified from the district court in order to resolve a doctrinal dispute between the judges.[52] The Supreme Court, accordingly, addressed only the doctrinal issues, treating the case in a factual vacuum.

The core issue was whether state or federal law controlled the executions of judgments in federal district courts in Kentucky.[53] The defendant to the appeal argued that federal law could not control for several reasons,[54] including that Congress could not delegate any authority it had over the law of execution to the federal courts.[55] The defendant's argument on delegation grew as much out of substantive due process theory as it did separation of powers:

> The right to liberty and property is a sacred vested right under the constitution and laws of the Union and States. The regulations by which it is to be devested, for the purpose of enforcing the performance of contracts, are of vital importance to the citizen. The power of making such regulations is exclusively vested in the legislative department, by all our constitutions, and by the general spirit and principles of all free government. It is the office of the legislator to prescribe the rule, and of the Judge to apply it; and it is immaterial whether it

51. *Id.* at 21.

52. *Id.* at 1.

53. *Id.* at 3.

54. On the part of the defendants it was insisted,

> 1. That Congress has no power, under the constitution, to enact an execution law, governing the substance of the proceedings on executions from the Federal Courts, in suits between private individuals.
>
> 2. That, supposing Congress to possess such a power, it could not delegate its authority to the Supreme and other Courts of the United States.
>
> 3. That the acts of Congress applicable to this subject, do not attempt to delegate that authority to the Courts of the Union.
>
> 4. That Congress has not attempted to establish a uniform execution law throughout the United States, nor adopted the laws of the States in force at any particular period, but left the process of execution to be regulated from time to time by the local State laws.

Id. at 11.

55. *Id.*

> respects the right in controversy, or the remedy by which it is to be enforced. The mere forms and style of writs, and other process, may, indeed, be regulated by the Courts, but the regulation of the substantive part of the remedy belongs to the legislature.[56]

Implicit here are two concepts. First, the judiciary cannot regulate "sacred vested right[s]" because they are too sacred and vested. Second, separation of powers forbids the judiciary from both defining substantive rights and from defining procedural rights with too great a substantive impact: "The rules by which the citizen shall be deprived of his liberty or property, to enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department."[57]

The Court took a categorical approach to the nondelegation argument.[58] It reasoned that there existed some powers that Congress alone could exercise, while others it could delegate to the other branches.[59] Nevertheless, Justice Marshall wrote famously for the majority that there was not yet a clear line between "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[60] The Court did not define these categories in general terms, however.[61] In fact, it shirked the task:

> [t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.[62]

Instead, Marshall indicated courts should treat delegations on a case by case basis, and in this case, the delegation was proper: "A general superintendence over [regulation of the conduct of a court officer in

56. *Id.* at 13-14.
57. *Id.* at 13.
58. *Id.* at 43.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 46.

executing its judgments] seems to be properly within the judicial province, and has been always so considered."[63] Nevertheless, Marshall agreed in principle that some delegations could be out of bounds, both substantively and on separation of powers grounds. He did not declare, however, where the line was. As a result, while in *Wayman* the doctrine gained recognition as an intellectually tenable theory, its mechanics remained entirely an open question.

The doctrine was first raised in *The Aurora* and first recognized, if only as a principle with vague boundaries, in *Wayman.* The Supreme Court did not fully adopt nondelegation as a workable legal doctrine until *Field v. Clark* in 1892, however. The Court's opinion in *Field* was complex: It simultaneously recognized the existence of a nondelegation doctrine, branded it as such, and created an exception to it.[64] In *Field*, the Tariff Act of October 1, 1890, authorized the President, upon finding that a foreign nation had imposed tariffs on certain agricultural goods produced in the United States, to initiate or suspend reciprocal tariffs on "sugar, molasses, coffee, tea, and hides."[65] As in *The Aurora*, the petitioners sought to characterize this as an unconstitutional delegation of legislative power to the President in order to escape paying the tariffs.[66] Citing *The Aurora*, the *Field* Court upheld the Tariff Act.[67]

Field and *The Aurora* were factually similar. Both involved plaintiffs seeking to avoid restrictions on foreign trade and both involved statutes that conditioned their implementation upon a Presidential finding of fact.[68] The *Aurora* Court held that Congress could condition the execution of legislation on future events, including presidential factual determinations.[69] The Court, moreover, broadly approved without discussing separation of powers.[70] One would expect the same rationale to hold in *Field.* This is not what happened.

Instead, the *Field* Court conclusorily and without citation adopted the nondelegation principle proffered by petitioners: "That Congress cannot delegate legislative power to the President is a

63. *Id.* at 45.

64. Field v. Clark, 143 U.S. 649 (1892).

65. *Id.* at 682.

66. *Id.*

67. *Id.* at 683.

68. Cargo of the Brig Aurora v. United States, 11 U.S. 382, 388 (1813); *Field*, 143 U.S. at 682.

69. *The Aurora*, 11 U.S. at 388.

70. *Id.*

principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[71] It also created an exception to this principle, however, for conditional execution delegations cognate with the President's foreign affairs powers.[72] To do this, it cast *The Aurora* as a case not about conditional executions broadly, but specifically about conditional executions relating to foreign trade.[73] It further discussed an extensive list of statutes dating to 1794 in which Congress granted discretion to the President over foreign trade.[74] It concluded that both *The Aurora* and long standing legislative practice justified exempting conditional execution delegations to the President in foreign affairs legislation from separation of powers analysis.[75] This conclusion could be rephrased as a finding of implied judicial and legislative consent to delegations in the field of foreign affairs.

The effect of adopting the nondelegation doctrine, creating an exception to it, and then applying it to the Tariff Act effectively rendered the Court's first formal recognition of the doctrine dictum, if not also incomprehensible. The majority further muddied the doctrine by not adopting a coherent test for evaluating delegations; its treatment of the nondelegation principle was conclusory.[76] The Court did approvingly cite an 1852 Ohio Supreme Court case, *The Cincinnati, Wilmington & Zanesville, Railroad Co. v. The Commissioners of Clinton County*, to establish the general contours of the doctrine:

> The true distinction ... is between the delegation of power to make law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[77]

This distinction played no role in the *Field* opinion, however. The difference between discretion over what the law is to be versus how it is to be executed simply applies the word "delegation" to *The*

71. *Id.* at 692.

72. *See Field*, 143 U.S. at 683-92.

73. *Id.* at 683.

74. *Id.* at 683-92.

75. *See id.* at 683.

76. *See id.* at 695.

77. *Id.* 693-94 (quoting *Cincinnati, W. & Z. R. Co. v. Commissioners*, 1 Ohio St. 77, 88 (1852)).

Aurora's broad allowance for conditional executions of the law.[78] If that had been enough, then the *Field* Court should not have needed to engage in its complex recasting of *The Aurora* and bolstering it with extensive legislative analysis.

An explanation for this convoluted and curious analytic strategy can be found in the strength of the dissent. The dissent pointed to a key distinction between the Non-Intercourse Act in *The Aurora* and the Tariff Act in *Field*. The Non-Intercourse Act called upon the President to determine whether Great Britain or France had levied tariffs on American exports—a question with only two possible answers, "yes" or "no."[79] By contrast, the Tariff Act authorized the President to impose tariffs whenever "'he may deem' the actions of any foreign nation producting [*sic*] and exporting the articles named in that section to be 'reciprocally unequal and unreasonable'" and to do so for an indefinite period of time.[80] The Tariff Act thus conferred substantive discretion whereas "[t]he legislation [in *The Aurora*] was purely contingent."[81] This argument builds seamlessly on the *Cincinnati Railroad* distinction between discretion over legislative content and discretion over how a statute is executed. The *Field* dissent takes a harsher stance, however, seeking explicit conditions where *Cincinnati Railroad* is agnostic.

Together, *Cincinnati Railroad*, the *Field* dissent, and the *Field* majority's waffling acknowledgement suggest that the nondelegation doctrine was gaining momentum. The *Field* majority, nevertheless, forestalled its full development with an analytic strategy that amounted to a doctrinal bait-and-switch. The nondelegation doctrine limped into existence in a case in which it had no effect and had an exception before it had any teeth.

II. *Hampton's* "Intelligible Principle" Test and its Origins: 1904-1922

Prior to *Hampton* in 1922, the Court did not have many opportunities to evaluate substantive delegations to the executive. It broadly upheld "when" delegations in *The Aurora*,[82] and dispatched the challenge in *Field* under an embryonic "cognate" exception in

78. *See* Cargo of the Brig Aurora v. United States, 11 U.S. 382, 388 (1813).

79. *See id.* at 388.

80. *Field*, 143 U.S. at 699 (quoting the Tariff Act of October 1, 1890).

81. *Id.*

82. *The Aurora*, 11 U.S. at 388.

Nineteenth Century.[83] It did address "what" delegations in three cases, however, in the first years of the Twentieth Century.

Buttfield v. Stranahan, a 1904 case about imported tea, laid the first paving stone on the way to *Hampton*.[84] The Tea Inspection Act of 1897 sought to bar the importation of inferior teas which were not "fit for consumption," and delegated to the Secretary of Agriculture's discretion as to which teas fit that description.[85] The facts were unusually well told in the case syllabus:

> On January 20, 1902, eight packages of tea were imported into the port of New York, per the steamer Adana, by a firm of which the plaintiff in error was the general partner. The tea was entered for import at the New York custom-house, and was stored in a bonded warehouse. At that time certain standards . . . which were selected by the board of tea inspectors, had been put in force by the Treasury regulations under said act of March 2, 1897.
>
> The eight packages of tea in question were embraced in the class known as "Country green teas," numbered 7 on list of standards.[86] The tea was examined on February 7, 1902, and was rejected as "inferior to standard in quality." By the term quality as thus used was meant the cup quality of the tea, that is to say, its taste and flavor. An appeal was taken by the importer to the board of general appraisers, and that board, on March 10, 1902, certified to the collector that "the said tea is inferior in quality to the standard prescribed by law," and

83. *Field*, 143 U.S. at 683.

84. Buttfield v. Stranahan, 192 U.S. 470, 491 (1904).

85. *Id.*

86. The Court listed the "standards" in the margin:

No. 1. Formosa Oolong.
No. 2. Foochon Oolong.
No. 3. North China Congon.
No. 4. South China Congon.
No. 5. India Tea (used for Ceylon tea).
No. 6. Pingsuey, green tea.
No. 7. Country green tea.
No. 8. Japan tea, pan fried (used for sun dried).
No. 9. Japan tea, basket fried.
No. 10. Japan tea, dust or fannings.
No. 11. Capers (used for scented orange Pekoe).
No. 12. Canton Oolong (a).
No. 13. Scented Canton (a).

Id. at 473 n.2.

> accordingly overruled the appeal. The firm was notified of the decision on March 12, 1902.
>
> In November following the plaintiff in error—who had acquired the interest of his partner in the tea—applied to the collector for permission to withdraw the tea for consumption, on payment of the duties. The request was refused. Application was then made for the release of the tea from bond in order to export it. This was also refused on the ground that the tea had been finally rejected under the act of March 2, 1897, more than six months previous to the application. The plaintiff in error was also notified that the tea would be ordered to the public stores for destruction.
>
> This action was commenced in the Supreme Court of the State of New York, county of New York, against the collector of the port of New York, to recover damages for the alleged wrongful seizure, removal and destruction of the tea in question. Averments were made of the importation, storing, tender of duties and refusal to accept the same, and of demand for the tea and refusal to deliver. A general denial was filed. The action being on account of acts done by the defendant under the revenue laws of the United States, as collector of customs, it was removed on his application to the Circuit Court of the United States for the Southern District of New York.[87]

The dispute centered on into which category the tea in question should have fallen:

> The chairman of the Board of Tea Experts of the Treasury Department testified that the standard for Country green teas in force at the time the tea in question was imported was Hyson of a Fine Teenkai, or No. 6 on the list of standards, and that before fixing this standard "the board made diligent search for any Country green teas of lower grades—Hysons of lower grades—of pure teas on the New York market obtainable by the trade, and were unable to find any." The term Hyson, it may be observed, indicated that the tea was made out of the coarsest leaves. For the plaintiff it was testified that the quality of the tea in controversy corresponded in quality with the grade No. 7 on Exhibit 8; while the evidence for the government was to the effect that it would grade as Fair Fychow, No. 11 on Exhibit 8. The testimony also tended to show that the tea in question differed only in respect to the cup quality from the government standard; the evidence for the government being

87. *Id.* at 472-73.

> that it was "a tea of a decidedly low grade, . . . a pure tea, but of low quality."[88]

Not only did the Treasury Department notably once have a "Board of Tea Experts," but *Buttfield* centered on that Board's interpretation of the Tea Act to exclude teas so fuzzily defined as "of a decidedly low grade, . . . a pure tea, but of low quality."[89]

The plaintiffs in error argued that the Tea Act violated several provisions of the Constitution. First, it unconstitutionally delegated legislative power to the Secretary of the Treasury and the Board of Tea Experts.[90] In sum,

> [t]he words "fitness for consumption" give the Secretary of the Treasury unlimited power to exclude teas according to his idea of fitness for consumption. An article which one man or class of men might regard as entirely fit for consumption might be regarded by another man or class of men as utterly unfit.[91]

What issues remained were variations of either procedural or substantive due process claims.[92] As in *Wayman*, the nondelegation argument in *Buttfield* was made in tandem with substantive due process arguments, suggesting that concerns about the proper locus of legislative decision-making and the purported arbitrariness of the resulting decisions were closely intertwined.

The Court diverged from *Wayman*'s categorical approach, however.[93] Justice White wrote for the Court that "Congress

88. *Id.* at 476-77.

89. *Id.* at 477.

90. *Id.* at 492.

91. *Id.* at 478.

92. The Court wrote:

> [T]he plaintiff in error had a vested right to engage as a trader in foreign commerce and as such to import teas into the United States, which as a matter of fact . . . were fit for consumption; . . . the establishment and enforcement of standards of quality of teas, which operated to deprive the alleged vested right, constituted a deprivation of property without due process of law; . . . the act . . . does not provide that notice and an opportunity to be heard be afforded an importer before the rejection of his tea by the tea examiner, or the Tea Board of General Appraisers; . . . that in any event the authority conferred by the statute to destroy goods upon the expiration of the time limit for their removal for export and the destruction of such property, without a judicial proceeding, was condemnation of property without hearing and the taking thereof without due process of law.

Id. at 491-92.

93. *See id.* at 496.

legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."[94] There was no improper delegation as a result.[95] The character of the delegated power did not factor into the analysis at all.[96] Instead, the Court's opinion suggested that Congress could delegate in any field, so long as it had performed its constitutional role by establishing boundaries to its delegations.

Buttfield's "as far . . . as reasonably practicable" test was more permissive than *Wayman* and even *Field,* but had not quite reached *Hampton*'s "intelligible principle." *Buttfield* emphasized the legislative process leading up to the delegation, whereas *Hampton* focused on the limits placed on the delegate's discretion. Separation of powers and the practicalities of judicial review were paramount in *Hampton*, while the *Buttfield* Court seemed at least as concerned with something akin to due process applied to the legislative arena. Nevertheless, *Buttfield* marked a shift from the doctrinaire separation of powers approach that characterized the Nineteenth Century cases.

In 1911, the Court meandered again, this time edging closer to *Hampton*'s "intelligible principle" test, but also returning in part to *Wayman*'s categorical approach. The Court in *United States v. Grimaud* considered the Forest Reserve Act of 1897.[97] The Forest Reserve Act authorized the President to set aside "public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations" for the purposes of environmental and resource management.[98] Initially, the Act delegated the authority to manage these reserves to the Secretary of the Interior, but in 1905 Congress transferred this power to the Secretary of Agriculture.[99] Accordingly, the Secretary of Agriculture established regulations under which a permit was required—at a fee—to graze sheep in forest reserves, even though no such permit was required under the statute.[100]

The action began after the defendants in error were indicted for illicit sheep grazing without a permit in the Sierra Forest Reserve in

94. *Id.*
95. *Id.*
96. *Id.*
97. United States v. Grimaud, 220 U.S. 506, 521-22 (1911).
98. *Id.* at 507.
99. *Id.* at 508-09.
100. *Id.*

California.[101] The defendants successfully demurred at trial, arguing that the Forest Reserve Act unconstitutionally delegated power to the Secretary of Agriculture to create penal offenses.[102] The Federal Government appealed directly to the Supreme Court under the Criminal Appeals Act of 1909, which provided for direct appeals when the validity of a federal statute was at issue.[103]

The Court found no unconstitutional delegation.[104] In language reminiscent of both *Wayman* and *Buttfield*, Justice Lamar wrote for the majority that "it was impracticable for Congress to [regulate] these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."[105] Present here are both the categorical sensibilities of *Wayman* and the "as far as practicable" metric of *Buttfield*. The distinction between "administrative" versus "legislative" power gives some form to *Wayman*'s notion that some powers could be delegated and others not. The impracticability of Congress regulating what grass sheep could and could not eat in a far-flung federal forest reserve underscores the *Buttfield* rationale.

But neither the reasoning of *Wayman* nor *Buttfield* ultimately controlled in pure form. Instead, the Court concluded:

> The Secretary of Agriculture could not make rules and regulations for any and every purpose. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.[106]

101. *Id.* at 514.
102. *Id.*
103. *Id.*
104. *Id.* at 522.
105. *Id.* at 516.
106. *Id.*

The Secretary of Agriculture's discretion was limited by the framework created by Congress, therefore the Forest Reserve Act was constitutional. This passage further indicates that the Act was constitutional because Congress set the penalty, and thus the power to create crimes should not be not delegable. It is because of this that *Grimaud* and *Hampton* are distinguishable doctrinally. The Court wove the *Buttfield* rationale into its discussion, but it was not, in the end, a part of its holding.[107] This set the stage for *Hampton*'s move towards a standard based solely on whether Congress provided measurable limits to its delegates' authority.

The Court developed the "intelligible principle" test in *Hampton* in order to police "what" delegations. In *Hampton*, the Court upheld section 315 of the Tariff Act of 1922, which allowed the President to adjust a tariff based on the market price of certain imported goods if the market price fluctuated beyond the statutorily contemplated range.[108] The President could adjust a tariff by proclamation but could not do so until the United States Tariff Commission investigated the matter and issued a report.[109] The Tariff Commission's investigation would consist of "ascertaining differences in costs of production" and issuing notice to give "opportunity to parties interested to be present, to produce evidence, and to be heard."[110]

On May 19, 1924, President Calvin Coolidge issued such a proclamation to raise the duty on imported barium oxide from Germany. After considering the Tariff Commission's investigation, during which notice was issued and comments heard, determined that "found that the principal competing country is Germany, and that the [current] duty... does not equalize the differences in costs of production in the United States and in... Germany."[111] President Coolidge accordingly ordered an increase in the duty from 4 cents to 6 cents per pound.[112] Then Secretary of State Charles E. Hughes countersigned the order, en route to a Supreme Court appointment

107. *See id.* at 522-23.

108. United States v. Hampton, 276 U.S. 394, 401-02 (1928). It is worth noting that since *Hampton* involved a tariff on imported goods, the Court could have applied the "cognate" exception and forgone the "intelligible principle" analysis altogether. Why it did not is unclear from the face of the opinion. Nonetheless, it suggests the unsettled nature of the doctrine during this period.

109. *Id.* at 402.

110. *Id.*

111. *Id.* at 403.

112. *Id.*

and his authorship of the majority opinions in the two most important cases in the nondelegation doctrine's history, *Panama Refining* and *Schechter*.[113]

Chief Justice Taft wrote for the Court in *Hampton*.[114] He cited the Court's nondelegation jurisprudence to that point, anchoring *Hampton*'s test in separation of powers concerns.[115] He further quoted *The Cincinnati, Wilmington & Zanesville, Railroad Co. v. The Commissioners of Clinton County*, the 1852 Ohio Supreme Court case first discussed by the Court in *Field v. Clark*,[116] for the proposition that

> [t]he true distinction . . . is between the delegation of power to make law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[117]

Justice Taft also found an analogue in Congress' ratemaking efforts which required minute attention to detail that would be impossible without some delegation to a administrative agency.[118] Congress could delegate ratemaking power to a commission so long as it laid down "general rules" and the commission merely applied such rules to specific factual situations.[119]

Justice Taft took this principle from the ratemaking context and applied it to the tariff setting authority at issue in *Hampton*, meanwhile giving it the patina of more general applicability. He replaced the words "general rules," however, with "intelligible principle": "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."[120] The Court found, accordingly, that

113. *Id.* at 404; *see infra* notes 135-231 and accompanying text.

114. *Id.* at 401.

115. *See id.* 406-07.

116. Field v. Clark, 143 U.S. 649, 693-94 (1892).

117. *Hampton*, 276 U.S. at 407 (quoting *Cincinnati, W. & Z. R. Co. v. Commissioners*, 1 Ohio St. 77, 88 (1852)).

118. *Hampton*, 276 U.S. at 408.

119. *Id.* at 408.

120. *Id.* at 409.

section 315 articulated an "intelligible principle" since it required the President to

> take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.[121]

Section 315 had yet more in its favor. It prohibited the President from deciding to what goods the tariff would apply.[122] More importantly, it also required "the advisory assistance of a Tariff Commission" where the Tariff act in *Field* required none.[123] The "intelligible principle" in *Hampton* was thus even more robust than it needed to be.

The *Hampton* Court went further to suggest that it would exempt "when" delegations from nondelegation doctrine analysis altogether. Congress simply did not delegate legislative authority by conditioning the execution of its laws on future executive branch determinations or on elections by private citizens.[124] Justice Taft wrote for the majority,

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.[125]

121. *Id.* at 401-02, 409-11.

122. *Id.* at 402.

123. *Id.* at 409-10.

124. *Id.* at 407.

125. *Id.*

As such, the Court did not apply the "intelligible principle" test to the portions of the Act granting discretion over the timing of its implementation.

III. Hot Oil, Sick Chickens, and the New Deal Conflagration: 1935-1937

The United States underwent tremendous social, economic, and political upheaval in the years following *Hampton* in 1922, culminating in the Great Depression, Franklin D. Roosevelt's presidency, and the New Deal. One of the cornerstones of the New Deal was the National Industrial Recovery Act of 1933 ("NIRA").[126] NIRA was a broad reaching statute, whose purpose was

> to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of Industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.[127]

To effectuate this purpose, NIRA contained a bevy of provisions delegating power to the president to establish administrative agencies,[128] enact codes of fair competition,[129] and enter directly into agreements with private commercial actors.[130] Other provisions allowed the president to directly regulate specific industries.

One such provision was section 9(c), which allowed the president "to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted . . . by any State law or

126. 15 USC §§ 703 *et seq* (repealed), *available at* http://www.ourdocuments.gov/doc.php?doc=66&page=transcript.

127. *Id.* at Title I, § 1.

128. *Id.* at § 2.

129. *Id.* at § 3.

130. *Id.* at § 4.

valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State." Section 9(c) furthermore prescribed a penalty of up to $1,000 and/or six months imprisonment for violating such a prohibition.

On July 11, 1933, President Roosevelt issued an Executive Order under section 9(c) and prohibited interstate trading of oil extracted in excess of state quotas.[131] Next, on July 14, 1933, President Roosevelt ordered the Secretary of the Interior to appoint agents and issue rules and regulations to permit enforcement of his section 9(c) order.[132] The July 14 order came under section 10(a) of the Act, which prescribed a penalty of up to $500 and/or six months imprisonment instead of section 9(c)'s $1,000 fine.[133] President Roosevelt further approved a "Code of Fair Competition for the Petroleum Industry," which was negotiated directly with the oil industry itself, and which established a federal agency to balance oil production against consumer demand.[134]

Two Texas oil companies, Panama Refining Company and Amazon Petroleum Corporation, brought separate actions to enjoin the federal government from enforcing these regulations; their hope was to sell their illicitly extracted oil in interstate commerce.[135] This is why *Panama Refining* is known as the "hot oil" case. The two cases were consolidated before the Supreme Court, resulting in *Panama Refining v. Ryan* in 1935.[136]

Panama Refining involved a "when" delegation. Section 9(c) provided nearly all the major details. It defined the criminal act: selling oil extracted in excess of quotas set by the states across state lines.[137] It defined the penalty: a determinate fine and term of imprisonment.[138] The only open question was when these provisions would come into effect. Section 9(c) could, likewise, be analyzed not as a delegation but as an ordinary statute with an open-ended window of time within which the president could execute it. In this sense, *Panama Refining* shared much in common with *The Aurora.*

131. *Id.* at 405-06.
132. *Id.* at 406-07.
133. *Id.*
134. *Id.* at 408-409.
135. *Id.* at 410-11.
136. Panama Refining v. Ryan, 293 U.S. 388 (1935).
137. 15 USC §§ 703, Title I, §9(c) (repealed).
138. *Id.*

The petitioners argued, however, that section 9(c) constituted an unconstitutional delegation of legislative power to the president.[139] Citing, *inter alia*, *Field v. Clark* and *Buttfield v. Stranahan*, but notably not *Hampton*, the petitioners argued that section 9(c) lacked any congressionally prescribed policy to guide the president's hand.[140] Further, the Codes of Fair Competition envisioned by NIRA were an illegitimate transfer of legislative power not only to the president, but to private industry actors outside of the federal government altogether.[141] In the petitioners' words, "We do not believe it can be said that merely because acts of Congress become enforceable when approved by the President, acts of the various industries of the country, acting instead of Congress, can become laws when approved by the President. There could be no clearer delegation of legislative power."[142]

The Supreme Court agreed in a curious opinion written by Justice Hughes. The Court reached three holdings in striking down section 9(c) on nondelegation grounds. First, Justice Hughes analyzed whether NIRA delegated legislative authority to the president.[143] The Court concluded that it did. Section 9(c) "declares no policy as to the transportation of the excess production .... [I]t gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[144] The Court further concluded that no other of NIRA's sections contained an adequate policy statement to constrain the president's authority.[145] As such, section 9(c) delegated to the president authority that extended into the realm of establishing "legislative policy."[146]

Second, in the most curious portion of the opinion, Justice Hughes reached far back in time to begin a circuitous drive towards the conclusion that the Constitution forbids such delegations.[147] He began with *The Aurora*, describing its facts and the Court's doctrinal moves.[148] He then followed suit with the major delegation cases since

139. *See id.* 414-15.
140. *Id.* at 392-93.
141. *Id.* at 393.
142. *Id.*
143. *Id.* at 415.
144. *Id.*
145. *Id.* at 416-20.
146. *Id.* at 415.
147. *Id.* at 423.
148. *Id.*

The Aurora, including *Field*, *Wayman v. Southard*, *Buttfield*, and *U.S. v. Grimaud*.[149] Notably, every single one of these cases upheld the delegation at issue and rejected the proposed application of the nondelegation doctrine. Hughes nevertheless held that the essential principle embraced by this line in the Court's jurisprudence was that "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend."[150] This judicial slight of hand hits the reader like a Woody Allen punch line; only one phrase really captures the effect: the old switcheroo.[151] If the Court upheld section 9(c), Justice Hughes determined, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory."[152]

Third, and finally, Justice Hughes applied a muddled due process analysis to the "when" delegation elements of section 9(c).[153] Other delegations, Justice Hughes reasoned, were saved because they limited the president's discretion over when to implement a given provision to a narrow set of factual determinations.[154] Here, for Justice Hughes, the nondelegation doctrine and due process converged:

> 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

149. *Id.* at 423-30.

150. *Id.* at 430.

151. A classic example from a 1972 article in *Time Magazine*:

> [Woody] Allen learned to deal with melancholy by furnishing it with a punch line. "For a while we pondered whether to take a *v*acation or get a divorce. We decided that a trip to Berm*u*da is over in two weeks, but a divorce is something you always have . . . ." The gag illust*r*ates Allen's reliance on a comic device that is as old as Aristophanes—the principle of inversion or, in more v*u*lgar parlance, the old s*w*itcheroo.

Woody Allen: Rabbit Running, TIME MAGAZINE Jul. 3, 1972, *available at* http://www.time.com/time/magazine/article/0,9171,877848-1,00.html (last visited Apr. 14, 2008) (emphasis added).

152. *Panama Refining*, 293 U.S. at 430.

153. *Id.* at 431-34.

154. *Id.* at 431.

> commission, and, if that authority depends on determinations of fact, those determinations must be shown.[155]

Also wrapped up in this line of reasoning was the cognate exception birthed in *Field v. Clark*. Justice Hughes indicated that broad presidential discretion over the factual determinations that might trigger a "when" delegation would be constitutional if the discretion at issue "appropriately belong[ed] to the executive province."[156] The upshot was that section 9(c) lacked adequate "when" triggering guidelines and was further unconstitutional on this point.

The legal import of *Panama Refining* could be better phrased than is immediately apparent on the face of Justice Hughes' tangled opinion. Justice Hughes outlined a two-pronged analysis. His first two issues comprised the first prong. Step one under the first prong was to ask whether Congress, in passing an act, had made a policy statement comprehensive enough to preclude the president from implementing his own policy determinations; if so, then it delegated no legislative authority; if not, then it had. Step two under the first prong of Justice Hughes' analysis was almost tautological and echoed *Hampton*'s intelligible principle test: If Congress had not precluded the president from making policy determinations, had it articulated a policy statement sufficient to cabin the president's policy determinations within some framework? The implication is that the policy statement needed to be more robust to satisfy step one than step two, although Justice Hughes did not deal with this explicitly. Justice Hughes' final issue comprised the second prong. Here the inquiry was straightforward: Did Congress define a set of factual determinations narrow enough to cabin the president's discretion over when to implement the statute in question? In short, "what" delegations needed policy statements and "when" delegations needed narrow sets of factual determinations.

Justice Cardozo dissented colorfully and emphatically, disagreeing with the Court's conclusion that section 9(c) lacked an adequate policy statement when viewed as a whole.[157] According to Justice Cardozo, the Court had looked at the myriad policy statements independently to determine that each one, standing alone, was insufficient to guide the president's hand.[158] Two cannons of statutory interpretation compelled Justice Cardozo to instead look at

155. *Id.* at 432.

156. *Id.*

157. *Id.* 433-34.

158. *See id.* at 434-35.

the statute as a whole: first, "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view"; second "when a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys."[159] Looking at the statute as a whole, Justice Cardozo determined that

> the test is plainly this, that the President is to forbid the transportation of the oil when he believes, in the light of the conditions of the industry as disclosed from time to time, that the prohibition will tend to effectuate the declared policies of the act—not merely his own conception of its policies, undirected by any extrinsic guide, but the policies announced by § 1 in the forefront of the statute as an index to the meaning of everything that follows.[160]

As any index would, section 1 pointed to more specific policy statements. Congress communicated these statements via the entirety of the "hot oil" provisions in NIRA, according to Justice Cardozo:

> [Congress] said to the President in substance: You are to consider whether the transportation of oil in excess of the statutory quotas is offensive to one or more of the policies enumerated in § 1, whether the effect of such conduct is to promote unfair competition or to waste the natural resources or to demoralize prices or to increase unemployment or to reduce the purchasing power of the workers of the nation. If these standards or some of them have been flouted with the result of a substantial obstruction to industrial recovery, you may then by a prohibitory order eradicate the mischief.[161]

Justice Cardozo was thus satisfied that NIRA confined the president's policy making discretion.

Justice Cardozo further noted that, contrary to Justice Hughes' position, the president did not gain legislative authority by having the freedom to choose "between one standard and another, acting or failing to act according to an estimate of values that is individual and personal."[162] Instead the president's role was merely "to study the facts objectively, the violation of a standard impelling him to action or inaction according to its observed effect upon industrial

159. *Id.* at 439.

160. *Id.* at 435.

161. *Id.* at 437.

162. *Id.*

recovery . . . ."[163] In so doing, the president was "not to prefer one [policy] standard to another in any subjective attitude of mind, in any personal or willful way."[164] If any one of Congress's policy rationales were implicated, the president was to act. By striking NIRA down in light of this, Justice Cardozo accused the Court of overturning *Field*, *Grimaud*, and *Hampton*, under whose rules he would have found "an instance of lawful delegation in a typical and classic form . . . ."[165]

Justice Cardozo yet further addressed the Court's general attitude towards separation of powers and the inter-branch delegation of authority. He wrote that, in statutes such as NIRA, the president's "[d]iscretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing."[166] *Field*, *Grimaud*, and *Hampton*, Justice Cardozo's anointed vanguard of nondelegation cases, stood for a principle utterly contrary to Justice Hughes' eyebrow-raising conclusion that "that there are limits of delegation which there is no constitutional authority to transcend."[167] To Justice Cardozo, these three cases taught "one lesson and a clear one":

> the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety.[168]

Gaining momentum, Justice Cardozo went on:

> There is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section. What can be done under cover of that permission is closely and clearly circumscribed both as to subject matter and occasion. The statute was framed in the shadow of a national disaster. A host of unforeseen contingencies would have to be faced from day to day, and faced with a fulness of understanding unattainable by any one

163. *Id.* at 437-38.
164. *Id.* at 437.
165. *Id.* at 438.
166. *Id.* at 440.
167. *Id.* at 430.
168. *Id.* at 440.

> except the man upon the scene. The President was chosen to meet the instant need.[169]

Justices Cardozo and Hughes thus represented two divergent views of the role of history in shaping doctrine. Justice Hughes had won the day, however.

Justice Hughes won again in 1935 when the Court struck down section 3 of NIRA on nondelegation grounds in *A.L.A. Schechter Poultry Corp. v. United States*.[170] Under section 3, "trade or industrial associations" could develop codes of fair "competition" and then seek approval from the President to make such codes binding law, so long as he found

> (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of Title I of the Act.[171]

The president did not need to either accept or reject the code as it came to him, as he would with ordinary legislation presented by Congress.[172] He could instead

> impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared.[173]

If the president rejected a code proposed by an industrial association, he could moreover prescribe his own code to replace it, "either on his own motion or on complaint."[174] Once the president approved a code, it became binding law and threatened a criminal misdemeanor fine of up to $500 for each violation. Each day after the first during which

169. *Id.* at 443-44.

170. 295 U.S. 495 (1935).

171. *Id.* at 522-23 (internal quotation marks and citation omitted).

172. *Id.* at 523.

173. *Id.* (internal quotation marks omitted).

174. *Id.*

the offending conduct continued would constitute a separate offence.[175]

On April 13, 1934, President Roosevelt approved a code under NIRA section 3 to govern the processing and sale of live poultry in metropolitan New York City.[176] President Roosevelt did this, as he had under section 9 in *Panama Refining*, by issuing an executive order.[177] The executive order of April 13, 1934, found that the "application for his approval had been duly made in accordance with [NIRA], that there had been due notice and hearings, that the Code constituted 'a fair code of competition' as contemplated by the Act . . . and that the Code would tend 'to effectuate the policy of Congress . . . .'"[178] Notably, President Roosevelt did not exercise his authority under section 3 to impose "conditions . . . and . . . provide exceptions to and exemptions from" the proposed code and also did not reject the code in order to put forth his own.[179] He instead approved the code as it came to him.[180]

The code, called the "Live Poultry Code," covered an area including "the five boroughs of New York City, the counties of Rockland, Westchester, Nassau and Suffolk in the State of New York, the counties of Hudson and Bergen in the State of New Jersey, and the county of Fairfield in the State of Connecticut."[181] It applied to "every person engaged in the business of selling, purchasing for resale, transporting, or handling and/or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form."[182] The Live Poultry Code granted wage, hour, and other employment rights to poultry industry employees: a forty hour work week, a 50 cent per hour minimum wage, a minimum working age of sixteen, and the right to collectively bargain while represented by a union of the employees' choice.[183] The code further prohibited various "unfair methods of competition" and required minimum accounting and reporting practices: Industry members had to track and report "all

175. *Id.*
176. *Id.* at 523.
177. *Id.* at 525-26.
178. *Id.* at 525.
179. *See id.* at 525-26.
180. *Id.*
181. *Id.*
182. *Id.* at 523-24 (internal quotation marks omitted).
183. *Id.* at 524.

financial transactions of their respective businesses and the financial condition thereof."[184]

The action commenced when the family owners of the Brooklyn-based A.L.A. Schechter Poultry Corporation and Schechter Live Poultry Market were convicted in United States District Court for violations of the Live Poultry Code.[185] Joseph, Martin, Alex, and Aaron Schechter operated at the end of the live poultry supply chain, where the poultry ceased to be live.[186] The Schechters purchased from so-called "commission men" who distributed live poultry throughout the New York market once it had been shipped into the city by rail.[187] The Schechters were "market men" who sold to butchers who in turn sold directly to consumers.[188] Immediately prior to sale, the Schechters' employees slaughtered the poultry.[189]

The Schechters committed eighteen violations of the Live Poultry Code, according to the lower court, including one charge of conspiracy.[190] Two of the charges were for minimum wage and maximum hour violations.[191] Ten counts were for violating the "straight killing" provision of the code, which required industry members to only sell "any half-coop, coop, or coops" as a complete, discrete run.[192] The Schechters had violated the "straight killing" provision by permitting retail dealers and butchers to select "individual chickens taken from particular coops and half-coops."[193] They had garnered a further count by "the sale to a butcher of an unfit chicken," nicknaming *Schechter* the "sick chicken" case ever since.[194] The remaining charges were for selling chickens without having them inspected, fraudulently accounting and reporting "daily prices and volume of sales," and selling to unlicensed dealers and slaughterers.[195]

184. *Id.* at 525 (internal quotation marks omitted).
185. *Id.* at 519-20.
186. *Id.* at 519-21.
187. *Id.* at 520.
188. *Id.* at 520-21.
189. *Id.* at 521.
190. *Id.* at 527.
191. *Id.*
192. *Id.*
193. *Id.* at 528.
194. *Id.*
195. *Id.*

Justice Hughes began his analysis by picking up where Justice Cardozo left off in *Panama Refining*. In his dissent in *Panama Refining*, Justice Cardozo urged that historical circumstances should impact constitutional analysis, in particular with respect to the Great Depression and the separation of powers.[196] Justice Hughes flatly rejected this proposition. He wrote,

> Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.[197]

To Justice Hughes, the role of historical circumstances in constitutional analysis was nil.

Justice Hughes went on to frame the nondelegation issue. Citing to *Panama Refining*, he saw the relevant inquiry as "whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."[198] Where *Hampton* had required only an "intelligible principle,"[199] Justice Hughes now required "standards of legal obligation."[200]

Despite citing to *Panama Refining*, Justice Hughes saw that case and *Schechter* as presenting distinct sub-species of the nondelegation doctrine. *Panama Refining*, according to Justice Hughes, dealt with an adequately defined statutory prohibition but granted the president excessive discretion over when to implement it.[201] *Schechter*, by contrast, went to "whether there [was] any adequate definition of the subject to which the [unfair competition] codes [were] to be addressed."[202] In other words, *Panama Refining* concerned a "when" delegation, while *Schechter* concerned a "what" delegation.

196. *See* Panama Refining v. Ryan, 293 U.S. 388, 443-44 (1935).

197. *Id.* at 527.

198. *Id.* at 530.

199. United States v. Hampton, 276 U.S. 394, 409 (1928).

200. *Schechter*, 295 U.S. at 530.

201. *See id.*

202. *Id.* at 531.

Justice Hughes proceeded to analyze *Schechter*'s "what" delegation by addressing section 3's use of the phrase "unfair competition."[203] The idea of legally prohibited "unfair competition" entered the lexicon in section 5 of the Federal Trade Commission ("FTC") Act, "which introduced the phrase 'unfair methods of competition,'" and provided a benchmark for the permissible use of the concept.[204] Via the FTC Act, Congress created a robust administrative procedure for identifying prohibited "unfair methods of competition" on a case-by-case basis.[205] The FTC, a "quasi-judicial body," would take formal complaints, issue notice, conduct hearings, and make "appropriate findings of fact supported by adequate evidence."[206] Finally, Congress provided "for judicial review to give assurance that the action of the Commission is taken within its statutory authority."[207]

The "codes of fair competition" provision of NIRA section 3 failed to live up to the FTC Act's example on two counts, according to Justice Hughes. First, was a procedural deficiency: Congress "dispense[d] with [the FTC Act's] administrative procedure and with any administrative procedure of an analogous character."[208] Second, NIRA's use of the phrase "fair competition" assumed "a much broader range and a new significance" compared to the FTC Act's "unfair methods of competition."[209] Probing the limits of this "broader range" occupied the remainder of Justice Hughes' nondelegation analysis.

Justice Hughes determined that the inquiry should center on NIRA's delegation to the president of power to "approve or prescribe."[210] This was because if the Court treated the president's executive power under section 3 as a constant and consistent with his traditional role, then the "fair competition" code mechanism presented a delegation to industry members to legislate.[211] In other words, if all section 3 called upon the president to do was execute "codes of fair competition" as he would execute statutes, then

203. *Id.*
204. *Id.* at 532.
205. *Id.* at 533.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 533-34.
210. *Id.* at 537.
211. *Id.*

industrial trade associations would be executing pure legislative power. The possibility rendered Justice Hughes apoplectic:

> [W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in [NIRA's policy statement in] section 1 of title I? The Answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[212]

Section 3's only chance for salvation, accordingly, was if it instead delegated legislative authority to the president, not trade groups, while narrowly confining that authority.[213]

Schechter's presented a "what" delegation, so, consistent with the Court's jurisprudence to that point, Justice Hughes examined section 3 for narrowly defined sets of factual findings that triggered the president's authority.[214] He found only two:

> *First,* the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code, "impose no inequitable restrictions on admission to membership" and are "truly representative." . . . *Second*, the president is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And, to this is added a proviso that the code "shall not permit monopolies or monopolistic practices."[215]

Justice Hughes found neither satisfactory. The first "condition of approval . . . relate[d] only to the status of the initiators of the new laws and not to the permissible scope of such laws."[216] The second set of "restrictions leave virtually untouched the field of policy envisaged by section one, and, in that wide field of legislative possibilities, the

212. *Id.* at 537.

213. *See id.* at 537-38.

214. *Id.* 538.

215. *Id.* 538 (italics original).

216. *Id.*

proponents of a ode, refraining from monopolistic designs, may roam at will and the President may approve or disapprove as he may see fit."[217] Justice Hughes complained further that "the President in approving a code may impose his own conditions, adding to or taking from what is proposed" or even prescribing his own replacement code.[218] This last point was dictum, however, given that President Roosevelt merely approved the "Live Poultry Code" without modification.

Justice Hughes consequently led the Court in striking down section 3. The Court held that section 3 violated the nondelegation rule laid down in *Hampton*, although curiously Justice Hughes omitted the words "intelligible principle" from his discussion.[219] Section 3 ultimately "had no precedent" because it lacked "appropriate administrative procedure," "sets up no standards," and granted to the president unfettered legislative authority.[220] Section 3 thus presented "an unconstitutional delegation of legislative power."[221]

This time, Justice Cardozo concurred.[222] In Justice Cardozo's view, section 9 should have been upheld in *Panama Refining* because "[c]hoice, though within limits, had been given [to the President] 'as to the occasion, but none whatever as to the means.'"[223] *Panama Refining*, in other words, had merely presented a "when" delegation, which Justice Cardozo found to satisfy separation of powers categorically. By contrast, Justice Cardozo borrowed his own words from *Panama Refining* to write that section 3 of NIRA in *Schechter* delegated power that was "not canalized within banks that keep it from overflowing. It [was] unconfined and vagrant."[224] Section 3 violated the nondelegation doctrine because "in effect [it was] a roving commission to inquire into evils and upon discovery correct them."[225] It was an unbounded "what" delegation.

Justice Cardozo did not argue to categorically strike down "what" delegations, however. To the contrary, "[i]f codes of fair

217. *Id.*
218. *Id.* at 538-39.
219. *Id.* at 541.
220. *Id.* at 541-42.
221. *Id.* at 542.
222. *Id.* at 551.
223. *Id.* (quoting *Panama Refining*, 293 U.S. at 435).
224. *Id.* at 551.
225. *Id.*

competition are codes eliminating 'unfair' methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered.... Delegation in such circumstances is born of the necessities of the occasion."[226] Furthermore, it was entirely permissible for industrial associations to play an advisory role in crafting the president's response: "When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers."[227] The president's authority to identify and prohibit unfair forms of competition would be bounded by "accepted business standards or accepted norms of ethics."[228] The soft law of existing business norms was sufficient to channel the president's authority within constitutionally acceptable limits.

Section 3 of NIRA, however, also presented illicit forms of delegated authority that were "so combined and welded [to the licit forms] as to be incapable of severance without destructive mutilation."[229] Section 3 authorized the president to go beyond prohibiting forms of unfair competition.[230] It gave the president comprehensive authority to "to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption."[231] Justice Cardozo noted the Live Poultry Code's "straight killing" requirement as a particularly offensive example of excessive authority because it found no prohibition whatsoever in existing norms of business ethics.[232]

Justice Cardozo's concurrence accordingly presents a test for analyzing "what" delegations in the commercial context. If Congress delegates to the president authority to lend criminal sanctions to existing business norms of "unfair competition," then the president's authority is confined to identifying those norms and is therefore constitutional. If Congress' grant of authority is over a field substantively broader than "unfair competition" the Court should exercise more exacting scrutiny in examining whether the delegated

226. *Id.* at 552.
227. *Id.*
228. *Id* at 553.
229. *Id.* at 554.
230. *Id.*
231. *Id.*
232. *Id.*

power is confined by standards "that could be known or predicted in advance of" it being exercised.[233] This approach reflects two underlying concerns and threads in the Court's nondelegation jurisprudence. One is substantive due process: Power should not be exercised arbitrarily. The other is less doctrinal and more pragmatic: Congress must give courts some standards by which to police legislative delegations to the executive.

In 1936, *Carter Coal* presented the Court's final use of the nondelegation to invalidate federal legislation. It is worth noting initially that *Carter Coal* is the forgotten stepchild of nondelegation doctrine scholarship. The modern Supreme Court in *Whitman* excluded *Carter Coal* from not only from its list of successful delegation challenges, but from its discussion of the doctrine altogether.[234] Not all scholars have followed suit, however.[235] In particular, Morton Horwitz suggests that *Schechter* and *Carter Coal* are analytically indistinguishable.[236] The differences between the two cases are not readily apparent.

Carter Coal involved the Bitiminous Coal Conservation Act of 1935 ("BCCA"). The Act provided that

> [w]henever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining . . . shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts.[237]

233. *Id.*

234. *Whitman*, 531 U.S. at 473. The Court counted only *Panama Refining* and *Schechter*: "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.'"

235. *See, e.g.*, Garry, *supra* note 7, 704 n. 121; *see also* Posner and Vermeule, *supra* note 7, 1723 n.5, 1757.

236. HORWITZ, *supra*, at 8.

237. *Carter Coal*, 298 U.S. at 283-84.

Despite the apparent similarity with section 3 of NIRA, the Court analyzed this portion of the Act not as a delegation to the executive, but as a delegation to the industrial community.[238] Justice Sutherland wrote for the majority that "[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[239] While the Court used the phrase "legislative delegation" and cited *Schechter* for its bearing on the nondelegation doctrine, however, it neither cited *Hampton* nor raised the faintest whiff of the "intelligible principle" test.[240] Why the Court took this analytical tact is unclear from the face of the opinion.

The long string of unsuccessful nondelegation challenges that has defined the doctrine ever since *Carter Coal* began in the same year, 1936, with *United States v. Curtiss-Wright Export Corp.*[241] In that case, the Court let flourish the "independent authority" exception it had first planted in *Field v. Clark* in 1892,[242] holding that Congress may delegate legislative authority to the President absent an "intelligible principle" if the delegation is "cognate to" the President's traditional powers.[243] On May 28, 1934, Congress passed a joint resolution providing in pertinent part

> [t]hat if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if . . . he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war . . . to the countries now engaged in that armed conflict . . . until otherwise ordered by the President or by Congress.[244]

238. *Carter Coal*, 298 U.S. at 311. As Louis L. Jaffe noted in a 1937 article, this inconsistency suggests that the Court's opposition to self-regulation statutes may best be explained not in terms of the nondelegation doctrine but in terms of due process. *Law Making by Private Groups*, 51 HARV. L. REV. 201, 248 (1937).

239. *Id.*

240. *Carter Coal*, 298 U.S. at 311-12.

241. *See* Curtiss-Wright Export Corp. v. United States, 299 U.S. 304 (1936).

242. *Id.* at 319-20.

243. *Id.* at 327 (quoting Panama Refining v. Ryan, 293 U.S. 388, 422 (1935)); *see also* Loving v. United States, 517 U.S. 748, 772 (1996).

244. *Curtiss-Wright*, 299 U.S. at 312.

The joint resolution further prescribed criminal punishments for violations of executive proclamations issued under it.[245] The *Curtiss-Wright* petitioners appealed their conviction for conspiracy to violate a May 29, 1934, proclamation issued by President Roosevelt under the Joint Resolution by selling machine guns to Bolivia.[246] At the time, Bolivia was "then engaged in armed conflict in the Chaco."[247]

The *Curtiss-Wright* petitioners argued that the joint resolution delegated legislative authority to the President absent an intelligible principle to guide his discretion.[248] The Court reframed the issue: "[A]ssuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?"[249] The answer was emphatically yes.[250] As Justice Sutherland wrote for the Court, at issue was not only a delegation brought on "by an exertion of legislative power, but [also] . . . the very delicate, plenary and exclusive power of the President . . . in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[251] The Court's holding was further justified because "an impressive array of legislation . . . enacted by nearly every Congress from the beginning of our national existence to the present day" delegated authority concurrent with the President's constitutional foreign relations power such that it supports an "unassailable [precedential] ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."[252]

To support his position, Justice Sutherland pointed to a catalogue of this "impressive array of legislation" and an accompanying discussion of the Court's early delegation rulings in *Panama Refining*.[253] In that case, the Court identified a series of legislative delegations in the late Eighteenth and early Nineteenth Centuries that never warranted judicial review because they were

245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 315.
249. *Id.*
250. *Id.* at 327.
251. *Id.* at 320.
252. *Id.* at 327.
253. *Id.* (citing Panama Refining v. Ryan, 293 U.S. 388, 421-30 (1935)).

truly cognate with the President's Article II power over "the foreign relations of the government."[254] Nevertheless, as Justice Sutherland noted, later and more ambitious foreign affairs "cognate" delegations were challenged before the Court.[255] The resulting jurisprudence allowed the *Panama Refining* Court to infer constitutional limitations on congressional delegations.[256]

IV. The Fading Importance of Separation of Powers and the Doctrine's Demise: 1939-1944

After the fervor of the initial New Deal cases had abated, the Court's use of the *Hampton* test became more consistent and forgiving; it never again struck down a statute on nondelegation grounds. In *Mulford v. Smith*, decided in 1939, the Court considered regional quotas on the sale of tobacco.[257] The statute gave the Secretary of Agriculture broad discretion over the amount of the quotas and their apportionment across regions.[258] The Court acknowledged that the statute provided no "definite standards" to guide the Secretary's discretion, but that it articulated "the considerations which are to be held in view" in exercising his discretion, and that this was enough.[259]

The Court carried this broader view of allowable "what" delegations through to the end of the period. It also carefully noted when subsequent statutes corrected the problems of the *Panama-Schechter-Carter* trilogy. For example, in *United States v. Royal Rock Co-Op*, the Court distinguished a price fixing statute from the NIRA in that

> [i]n the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions... While considerable flexibility is provided... it gives opportunity only to include provisions auxiliary to those definitely specified.[260]

254. *Curtiss-Wright*, 299 U.S. at 327.

255. *See Panama Refining*, 293 U.S. at 423-24.

256. *Panama Refining*, 293 U.S. at 430.

257. Mulford v. Smith, 307 U.S. 38, 43-44 (1938).

258. *Id.*

259. *Id.* at 48-49.

260. United States v. Royal Rock Co-operative, Inc., 307 U.S. 533, 575-76 (1939).

As legal historian Peter Irons argues and this language in *Royal Rock* suggests, better legislative craftsmanship no doubt played a central role in quieting the Court's nondelegation objections.[261]

Furthermore, *Sunshine Anthracite* strongly affirmed the intellectual triumph of legal realism over legal formalism that legal historian Mortin Horwitz posits.[262] It also harmonized with *Hampton*'s version of an "intelligible principle." In *Sunshine Anthracite*, the Bitiminous Coal Act of 1937 called on the National Bitiminous Coal Commission to fix maximum prices such that "in the aggregate they will yield a reasonable return above the weighted average total cost" of the applicable region.[263] The Commission's discretion was thus bounded not by formalistic rules, but by flexible, scientifically grounded economic considerations. The Court upheld the Act, concluding that "[t]o require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process."[264] Similarly, twelve years prior, in 1928—and before the Great Depression and the *Panama-Schechter-Carter* trilogy—the *Hampton* Court upheld the Tariff Act of 1922, which allowed the President to adjust cost-based tariffs on imported goods so as to equalize domestic industrial conditions with those of foreign nations.[265] The same sort of executive discretion prevailed in *Sunshine Anthracite* as in *Hampton*, and the Court's approach to legislative delegations had come full circle. There was one important difference, however: The New Deal had become so well-established that comporting with "the requirements of the administrative process" had itself become a justification for legislative delegations.[266] In this sense, the separation of powers theory that under-girded *Hampton* had eroded in importance.

Sunshine Anthracite marked yet another return to *Hampton* and even earlier cases in terms of "when" delegations. In *Hampton*, Justice Taft wrote that Congress did not delegate legislative power when it conditioned execution of its legislation on future events.[267] Further back, in *The Aurora*, the Court broadly upheld Congress's

261. IRONS, *supra* note 11, at 227.

262. *See* HORWITZ, *supra* note 8, 230-31.

263. Sunshine Anthracite Coal Co. v. Akins, 310 U.S. 381, 397 (1940).

264. *Id.* at 398.

265. United States v. Hampton, 276 U.S. 394, 401-02 (1928).

266. *Id.* at 398.

267. *Id.* at 407.

conditional executions: "[W]e see no reason why the legislature should not exercise its discretion in [implementing the embargo], either expressly or conditionally, as their judgment should direct."[268] Nevertheless, in *Panama Refining* the Court's strongest critique of section 9(c) of the NIRA was in its vagueness as a "when" delegation: "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 or petroleum products produced in excess of the State's permission."[269] However, section 9(c) was otherwise quite specific as to what it allowed the President to do:

> The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.[270]

The President's substantive authority was thus narrowly limited to lending federal criminal punishment to state law. The only discretion one could sensibly attack was his discretion over when to apply such punishment.

The price-fixing provision in *Sunshine Anthracite* granted similarly broad discretion as to when it was to be implemented. It vaguely provided that the Commission could fix maximum prices whenever "in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices."[271] There could be no broader a "when" delegation. However, the Court never addressed this issue. It was as if *Panama Refining* never existed.

If the brevity of the *Panama-Schechter-Carter* trilogy can really be called a life, then it was *Sunshine Anthracite* that dealt the nondelegation doctrine its death blow. But it was not until four years later, in *Yakus*, that the court overtly embraced the doctrine's

268. Cargo of the Brig Aurora v. United States, 11 U.S. 382, 388 (1813).

269. *Panama Refining*, 293 U.S. at 415.

270. *Id.* at 406.

271. *Sunshine Anthracite*, 310 U.S. at 397.

practical demise.[272] The Court upheld yet another price-fixing statute—this time for the price of beef—and concluded that

> Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's 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.[273]

The Court thus found peace with legislative delegations by developing *Hampton*'s "intelligible principle" into a basis for judicial review.

The question was no longer whether Congress had provided some abstractly sufficient standard to guide an administrator's hand, but whether it was totally impossible in practical terms for the Court to police an administrator's actions. All of the earlier separation of powers anxiety gave way to the simple question of whether the Court could tell if a government actor had violated a statute—not a complex constitutional analysis. However, even this development was not entirely new. For example, in *Mulford*, the Court approvingly noted that "in order to protect against arbitrary action, [the clarity of the statute's underlying principle] has afforded both administrative and judicial review to correct errors."[274] Even so, *Yakus* resolutely ended the nondelegation doctrine's quixotic campaign against the New Deal.

Conclusion

During the Nineteenth Century, the doctrine lurked on the periphery of the Supreme Court's jurisprudence, only half-heartedly gaining recognition, existing more as a nebulous idea about separation of powers than a cogent doctrine, and never striking down a statute. Then, in the early Twentieth Century, the doctrine solidified around the separation of powers theory and gained the test that has endured ever since: the "intelligible principle" test set forth in *Hampton* in 1922. Little more than a decade later the Court applied the doctrine to New Deal legislation, striking down the only three statutes ever on nondelegation grounds in *Panama Refining*,

272. Yakus v. United States, 321 U.S. 414, 426 (1944).

273. *Id.*

274. Mulford v. Smith, 307 U.S. 38, 50 (1938).

Schechter Poultry, and *Carter Coal*. These cases did not cement the doctrine's future as a formidable impediment to legislative delegations to the executive, however. The separation of powers rationale faltered immediately after these cases. After *Carter Coal*, the doctrine came to center on the judiciary's ability to police congressional delegations to ensure that the exercise of delegated power remained within statutorily defined limits. This shift in rationale paved the way for the "intelligible principle" test to develop over the late 1930s and early 1940s into the deferential stance evident in *Yakus*. By then, the Court's emphasis became whether it could practically policy delegations to the executive. The separation of powers concerns that nursed the doctrine into existence had meanwhile all but died out like a burst of hot air.