



Delegation in Context

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Abstract.

Several Justices and numerous scholars have proposed to revive the nondelegation doctrine. It is common ground that the operative “intelligible principle” standard is meaningless. Moreover, any one-dimensional, stand-alone nondelegation standard will soon collapse into a hopeless “how much is too much” inquiry. Thus, nondelegationist jurists have sought to enrich the doctrine and to re-connect it to foundational separation-of-powers precepts.

To those ends, this Article parses the New Deal cases in which the Supreme Court last employed the nondelegation doctrine to declare a statute unconstitutional: A.L.A. Schechter Poultry v. United States and its immediate precursor, Panama Ref. Co. v. Ryan. Curiously unexamined in the contemporary debate, the decisions have come down to us as “intelligible principle” cases—notoriously, the only cases in which the Court found that principle wanting. But that is not what the opinions say; what the Court thought it was doing; or what anyone at the time perceived the Court to be saying or doing. Schechter-style nondelegation is not a one-dimensional, put-statutory-phrase-next-to-standard inquiry. Rather, the analysis probes the statute as a whole—its text, context, and real-world operation. And it reflects a whole-Constitution understanding, as distinct from clause-bound formalism. It asks how much power and what kind of power has been delegated to whom and why and with what legal safeguards. Under that approach, the constitutional system tolerates considerable slack for “necessary and proper” congressional responses to the demands of a modern economy and society—provided that adequate safeguards remain or are put in place. Congress may push the constitutional boundaries here or there but not all at once and to the point of compromising the constitutional architecture.

The Hughes Court’s understanding soon crumbled under an assault by President Roosevelt’s lawyers and judicial appointees. Their accomplishment was to carve up the Schechter Court’s integrated legal universe and to disaggregate constitutional principles into disconnected and largely toothless constraints on “the administrative

process.” The collapse of nondelegation into an “intelligible principle” exemplifies that process of disintegration.

The recovery of a tenable, constitutionally grounded nondelegation doctrine, I contend, will require something close to the Schechter Court’s understanding of the problem. That understanding differs from the Roberts Court’s tendency to tackle separation-of-powers problems by way of grim formalism or else, the aggressive deployment of interpretive canons (foremost, the “major question” doctrine.) In cases such as Free Enterprise Fund and Seila Law, however, the Court has embraced an approach that strongly resembles Schechter in substance, though not in exact form. The cases hold that two (or more) institutional arrangements that have passed constitutional muster may yet violate the Constitution when combined in a single statute. While those cases deal with appointment and removal issues, the basic analysis translates readily into the delegation context. In fact, the decisions are best understood as nondelegation cases. Recent appellate decisions point in the same direction.

Rightly understood, Panama Refining and Schechter provide the building blocks for a tenable, constitutionally grounded nondelegation doctrine for this day and age. A closer analysis of the cases, I hope, will in formulating such a doctrine.

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Introduction

In numerous cases, the Roberts Court has sought to re-impose constitutional constraints on the powers of the President and of administrative agencies. Among the doctrines that several Justices have sought to revive is the nondelegation doctrine. Congress, the theory goes, cannot “delegate” powers that it does not possess in the first place, and the legislative powers it does possess are inalienable : whatever exactly they may be, they must remain where the Constitution put them. Justice Thomas’s concurrence in *Department of Transportation v. Association of*

*American Railroads*¹ (“*Amtrak*”) and Justice Gorsuch’s dissent in *Gundy v. United States*² provide forceful judicial articulations of that theory.

It is uncertain whether such a nondelegation doctrine could or should play a prominent role in the Court’s effort to re-constitutionalize the administrative state. Interpretive and administrative law canons—foremost perhaps, the Court’s “major question” doctrine—may well serve the same purpose, and they are more easily tailored to real or perceived administrative excesses than is a first-order, across-the-board constitutional doctrine. As a doctrinal matter, moreover, textualist-originalist justices are far more comfortable with specific separation-of-powers clauses (say, the Appointments Clause or the Appropriations Clause) than with a standard or principle inferred, somewhat awkwardly, from the Vesting Clauses or the constitutional structure writ large.³

Still, the quest for a viable nondelegation doctrine rests on two solid intuitions. One: without *some* judicially enforceable nondelegation doctrine, the Constitution “would make no sense.”⁴ (Why “vest” powers in one or another branch if Congress may change the arrangement at will?) Two: infra-constitutional nondelegation canons eventually need a constitutional anchor, lest they come to look manipulative and underhanded.⁵ Thus, the hard task of articulating a constitutionally grounded nondelegation doctrine isn’t really optional.

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¹ 575 U.S. 43, 66 (2015).

² 139 S. Ct., 2116, 2131 (2019).

³ On one account (Justice Scalia’s), the Court has been and should be highly formalistic with respect to the Constitution’s procedural separation-of-powers provisions precisely because substantive nondelegation rule or standard is hard to come by. *Mistretta v. United States*, 488 U.S. 361, 416-417 (1989) (Scalia, J., dissenting) (“Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution’s structural restrictions that deter excessive delegation.”).

⁴ *Gundy*, 139 S.Ct. at 2134-35 (quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)). That much, I take it, is broadly agreed upon. (Notably, Justice Kagan’s plurality opinion in *Gundy* makes no attempt to dispute the point.) The hard part, of course, is to come up with a manageable, constitutionally grounded doctrine. See *Mistretta*, 488 U.S. at 415 (1989) (Scalia, J., dissenting) (“While the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”).

⁵ The need has become increasingly acute, insofar as nondelegation precepts have come to lead a *very* active life in quasi-constitutional, interpretive and administrative law canons See *Gundy*, 139 S. Ct. at 2141-42 (Gorsuch, J., dissenting) (citing the major-question doctrine and void-for-vagueness canon as ways that courts rein in delegation);

It is common ground that the operative judicial standard—delegation is fine so long as Congress has stated an “intelligible principle”—is no standard at all: it simply means that Congress gets to do as it wishes.⁶ Too, there is an increased recognition that *any* one-dimensional, stand-alone nondelegation standard, even in some revised or ramped-up version, will soon collapse into a “how much is too much” inquiry—a garden path on which no law can be found.⁷ Sensibly, then, prolific scholars and Justices have sought to enrich the doctrine and to re-connect it to foundational separation-of-powers precepts.⁸

and see generally Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1118–30 (2021); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHICAGO L. REV. 315 (2000).

⁶ See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)); Eric A. Posner and Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHICAGO L. REV. 1331 (2003) (“The standard nondelegation doctrine . . . is no more than a vague and ultimately uncashable metaphor”); Cody Ray Milner, *Replacing the Intelligible Principle Standard with a Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395, 396 (2020) (“[T]he currently accepted standard for testing improper delegation . . . has eroded over the years to a point of futility.”) (footnotes omitted).

⁷ See *Mistretta*, 488 U.S. at 426 (1989) (Scalia, J., dissenting) (criticizing the Court’s “regrettable tendency . . . to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court”) (internal citations omitted); *Whitman*, 531 U.S. at 473–76 (explaining that the Court has never demanded “that statutes provide a ‘determinative criterion’ for saying ‘how much . . . is too much’”) (quoting *Am. Trucking Ass’n v. U.S. E.P.A.*, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

⁸ Cf. *Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting) (outlining principles to guide courts in nondelegation challenges); *Amtrak*, 575 U.S. at 77 (Thomas, J., concurring) (delegation cases should be guided by “the original understanding of the federal legislative power”). Numerous scholarly attempts to enrich and elaborate the nondelegation doctrine include, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377–402 (U. Chicago Press 2014) (proposing a categorical approach to nondelegation cases); Michael B. Rappaport, *The Selective Nondelegation Doctrine*, 76 TULANE L. REV. 265, 271 (2001) (arguing for a “formalist” nondelegation doctrine that does not apply to areas of the law “where executives have traditionally received broad delegations and where limiting delegation would promote the structure of the Constitution much less than it ordinarily would”); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL’Y 147 (2017) (arguing that nondelegation doctrine should focus on the nature of the authority rather than its scope); Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L. J. 363 (2020) (proposing a two-part inquiry for courts to determine whether a statute unconstitutionally delegates legislative power: (1) “whether Congress has made a sufficiently detailed political commitment to improve voters’ ability to judge . . . their elected representatives,” and (2) whether “Congress would not have a reasonable opportunity to make that decision in the first place”); Cody Ray Milner, Comment, *Into the Multiverse: Replacing the Intelligible Principle Standard with Modern Multi-Theory of Nondelegation*, 28 GEO. MASON L. REV. 395 (2020) (proposing a “Multi-Theory” that applies different standards after separating “Congress’s delegable powers into three flexible categories”); Chad Squittieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1258–90 (2022) (arguing that nondelegation standards should differ depending on the nature of the congressional power); and Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975 (2018). For further contributions and literature references, see THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (PETER J. WALLISON & JOHN YOO, EDs.) (AEI 2022) (“PERSPECTIVES”).

My own contribution to this recovery project is modest.⁹ I propose that we actually read, and try to comprehend, the New Deal cases in which the Supreme Court last employed the nondelegation doctrine with the effect of declaring a congressional statute unconstitutional: *A.L.A. Schechter Poultry v. United States*¹⁰ and its immediate precursor, *Panama Ref. Co. v. Ryan*.¹¹ The cases have remained curiously under-examined in the contemporary nondelegation debate;¹² and so far as I can tell, the question of how the Hughes Court’s approach to the problem might bear upon and play out in the here and now has remained unasked and thus unanswered. I hope to show that the cases have been widely, dreadfully misunderstood, and those misunderstandings block the path toward a tenable nondelegation doctrine. Rightly understood, the cases and especially *Schechter* provide the building blocks of a viable, constitutionally grounded nondelegation doctrine for this day and age.

The crucial mistake is to read the cases through the prism of post-New Deal nondelegation theory, so-called. From that vantage, *Panama Refining* and *Schechter* look like “intelligible principle” cases; they just happen to be the only cases in which the Court found that principle wanting. But that is not what the opinions say. It is not what the Court thought it was doing. And it is not what anyone at the time—emphatically including the New Dealers—perceived the Court to be saying or doing. *Schechter*-style nondelegation doctrine is not a one-dimensional, put-statutory-phrase-next-to-standard inquiry. It is a far more contextual and nuanced inquiry. In one direction, the analysis probes the statute as a whole—not just its text but also its

⁹ I do mean “modest.” I set aside the question of whether the Constitution in fact implies or compels a nondelegation doctrine (see, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Lawson, *A Private Law Framework for Subdelegation*, in PERSPECTIVES, supra note 4, at 123); the question of what early Congresses thought or did or thought they were doing, delegation-wise (see, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Aditya Bamzai, *Alexander Hamilton, The Nondelegation Doctrine, and the Creation of the United States*, 45 HARV. J. L. & PUB. POL’Y 796 (2022); Jennifer Mascott, *Early Customs Law and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019); and the quest for the doctrine’s normative foundations (Separation of powers? Tyranny prevention? Political accountability? Agency theory? Compact Theory?) (see, e.g., Joseph Postell, “*The People Surrender Nothing*”: *Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 MO. L. REV. 1003 (2016); Lawson, *Private Law Framework*. Without remotely questioning the salience of those lines of inquiry, I simply assume for purposes of this Article that some constitutionally and normatively grounded nondelegation doctrine is available. My limited objective is to explore its content and contours.

¹⁰ 295 U.S. 495 (1935).

¹¹ 293 U.S. 388 (1935). A third case of that period, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), posed the somewhat different issue of a delegation to private parties.

¹² E.g., Justice Thomas’s *Amtrak* concurrence and Justice Gorsuch’s *Gundy* dissent provide extensive accounts of the nondelegation doctrine’s trajectory over the centuries. Yet neither opinion examines *Panama Refining* or *Schechter*—helpful though such probing might prove to the authors’ basic contentions.

context and its real-world operation.¹³ It asks *how much* power and *what kind* of power has been delegated *to whom* and *why* and *with what legal safeguards*. In another direction, *Schechter*-style analysis encapsulates a whole-Constitution form of understanding. To illustrate that theme, extensively explored below:¹⁴ in *Schechter* as well as *Panama Refining*, the substantive question of how much power Congress may delegate is inextricably linked to the agency procedures and judicial review provisions that accompany the delegation. A broad delegation to an agency that operates under regularized procedures and whose orders require judicial enforcement is one thing; the same substantive delegation to an agency that lacks those control mechanisms is a very different thing. The delegation problem hangs together with a due process problem hangs together with the judicial review (Article III) problem.

The lines of inquiry converge on a central proposition: the constitutional system tolerates quite a bit of slack for “necessary and proper” congressional responses to the demands of a modern economy and society—provided that adequate safeguards remain or are put in place. Congress may push the constitutional boundaries here or there but not all at the same time and to the point of compromising the constitutional architecture. Pragmatic concessions to the demands of the administrative state are plausible and responsible so long as, but *only* so long as, they are accompanied by an insistence on the integrity of the over-all constitutional scheme. That mode of constitutional understanding drove the Hughes Court’s entire jurisprudence, from federalism and due process¹⁵ to the separation of powers in its varied aspects; from agency adjudication to officer removal to (yes) nondelegation. And *that*, I argue, is the only way of recovering a tenable, constitutionally grounded nondelegation doctrine. Such a doctrine will not mirror or mimic *Schechter* in all respects. It will surely reflect institutional and jurisprudential developments over time—say, the law of the Administrative Procedure Act, or the dominance of textualist-originalist

¹³ Richard A. Epstein has rightly emphasized this aspect of *Schechter* and criticized scholars who have slighted it. RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW* 51-52 (Rowman & Littlefield Publishers 2020).

¹⁴ *Infra* Part II.

¹⁵ We put those things in separate mental boxes (and even separate law courses); jurists a century ago did not. BARRY CUSHMAN, *RETHINKING THE NEW DEAL: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (OXFORD UP 1998), describes the Hughes Court’s “integrated body of jurisprudence” as “an interwoven fabric of constitutional doctrine,” which “disintegrated” and “unraveled” in the course of the New Deal. *Id.* at 7. Cushman’s masterful account homes in on the unlikely connection between the Commerce Clause and the Due Process Clause; mine focuses on the separation of powers. However, in most essential aspects, the story remains the same.

jurisprudence. But it will depend, not on the refinement of some stand-alone legal standard, but on re-integrating the constitutional pieces the *Schechter* Court still held together. In Part IV, I will attempt to sketch the rough contours of such a doctrine, and I will identify recent judicial decisions in separation-of-powers cases that point in the suggested direction.

I recognize forceful objections to my proposed enterprise. One objection is jurisprudential: on my reading, *Panama Refining* and especially *Schechter* look suspiciously like multi-factor, “totality of the circumstances” tests. I will attempt to show that this is not necessarily so. The Hughes Court’s approach is best understood as a sensible reluctance to place excessive reliance on formal categories that will crumble upon even glancing inspection. Conversely, the analysis can be re-cast in more formalist terms.¹⁶ In any event, I fail to see a plausible alternative. On one side, no tenable nondelegation doctrine can be stick-built in response to the necessities or excesses of the administrative state. On the other side, foot-stomping, clause-bound originalism (“*All* legislative powers herein granted shall be vested in a Congress” must mean *all*”) merely invites the question of what exactly *legislative* powers might be and how one might distinguish them from executive powers—a notoriously vexing question to which no satisfactory answer has been forthcoming in two-plus centuries.¹⁷ *Schechter*’s doctrinal middle-ground may look murky; but it is the only defensible ground that can be had.

One may further object that my proposed enterprise looks like a search for illumination in a constitutional half-way house. *Panama Refining* and *Schechter* share a great deal, in substance and tenor, with the Supreme Court’s earlier, notoriously ambivalent decision in *Crowell v. Benson*,¹⁸ which greenlighted the delegation of certain adjudicatory functions to administrative agencies: encomia to administrative government are accompanied by an insistent demand on constitutional barriers. *Schechter* and for that matter *Crowell* accommodated Progressive notions of administrative law¹⁹ and yielded enough to the demands of

¹⁶ *Infra* Part IV.B.

¹⁷ In fairness, defenders of a judicially enforceable nondelegation doctrine readily acknowledge the point. *See, e.g., Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting); *Amtrak*, 575 U.S. at 86 (Thomas, J., concurring) (“It may never be possible perfectly to distinguish between legislative and executive power.”).

¹⁸ 285 U.S. 22 (1932).

¹⁹ Mark Tushnet, *Administrative Law in the 1930s: the Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011).

modern-day administration to pave a path for future inroads—perhaps even “Law’s Abnegation,”²⁰ as Adrian Vermeule has forcefully argued.

However, not every accommodation is a surrender. The Court’s nondelegation rulings did in fact serve the intended purpose of curbing the New Dealers’ wilder ambitions and to discipline the administration, at least until the arrival of the wartime Office of Price Administration.²¹ And while it is true that the Court’s whole-Constitution understanding soon gave way, that unravelling was a product not of doctrinal incoherence or internal, abnegationist dynamics but of an energetic assault by President Roosevelt’s government lawyers and judicial appointees, who were hell-bent on blowing through the constitutional limits and, to give credit where it is due, pretty smart about their enterprise. Their principal accomplishment was to carve up the *Schechter* Court’s integrated legal universe and to de-constitutionalize administrative law by way of disaggregating constitutional principles into disconnected constraints on “the administrative process.”²² The constraints operate only at the margin, and each comes with silly little doctrines that gesture at judicial review without actually exercising it. The collapse of nondelegation into an “intelligible principle” exemplifies that process.²³ As Cass Sunstein aptly put it long ago, it marks the doctrine’s “disintegration” as a central principle of the separation of powers.²⁴

My proposed re-integration proceeds as follows: Part I briefly outlines the Supreme Court’s recent jurisprudence on the nondelegation doctrine. The point of covering this well-trod ground is part critical, part affirmative. The principal opinions do not proffer a full-blown nondelegation doctrine; more modestly, they seek to articulate

²⁰ See generally Adrian Vermeule, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (Harvard Univ. Press 2016).

²¹ See *infra* Part III.

²² For an earlier account of this accomplishment see James R. Conde & Michael S. Greve, *Yakus and the Administrative State*, 42 HARV. J. L. & PUB. POL’Y 807, 822–24 (2019).

²³ Further illustrations spring readily to mind. One of them is the notion that any private right to engage in lawful, productive conduct becomes “public” and therefore exempt from the need for Article III adjudication when the government happens to be a party; on Congress’s say-so; or perhaps a federal agency’s say-so. *Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm’n*, 430 U.S. 442, 450, 455 (1977); *CTFC v. Schor*, 478 U.S. 833, 854–57 (1986) (agency adjudication of common-law counterclaims, pursuant to agency regulation). Another illustration is the idea that agencies may pursue their goals by regulation or adjudication, as they deem most convenient, see *SEC v. Chenery Corp.* (“*Chenery I*”) 332, U.S. 194, 203 (1947). Yet another is the notion that Congress may bar federal courts from entertaining criminal defendants’ right to challenge the administrative rules under which they are convicted, while mobilizing those same courts—state and federal—for the enforcement of those rules, see *Yakus v. United States*, 321 U.S. 414, 432–34 (1944).

²⁴ Cass Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L.R. 421, 447–48 (1987).

principles on which such a doctrine might be developed.²⁵ Perhaps on account of that sensibly limited ambition, the opinions remain somewhat disconnected both from the broader separation-of-powers architecture and from the Court’s administrative law jurisprudence. They do, however, provide important guideposts for further doctrinal elaboration in the direction I commend.

Part II seeks to recover the meaning and import of *Schechter* and *Panama Refining*, understood in historical context and in terms of the opinions. Again, nothing in the opinions or their context warrants a reductionist “intelligible principle” interpretation. Instead, the opinions articulated a then-conventional, widely shared, constitutionally grounded, contextual nondelegation doctrine. As shown in Part III, the “intelligible principle” reading of *Schechter* and *Panama Refining* is a product of the New Deal Court’s depressingly successful effort to erase any remnant of a constitutional architecture that the *Schechter* Court still understood.

Part IV, more speculative and argumentative than Parts I-III, examines recent judicial precedents—some directly addressing nondelegation; others, separation-of-powers questions that may seem a step removed. Picking up the thread left dangling in Part I, I argue that those decisions provide crucial points of contacts with *Schechter*’s seemingly lost world. The most obvious connection is the explicit judicial effort to replace the meaningless “intelligible principle” with what Justice Thomas and Justice Gorsuch have called the “traditional” or “original” understanding of nondelegation. Three further, more oblique points of congruence and contact emerge from widening the jurisprudential lens a bit and then focusing more closely on *Schechter*.

First, concerns of the sort that loomed large in *Schechter*—why the delegation? How much and what kind of power? To whom, and with what safeguards? How does this statute operate?—also loom large in many of the Roberts Court’s separation-of-powers cases; they just haven’t (yet) become integral parts of a coherent analysis.

Second, and most important, the Supreme Court has in several separation-of-powers cases deployed a mode of argument that strongly resembles *Schechter*’s experiments-within-bounds message. In *Free Enter. Fund v. Pub. Co. Accounting*

²⁵ See *Amtrak*, 575 U.S. at 69 (Thomas, J., concurring) (“I do not purport to offer a comprehensive description of [constitutional] powers. My purpose is to identify principles relevant to today’s dispute...”); *Gundy*, 139 S.Ct. at 2136 (Gorsuch, J., dissenting) (seeking to identify “important guiding principles”).

Oversight Bd. and again in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, the Court held that statutory appointment and removal provisions that had passed constitutional muster in earlier cases may nonetheless violate the Constitution *when combined* in an agency’s organic statute.²⁶ That mode of argument—“two (tenuous) rights may yet make a constitutional wrong,” one might call it—translates easily into the nondelegation context. In fact, recent judicial decisions in separation-of-powers cases practically beg for such an analysis. They do not make much sense in the formalist-textualist terms in which they have been proffered. They make a great deal of sense in terms of *Schechter*’s contextual, whole-statute and whole-Constitution understanding.

Third, the Roberts Court’s institutional predicament at the separation-of-powers front bears a strong resemblance to the Hughes Court’s. Here as there, the Court (has) found itself confronted with ambitious legislative and executive initiatives that test the constitutional boundaries. Here as there, the judicial response is fairly described as accommodationist, yet skeptical. Judicial affirmations of established, previously sanctioned arrangements go along with an insistence on constitutional boundaries and a resistance to *novel* institutional experiments. Novelty alone need not sink an institutional experiment. It does, however, serve as a kind of fire alarm that prompts a probing look at the over-all arrangement, in a mode of analysis that is not easily reduced to conventional formalism.²⁷

To be sure, the specific problems and responses that appear under the nondelegation umbrella differ. The Hughes Court sought to discipline executive agencies, acting under broad delegated powers, chiefly by procedural means: “findings” requirements; procedural protections for regulated parties; adequate provisions for judicial review. Those particular problems, one might think, were solved by the Administrative Procedure Act (APA). Indeed, the compromise of the APA may help to explain the emergence of an emaciated “intelligible principle”: with an administrative “Bill of Rights” in place, why worry about delegation? The APA compromise has frayed, however; and the problem of containing delegated powers within constitutional bounds has re-appeared in many other permutations. A closer

²⁶ 561 U.S. 477 (2010) and 140 S. Ct. 2183 (2020) (both discussed *infra* Part IV.).

²⁷ For *Schechter*, see the analysis *infra* notes ____ and accompanying text. For the Roberts Court see, e.g., *Seila Law*, 140 S.Ct. at 2201 (“Perhaps the most telling indication of [a] severe constitutional problem’ with an executive entity ‘is [a] lack of historical precedent’ to support it.” (citing and quoting *Free Enter. Fund*, 561 U.S. at 505)).

look at *Panama Refining* and *Schechter* won't supply the legal answers to specific modern-day questions; but it will help us how to think about the answers.

I. *Amtrak, Gundy*—and Then, What?

Two Supreme Court opinions over the past decade have prominently attempted to re-conceptualize the nondelegation doctrine: Justice Thomas's concurrence in *Amtrak*, and Justice Gorsuch's dissent in *Gundy*. A brief review of the two opinions illustrates both the promise and the limits of the Justices' approach, as they have so far articulated it.

“When the Court speaks of Congress improperly delegating power,” Justice Thomas begins, “what it means is Congress’ authorizing an entity to exercise power in a manner inconsistent with the Constitution.”²⁸ Disavowing any “comprehensive” attempt to define legislative, executive, and judicial powers, Justice Thomas seeks to identify relevant principles for the issue at hand: “the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power.”²⁹ The Court, of course, has insisted that Congress may *never* delegate that kind of power—yet sustained very broad delegations on the theory that the exercise of rulemaking powers is really an exercise of *executive* power, provided that Congress has supplied an “intelligible principle.”³⁰ That test, Justice Thomas avers, is wholly inadequate to distinguish legislative from executive powers. Instead, Justice Thomas would “return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.”³¹

²⁸ *Amtrak*, 575 U.S. at 68. Notably, that broad definition reaches much beyond the nondelegation problem at issue in cases from *Schechter* to *Whitman* to *Gundy*—*i.e.*, the delegation of legislative power to administrative or executive agencies. It encompasses delegations of “the Judicial Power” to non-Article III tribunals, *see, e.g., Stern v. Marshall*, 564 U.S. 462, 482–84 (2011), or delegations of legislative powers to courts, *cf. Wayman v. Southard*, (10 Wheat.) 1, 42–43 (1825), or to Congress itself, *see INS v. Chadha*, 462 U.S. 919, 952–55 (1983).

²⁹ *Amtrak*, 575 U.S. at 70. According to Justice Thomas, that power is exclusive: “By corollary, the discretion inherent in executive power does not comprehend the discretion to formulate generally applicable rules of private conduct.”

³⁰ *See, e.g., Whitman*, 531 U.S. at 472–75.

³¹ *Amtrak*, 575 U.S. at 77.

Two themes stand out in Justice Thomas’s opinion. *First*, Justice Thomas seeks to re-limit the “intelligible principle” test to its original domain of “conditional” delegations. The test, Justice Thomas notes, was formulated in *J.W. Hampton* in regard to a statute that authorized the President, upon a determination of certain facts, to impose (or not) a congressionally pre-determined rule. Such delegations are permissible, at least in the field of foreign affairs (such as the tariff rates at issue in *J. W. Hampton, Jr., & Co. v. United States*³² and the Court’s earlier decision in *Marshall Field & Co. v. Clark*³³) and at least so long as the fact-finding does not entail excessive policy discretion.³⁴ *Second*, Justice Thomas identifies the power of imposing “generally applicable rules governing private conduct” as the core, non-delegable legislative power.³⁵

Both themes recur in Justice Gorsuch’s *Gundy* dissent. At the outset, Justice Gorsuch identifies the central delegation problem as the delegation of *lawmaking* power.³⁶ The Justice readily acknowledges the difficulty of distinguishing that power from executive power and adjudication, quoting James Madison’s and John Marshall’s well-known averments to that effect.³⁷ Still, the difficult task is obligatory, and the Framers “offered us important guiding principles.”³⁸ Justice Gorsuch distills three such principles from 19th-century cases.

“First,” the *Gundy* dissent reads, “as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”³⁹ The opinion cites the usual cases (beginning with *Wayman v. Southard*, the *fons et origo* of the “details” language) and notes that “[t]hrough all these cases, small or large, runs the theme that Congress must set forth standards ‘sufficiently definite and precise to enable Congress, the courts, and the public to ascertain

³² 276 U.S. 394, 409, 412 (1928).

³³ 143 U.S. 649, 692–93 (1892).

³⁴ *Amtrak*, 575 U.S. at 81.

³⁵ For the most part, Justice Thomas employs the “private conduct” formulation. More than occasionally, however, he has written of binding rules respecting “substantive private *rights*.” For discussion, see *infra* notes ____ and accompanying text.

³⁶ *Gundy*, 139 S. Ct. at 2133–35 (Gorsuch, J., dissenting).

³⁷ *Id.* at 2135 (“Madison acknowledged that ‘no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.’ Chief Justice Marshall agreed that policing the separation of powers ‘is a subject of delicate and difficult inquiry.’” (citations omitted)).

³⁸ *Id.* at 2136.

³⁹ *Id.* (quoting *Wayman*, (10 Wheat.) at 20.

whether Congress's guidance has been followed.”⁴⁰ “Second,” Justice Gorsuch continues, “once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”⁴¹ “Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities”—chiefly, the administration of powers that are already lodged in those institutions.⁴²

None of this, Justice Gorsuch continues, warrants an “intelligible principle” standard in the form of a *carte blanche* for the Congress. Echoing Justice Thomas’s *Amtrak* opinion, Justice Gorsuch notes the origin of the phrase in *J. W. Hampton* and adds that no one at the time thought that the phrase “meant to effect some revolution in this Court's understanding of the Constitution. While the exact line between policy and details, lawmaking and fact-finding, and legislative and non-legislative functions had sometimes invited reasonable debate, everyone agreed these were the relevant inquiries.”⁴³ *Schechter* and *Panama Refining*, decided a mere seven years later, did not attribute any revolutionary force to *J.W. Hampton*’s “intelligible principle” phrase. “In fact,” Justice Gorsuch writes, “the phrase sat more or less silently entombed until the late 1940s. Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (sub silentio of course) all prior teachings in this area.”⁴⁴ “And since that time,” Justice Gorsuch obligingly notes, “the Court hasn't held another statute to violate the separation of powers in the same way.”⁴⁵ But the Court should not adhere to a phrase adopted in

⁴⁰ *Id.* (quoting, and citing, *Yakus*, 321 U.S. at 426).

⁴¹ *Id.*

⁴² 139 S. Ct. at 2137 (citing *Cargo of Brig Aurora v. United States*, 7 Cranch 382, 388 (1813) and *Wayman*, (10 Wheat.) at 43).

⁴³ *Id.* at 2139. “[W]hen Chief Justice Taft wrote of an ‘intelligible principle,’” Justice Gorsuch adds, “it seems plain enough that he sought only to explain the operation of these traditional tests; he gave no hint of a wish to overrule or revise them.” *Id.*

Justice Gorsuch is entirely right on these points. As shown *infra* Part III, neither *Panama Refining* nor *Schechter* paid much heed to *J.W. Hampton*. In fact, it appears that the case was essentially understood as a tariff thing. In cases decided between *J.W. Hampton* and *Panama Refining*, the “intelligible principle” language appears almost exclusively in cases decided by the Court of Customs and Patent Appeals. See, *Frischer & Co. v. Bakelite Corporation*, 39 F.2d 247 (C.C.P.A. 1930); *William A. Foster & Co. v. United States*, 20 C.C.P.A. 22 (1930); *Kleberg & Co. v. United States*, 71 F.2d 332 (C.C.P.A. 1930) (all upholding various tariff provisions against delegation attacks, relying on *J.W. Hampton*). I am indebted to Raymond Yang for this observation and the case citations.

⁴⁴ *Id.* at 2139. A footnote to this sentence cites *Lichter v. United States*, 334 U.S. 742, 785 (1948). To my mind, this is not quite right. As shown (or at any rate argued) *infra* note ___ and accompanying text, *Schechter* was effectively overruled (“sub silentio, of course”) in the earlier *Yakus* decision. See *Yakus*, 321 U.S. at 45 (Roberts, J., dissenting).

⁴⁵ *Gundy*, 139 S. Ct. at 2138.

a fit of absentmindedness or lawyerly manipulation. Instead, the Court should—do what, exactly?

It is child’s play to show that in each of Justice Gorsuch’s categories, serious line-drawing problems will arise. What, for instance, distinguishes a “policy decision” from mere “detail”?⁴⁶ Then again, such problems arise in any legal venue. The real problem is that one cannot easily identify a defensible standard in Justice Gorsuch’s categories without recourse to broader, more substantive constitutional arguments and doctrines.⁴⁷ That is especially true of the distinction between decisions in matters regulating private conduct (which must be made by Congress) and authorizations that permit other branches “fill up the details”—the “traditional test,” as Justice Gorsuch insists, to which the Court should return.⁴⁸ Justice Gorsuch is right on the “traditional” point: as shown below,⁴⁹ his understanding of the test reflects the *Schechter* Court’s in important respects. That said, in Justice Gorsuch’s as well as Justice Thomas’s version, the nondelegation inquiry remains somewhat disconnected from the larger legal-constitutional architecture. A few illustrations shall suffice.

Consider the notion that the key delegation problem is the power to make “binding rules of private conduct” and its continuity, or lack thereof, with standard formalist positions on matters of administrative law. The nondelegation position coheres with some conventional formalist administrative-law precepts—for instance, the idea that standing to sue should be much more difficult to obtain for regulatory beneficiaries of agency action than for regulated parties;⁵⁰ or the doctrine that spending and enforcement decisions are presumptively unreviewable.⁵¹ However, as Kristin Hickman has observed, the doctrine still seems strangely disconnected from standard administrative law canons.⁵² For instance, it runs up against a widely shared

⁴⁶ See, e.g., Jonathan H. Adler, *A “Step Zero” for Delegations*, in PERSPECTIVES *supra* note 8, at 172 (“The potential lines of inquiry [proposed in the *Gundy* dissent] may be insufficient to yield a determinate test. Allowing an agency to simply ‘fill in the details’ may not sound like much, but in practice, the ‘details’ are often where significant policy determinations are made.” (footnote omitted)).

⁴⁷ E.g., the fact that the “fact-finding” requirement in *J.W. Hampton* was thoroughly policy-laden may raise delegation concerns. Cf. Justice Thomas’s opinion in *Amtrak*, 575 U.S. at 81-82 (“[t]he analysis in *Field* and *J.W. Hampton* may have been premised on an incorrect assessment of the statutes before the Court ...” (internal cross-reference omitted)).

⁴⁸ See *supra* notes and accompanying text.

⁴⁹ *Infra* nn. and accompanying text.

⁵⁰ See *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561–62, 573 (1992).

⁵¹ See *Lincoln v. Virgil*, 508 U.S. 182, 191–93 (1993); *Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985).

⁵² Hickman, *supra* note 5, at 1120–21.

sentiment and proposition: if we must have administrative agencies run the country, we should at least incentivize them to write notice-and-comment rules (for example, by reserving *Chevron* deference for those types of agency decisions).⁵³ Similarly, a nondelegation doctrine that focuses on a question of form—"binding rules"—is discontinuous with the major question doctrine, which turns on the economic or policy significance of agency programs and by and large abstracts from questions of form.⁵⁴ A jurisprudence that pushes in one direction at a constitutional level and in a different direction at an administrative law level needs a doctrinal re-connect.⁵⁵

Similar perplexities arise at a constitutional level. Commendably, the *Gundy* dissent does not sound in *Bostock*-style, context-free formalism and hyper-textualism.⁵⁶ Instead, Justice Gorsuch freely acknowledges the conceptual difficulties in this area and explains why the judiciary must nonetheless protect some nondelegation line, for constitutionally grounded reasons. The constitutional scheme, the Justice explains, serves to protect free citizens against an "excess of lawmaking." It forces legislative deliberation. It guards the separation of powers by making "ambition counteract ambition." And it ensures democratic accountability.⁵⁷ Accept that formulation for present purposes, and stipulate that boundless delegations short-circuit all four of Justice Gorsuch's nondelegation rationales in one way or another: there remain problems of constitutional disconnect.

Based on the rationales just sketched, one would think that uniform nondelegation principles should apply regardless of the legislative subject-matter, the constitutional

⁵³ E.g., Aaron Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON. L. REV. 657 (2021); Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 980–82 (2021); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 540–42 (2013); Leandra Lederman, *The Fight over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 678 (2012); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1488 (2005); Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541–44 (2003); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 885–86 (2001).

⁵⁴ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2620–22 (2022) (Gorsuch, J., concurring) (listing the "major question" factors, including whether (1) an "agency claims the power to resolve a matter of great political significance . . . or end an earnest and profound debate across the country," (2) an agency "seeks to regulate a significant portion of the American economy . . . or require billions of dollars in spending," and (3) "an agency seeks to intrud[e] into an area that is the particular domain of state law." (internal citations and quotation marks omitted)). None of these factors have to do with the form of agency action. I do not mean to suggest that such a re-connect is impossible, only that it is needed. For an impressive judicial effort to integrate the "major question" doctrine with a nondelegation baseline, see *U.S. Telecom Association v. FCC*, 855 F.3d 381, 417–421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

⁵⁵ Professor Hickman has made the point forcefully. Hickman, *supra* note 5, at 1132–37.

⁵⁶ Cf. *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020).

⁵⁷ *Gundy*, 139 S. Ct. at 2135–36.

basis of congressional legislation, or the form of agency action. They should apply when Congress authorizes agencies to hand out subsidies to favored industries; authorizes student loan forgiveness on a pretextual emergency basis;⁵⁸ incentivizes state and local governments to participate in federal spending programs; enables a federal agency to auction off spectrum or drilling licenses; authorizes the U.S. Treasury Department to issue bonds at unspecified rates and duration; authorizes the Federal Reserve to buy, sell, or retire those (or any other) financial instruments; or empowers a federal agency to decide whether to charge violators in its own tribunals or in a federal court.⁵⁹ But that account cannot be right. It is obviously not the law, and we have not ever followed it.⁶⁰

Perhaps for reasons of that sort, Justice Gorsuch takes care to specify that the nondelegation standard (important policy versus detail) applies when Congress undertakes to *regulate private conduct* and then delegates *that* authority to an administrative agency. In that formulation (call it the “Lockean position”), Gorsuch-Thomas nondelegation revivalism has distinct advantages. It responds to Justice Gorsuch’s first rationale—*i.e.*, the liberty-protective purpose of the nondelegation doctrine. It roughly aligns with past constitutional practice, and it is not an attack on “the administrative state” *tout suite*. Whatever precisely its eventual reach, its target is the *regulatory* state. It is limited in scope, and thus not easily dismissed as an assault on the entire Progressive-New Deal legacy.⁶¹ Even so, it is not unproblematic.

For one thing, a Lockean position that the power to make binding rules in matters of private right or conduct is *the* nondelegable “legislative power” is not self-evidently correct.⁶² The constitutional powers of the purse, for example, also look

⁵⁸ Cf. *Nebraska v. Biden*, 52 F.4th 1044 (8th Cir. 2022), cert. granted, *Johnson v. Missouri*, 143 S.Ct. 477 (2022); *Dep’t of Educ. v. Brown*, 143 S. Ct. 541 (2022); --- F. Supp. 3d ---, *Brown v. United States Dep’t of Educ.*, 2022 WL 16858525, cert. granted, 143 S. Ct. 541 (2022) [It’s feels like the same case is being cited again (143 S. Ct. 541 (2022)), but this also references a different case, I don’t know what put here].

⁵⁹ See *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

⁶⁰ Defenders of the nondelegation doctrine have readily acknowledged the point. See, e.g., HAMBURGER, *supra* note 8, at 355–77.

⁶¹ But see Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (apprehending a wholesale “anti-administrativist” assault on the New Deal legacy and arguing that conservative justices “have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional” (*id* at 3; footnote omitted)).

⁶² See, e.g. Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 795-797 and sources cited *id.* nn. 294-299 (contesting the “Lockean” position).

nondelegable, certainly as a textual matter.⁶³ Perhaps, then, excessive delegations of such powers should likewise be suspect. Even in the regulatory domain, moreover, questions arise over the limitation to *rulemaking* powers. What if Congress authorizes an agency to promote the public good (etc.) by means of enforcement and adjudication, to the exclusion of substantive rulemaking authority? Either way, Congress has failed to make the “important” policy decisions and short-circuited the protection of private rights, deliberation, accountability, and arguably the separation of powers. From a Lockean perspective, however, there has been no delegation of legislative power *at all*.

Pursue the point—it will turn out to be the same point soon enough—in a different direction: Justice Thomas, following Philip Hamburger’s pathbreaking account,⁶⁴ has often written that the power that cannot be delegated, ever, is the power to make binding rules in matters of private *right*, as distinct from private conduct.⁶⁵ The difference matters, inasmuch as not all binding regulations of private conduct affect or infringe upon private rights. In point of fact, if the Court were to follow the understanding that it has adopted in cases dealing with workplace regulation, patents, futures trading, and various “comprehensive” regulatory regimes, the bare fact that private conduct falls under the regulatory regime means that it is a matter of *public* rather than private right.⁶⁶ In which event a private-rights-based nondelegation doctrine would forbid the delegation of next to nothing. Why then bother?

The questions just sketched have answers—so long as one keeps the constitutional architecture in view. A statute that empowers agencies to make major policy

⁶³ The textual case for nondelegation may be more solid with respect to fiscal matters than to the legislation of binding rules. With respect to the latter, any plausible theory will have to explain why the powers conferred upon Congress are inalienability entitlements rather than property entitlements. (Perhaps, it can be done, *see, e.g.*, HAMBURGER, *supra* note 8, at 108–10; but it must be done.) Not so with spending: *no* money can be drawn from the U.S. except pursuant to an appropriation by law. *See Cmty. Fin. Servs. Assoc. of Am. v. CFPB*, 51 F.4th 616, 636–42 (5th Cir. 2022) (discussed *infra* nn. and accompanying text).

⁶⁴ *See* HAMBURGER, *supra* note 8, at 33–39, 377–86.

⁶⁵ *Amtrak*, 575 U.S. 43, 76 (2015) (“If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free.”); *id.* at 83 (“Thus, when Chief Justice Marshall spoke [in *Wayman*] about the ‘difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts, he did not refer to the difficulty in discerning whether the Legislature’s policy guidance is ‘sufficiently defined,’ but instead the difficulty in discerning which rules affected substantive private rights and duties and which did not.”).

⁶⁶ *Atlas Roofing Co. v. Occupational Health and Safety Comm’n* 430 U.S. 442 (1977); *Oil States Energy Servs, LLC v. Greene’s Energy Grp., LLC*, 138 S.Ct. 1365 (2018); *Commodity Futures Trading Com v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

decisions by adjudication rather than rulemaking is still a delegation problem—just not an Article I problem but an Article III problem and perhaps a Due Process problem; not a *Schechter* problem, but a *Crowell* problem.⁶⁷ (Those are just different institutional forms of the same problem.) Justice Thomas’s approach, too, points to a whole-Constitution understanding. The central nondelegation problem—private rights—is the same problem that the Court has confronted in cases concerning the permissible scope of agency adjudication,⁶⁸ the appointment and removal of agency adjudicators,⁶⁹ and the timing and availability of judicial review.⁷⁰ In all those venues, the analysis eventually comes down to the central question of whether and to what extent (if any) the political branches may govern or interfere with ordinary private orderings, conduct, or rights in ways and through institutions other than those that the Constitution provides. At some level, the Justices seem well aware of the broad picture; but only faint traces of that recognition show up in judicial opinions.

The constitutional pieces all still hung together in the *Schechter* Court’s legal universe⁷¹—as one would expect, so long as one operates on a robust presumption of constitutional coherence. The post-New Deal Court, in contrast, repudiated that premise or at least lost sight of it. The Article I delegation problem disappeared in the meaningless “intelligible principle” test; the Article III problem, in perplexing bankruptcy court cases and an encompassing public rights “exception”⁷²; the Due Process problem, in a generous (to the government) balancing test developed in the context of welfare benefits; and so on.⁷³ The modern Court has yet to re-connect the pieces. That reconnect, not the refinement of a free-standing “nondelegation standard,” is the true intellectual and constitutional problem in the nondelegation debate. We begin with a new look at old cases.

⁶⁷ And it is a *delegation* problem, not a “court-stripping” problem. Congress need not confer federal court jurisdiction over *Crowell*-style private-rights claims or waive sovereign immunity in cases against the government. What it may not do is to create such jurisdiction and then lodge it in—delegate it to—non-Article III bodies.

⁶⁸ E.g., *Oil States Energy Servs, LLC v. Greene’s Energy Grp., LLC*, 138 S.Ct. 1365 (2018) *B & B Hardware v. Hargis*, 135 S.Ct. 1293, 1310 (2015) (Thomas, J., dissenting).

⁶⁹ E.g., *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

⁷⁰ E.g., *Sackett v. EPA*, 566 U.S. 120 (2012); *Axon Enter. v. FTC*, 143 S. Ct. 890 (2023). [There is a 2023 one as well for *Sackett* (supreme court case) but I think you were referring to 2012].

⁷¹ See *Conde & Greve*, *supra* note 22, at 821–22.

⁷² *Stern v. Marshall*, 564 U.S. 462 (2011); *Oil States Energy Servs., v. Greene’s Energy Grp, LLC*, 138 S. Ct. 1365 (2018). Tellingly, the opinions in these and other leading cases never identify the issue as a delegation problem.

⁷³ *Matthews v. Eldridge*, 424 U.S. 319 (1976).

II. 1935

Panama Refining and *Schechter Poultry* are, famously, the only two cases in which the Supreme Court invalidated provisions of a congressional statute—the National Industrial Recovery Act (NIRA)—as unconstitutional delegations of legislative power to the Executive.⁷⁴ It is tempting to read the cases as the first and last applications of *J.W. Hampton*’s “intelligible principle” test, armed with teeth. Not a lot of bite may have been needed, the standard narrative continues, because the NIRA was truly a one-of-a-kind statute at the time.⁷⁵ As the New Deal lawyers and Congress learned to work around the Court’s decisions, the “intelligible principle” was defanged and took hold.

As shown in Part III, however, that story is largely a product of New Deal myth-making. Neither *Panama Refining* nor *Schechter* suggests that the purported *J.W. Hampton* test had much to do with the questions surrounding the NIRA.⁷⁶ Instead, the near-unanimous decisions articulated a far broader, contextual, and then-still-common understanding of the nondelegation doctrine. The point emerges when one engages the holding and the reasoning of *Panama Refining* and *Schechter* with an open mind. Section A provides a brief account of the historical context of the decisions; Section B parses the opinions.

The key to understanding the two cases is that questions that we now sort into separate boxes—the separation of powers, due process, judicial review, agency procedures—still hung together in the *Schechter* Court’s constitutional universe. All were mutually reinforcing, and all had a great deal to do with nondelegation. Precisely because the constitutional guardrails were all connected, there could be some give at this or that front. For example, by the time of *Schechter*, the Court had

⁷⁴ In two other cases, the Supreme Court had invalidated delegations of congressional power (portions of the exclusive maritime jurisdiction) to states: *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920); *Washington v. Dawson & Co.*, 264 U. S. 219 (1924). In an additional case decided shortly after *Schechter*, the Court invalidated a delegation of legislative power to private parties: *Carter v. Carter Coal*, 298 U.S. 238 (1936).

⁷⁵ Or perhaps, because the Court just had it in for President Roosevelt and the New Deal. In light of the near-unanimity on both cases and for reasons explained in this Part, that theory does not look convincing. However, it, too, has clouded our understanding of the cases. Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today’s Administrative State*, 91 ST. JOHN’S L. REV. 247, 259 (2017) (“Both *Panama Refining Co.* and *A.L.A. Schechter Poultry* provide meaningful insight into the intelligible principle. Unfortunately, this insight has largely been dismissed based on the notion that the Court struck down congressional delegation in the [1930s] solely because of the tension that existed between the Court and President Roosevelt.”)

⁷⁶ In fact, both decisions explicitly place the NIRA provisions at issue outside the scope of *J.W. Hampton*’s “conditional preemption” range. See *infra* nn. ___ and accompanying text.

firmly established that in some settings and on some conditions, adequate agency procedures could serve as a substitute for full-scale due process, which could be had only in Article III courts.⁷⁷ Similarly, the Court had sustained statutes against delegation challenges on the grounds that the agency had specific rather than general rulemaking authority;⁷⁸ that the “findings” requirements of conditional delegation statutes compelled the executive to produce a reviewable record;⁷⁹ that the agency had to enforce its orders in federal court; or that Congress had legislated with all the precision one could reasonably expect.⁸⁰ The NIRA, in contrast, crashed through all those guardrails. Predictably, it went down.

A. The Birth of the Blue Eagle

President Roosevelt was elected in 1932, with a mandate to overcome the Great Depression. The central problem, he and his fellow New Dealers believed, was “overproduction”: too much stuff, too little purchasing power. Hence, the National Industrial Recovery Act (NIRA). The basic idea was to protect industries from “ruinous competition”—to cartelize industries and to prop up producer prices.

The NIRA was enacted in great haste during Congress’s legendary “Hundred Days” Session beginning in March 1933.⁸¹ Roosevelt sent the bill to Congress on May 17; within a week, the House passed it by a lopsided margin. Neither the bill’s drafters nor the Members of the House paid much heed to constitutional questions. In the Senate, Senator Wagner defended the NIRA against opponents who feared that the act would deliver government into the hands of big business.⁸² Repeatedly

⁷⁷ *Interstate Com. Comm’n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 92 (1913); *United States v. Louisville & Nashville R.R. Co.*, 235 U.S. 314, 320, 321 (1914); *Louisville & Nashville R.R. Co. v. United States*, 245 U.S. 463, 466 (1918); *Block v. Hirsh*, 256 U.S. 135 (1921); *Stafford v. Wallace*, 258 U.S. 495, 512 (1922); *FTC v. Pac. States Paper Trade Ass’n*, 273 U.S. 52, 63 (1927); *Int’l Shoe Co. v. FTC*, 280 U.S. 291, 297 (1930); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 443–44 (1930); *Phillips v. Comm’r of Internal Revenue*, 283 U.S. 589 (1931).

⁷⁸ E.g., *United States v. Eaton*, 144 U.S. 677, 688 (1892); *In re Kollock*, 165 U.S. 526, 533 (1897); *Md. Cas. Co. v. United States*, 251 U.S. 342, 349 (1920); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). For a post-*Schechter* case to the same effect see *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418–19 (1942).

⁷⁹ See, e.g., *Mahler v. Eby*, 264 U.S. 32, 41–44 (1924). At the time of *Schechter*, this requirement was based on constitutional due process and a key element of the nondelegation mix. As Kevin Stack has convincingly explained, it disappeared from post-*Schechter* delegation cases and developed into the Chenery I canon of administrative law: the agency is bound by the record. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007); *id.* at 989–90 (“[I]t’s the express statement principle of delegation that *Chenery* implements.”).

⁸⁰ *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

⁸¹ See Peter H. IRONS, *THE NEW DEAL LAWYERS* 22–26 (Princeton Univ. Press 1982).

⁸² Opposition centered principally on the exemption of NRA industry codes from the antitrust laws. – Wagner’s “lengthy speech defending the constitutionality of the NIRA,” Peter Irons writes, “was aimed more at judges who would search the Congressional Record for evidence of the intent of the bill’s sponsors than it was designed to sway the votes of wavering senators.” Irons, *supra* note 81, at 25.

characterizing the NIRA as “emergency legislation” (a declaration also contained in Section 1 of the Act), Wagner articulated a broad theory of congressional power on the constitutional issues that would emerge in subsequent litigation: commerce powers, due process, and delegation. The Senator dismissed the nondelegation concern in a single paragraph. The Supreme Court, he insisted, had always sustained administrative action under “statutes which set up reasonable guides to action,” and the NIRA’s “careful” standards fully sufficed to guide the President and his administrative officials.⁸³ Eventually the Senate approved the bill by a 46-39 vote. On June 16, 1933, President Roosevelt signed the NIRA into law.

Title I, Section 1 of the Act, styled the “Declaration of Policy,” warrants exposition in full:

A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress 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.⁸⁴

To implement those goals, the President was authorized to establish “such agencies ... as he might find necessary” and to delegate his functions and powers to subordinates.⁸⁵ That generous grant was followed by numerous, broad substantive

⁸³ *Id.* at 26.

⁸⁴ National Industrial Recovery Act (NIRA) of 1933, Pub. L. No. 73-67, 48 Stat. 195 (1933) (repealed 1935) (hereinafter “NIRA”).

⁸⁵ *Id.* § 2(a)–(b). The National Recovery Administration (“NRA”) was established on that authority.

delegations. Section 3, the Act's core operative provision, authorized the President to "approve a code or codes of fair competition," either upon proposal by representative trade associations⁸⁶ or, should such voluntary action be unforthcoming, on his own motion.⁸⁷ As a condition of code approval, the President was authorized to "impose such conditions [...] for the protection of consumers competitors, employees, and others, and in furtherance of the public interest, and [to] 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."⁸⁸ Upon a finding of "destructive wage or price cutting or other activities contrary to the policy" of the NIRA, the President was authorized to impose a licensing regime on entire industries.⁸⁹ Section 7(a) provided for employees' collective bargaining rights. Sections 7(b) and (c), running parallel to the approve-or-impose regime of Section 3, encouraged employers and employees "to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy" of the Act.⁹⁰ That unavailing, the President was authorized to impose conditions on his own.⁹¹ Under the catch-all provision of Section 10(a), the President was "authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition and agreements, and any violation of any such rule or regulation shall be punishable by fine of not to exceed \$500, or imprisonment for not to exceed six months, or both."⁹²

⁸⁶ *Id.* § 3(a). Under Section 6(b), the President was provided with authority "to prescribe rules and regulations designed to insure [*sic*] that any organization availing itself of the benefits of this title shall be truly representative of the trade or industry or subdivision thereof represented by such organization."

⁸⁷ *Id.* § 3(d).

⁸⁸ *Id.* 3(a)

⁸⁹ *Id.* § 4(b) (authorizing the President to impose licensing regimes whenever "he shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof.") To some observers at the time, that never-litigated delegation looked problematic. Robert A. Maurer, *Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act*, 22 GEORGETOWN L J 207, 223-24 (1933) ("[I]t will not be presumed that Congress seeks to promote the general welfare by granting to the President a regulatory power through license that goes beyond the constitutional regulatory power of Congress itself").

⁹⁰ *Id.* § 7(b).

⁹¹ *Id.* § 7(c).

⁹² *Id.* § 10(a). The list of delegations in the text is not exhaustive. For example, Section 3(e) authorized the President, through the U.S. Tariff Commission, to impose tariffs or import quotas on articles of commerce that, according to the President's "finding," might undercut the code regime. (The President's determination as to facts was to be "conclusive." *Id.*) The delegations concerning the oil industry, at issue in *Panama Refining* and the broader delegations at issue in *Schechter* are discussed *infra* Part II.B.2.

In a span of two years, the National Recovery Administration (NRA) approved some 746 industry codes,⁹³ prohibited between 4,000 and 5,000 business practices, and issued thousands of administrative orders and guidance documents.⁹⁴ Implementation produced considerable labor strife and, predictably, extensive litigation.

B. Litigating Delegation

Most litigated NIRA cases hung on the scope of the commerce power and were decided on those grounds in the lower courts, with mixed results.⁹⁵ Delegation concerns played a lesser role. Among the few courts that addressed the issue, only one decided against the government.⁹⁶ That may seem surprising, given the centrality of the issue in the Supreme Court's decisions in *Panama Refining* and *Schechter*. At the time, however, the Supreme Court had *never* declared a delegation unconstitutional. It had sustained delegations from *Field v. Clark*⁹⁷ to *Grimaud*⁹⁸ and *J.W. Hampton*,⁹⁹ and it had affirmatively blessed administrative agencies from the ICC to the FTC and, most recently, the Radio Commission (soon renamed the Federal Communications Commission (FCC)).¹⁰⁰ It would have taken a truly intrepid judge to slam on the brakes—or an unusually sophisticated lawyer to distinguish the precedents. Law review articles of the period breathe a similar spirit. Surely, legal scholars postulated, the Declaration of Policy in Section 1 should assuage any delegation concerns.¹⁰¹ “[T]he standards laid down in section 1 of the

⁹³ See MARC A. EISNER, *REGULATORY POLITICS IN TRANSITION* 86 (Johns Hopkins Univ. Press 2d ed. 2000).

⁹⁴ See GARY D. BEST, *PRIDE, PREJUDICE, AND POLITICS: ROOSEVELT VERSUS RECOVERY, 1933–1938* 79 (Praeger Publishers 1991).

⁹⁵ See Irons, *supra* note 81, at 51 (counting nineteen cases, with eleven going against the government and eight in favor).

⁹⁶ See *id.* That case was *Acme v. Besson*, 10 F. Supp. 1 (D.N.J. 1935). See Irons, *supra* note 81, at 52.

⁹⁷ 143 U.S. 649 (1892).

⁹⁸ 220 U.S. 506 (1910).

⁹⁹ 276 U.S. 394 (1928).

¹⁰⁰ *FTC v. R.F. Keppel Bro.*, 291 U.S. 304 (1934); *Fed. Radio Comm'n v. Nelson Brothers Bond & Mtg. Co.*, 289 U.S. 266 (1933); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *Chesapeake & O Ry. Co. v. United States*, 283 U.S. 35 (1931).

¹⁰¹ See, e.g., John Dickinson, *Major Issues Presented by the Industrial Recovery Act*, 33 COLUM. L. REV. 1095, 1100 (1933); Markley Frankham, *An Analysis of the Delegation of Power in Some of the Recent Congressional Enactments*, 3 BROOK. L. REV. 38, 50 (1933) (“It seems fair to assume that Congress has gone much further in outlining the standard to be followed by the President than would have been necessary in order to sustain the validity of the delegation of power to him.”); Milton Handler, *The National Industrial Recovery Act*, 19 A.B.A. J. 440, 446 (1933) (“While the policy of the Recovery Act as defined in Section one is . . . both vague and uncertain, it is no more indefinite than the . . . criterion under the Interstate Commerce Act for administrative approval of the acquisition of control of one carrier by another.”) (footnote omitted); Robert A. Maurer, *Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act*, 22 GEO L. J. 207, 213 (1934) (“[A]n examination of the strictly regulatory features of [the Agricultural Adjustment Act and the NIRA] reveals for

Recovery Act,” John Dickinson intoned in an embarrassingly awful law review article,

can in the matter of vagueness hardly be thought to exceed other standards, such as the ‘reasonableness’ of a rate or the ‘undue’ nature of a discrimination or the competitive effectiveness of a tariff rate, all of which have been held within the limit of permissible delegation. The provisions of the Act grow logically and articulately out of the precedents, if the precedents are permitted to unfold and develop according to their principles like living things. No reversal of the past, not even a breach of continuity, is required.¹⁰²

Government lawyers evidently shared that insouciance: their decidedly lame delegation argument spanned less than three pages of their 195-page merits brief in *Panama Refining*.¹⁰³ A few learned minds, though, saw the handwriting on the wall. Harvard Professor Felix Frankfurter, for one, doubted the NIRA’s constitutionality, and the delegation question appears to have been his central concern.¹⁰⁴ In short order, his apprehension would prove well-warranted.

1. *Panama Refining*

The first NIRA challenge to reach the Supreme Court involved the regulation of a single industry: the oil industry, which (like many other industries) suffered from chronic “overproduction.” Texas and other producer states had established *de facto* quota systems to curb production. However, enforcement of those regimes proved difficult, and “hot” oil produced in excess of the quotas continued to show up on interstate markets. Section 9(c) of the NIRA authorized the President “to prohibit the transportation in interstate or foreign commerce of petroleum and the products produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid [state] regulation or order.”¹⁰⁵ President Roosevelt promptly issued an order to prohibit the interstate

the most part a studied attempt by the authors to bring such exercise of power within some federal delegated constitutional authority.”); see also George K. Ray and Harvey Wienke, *Hot Oil on Uncharted Seas of Delegated Powers*, 29 ILL. L. REV. 1021, 1025 (1934–35).

¹⁰² Dickinson, *supra* note 101, at 1100–01. Dickinson, serving as Undersecretary of Commerce, had drafted a version of the bill that became the NIRA.

¹⁰³ Resp’t’s Br. 166–69. In substance, the brief articulated the post-New Deal delegation position: *Field v. Clark*, *J.W. Hampton*, good night. *Id.* The remaining passages addressed ancillary issues. On Peter Iron’s account, the government’s attorneys did no better at oral argument. *Irons*, *supra* note 81, at 71–72.

¹⁰⁴ *Irons*, *supra* note 81, at 81, 96.

¹⁰⁵ *Id.* at 73 (“Congress had tacked on Section 9(c) to the NIRA without giving much thought to its administrative consequences.”).

transportation of hot oil and authorized the Secretary of the Interior to implement the order by regulation. Small producers, including Panama Refining, challenged the regulations. Initially, they obtained a district court injunction. However, the Fifth Circuit Court of Appeals rejected the plaintiffs' Commerce Clause arguments on the grounds that the statute aimed to aid rather than frustrate state regulation. It dismissed the petitioners' nondelegation challenge by describing the policy established in Section 9(c) as "entirely clear."¹⁰⁶

The Supreme Court granted the oil companies' petitions for certiorari and heard argument in December 1934. The producers' Commerce Clause argument was quite weak, inasmuch as they were compelled to argue that Congress lacked power to aid states in the enforcement of their own quota laws. The Court left the Commerce Clause issue undecided,¹⁰⁷ and the delegation issue took center stage.

After a recapitulation of the litigation, the President's Orders and the Secretary's regulations, and jurisdictional matters, the Court addressed the petitioners' delegation attack on Section 9(c). Describing the provision as "brief and unambiguous," the Court deemed it unambiguous in a bad way:

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. It establishes no creterion [*sic*] to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it 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. And disobedience to his order is made a crime punishable by fine and imprisonment.¹⁰⁸

The want of a "findings" requirement takes Section 9(c) outside the realm of conditional delegation. Thus, there must be some primary standard to circumscribe the President discretion. According to the Court, however, Section 9(c) provided *no* such standard.

¹⁰⁶ *See id.* at 69–70.

¹⁰⁷ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935).

¹⁰⁸ *Id.* at 415.

Contrary to post-New Deal spin, however, that was not the end of the inquiry. “We examine the [statutory] context,” the passage just quoted continues, “to ascertain if it furnishes a declaration of policy or a standard of action, which can be deemed to relate to the subject of section 9(c) and thus to imply what is not there expressed.”¹⁰⁹ The Court then rattles through nearly every Section of the Act—and finds nothing to limit the President’s discretion even by implication.¹¹⁰

Next, the Court turns to an extensive review of its precedents. A brief opening paragraph captures an ambivalence reminiscent of *Crowell*. “The Congress,” the Court avers, “manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.” Yet “[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.”¹¹¹ The Court distinguishes two types of permissible delegations: “conditional” fact-finding delegations, exemplified by *The Brig Aurora* and *Field v. Clark*;¹¹² and a delegated power to “fill up the details” under a primary legal standard established by Congress, exemplified by cases from *Wayman v. Southard* to cases sanctioning the delegation of powers to the ICC, the FTC, and the FCC.¹¹³ Citing *Grimaud*, the Court expressly acknowledges a congressional power to delegate the authority to make binding rules governing private conduct; but such rules “are valid only as subordinate rules and when found to be within the framework of the policy which the Legislature has sufficiently defined.”¹¹⁴ Finally, the Court briefly discusses *J.W. Hampton*. The novel feature of that case was that the “flexible tariff provision” of the underlying statute combined a conditional delegation with a presidential power to set *variable* tariff rates. It was in that latter respect, *Panama Refining* rightly notes, that the

¹⁰⁹ *Id.* at 416.

¹¹⁰ *See id.* at 416–19.

¹¹¹ *Id.* at 421.

¹¹² *See Panama Refining*, 293 U.S. at 423–26.

¹¹³ *See id.* at 426–28 (discussing, *inter alia*, “the authority given to the Secretary of War to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to remove such obstructions” and the Federal Radio Commission’s mandate “to act as public conveyance, interest, or necessity requires.”) (internal quotation marks omitted).

¹¹⁴ *Id.* at 429.

Hampton Court had analogized customs duties to the ICC’s ratemaking and insisted on an “intelligible principle.”

Three related aspects of the opinion bear note.

First, and to repeat, the *Panama Refining* analysis is *not* an “intelligible principle” or magic words test focused on a key provision. If it were, the opinion would end at page 415 of Volume 293 of the U.S. Reporter, with the parsing of Section 9(c). Instead, the Court readily concedes the possibility of an “implied” delegation, inferred from the statutory context.¹¹⁵

Second, and relatedly, conspicuously missing from the Court’s whole-of-statute survey is NIRA’s Section 10—that is, the grant of general authority to make rules carrying the force of law. The omission is perfectly intelligible so long as one thinks as the jurists of that age: a general grant of rulemaking authority to effectuate the purposes of the statute cannot conceivably *circumscribe* the President’s discretion. One still has to ask whether the substantive regulatory provisions of the statute contain any limits—put differently, whether a general grant of authority covers the particular rule at issue, given the context and the structure of the statute as a whole. So, at any rate, thought the Hughes Court.¹¹⁶

Third, for all of *Panama Refining*’s whole-of-statute analysis and the rehearsal of the precedents, there remains something unsatisfying about the opinion. Every single precedent, the Court emphasizes, had insisted that of course Congress may not delegate legislative powers.¹¹⁷ Then again, every single precedent had upheld the delegation of what often looked suspiciously like legislative powers, formally

¹¹⁵ Importantly, Justice Cardozo’s lone dissent took the same approach. Describing his disagreement with the opinion for the Court as “narrow,” Justice Cardozo would have found a standard of discretion “when the act with all its reasonable implications is considered as a whole.” *Id.* at 434.

¹¹⁶ The modern Court, it bears mention, does not. Cases decided in *Chevron*’s looming shadow routinely assume that a general grant of rulemaking authority implies a delegation of such authority across the statutory board—with nary a glance at the statutory structure or its nuances. See Hickman, *supra* note 5, at 1110, 1115–18; THOMAS W. MERRILL, *THE CHEVRON DOCTRINE* 120–44 (HARV. UNIV. PRESS 2022); Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 473–74 (2002). For a pristine example see *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) (“[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”) Under that approach, and assuming that the Secretary of the Interior jumps through the judicial ringmasters’ arbitrary-and-capricious hoops, *Panama Refining* would have been decided quite differently.

¹¹⁷ See *Panama Refining*, 293 U.S. at 425–29.

(rulemaking) as well as substantively. Why then hit the brakes in *this* case? Several answers come to mind.

One possible answer is that while the statutes at issue in earlier cases had presented some intelligible principle, the NIRA did not. *Panama Refining* seemed to say so.¹¹⁸ But that distinction is doubtful. In a carefully argued dissent, Justice Cardozo articulated the view that the NIRA—more specifically, Section 9(c) read in light of Section 1—did in fact provide a principle no less intelligible than those upheld in earlier cases.¹¹⁹ Reasonable minds may differ on this point; but for my money, Justice Cardozo had the better of this part of the argument.

A second, more plausible answer hinges on an understanding of the nondelegation doctrine that Martin Redish has characterized (and embraced) as “pragmatic formalism.”¹²⁰ Congress may delegate for reasons of flexibility and practicality; but it must establish the governing rule or standard *so far as one may reasonably expect*. In earlier cases, the Court had in fact conducted an analysis along those lines.¹²¹ Apply it to the NIRA and Section 9(c): the statute tanks. Congress easily could have prohibited hot oil shipments directly. Such a statute would consist of simple rules (the oil is hot, or not; in interstate commerce, or not), and no sophisticated administrative machinery would be required. In this deployment, the nondelegation doctrine strongly resembles a *M’Culloch* pretext analysis.¹²² Delegating tasks that really cannot be performed by Congress itself (making “findings,” “filling up the details”) is necessary and proper. But Congress must make some such showing; it cannot exercise a power it does not possess—the delegation of a vested power—on

¹¹⁸ See *id.* at 430 (“Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.”).

¹¹⁹ *Id.* at 435–40 (Cardozo, J., dissenting).

¹²⁰ See generally Redish, *supra* note 8.

¹²¹ See, e.g., *United States v. Grimaud*, 220 U.S. 506, 516 (1911) (“In the nature of things, it was impracticable for Congress to provide general regulations for these various and varying details of management.”); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (“Congress 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. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.”).

¹²² Cf. *M’Culloch v. Maryland*, 4 Wheat 316, 423 (1819) (“[S]hould Congress [...] , , under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”)

pure pretext. And a good case can be made that that is what happened in *Panama Refining*.¹²³

A third, more contextual answer has to do with the statute in front of the Court. The Justices knew all too well that the industry-specific provisions at issue in *Panama Refining* were a small piece of a statute that authorized comprehensive industry regulation across the entire United States economy. The Court had a choice, then, between Justice Cardozo’s approach or else, a ruling that would set the stage for the broader challenge that was sure to come sooner rather than later.¹²⁴ That case would turn out to be *Schechter*.

2. *Schechter Poultry*

Schechter involved the Live Poultry Code for the Metropolitan Area of New York City, issued per Executive Order under Section 3 of the NIRA. The code provisions were to serve as standards of “fair competition.”¹²⁵ Violations of the provisions constituted methods of “unfair competition” within the meaning of the Federal Trade Commission Act, and they were subject to civil and criminal penalties.¹²⁶

The facts of the legendary “sick chicken case” are too notorious to merit extensive recounting.¹²⁷ For nondelegation purposes, it bears mention that the code just about covered the regulatory waterfront. It governed working conditions, salary requirements, health and safety matters, production methods, sales provisions, product pricing, business conduct, record-keeping requirements, and other matters. The Schechter brothers were indicted on no fewer than sixty criminal charges. The District Court Judge dismissed 27 of those charges; the jury found the defendants guilty on 19 of the remaining counts. The Second Circuit Court of Appeals upheld

¹²³ For example, the government’s extensive reliance on an “emergency” as NIRA’s rationale arguably strengthens the case for invalidation: under the circumstances, a direct prohibition would have been far more effective than the delegation. The clearest indication appears in Justice Cardozo’s dissenting opinion. Having conceded that Congress could have imposed the Section 9(c) prohibitions outright, Cardozo proffers reasons why Congress might have preferred executive discretion. *Id.* at 440–44. To my eyes, those reasons—never articulated by Congress or the government in its briefs—look thin. Nothing hangs on that assessment, though; the important point is the nature of the analysis.

¹²⁴ I submit this somewhat speculative interpretation on the splendid authority of Justice (at the time of writing, Solicitor General) Robert H. Jackson. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 94 (1941) (“Many thoughtful persons were unable to understand [*Panama Refining*] except as a deliberate forewarning of what was to come...”)

¹²⁵ Sec 3(b)

¹²⁶ Sec 3(f), 10(a).

¹²⁷ For a non-lawyerly, riveting account see AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION*, 214–25 (2007).

the Schechter brothers' convictions on 17 of those counts.¹²⁸ As to the appellants' nondelegation arguments, the Court distinguished *Panama Refining* on the grounds that NIRA's Section 1 "Declaration of Policy"—unlike, supposedly, Section 9(c)—established discernable standards.¹²⁹ Moreover, Section 3 provided that the President approve codes only after hearings.¹³⁰

The Schechters sought review; and after much internal debate and confusion, the government, too, filed a "hastily prepared" petition for certiorari.¹³¹ The Supreme Court's certiorari grant issued on April 15, 1935, some four months after the *Panama Refining* decision.

The Schechters' merits brief raised a Commerce Clause challenge; a due process challenge;¹³² and the delegation challenge. Wisely (as it turned out) the petitioners led with the delegation argument. Naturally, they relied heavily on the recent *Panama Refining* decision and argued that the economy-wide industry codes authorized by Section 3 were unconstitutional *a fortiori*. Earlier delegation cases relied upon by the government were "easily" distinguished.¹³³ Time and again, the petitioners sought to demonstrate in a lengthy analysis of numerous precedents, the Supreme Court had required three characteristics of permissible delegations: a discernable congressional *policy*; an intelligible *standard* to govern the administrative implementation of that policy; and adequate *procedural mechanisms* to circumscribe the administrators' discretion and to protect regulated entities. In the petitioners' view, the NIRA lacked all those characteristics.

The government's merits brief relied heavily on "emergency" arguments. On the nondelegation issue, it sought to distinguish *Panama Refining* substantially on the grounds articulated by the Second Circuit, especially the supposedly "intelligible"

¹²⁸ The two reversed counts concerned violations of the code wage and hour provisions. Those matters, the Court held—notwithstanding its otherwise expansive understanding of the Commerce Clause—lay beyond the powers of Congress. *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir. 1935), rev'd 295 U.S. 495 (1935).

¹²⁹ *Id.* at 623.

¹³⁰ *Id.*

¹³¹ Irons at 85.

¹³² In fact, the petitioners' brief raised two due process challenges: a procedural challenge focused on the NIRA's lack of adequate administrative procedures and judicial review mechanisms; and a substantive due process challenge. The first challenge is closely interwoven with the delegation challenge: *see infra* nn. ___ and accompanying text. The substantive challenge—to the effect that the NIRA and its codes deprived the petitioners of liberty without any health or other permissible rationale—went unaddressed by the Court.

¹³³ Brief for Petitioner at 28–34, *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (1935) (Nos. 854, 864), 1935 WL 32836.

standards of Section 1. That lengthy argument, too, eventually collapsed into an appeal to the emergency conditions that prevailed at NIRA’s enactment.¹³⁴ Felix Frankfurter, for one, was not impressed by the effort. “I shall be surprised,” he wrote to Solicitor General Stanley Reed, “if delegation does not prove to be much more of a stumbling block in the Supreme Court.”¹³⁵

So it would come to pass. In an opinion authored by Chief Justice Hughes, the Court held that the NIRA effected an unconstitutional delegation of legislative power and, moreover, that the Act—as applied to the Schechter brothers—exceeded Congress’s power under the Commerce Clause. Having so held, the Court saw no need to address the petitioners’ due process arguments.

After a recapitulation of the case and the statutory framework, the Court rather curtly dismisses “[t]wo preliminary points [...] with respect to the appropriate approach to the important questions presented.”¹³⁶ It rejects the government’s “emergency” appeals on the grounds that “[e]xtraordinary conditions do not create or enlarge constitutional power.”¹³⁷ And it rejects the government’s contention that “the national crisis demanded a broad and intensive co-operative effort by those engaged in trade and industry, and that this necessary co-operation was sought to be fostered by permitting them to initiate the adoption of codes.”¹³⁸ Far from it, the Court responds: the Act “involves the coercive exercise of the lawmaking power.”¹³⁹

To those two “preliminaries,” one could add a third (appearing later in the Court’s opinion)—to wit, the government’s attempt to squeeze Section 3 into the “conditional delegation” line of cases. Section 9, the government noted, imposed no presidential “findings” requirement, and *Panama Refining* had distinguished earlier cases on those grounds. Section 3, in contrast, did purport to impose various “findings” requirements. In a single paragraph, however, the Court dismissed one of the requirements as inapposite; a second as wildly underinclusive; and the third requirement—that the code “will tend to effectuate the policy of this title”—as

¹³⁴ *Id.* at 118–137.

¹³⁵ Quoted in Irons, at 94.

¹³⁶ *Schechter*, 295 U.S. at 528.

¹³⁷ *Id.* at 528. A footnote to the sentence cites *Ex Parte Milligan*, 4 Wall. 2, 120–21 (1866) and, rather oddly, *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934).

¹³⁸ 295 U.S. at 529.

¹³⁹ *Id.* at 529. The point matters, delegation-wise. See *infra* notes ____ and accompanying text.

purely pretextual: the so-called finding “is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws.”¹⁴⁰

All that out of the way, one would think that the case was plainly governed, and the result foreordained, by *Panama Refining*. That case, after all, involved a single industry and an on-off presidential decision. Section 3, in contrast, authorized the President and his subordinates to blanket the entire U.S. economy, from cradle to grave,¹⁴¹ with comprehensive regulatory regimes. However, while the *Schechter* Court naturally began its nondelegation analysis with a summary of *Panama Refining* and its central propositions,¹⁴² it proceeded to draw a distinction: Section 9(c) at least defined the subject-matter. Section 3, in contrast, posed the “more fundamental” question of “whether there is any adequate definition of the subject to which the codes are to be addressed.”¹⁴³

As the Petitioners had noted, that way of casting the issue screams *a fortiori*; and Justice Cardozo’s concurrence in *Schechter*—after his dissent in *Panama Refining*—expounded on the point.¹⁴⁴ However, Chief Justice Hughes’ opinion supplied a substantially more extensive and nuanced analysis. In part, that analysis served to distinguish precedents on which the government sought to rely. As noted, the Court had upheld the statutes that governed the ICC, the FTC, and the FCC against delegation challenges. Disavowing any intention of drawing those decisions into doubt, the Court had to explain what rendered *this* statute different. However, that the Court’s analysis also served an affirmative, constructive purpose—easily missed after eight-plus decades of forgetfulness, but well understood by New Deal lawyers at the time: the Court provided a kind of how-to-delegate manual for the Congress.

For purposes of exposition, one can disaggregate the *Schechter* Court’s analysis into seven questions.

- *Why, to what end, and in what context* is Congress delegating power?

¹⁴⁰ *Id.* at 538. The Court’s brush-off hangs together with its observation that the delegation at issue authorized the President, as opposed to an expert agency whose record findings might merit judicial respect. *See infra* notes ___ and accompanying text.

¹⁴¹ Petitioners’ counsel pointedly observed that there was a code for the producers of infant wear and another for tombstone makers. Brief for Petitioner at 28–34, *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (1935) (Nos. 854, 864), 1935 WL 32836, at *79.

¹⁴² *Schechter*, 295 U.S. at 529–30.

¹⁴³ *Id.* at 531.

¹⁴⁴ *Id.* at 551 (Cardozo, J., concurring).

- *How much* power is being delegated?
- *What* is being delegated—a legislative power?
- If so, *what kind* of legislative power is being delegated?
- *To whom* is the power delegated?
- Does the statute contain any *institutional safeguards*, especially procedural safeguards?
- What provisions are made for *judicial review*?

Those lines of inquiry are not *separate* questions, akin to proving up the elements of common law fraud. They bleed into each other in the Court’s opinion, and they belong together.

The contextual “*why*” question may seem odd or irrelevant: the wisdom or utility of legislation is presumably left to Congress. At the time, however, it had real operational content. As noted, the Court made short shrift of the government’s “emergency” and “voluntary cooperation” rationales. Repeatedly, however, the Court had accepted—not on Congress’s say-so, but upon examination of the legislative schemes at issue—compelling reasons for delegation, foremost including the need for expertise, speed, and prompt regulatory adjustments. So long as Congress declares binding rules of conduct so far as can reasonably be expected, it may avail itself (within certain bounds) of the assistance of administrative agencies, built for the purposes at hand.¹⁴⁵

While the concession to administrative expertise and speed may look like a surrender to the administrative state, it did not help the government in *Schechter* any more that it had in *Panama Refining*. Under the NIRA scheme, no government actor, and surely not the President himself, had any particular expertise on the *n* number of subjects of regulation: whatever “expertise” could be had would come from self-interested trade associations. Nor had Congress performed its duty to legislate to the reasonably expectable extent. Nothing and nobody at the time precluded Congress from imposing price controls, at least with respect to articles in interstate commerce: the Supreme Court had already blessed equivalent state statutes against substantive

¹⁴⁵ *Supra* notes ___ and accompanying text.

due process challenges.¹⁴⁶ Likewise, Congress could have regulated labor conditions directly, instead of extracting those conditions as the price of admission to government-sponsored producer cartels.¹⁴⁷ Bereft, then, of any acceptable rationale, the delegation stood stark naked.

How much power is being delegated? The question continues to inform modern-day, “intelligible principle” nondelegation cases, albeit commonly in the guise of the constitutional avoidance and “major question” doctrines.¹⁴⁸ It loomed large and as a matter of first-order principle in *Schechter*. Both the opinion for the Court and Justice Cardozo’s concurrence emphasized the economy-wide coverage of Section 3 and the President’s authority to “effectuate” the manifold purposes of the statute in whatever form he would choose.¹⁴⁹ Congress has ample authority to address identifiable problems in interstate commerce—say, shipments in the oil industry—in some constitutionally acceptable fashion. But on the authority of *Panama Refining*, even that delegation was out, at least without some guardrails. And NIRA’s Section 3 and the concomitant Section 7 did not address any limited, particularized calamity or identifiable problem. In Justice Cardozo’s famous phrase, it presented a case of “delegation running riot.”¹⁵⁰

¹⁴⁶ *Nebbia v. New York*, 291 U.S. 502 (1934).

¹⁴⁷ Leading labor lawyers had urged that course prior to *Schechter*, and sober minds promptly realized that nothing in the decision called such legislation into doubt. John B. Andrews, *Delegated Labor Legislation Unharmful by Recent Court Decisions*, 25 AM LAB. LEGIS. REV. 90, 93 (1935) (the *Schechter* Court was simply “reiterating and applying principles long familiar to those acquainted with earlier state and Federal court decisions on the subject of administrative regulation [...] [N]o one need fear that [more traditional] ‘delegated labor legislation’ will be interfered with by the courts.”). When the Roosevelt Administration, chastened by the *Schechter* result, embarked on that course, the Supreme Court declared clear sailing. *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937) (discussed *infra* notes ___ and accompanying text)).

¹⁴⁸ *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (“[W]e ‘typically greet’ assertions of ‘extravagant statutory power over the national economy’ with ‘skepticism.’ (quoting *Utility Air*, 573 U.S. 302, 324 (2014)); *Id.* at 2620–21 (Gorsuch, J., concurring) (discussing applications of the major questions doctrine); *NFIB v. OSHA*, 595 U.S. —, —, 142 S.Ct. 661, 665 (2022) (per curiam) (“Permitting OSHA to regulate the hazards of daily life . . . would significantly expand OSHA’s regulatory authority without clear congressional authorization.”); *Indus. Union Dep’t, AFL–CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion) (“In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government’s view of [the statute].”); *Int’l Union v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1994) (“In effect we require a clear statement by Congress that it intended to test the constitutional waters.”). *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U.S. —, —, 141 S.Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (per curiam) (“We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” (internal quotation marks omitted)).

¹⁴⁹ *Schechter*, 295 U.S. at 538–39; *id.* at 852–53 (Cardozo, J., concurring).

¹⁵⁰ *Id.* at 553 (Cardozo, J., concurring).

The “how much” inquiry hangs together with the related but distinct question of *what kind of power* is being delegated. “Instead of prescribing rules of conduct,” Chief Justices Hughes wrote, the statute “authorizes the making of codes to prescribe them.”¹⁵¹ That power is obviously legislative in form; it is legislative in substance unless it is limited to the regulation of minutiae.¹⁵² As noted, however, the Supreme Court had long blessed at least some such delegations. In one leading case, it had sustained a statute authorizing the Secretary of the Interior to issue binding rules—carrying criminal penalties, no less—governing the use of federal lands.¹⁵³ In numerous other cases, it had blessed the ICC’s ratemaking procedures—on anyone’s account a formally legislative function and, moreover, hardly a matter of mere detail.¹⁵⁴

One can think of several ways to distinguish those precedents. One way of doing so is a robust “intelligible principle.” Those earlier statutes contained some such principle; the NIRA did not; and so therefore. As already suggested, however, that line of argument is doubtful.¹⁵⁵ A second distinction has to do with the “to whom” question and the operation of the regulatory scheme. Arguably, it is one thing to authorize a regular expert commission to write rules for a single industry (railroads) or federal properties; it is a very different thing to authorize the President and actors of his choosing to cartelize the entire economy in cahoots with trade associations. The *Schechter* Court made that point;¹⁵⁶ I will return to it below. A third distinction, often overlooked but of central importance in the *Schechter* litigation, has to do with the *kind of (delegated) legislative power*.

In its briefs and at oral argument, the government laid stress on what it viewed as a NIRA precedent: the Federal Trade Commission. Like the NIRA, the FTC’s authority extended over all interstate commerce. The agency’s statutory mandate was to prevent “methods of unfair competition.” The “fair competition” codes authorized by the NIRA, the government urged, were just the flipside of *un-fair* competition. And if Congress may delegate the power to regulate one, it may

¹⁵¹ *Schechter*, 295 U.S. at 541 (1935).

¹⁵² *See id.* at 537–540.

¹⁵³ *United States v. Grimaud*, 220 U.S. 506, 517–18 (1911).

¹⁵⁴ *See, e.g., Intermountain Rate Cases*, 234 U.S. 476 (1913). Numerous legal scholars noted the point. *See, e.g.,* William Sternberg, *Delegation of Legislative Authority*, 11 NOTRE DAME L. REV., 109, 117 (1936); Milton Handler, *The National Industrial Recovery Act*, 19 A.B.A.J. 440, 446 (1933).

¹⁵⁵ *See supra* notes and accompanying text (discussing Justice Cardozo’s *Panama Refining* dissent).

¹⁵⁶ *Schechter*, 295 U.S. at 537.

delegate the power to regulate the other. The argument served two purposes. One was to paint the powers delegated under the NIRA as not unprecedented, though perhaps not perfectly conventional. The other was to suggest that the President's seemingly boundless powers had a limit after all: NRA codes would really have to be codes of "fair competition."

Compared to the fate that this argument would suffer in the Supreme Court, the Hindenburg was a trial balloon. At every turn, the Court portrayed the FTC as an exemplar of sensible administration and the NRA as a hideous example of what *not* to do.¹⁵⁷ Here again, the Court noted operational differences. The FTC operated by means of adjudication (rather than rulemaking). Those determinations which required judicial enforcement and so would be reviewed in regular courts (initially, *de novo*;¹⁵⁸ by the time of *Schechter*, under what we would now call a *Skidmore* standard).¹⁵⁹ NIRA codes, in contrast, would bind of their own force.¹⁶⁰ Moreover, and more fatefully on Peter Irons's account,¹⁶¹ the symmetry between the FTC's mandate ("unfair competition") and the NRA codes ("fair competition") collapsed. At oral argument, Solicitor General Stanley Reed abandoned the government's position that "fair" competition was simply the obverse of FTC prohibitions against "unfair competition" and, under intense questioning, conceded that "fair," under the NIRA, meant whatever trade associations or the President meant by it.¹⁶² With that, the perceived limitation on the President's discretion—the tie to FTC rules and standards—was gone, and the NRA's codes appeared in a very different light. For one thing, the *Schechter* Court noted, FTC prohibitions against unfair competition were borrowed from the common law. They were of course somewhat broader (why else have an agency?) but they could be analogized quite readily.¹⁶³ For another thing, FTC prohibitions against "unfair competition" were *pro*-scriptive. They

¹⁵⁷ Ironically, the FTC, oft-maligned and in its early years an object of great judicial suspicion, emerged from the 1934-1935 Term with flying colors. Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 243 n. 305 (1936) (noting the fact). The Supreme Court's embrace of the FTC model in *Schechter* was accompanied by the decisions in *FTC v. R.F. Keppel*, 291 U.S. 304 (1934) (granting a measure of judicial deference to FTC determinations) and *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935) (upholding removal protection for FTC Commissioner).

¹⁵⁸ *FTC v. Gratz*, 253 U.S. 421 (1920).

¹⁵⁹ *FTC v. R.F. Keppel*, 291 U.S. 304 (1934).

¹⁶⁰ *Schechter*, 295 U.S. at 529.

¹⁶¹ Irons at 86-97. The account of the oral argument in this paragraph is taken from those pages.

¹⁶² Irons at 96. On the author's account, the government realized that it needed a clean-up in aisle seven, but that attempt on the following day of oral argument also failed. *Id.* at 97. I suspect that Reed may have no other choice. If NRA codes could ordain no more than pre-existing FTC prohibitions, it is hard to see what might lure trade associations into the bargain or what would be left of the President's discretion.

¹⁶³ *Schechter*, 295 U.S. at 532-33.

established prohibitions; within those limits, market actors remained free to do as they wished. The NRA codes were *pre*-scriptive: you must do “x,” or else.

The distinction matters at a constitutional level and with respect to congressional statutes, not just agency regulations. The power to preempt states is not the power to commandeer them.¹⁶⁴ The power to regulate health insurance is not the power to force individuals into the market.¹⁶⁵ The power to impose a curfew is not the power to order citizens to report to the nearest detention camp.¹⁶⁶ The *Schechter* Court had no need not address that first-order question directly, but the distinction was prominently articulated in the opinion for the Court¹⁶⁷ and, more compellingly yet, in Justice Cardozo’s concurrence.¹⁶⁸

Three further, more institutional themes run through the *Schechter* opinion. The Court asked *to whom* the power had been delegated: perhaps the trade associations who submit codes? So the government contended in *Schechter*¹⁶⁹; and in a later, momentous case involving an equally broad delegation of regulatory power to the President and a national “Price Administrator,” the Court—now firmly in the hands of Roosevelt appointees—sought to distinguish *Schechter* on the grounds that the NIRA had delegated legislative powers to private parties.¹⁷⁰ That, though, is simply false. Undoubtedly, the incestuous relations between conniving industry associations and administrators gave the justices heartburn, and the NIRA’s appalling political economy helps to account for the *Schechter* Court’s striking unanimity. Still, it is hard to discern a private delegation in a statute that authorized the President to impose codes *sua sponte*; and in any event, the opinion for the Court said the opposite. “[W]ould it be seriously contended,” the Court asked impatiently, “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?”¹⁷¹ Puh-lease. “Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress. The

¹⁶⁴ *Printz v. United States*, 521 U.S. 898 (1997).

¹⁶⁵ *NFIB v. Sebelius*, 567 U.S. 519, 558 (2012).

¹⁶⁶ *Korematsu v. United States*, 323 U.S. 214, 246–47 (Jackson, J., dissenting).

¹⁶⁷ *Schechter*, 295 U.S. at 535.

¹⁶⁸ *Id.* at 552–53 (Cardozo, J., concurring).

¹⁶⁹ *Id.* at 537.

¹⁷⁰ *Yakus*, 321 U.S. at 424 (1944) (discussed *infra* nn and accompanying text.)

¹⁷¹ *Schechter*, 295 U.S. at 537 (1935).

question, then, turns upon the authority which section 3 of the Recovery Act vests *in the President* to approve or prescribe.”¹⁷²

On that score, does it matter that the delegee is the President, rather than an “expert,” independent agency? The Hughes Court wavered on the question. *Panama Refining* intimates a “headless Fourth Branch” apprehension: if Congress can delegate to the President, it can also delegate to an agency of its own creation, and then the game is up.¹⁷³ *Schechter*, in contrast, strongly suggests that a regular, “quasi-judicial” body like the FTC is one thing, delegation-wise; a free-roaming President is another, far more problematic thing.¹⁷⁴

The Court further addressed the question of *procedural safeguards* for regulated parties. As noted,¹⁷⁵ the Court at the time had already accepted “appropriate administrative procedure” as a partial substitute for actual due process. Still, it insisted that there must *be* a process.¹⁷⁶ That, too, distinguished the NIRA from the FTC or the ICC. Both of those agencies operated under standing procedures that offered regulated parties a right to be heard; identified the administrative bodies that would conduct adjudicatory or ratemaking procedures; and limited the agencies’ decisions to the record. The NIRA lacked any comparable protections.

Finally, and on a closely related note, the *Schechter* Court adverted to the provision (or lack thereof) of *judicial review*. Procedurally, the NIRA’s codes were probably reviewable in a jurisdictional sense—not (as usually now) by way of pre-enforcement review, but upon enforcement by a U.S. District Attorney (as in *Schechter*). Still, a problem remains so long as one thinks in *Marbury* terms. While the utility or reasonableness of this or that measure is the political branches’ business, the executive may not act *ultra vires*. Whether or not it has done so is the courts’ business. If the Court is looking at a statute that makes it impossible to answer the *ultra vires* question, it is confronted with an unconstitutional delegation.

¹⁷² *Id.* (italics added).

¹⁷³ *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

¹⁷⁴ *Schechter*, 295 U.S. at 533, 539-540 (1935).

¹⁷⁵ *Supra* n. and accompanying text.

¹⁷⁶ The connection between the explosive growth of administrative agencies and their power and the need for procedural regulatory was central to Chief Justice Charles Evans Hughes’ thinking about the administrative state. DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, 51-77 (Oxford UP 2014).

That may be the most reasonable sense of an “intelligible principle” inquiry: intelligible *to a court* that is duty-bound to answer the *Marbury* question.

III. Learning, and Unlearning, *Schechter*

What can one learn from *Panama Refining* and *Schechter*? The question of what we can learn *now* is explored in Part IV. This Part addresses the political and legal response over the decade after *Schechter*. It is in that period that the “intelligible principle” emerged and then became established as the lodestar of nondelegation. The question of how that happened is inextricably linked with, and central to, the formation of the modern administrative state and its law in that period. For present purposes, a brief and partial account must suffice.

Panama Refining and *Schechter*, I hope to have shown, were conventional applications of time-honored principles of constitutional and administrative law to a statute that crashed through all established boundaries. In subsequent cases, the Court consistently and without much bellyaching reaffirmed those principles. Even so, the anything-goes “intelligible principle” emerged in a process of constitutional erosion. It proceeded, roughly, in two stages: an initial, successful congressional effort to conform New Deal legislation to *Schechter*’s strictures; and a subsequent, deliberate judicial effort to compartmentalize *Schechter*’s constitutional universe. That effort, too, succeeded, due to the exertions of some very good lawyers; the dominance, after 1938, of New Deal acolytes on the federal bench; and the genuine emergency of World War II. Consider the two stages in turn.

A. Adaptation and Accommodation.

Two features of the early post-*Schechter* nondelegation cases bear mention. *First*, they invariably involved statutes that had survived delegation challenges before *Schechter* or else, statutes that were drafted with the teaching of *Panama Refining* and *Schechter* in mind.¹⁷⁷ *Second*, while the cases uniformly sustained those statutes

¹⁷⁷ See, e.g., *Mulford v. Smith* 307 U.S. 39, 51 (1939) (Agricultural Adjustment Act (AAA)); *Rock Royal Co-op Co.*, 307 U.S. 39 (1939) (Agricultural Marketing Agreement Act); *Curran v. Wallace*, 306 U.S. 1 (1939) (AAA); *NBC v. United States*, 319 U.S. 190 (1943) (Radio Act); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S.381 (1940) (Bituminous Coal Act); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (NLRA); *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941) (Fair Labor Standards Act)..

against direct nondelegation challenges, they did *not* embrace the “anything goes” proposition for which the Supreme Court and myriad scholars mindlessly cite them.

As Daniel Ernst and other scholars have shown, the formation of the administrative state in that era was a learning effort between the New Dealers and the Court.¹⁷⁸ *Schechter*, like *Crowell* and similar cases of that era, produced some—in retrospect, slightly unhinged—attacks to the effect that the Justices had rung the curtain on the New Deal.¹⁷⁹ Never mind, though: just as *Crowell* effectively greenlighted the way for administrative adjudication within bounds,¹⁸⁰ so *Schechter*’s insistence on constitutional boundaries took the form of a manual on how to do constitutionally acceptable delegation.

That should have been a piece of cake, one would think, if *Schechter* had been or been understood as a one-dimensional “intelligible principle” case: re-write NIRA’s Section 1 (and dare the Court to do its thing again). On Daniel Ernst’s account, a few hapless souls contemplated that course of action: “[T]he NRA was prepared to tell Congress that with adequately drafted standards ‘all could go on as before.’”¹⁸¹ But that brilliant piece of advice came *before Schechter*, from agency lawyers who did not exactly cover themselves in glory in the actual engagement. The Roosevelt Administration’s and Congress’s response to *Schechter* reflected a far more sophisticated and accurate comprehension of the Court’s jurisprudence.

As noted, *Panama Refining* and *Schechter* had endorsed—not in a “never mind” mode but as integral parts of the holdings and opinions—prior decisions governing the ICC, the FTC, the SEC, and the FCC. Those statutes and their embrace by the *Schechter* Court provided a road map. President Roosevelt’s lawyers used that map

¹⁷⁸ DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE* 56-69 (2014); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 109-114 (Harvard UP 2000); Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 B.Y.U.L. Rev. 147, 189 (2020).

¹⁷⁹ Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 Yale L.J. 816 (1936), exemplifies that genre. In a tone reminiscent of some of the contemporary “administrativist” literature, the author warns that *Schechter*’s insistence on regularized administration “can have no other effect than to render Congress and the President impotent to deal with the conditions designed to be regulated under the recovery act,” *id.* at 835. In *Schechter*, he avers, Chief Justice Hughes expressed “his feeling of resentment toward the modern tendencies in the development of administrative law” and joined “with ardor such critics of recent methods in public administration as the Lord Chief Justice of England, who characterized the modern tendencies in administrative law as *The New Despotism*, and Professor Allen of Oxford University who styled the same tendencies as *Bureaucracy Triumphant*,” *id.* at 836 (footnotes omitted). Indeed.

¹⁸⁰ Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in, *FEDERAL COURTS STORIES* (VICKI C. JACKSON & JUDITH RESNICK, EDS (FOUNDATION PRESS 2010) 359, 386-387.

¹⁸¹ ERNST, *NIGHTMARE* at 60.

to draft the National Labor Relations Act (NLRA).¹⁸² In the sure-to-come legal test, a collection of consolidated cases known as *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the NLRA not only against a Commerce Clause challenge but also against due process and separation-of-powers attacks.¹⁸³ And while the Commerce Clause issue produced dissension among the Justices, the nondelegation issue did not even merit mention in any of the opinions—why? Because the NLRA checked all of *Schechter*’s boxes. Daniel Rodriguez and Barry Weingast have ably summarized key differences between the NLRA and the NIRA:

(1) [The NLRA] defined a number of unfair labor practices that by nature interfered with the meaningful enjoyment of the organizing and bargaining rights created in the law, imposing clear and uncontestable constraints on employers; (2) it provided a Board-controlled process for election of union representatives, effectively constraining employees as well; (3) it provided the NLRB with the power and independence necessary for effective enforcement of those constraints upon both workers and their employers; (4) it cleared up lines of authority so the president could not intervene on an ad hoc basis [...]; and, (5) it created a regulatory process that the Supreme Court held constitutional and hence legally binding on employers.¹⁸⁴

Just so. The NLRA required adjudications to proceed through notice and a hearing on the record. The NLRB had to seek judicial enforcement of its orders, and “all questions of constitutional right or statutory authority” were subject to judicial review.¹⁸⁵ Note well: none of those features is reducible to a bare “intelligible principle.” Questions that we now relegate to Administrative Law or Federal Courts remained part of the constitutional nondelegation mix. And they remained part of the mix not only in *Jones & Laughlin* but also in other cases decided in *Schechter*’s early aftermath, including cases that in later decades and to this day are cited, routinely but wrongly, as bare-bones “intelligible principle” cases.

In a remarkable opinion, Justice Stephen Markman of Michigan’s Supreme Court has called attention to that fact.¹⁸⁶ In cases before and even after *Schechter*, he notes,

¹⁸² ERNST, *supra* note 181, at 67–69.

¹⁸³ NLRB, 301 U.S. at 46-48.

¹⁸⁴ Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 B.Y.U.L. Rev. 147, 195 (2020).

¹⁸⁵ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937).

¹⁸⁶ *In re Certified Questions*, 958 N.W.2d 1, 17–26 (Mich. 2020).

the Court performed a whole-of-statute analysis and, in sustaining the delegations at issue, highlighted legal and institutional constraints that served to bound what might otherwise look like a worrisome scope of agency discretion. What might those be? Why, the stuff you encounter when you read *Schechter* with an open mind, unblinkered by textualist obsessions or for that matter *Chevron*-style “delegation is intended” distractions. The statute’s conferral of *specific* rulemaking authority, for instance, as distinct from its general authority to act with the force of law.¹⁸⁷ The agency’s limited, defined portfolio; its relative insulation from raw political control and favoritism; its regularized procedures; judicial review provisions. That remained the dominant understanding throughout the early 1940s. For the sake of brevity and at the risk of suppressing important nuances, a single illustrative example must suffice.

*NBC v. U.S.*¹⁸⁸ is routinely cited for the proposition that a general grant of rulemaking authority, conferring on the FCC power to issue rules and regulations for the broadcasting industry “as public convenience, interest, or necessity requires,” satisfies an “intelligible principle” standard (and thus, anything will do).¹⁸⁹ That, though, is every bit as facile and false as the “intelligible principle” reading of *Schechter*. The petitioners challenged the FCC’s regulations governing contractual arrangements between “chain broadcasters” (*i.e.*, networks) and local stations. The networks attacked the regulations on numerous grounds (arbitrary and capricious; beyond statutory authority)—*but not* on straight-up nondelegation grounds.¹⁹⁰ Instead, they argued that *if* the Federal Communications Act’s grant of general rulemaking authority were read to authorize the regulation of industry structure, *then* it would pose nondelegation problems. Justice Frankfurter’s opinion for the Court addressed the question in those terms.¹⁹¹ His answer was *not*, “public interest [etc.]”

¹⁸⁷ See, e.g., *Batterton v. Francis*, 432 U.S. 416 (1977). On the importance of this distinction, see Hickman, *supra* note 5, at 1106–13; Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 46 (2002).

¹⁸⁸ *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943).

¹⁸⁹ See, e.g., *Gundy*, 139 S. Ct. at 2129; *Whitman*, 531 U.S. at 474; *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta*, 488 U.S. at 374, 378.

¹⁹⁰ To my mind, that course of action would have provided grounds for disbarment. In two pre-*Schechter* cases, the Court had sustained the statute against such challenges: *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932). As noted, *Schechter* had affirmed those decisions.

¹⁹¹ *NBC*, 319 U.S. at 209–10.

is good enough. Instead, he engaged in an elaborate “contextual”¹⁹² analysis of the statute as a whole, seeking to determine whether the general rulemaking grant could reasonably be read to encompass the authority to promulgate the regulations at issue. That, Justice Frankfurter explained with copious citations to pre-*Schechter* cases, had been the understanding all along. Based on that analysis, coupled with an account of the agency’s thorough rulemaking process and a strikingly *State-Farm*-ish review of its individual regulations,¹⁹³ Justice Frankfurter concluded that the FCC did possess the claimed authority. Justice Murphy’s dissent, joined by Justice Roberts, asked the same question and rattled through the same analysis, though obviously with a different result. Read the statute as a whole, Justice Murphy urged: the general grant of rulemaking authority must refer to considerations of spectrum interference and the like; it cannot encompass an authority to revamp the industry structure (and if Congress had meant that, it should and would have said so).¹⁹⁴ Reasonable minds can differ as to who had it right. They cannot differ on the observation that the case simply does not stand for the proposition for which it is now routinely cited.¹⁹⁵

B. Disintegration

All that gave way, eventually, to an emaciated intelligible principle. How, when, and why did that happen? Hard though it is to pinpoint a process of erosion on a single Supreme Court decision, the first case that unmistakably signals a new understanding of nondelegation is the Court’s 1943 decision in *Yakus v. United States*.¹⁹⁶ The case presented the last of many constitutional challenges to the 1942

¹⁹² *Id.* at 216 (explaining that the requirement of “public interest, convenience or necessity” should be “interpreted by its context, by the nature of the radio transmission and reception, [and] by the scope, character, and quality of the services”) (quoting *Fed. Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933)).

¹⁹³ *Cf. Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–51 (1983); and compare *NBC*, 319 U.S. at 196, 198–209.

¹⁹⁴ *NBC*, 319 U.S. at 228–30 (Murphy, J., dissenting).

¹⁹⁵ *NBC* was what we now call a “major question” case. Put the opinions next to *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–14 (2022): the parallels are striking.

¹⁹⁶ At a workshop presentation of an earlier version of this Article, several participants urged me to make my position on *Yakus* unmistakably clear. Very well, then: *Ceterum censeo Yakus esse delendum*.

My reading of the case is at variance with the conventional judicial and scholarly understanding. At times, the Supreme Court has sought to distinguish *Yakus* as a wartime case. *See, e.g.*, *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (Powell, J., concurring); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Whitman*, at 474. In delegation cases, however and alas, the Court has often cited *Yakus* as good authority. *See, e.g.*, *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 378–79 (1989). *See also Gundy v. United States*, 139 S. Ct. 2116, 2136 & n.39 (Gorsuch, J. dissenting) (characterizing *Yakus*, erroneously, I believe, as consistent with traditional notions of nondelegation). Among scholars, even the usually hard-nosed Richard A. Epstein has embraced that understanding, albeit

Emergency Price Control Act (EPCA),¹⁹⁷ which authorized the Executive—more precisely, an Office of Price Administration (OPA) established under the Act—to control prices for just about every commodity across the entire economy. Unlike congressional enactments of the post-*Schechter* years that reflected the teaching of that case, the EPCA bore a conspicuous, far-from-coincidental¹⁹⁸ resemblance to the NIRA. Even so, the *Yakus* Court upheld the EPCA against the petitioners’ nondelegation challenge, their due process challenge, and other arguments. In an opinion authored by Chief Justice Harlan Fiske Stone, the Court did not overrule *Schechter in haec verba*. Instead, it relied on dubious arguments to distinguish the case into oblivion, principally by way of carving up the EPCA and the petitioners’ challenge into separate pieces. It is chiefly this disaggregation of *Schechter*’s nondelegation understanding that produced the meaningless “intelligible principle” test.

EPCA’s Section 1 provided a broad statement of congressional purposes, including “stabiliz[ing] prices”; protecting the “standard of living” of “persons with relatively fixed and limited incomes”; promoting “fair and equitable wages”; permitting cooperation between producers and the government; ensuring that defense appropriations were not “dissipated by excessive prices”; and “eliminat[ing] and prevent[ing] profiteering, hoarding, manipulation, speculation, and other disruptive practices.”¹⁹⁹ Section 2 authorized the Administrator the power to issue “generally fair and equitable” price controls, with binding force, “[w]henever in [his] judgment . . . the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.”²⁰⁰

How does this scheme differ from the NIRA? Surely, not the grab-bag of “purposes,” and surely not the scope of administrative discretion. Two differences come to mind. *First*, the EPCA—unlike the NIRA—established an administrative machinery (the OPA), instead of authorizing “the President” and unnamed subordinates. *Second*, while the NIRA authorized codes that regimented private transactions on every conceivable margin, the EPCA authorized binding regulations on only one: price.

grudgingly and with the caveat that “there is much to be said on the other side.” EPSTEIN, DUBIOUS MORALITY at 69. Indeed there is. See Conde & Greve, *supra* note 22, at 820–24; and discussion *infra* nn. and accompanying text.

¹⁹⁷ Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23.

¹⁹⁸ Conde & Greve, *supra* note 22, at 827–35.

¹⁹⁹ Emergency Price Control Act of 1942 § 1(a), 56 Stat. at 23–24.

²⁰⁰ *Id.* § 2(a), at 24–25.

Both those distinctions, however, are questionable.²⁰¹ In any event, the *Yakus* majority did not draw them. Instead, the Court’s delegation analysis established the pattern of later opinions and decisions: conclusory statements to the effect that the delegated power was no broader than that conferred under statutes that had been upheld in earlier cases; string cites to those cases, without any reference to their limited holdings; followed by general averments to the effect that the choice between direct regulation and administrative decisionmaking must be left to Congress.²⁰² The Court’s discussion of the NIRA and *Schechter* occupies a single paragraph:

The [EPCA] is unlike the National Industrial Recovery Act [...], which proclaimed in the broadest terms its purpose ‘to rehabilitate industry and to conserve natural resources.’ It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated.²⁰³

The paragraph is a template for the Court’s later treatment of *Schechter*; and none of it is correct. The NIRA, as seen, had authorized the Executive to pick and choose among numerous purposes; so, too, did the EPCA.²⁰⁴ NIRA codes had to be “fair”; it is difficult to see what the EPCA’s requirement of “fair and equitable” adds. And the averment that *Schechter* hung on *private* delegation is demonstrably false.²⁰⁵ Note well, moreover, all that drops out in the *Yakus* Court’s conclusory paragraph. *Yakus* cavalierly cites pre-*Schechter* cases as supporting its holding—without any mention that *Schechter*, too, had acknowledged those cases but explained that they

²⁰¹ As for the former distinction: long before *Schechter*, the Roosevelt Administration had established an OPA-style agency (the National Recovery Administration). As for the latter: the OPA learned very quickly that the suppression of competition on one margin (price) prompts competition on another (product quality) and therefore went from controlling beef prices into the business of regulating butchery practices and meat cuts. *Conde & Greve*, *supra* note 22, at 809–11, 831–35.

²⁰² See *Yakus*, 321 U.S. at 426–27 (citing *NBC v. United States*, 319 U.S. 190 (1943); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Mulford v. Smith*, 307 U.S. 38 (1939); *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304 (1934); *New York Cent. Securities Corp. v. United States*, 287 U.S. 12 (1932); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163 (1919); *Field v. Clark*, 143 U.S. 649 (1892)). Not one of these cites is accurate.

²⁰³ *Yakus*, 321 U.S. at ____.

²⁰⁴ See the recitation of “purposes,” *supra* note ____ and accompanying text.

²⁰⁵ *Supra* notes ____ and accompanying text.

differed in important respects.²⁰⁶ And, what, pray tell, of *Panama Refining*? A Court that seeks to explain why the NIRA’s Section 9(c), limited to a single industry and subject to a discernable standard, flunks a nondelegation test while the EPCA does not has work to do. In *Yakus*, an opinion teeming with case cites and authored by a Justice of great ability to synthesize seemingly discordant decisions, *Panama Refining* just disappears.

Consider, too, the question of agency procedures and judicial review. The *Schechter* Court, as noted, had distinguished the NIRA’s delegation arrangement from the statutes governing the ICC, the FTC, and the FCC on several grounds, foremost including the observation that all those agencies—unlike the NRA—operated under regular procedures. Moreover, the agencies’ decisions were either subject to enforcement in an Article III court or at least to direct judicial review. In short, to the *Schechter* Court, nondelegation and due process considerations were of a piece.²⁰⁷ The *Yakus* majority, in contrast, treated the EPCA’s administrative and judicial review provisions as separate issues.²⁰⁸

Those provisions were plainly designed to obviate timely and effective relief.²⁰⁹ The EPCA required notice and some sort of hearing;²¹⁰ but then, that had also been true under the NIRA.²¹¹ The EPCA required OPA to publish a “statement of considerations” alongside a regulation; however, it did not require OPA to make any reviewable record findings.²¹² Administrative protests could be filed within sixty days, and OPA denials of such protests had to be accompanied by a statement of reasons. Once OPA denied a protest, the challenger could bring suit in the

²⁰⁶ *Supra* nn and accompanying text.

²⁰⁷ The point is even clearer in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). It is hard to say whether that case was decided as a “nondelegation case” or a “due process case.” See Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 973–80 (2014). The best answer may be that it did not really matter to the Hughes Court, which was not terribly concerned with putting constitutional precepts into little boxes.

²⁰⁸ The delegation issue is discussed and disposed of in Part I of the Court’s opinion and the procedural and judicial review questions in Parts II and III. *Yakus* at 426–443.

²⁰⁹ *Cf. Yakus* at 474 (Rutledge, J., dissenting) (criticizing EPCA’s “short-cut proceedings, trimmed almost to the bone of due process”).

²¹⁰ Emergency Price Control Act of 1942, Pub. L. No. 77-421 § 203(a), 56 Stat. 23, 31.

²¹¹ See *Schechter*, 295 U.S. at 525 (discussing the procedural requirements of the NIRA).

²¹² Emergency Price Control Act of 1942 §2(a). Recall that the NIRA, too, had required some sort of “findings”; and that the *Schechter* Court dismissed the supposed statement as pretextual. *Supra* note ____ . Relying on that holding, the *Yakus* plaintiffs pointed out that OPA’s “statement of considerations” involved no actual findings of fact and that the considerations were mere statements of opinion parroting the language of the statute. Good try; epic fail. Conde & Greve, *supra* note 22 at 848.

Emergency Court of Appeals, which could set aside OPA’s regulations if they were “arbitrary or capricious” or “not in accordance with law.”²¹³ However, the OPA had broad discretion to delay its decision on a protest even while it brought suits to enforce its regulations in court.²¹⁴ In the Emergency Court, regulated parties had no opportunity to present additional evidence—even while bearing the burden of proving that the challenged regulation was *not* “generally fair and equitable” or did *not* promote any of the manifold purposes of the Act. The only available remedy was a remand to the agency. All the while, OPA regulations remained binding in the courts even in criminal cases: the EPCA made federal as well as state courts available for the enforcement of OPA orders and regulations, while providing that the validity of the regulations could not be “drawn into question” in any of those courts.²¹⁵

The *Yakus* majority broke that scheme, too, down into its component parts. Surely, there could be no complaint against administrative procedures of which the petitioners had failed to avail themselves. Surely, Congress could lodge exclusive jurisdiction over challenges to agency regulations in a single appellate court. And surely, it could make the courts available for the enforcement of administrative regulations and orders. The concern that the *combination* of those mechanisms might yet pose constitutional problems is wholly absent from the opinion for the Court.²¹⁶ Likewise missing is any attention to the actual operation of the statute as a whole, or for that matter any acknowledgment that the scope of permissible delegation—as embodied in the agency’s statutory grant of authority—might have something to do with the agency’s operation. All that remains of the delegation analysis is the question of whether the statute contains *some* standard to which the administrator must conform.²¹⁷ And the answer to that question is always “yes.”

In an exasperated dissent, Justice Roberts observed that *Schechter* had been effectively overruled.²¹⁸ It is hard to disagree with that assessment. It is important to recognize, though, that the case did not turn on the textual details of the NIRA’s and

²¹³ Emergency Price Control Act of 1942 §203(a)–(b), at 31. The Emergency Court of Appeals, with exclusive jurisdiction over challenges to OPA regulations, had been created by the EPCA.

²¹⁴ OPA made ample use of that discretion. *See* Conde & Greve, *supra* note 22, 830-831.

²¹⁵ Emergency Price Control Act of 1942, §§ 204(d), 205(c), at 32–33.

²¹⁶ It does appear prominently in Justice Rutledge’s dissent. For discussion *see* Conde & Greve, *supra* note 22, at 857–59.

²¹⁷ *Id.* at 425–26.

²¹⁸ *Id.* at 452.

the EPCA’s authorizing language. The majority’s parsing served the principal purpose of distracting from Albert Yakus’s one central claim: before a citizen may be sent to jail for violating a generally applicable rule of private conduct originating in an administrative agency, that person must have some effective means of testing, in an independent court, the validity of that rule vis-a-vis the congressionally enacted statute said to authorize it. You can argue that a denial of that principle unconstitutionally empowers administrative lawmaking: that is a *Schechter*-style nondelegation framing. Or, you can argue that it unconstitutionally eviscerates judicial review: that is a *Crowell*-style Article III framing. Or, you can say that it unconstitutionally subjects citizens to arbitrary, tyrannical government: that is a Due Process framing. In any given case, one line of argument may be more persuasive than another. None of them will work, however, in a court that cannot or will not hold the constitutional pieces together.

IV. *Schechter*’s World, and Ours

A. Prolegomena

The rehabilitation of a tenable nondelegation doctrine, I urged in the Introduction, requires a re-discovery of the true meaning and import of *Panama Refining* and *Schechter*. What, then, might a here-and-now *Schechter*-style nondelegation doctrine look like?

In urging that inquiry, I do not have in mind some set of hard-and-fast rules or propositions to be derived from those cases, nor the precise arguments or the form in which they were articulated. What I have in mind, rather, is the conceptual rule-of-law universe in which that Court operated. That recovery project is akin to teaching a lost language. However, it may be possible to explicate *Schechter*’s constitutional premises and presumptions in contemporary jurisprudential terms and, that done, to transport them into the nondelegation landscape.

Justice Thomas’s and Justice Gorsuch’s nondelegation opinions, discussed in Part I, can be understood to contemplate that kind of project. They seek to limit the “intelligible principle” to its original domain of conditional delegations, as distinct from the congressional enunciation of primary standards: that distinction, we have seen, finds ready support in *Panama Refining* and *Schechter*. Both Justices seek to elucidate the limits of such delegations by examining the reasoning of pre-New Deal

cases, and both zero in on the nature of (non)delegable powers: those orientations, too, find ready parallels in the Hughes Court’s decisions. On a less doctrinal but nonetheless instructive note, the Court’s nondelegationists abjure any intention of laying waste to the administrative state, while nonetheless insisting on constitutional boundaries:²¹⁹ echoes, again, of *Panama Refining* and *Schechter*.

I hope to have shown, though, that there is more to learn from those cases. This Part attempts to develop a few *Schechter*-ian propositions. Section B explores the “whole-Constitution” theme. The Founders, too wise to leave us with a clutter of formal clauses, provided us with a coherent constitutional scheme. That scheme allows for give, in ways that test formalist barriers—but not to the point of permitting Congress to overrun the system. Admittedly, it is difficult to capture that general proposition or orientation in a single legal standard. However, the Roberts Court has repeatedly deployed a form of argument that re-approximates the *Schechter* understanding in substance and quite arguably in spirit: two (or more) boundary-pushing legislative contrivances that might pass muster standing alone may yet, in combination, amount to a constitutional violation.²²⁰ To date, that form of argument has been applied in separation-of-powers cases dealing with presidential appointments and removal.²²¹ However, it applies easily and elegantly to the nondelegation context.

Section C provides illustrative examples to that effect, drawing on recent and pending appellate and Supreme Court separation-of-powers decisions. Those decisions make little sense in the textualist-formalist categories in which they are proffered. They make all the sense in the world in *Schechter*-style nondelegation terms, and they rest on the same sensibilities and intuitions. Those are never quite spelled out, and they are never connected to one another or for that matter a coherent jurisprudence. But they could be connected, and they form points of contact with *Schechter*’s world.

²¹⁹ See *infra* notes ___ and accompanying text.

²²⁰ Cf. *Association of American Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013) (“[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute.”) *vacated and remanded on other grounds*, 135 S. Ct. 1225 (2015).

²²¹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Seila Law*, 140 S. Ct. 2183; *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

B. Delegation Rights and Wrongs

On the organizing principles of the Constitution—federalism, or the separation of powers—neither formalism nor unconstrained pragmatism will carry you through. The need for some form of common-law-ish “pragmatic formalism”²²² becomes obvious when a Court—the Hughes Court, the Roberts Court—finds itself confronted with innovative congressional enactments that test the constitutional boundaries. In truth, though, the need for a doctrinal middle ground is a constant; and on the authority of *M’Culloch*, that mode of argument is not only legitimate but constitutionally compelled. The question is how to anchor the doctrines that govern this universe in the Constitution.

The *Schechter* Court struggled with that predicament time and again. In *Crowell*, *Panama Refining*, *Schechter*, and other cases of that era, formalist pronouncements alternate with forthright acknowledgments of Congress’s legitimate interest in providing for administrative expertise and speed. It is easy to denounce that posture as schizophrenic and unstable. Then again, it is hard to see the alternative; and the modern Court’s formula—grim formalism when a specific constitutional clause seems to lie at hand,²²³ “anything goes” when it does not; bluster or evasion when those orientations meet head-on²²⁴—is yet more schizophrenic.

That said, *Schechter*-style analysis might still cause discomfort. As explained, the Court invoked a multitude of features that distinguished the NIRA from regulatory regimes and institutional arrangements that had previously passed muster. The fact that all the distinctions cut in one direction makes *Schechter* look convincing. By that same token, Congress’s decision to fix all the shortcomings in the NLRA makes the nondelegation piece of *Jones & Laughlin* look easy. In in-between cases, though, the analysis might come to look like a freewheeling “totality of the circumstances” test or perhaps a “mosaic theory” of the Constitution.²²⁵

²²² Redish, *supra* note 8.

²²³ See *INS. v. Chadha*, 462 U.S. 919 (1983).

²²⁴ See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998). As written—*i.e.*, as a formalistic interpretation of U.S. Const. Art I Sec 7—the case cannot possibly mean what it seems to be saying. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM L. REV. 265, 313–18 (2013). Plainly, the case was a nondelegation case in drag. See *Clinton*, 524 U.S. at 480–89 (Breyer, dissenting); *id.* at 463–69 (Scalia, concurring in part and dissenting in part). Analyzed in those terms, however, the case obviously goes the other way: the misnamed “Line Item Veto Act” contained intelligible principles galore.

²²⁵ Cf. *Consumer Fin. Prot. Bureau v. ITT Educ. Servs.*, 2015 U.S. Dist. LEXIS 28254, *29-30 (S.D. Ind. Mar. 6, 2015) (dismissing, and mocking, the defendant’s nondelegation challenge, proffered much along the lines suggested below, as a “mosaic theory” of the Constitution).

The tempting response to that rote formalist challenge is a defensive crouch: At least, it's not a balancing test. At least, every one of the *Schechter* lines of inquiry is directly traceable to the Constitution's text and structure. And in any event: so long as we agree that the Constitution necessarily implies *some* nondelegation doctrine, a doctrine that might leave rock-ribbed formalists a bit queasy is preferable to the search for an elusive one-dimensional standard that is "no doctrine at all."²²⁶ All that, I think, is right. The easier path, though, is to show that the Roberts Court's "two (or more) constitutional 'rights' may yet make a constitutional wrong" analysis hearkens back to *Schechter*.²²⁷

Congress, the Court has held, may limit the President's authority to remove principal officers, on the authority of *Humphrey's Executor*.²²⁸ Congress may also protect inferior officers against removal, on the authority of *Morrison v. Olson*.²²⁹ However, it may *not* combine those two layers of protection, on the authority of *Free Enterprise Fund*²³⁰—the first modern Supreme Court decision and opinion to deploy a "two rights may make a wrong" analysis in the separation-of-powers field. In *Seila Law*,²³¹ the Court doubled down. Congress, *Seila Law* says, may of course create single-director agencies. It may also create multi-member commissions with removal protections: we know this because we have read *Humphrey's Executor*. It may *not* establish a single-director agency, such as CFPB, whose principal enjoys removal protection—surely not when that agency commands a vast part of the American economy and is freed from fiscal controls,²³² and not even when a non-removable director agency paddles in a regulatory backwater.²³³

Schechter is easily read through that prism. Even a very broad delegation might be acceptable, the case practically screams, so long as the agency exercises familiar-looking powers and operates with tolerably fair procedures and ample opportunities for regulated parties to obtain judicial review. Conversely, such safeguards may not be needed so long as the delegation remains more confined, to an area where private

²²⁶ Antonin Scalia, *A Note on the Benzene Case*, REGULATION 27, 28 (July/Aug 1980)

²²⁷ "Rights" is not quite the right word. "Things that we might be willing to tolerate for *stare decisis* or prudential reasons" is the intended meaning, here and in the remainder of this Article. Thanks to Todd Gaziano for flagging the point.

²²⁸ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

²²⁹ *Morrison v. Olson*, 487 U.S. 654 (1988).

²³⁰ *Free Enter. Fund*, 561 U.S. at 495–97 (2010).

²³¹ *Seila Law*, 140 S. Ct. 2183.

²³² *Seila Law*, 140 S. Ct. at 2202–05.

²³³ *Collins*, 141 S. Ct. at 1783–87.

rights and expectations seem less immediately threatened. Put a broad delegation together with a lack of procedural and judicial safeguards, in a domain where citizens' liberties are at stake: down goes the statute.²³⁴ This mode of analysis was cast aside in *Yakus*, never to re-appear in a subsequent nondelegation case. The Roberts Court's appointment and removal decisions offer an opportunity to overcome that unhappy legacy. Viewed in proper perspective, they deploy the same form of argument—

or do they? Perhaps, the removal decisions are predicated on a syllogism that does not readily translate into the delegation context. The Constitution requires a unitary executive, the argument goes. The power to command the executive branch requires free presidential reign over subordinates. Therefore, there is an executive power to appoint and remove, subject only to the textual constraints of Article II. We the Court have made two exceptions over time, for good or ill. However, Congress may not combine those exceptional devices, lest it infringe upon the Vesting Clause and/or the Take Care Clause of Article II.²³⁵

Even on its own terms, however, the syllogism fails to convince.²³⁶ More broadly, it is hard to defend the removal power baseline on formalist grounds.²³⁷ John Harrison, for one, has argued that the supposed baseline is a mirage.²³⁸ *The* executive power that Congress may not abrogate or compromise, Harrison argues, is the power to see that the laws are faithfully executed and to set and implement policy within the confines of the Constitution and duly enacted statutes. To that end, the executive must be unitary, as the advocates of an unchecked removal power insist. However,

²³⁴ This particular illustration of a “two-rights-yet-wrong” analysis, while central to the development of administrative law during the Taft Court and the Hughes Court, is unlikely to play much of a role in a contemporary scenario. The question was solved (in a manner of speaking) by means of the Administrative Procedure Act. Nowadays, even the most expansively authorized agency is bound to operate under the commands of the APA and a robust presumption of judicial reviewability. However, other salient illustrations of the analysis come readily to mind. *See infra* IV.C.

²³⁵ *Free Enter. Fund*, 561 U.S. at 495–97; *Seila Law*, 140 S. Ct. at 2202–05.

²³⁶ *E.g.*, Judge (then Professor) Neomi Rao noted that the remedy afforded by the *Free Enterprise Fund* Court—the removability of PCAOB members by the SEC—did nothing to cure the perceived constitutional defect of the “dual layer” removal protection scheme (to wit, the broken chain of command between the President and his subordinates). Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 *FORDHAM L. REV.* 2541, 2257–58 (2011).

²³⁷ In a dissenting opinion that became a blueprint of sorts for the Supreme Court's decision and opinion in *Seila Law*, then-Judge Kavanaugh proffered a conspicuously more pragmatic, functionalist version of the analysis. *See PHH Corp. v. CFPB*, 881 F.3d 75, 164–200 (2018) (*en banc*) (Kavanaugh, J., dissenting);

²³⁸ John Harrison, *The Unitary Executive Without Inherent Presidential Removal Power* (available at <https://administrativestate.gmu.edu/wp-content/uploads/2022/08/Harrison-Revised-FINAL.pdf>)

the removal of derelict or recalcitrant officers is only one way of protecting that arrangement. It is neither constitutionally required nor inherent in the office; and it is neither necessary nor sufficient to ensure the requisite degree of presidential control and direction.²³⁹ Moreover, the removal power is subject to presidential abuse, of a kind that Congress may worry about and guard against. Thus, removal restrictions may in fact be constitutional, provided that they do not unduly compromise the chief executive's core powers. Whether or not removal restrictions have that effect, Harrison urges, is context-dependent. For example, the author insists that *Morrison v. Olson* was wrongly decided—not because a removal restriction for inferior officers is *per se* unconstitutional, but rather because a separate provision of the statute authorized the Independent Counsel to set her own policy, at variance with her nominal supervisors at the Department of Justice.²⁴⁰ Congress might provide for an inferior officer with policy-making authority, provided she remains removable at will; or, it might protect an inferior officer against removal at will, provided that the officer has no authority to make policy. It may not do both at the same time.

Harrison's analysis provides a ready analogy to the nondelegation question. Just as there is an executive power that may not be unduly compromised by Congress, so there is—or would be, under a neo-*Schechter*-ian analysis—a (set of) legislative power(s) that Congress may not unduly delegate.²⁴¹ In either case, a break with a constitutionally implied baseline rule (a “good cause” removal provision or a delegation of broad rulemaking authority, respectively) need not be fatal. But it might well be—if, combined with another salient feature of the same regulatory regime, it would unduly derogate from the constitutional baseline.

²³⁹ But see Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014).

²⁴⁰ Harrison, at 94-95. To be clear: while embracing Professor Harrison's mode of separation-of-powers analysis, I remain skeptical of some of his conclusions. His understanding of *Morrison* seems doubtful; and his claim that Congress may under certain circumstances condition presidential removal on the Senate's consent, *id.* at 85, strikes me as almost surely wrong. For present purposes, however, those disagreements matter not.

²⁴¹ The confident sentence in the text hides certain problems. For one thing, Harrison readily volunteers that a different understanding of the executive power—say, of the executive as a congressional errand boy or as an incarnation of the union's sovereignty, *Curtiss-Wright* style—would entail very different doctrinal consequences. By that same token, different understandings of legislative powers would produce different results under a neo-*Schechterian* analysis. For another thing, Harrison notes that his analysis yields a standard, not a formal rule. *Id.* at 71. That, too, would be true in the nondelegation context. However, I fail to see how any plausible separation-of-powers theory could avoid those difficulties. They just come with the territory.

Schechter Poultry would be a perfectly fine cite in support of that proposition. And one can easily think of cases, agencies, and regulatory regimes that would have lent themselves, have already lent themselves, or would prospectively lend themselves to a two-rights-yet-wrong nondelegation analysis. A few examples must suffice.

C. Delegation in Drag

The best illustration of the point at issue is the CFPB, established in the wake of the 2008 financial crisis and, ever since, the subject of “heavy” separation-of-powers litigation.²⁴² To date, courts have uniformly rejected direct nondelegation challenges to the agency’s authority, substantially on the grounds that Congress’s delegation of rulemaking and enforcement authority, while undoubtedly broad, still conforms to an “intelligible principle” requirement.²⁴³ However, the Bureau has fared poorly in separation-of-powers cases involving presidential removal powers and the agency’s funding. And those cases are best viewed as nondelegation cases.

The principal case in point, of course, is *Seila Law*. As noted, the Court’s holding rested on a two-rights-one-wrong analysis. Moreover, it invoked arguments and considerations that sound in nondelegation. Perhaps in recognition of the fact that the unitary executive syllogism and its supposed conclusion—no removal restriction for principal officers of single-director agencies—is unconvincing,²⁴⁴ Chief Justice Roberts’ opinion supplied a wide range of seemingly extraneous considerations. Among them are the novelty of the CFPB removal regime,²⁴⁵ the breadth of the agency’s mandate,²⁴⁶ and the fact that the agency’s self-funding arrangement—it is financed not through congressional appropriations but through the agency’s request

²⁴² CFSA at 23 (“the constitutionality of the Bureau has been heavily litigated.”)

²⁴³ See, e.g., *Cnty. Fin. Servs. Assoc. of Am.*, 51 F.4th at 634 (5th Cir. 2022) (“Given that the Supreme Court ‘has over and over upheld even very broad delegations,’ *Gundy*, 139 S. Ct. at 2129, the Act’s delegation of rulemaking authority to the Bureau passes muster.”), *cert. granted*, No. 22-448, 2023 WL 2227658 (Feb. 27, 2023). Within the framework of a one-dimensional nondelegation analysis, that is surely the right result. Congress did in fact undertake to define or at least circumscribe open-ended statutory terms, such as the Bureau’s authority to regulate “abusive” financial practices. 12 U.S.C. § 5531(b) (authorizing the Bureau to prescribe rules regulating practices that are “unfair,” “abusive,” or both). Moreover, courts interpreting that provision could and did do what the *Schechter* Court could not: construe the term in analogy to a cognate statute. CFSA, at ____.

²⁴⁴ Foremost, it is far easier for the President to ride herd on a single administrator than on a multi-member board. Justice Kagan’s dissent duly noted the obvious point: *Seila Law*, 140 S. Ct. at 2242 (Kagan, J. dissenting).

²⁴⁵ *Seila Law*, 140 S. Ct. at 2200–01.

²⁴⁶ *Seila Law*, 140 S. Ct. at 2193, 2200.

of transfers from the Federal Reserve²⁴⁷—puts it beyond the budgetary control of the Chief Executive and the Congress itself.²⁴⁸

One can reasonably ask whether those passages were essential to the holding; mere atmospherics; or perhaps a signal to the appellate bar to attack the CFPB’s authority on broader separation-of-powers grounds. For the sake of argument, though, start the analysis not at the removal end but rather at the nondelegation end: the holding makes eminent sense.

It is one thing, the argument from the *Schechter* playbook would go, for Congress to delegate broad rulemaking authority to an independent agency that operates under institutional constraints that are reasonably calculated to enhance agency expertise and regulatory predictability over time. It is a very different thing to entrust that authority to a single non-removable director who is statutorily unleashed from internal constraints and, for that matter, from budgetary constraints and congressional oversight. At that point, delegation has sprung its bounds and “run riot”—not for want of a magic-words “intelligible principle,” but on account of the over-all arrangement. To put the same point in textualist constitutional terms: at variance with Article I, Section 8, Clause 18, Congress’s CFPB arrangement did not carry anything into execution. It simply enshrined the will of a temporary congressional majority and protected the statutory product of that will not just against presidential control but also against budgetary and oversight controls by any future Congress.²⁴⁹ And *that* kind of delegation of *that* kind of power is neither necessary nor proper. In fact, the Constitution forbids it. On this theory, the removal

²⁴⁷ *Seila Law*, 140 S. Ct. at 2203–04.

²⁴⁸ *Seila Law*, 140 S. Ct. at 2204.

²⁴⁹ Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy With Removal Protection*, 125 HARV. L. REV. 1822, 1840–41 (2012). Ironically perhaps, Justice Breyer’s and Justice Kagan’s opinions in appointment and removal cases lend considerable support to this line of argument. Justice Breyer’s powerful dissent in *Free Enterprise Fund* acknowledged that removal limitations, imposed pursuant to the Necessary and Proper Clause, must actually help the executive to carry out the faithful execution of the laws. Removal restriction may serve that end by stabilizing private expectations, or “mast-tying.” *FEF v. PCAOB*, 561 U.S. 477, 522, 532 (2010). Apply that analysis to the CFPB regime: the agency’s director is untied from *any* mast. Similarly, Justice Kagan’s equally powerful dissent in *Seila Law* rightly notes that agency independence depends on many factors. *Seila Law*, 140 S. Ct. at 2237–38 (Kagan, J. dissenting). Just so, and convincingly so vis-à-vis the Court’s contrived formalism. Not so much against the analysis suggested in the text: if *everything* points to the creation of a rogue agency, why should “it depends” counsel against rather than for judicial intervention?

provisions become part of, rather than the focus of, the separation of powers analysis, and the case looks pretty easy. Rote cite to *Schechter*, out of here.²⁵⁰

A recent decision by the Fifth Circuit Court of Appeals, also involving an *n*-prong attack on the CFPB's authority, presents much the same picture.²⁵¹ Plaintiffs challenged a CFPB rule on multiple grounds, including APA violations and constitutional infirmities. The appellate court rejected all challenges but one: the CFPB's funding provisions, the plaintiffs contended and the court held, violate the Constitution's Appropriations Clause.²⁵² As in *Seila Law*, the court's analysis is unpersuasive when understood in formalist-textualist terms. As in *Seila Law*, the analysis makes perfect sense when understood in nondelegation terms.

As noted, the CFPB is not funded through congressional appropriations. Instead, the Bureau draws funds from the Federal Reserve, up to twelve percent of the Fed's operating budget.²⁵³ Intriguingly, the plaintiff-appellants eventually proffered their attack on that regime as a nondelegation claim. In a footnote, the appellate court rejected that challenge as untimely²⁵⁴ and instead focused its analysis on the plaintiffs' Appropriations Clause challenge. In substance, however, the plaintiffs' claim was in fact a nondelegation claim. It *had* to be; and upon inspection, the appellate court treated it accordingly.

Start with the obvious: the text of the Appropriations Clause does not support the appellate court's holding. The clause prohibits executive expenditures of unauthorized, non-appropriated funds, and it obligates Congress to authorize the expenditures by law. Congress, the appellate court insisted, must actually appropriate the funds, and the appropriations power is exclusive.²⁵⁵ All true. None of it, however, says anything about Congress's authority to establish agencies outside the constitutionally envisioned "all money into the Treasury, no money out of it except through appropriations by law" scheme.²⁵⁶

²⁵⁰ One could hang the synthetic argument just sketched on several of *Schechter*'s analytical strands, described *supra* note ____, and accompanying text. *E.g.*, "why": did Congress delegate for permissible reasons, or on pretext? I would confidently cite *M'ulloch* for that inquiry and cite *Panama Refining* in support.

²⁵¹ *Cnty. Fin. Servs. Assoc. of Am.*, 51 F.4th at 634, *cert. granted*, No. 22-448, 2023 WL 2227658 (Feb. 27, 2023).

²⁵² U.S. CONST., Art I, Sec 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law [...]").

²⁵³ *Seila Law*, 140 S. Ct. at 2193–94.

²⁵⁴ *Cnty. Fin. Servs. Assoc. of Am.*, 51 F.4th at 634 n.6.

²⁵⁵ *Cnty. Fin. Servs. Assoc. of Am.*, 51 F.4th at 635–37.

²⁵⁶ *Cf.* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

Congress’s authority to create self-funding agencies is well-established. The federal government teems with them, from PX stores to the U.S. Mint to the Federal Reserve; and none of those funding arrangements has been deemed to violate the Appropriations Clause.²⁵⁷ The Federal Reserve illustrates the basic logic. The “Money” in its accounts consists of fees that are levied by the Fed, on statutory authority,²⁵⁸ on its member-banks (and, in good times, of the proceeds of the Fed’s open-market transactions). The funds do not enter the Treasury unless and until the Fed transfers its annual gains (net of certain calculations) *to* said Treasury. Whatever money the Fed spends prior to such transfers cannot have been drawn *from* the Treasury, and therefore requires no appropriation by law.

What, on that logic, can possibly be wrong with the CFPB’s annual draw on the Federal Reserve? It proceeds in accordance with law (the CFPB’s organic statute) and, for what it may be worth, under an intelligible principle (the twelve percent limit). And, to repeat, the arrangement meticulously conforms to the constitutional text: the CFPB has no authority whatever to “draw” money from the Treasury—only from the Federal Reserve.

The appellate court’s opinion, if I understand it correctly, rejects that logic on three grounds. *First*, it seeks to establish the Appropriations Clause as a central element of a broader, exclusive congressional “power of the purse” and, indeed, a key element of the separation of powers.²⁵⁹ *Second*, the court resorts to a “two rights one wrong” argument. A self-funded agency is one thing. A self-funded agency that funds itself from another self-funded agency—and which is then, by statute, protected from congressional budgetary review—is a different beast, and a step too

²⁵⁷ See, e.g., *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 95 (D.C. Cir. 2018) (“Congress has consistently exempted financial regulators from appropriations: The Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency all have complete, uncapped budgetary autonomy.”), abrogated by, *Seila Law v. CFPB*, 140 S. Ct. 2183 (2020); *Taylor v. United States*, 49 Fed. Cl. 598, 602 (2001) (describing PX stores as a non-appropriated fund instrumentality, which is a federal government entity whose “monies do not come from congressional appropriation but rather primarily from [their] own activities, services, and product sales” (quoting *El-Sheikh v. United States*, 177 F.3d 1321, 1322 (Fed.Cir.1999) (alterations in original))). See also 12 U.S.C. §§ 481, 482 (Office of Comptroller of Currency); Federal Reserve Act, 12 U.S.C. §§ 243, 244; Coinage Act of 1792, 1 Stat. 246-251 (Mint).

²⁵⁸ 12 U.S.C. § 243.

²⁵⁹ *Cnty. Fin. Servs. Assoc. of Am.*, 51 F.4th at 637 (“The Appropriations Clause thus does more than reinforce Congress’s power over fiscal matters; it affirmatively obligates Congress to use that authority ‘to maintain the boundaries between the branches and preserve individual liberty from the encroachments of executive power.’”) quoting *CFPB v. All Am. Check Cashing*, 33 F.4th 218, 231 (Jones, J., concurring)).

far.²⁶⁰ *Third*, the overall institutional context matters: what kind of an agency, with what kinds of powers, are we looking at? A revolving-fund agency (such as PX stores) does not look like a surrender of the power of the purse or a menace to a free society. Combine self-funding with broad coercive agency powers: the analysis will look different. Concluding its analysis, the court writes that

[e]ven among self-funded agencies, the Bureau is unique. The Bureau’s perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies on offer. And none of [those] agencies “wields enforcement or regulatory authority remotely comparable to the authority the [Bureau] may exercise throughout the economy.” [...] Taken together, the Bureau’s express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority combine to render the Bureau “an innovation with no foothold in history or tradition.”²⁶¹

Agree or disagree with that disposition: either way, it has little to do with the Appropriations Clause. In substance, it is a nondelegation ruling. And the court’s best case in support is... Fill in the blank.

Conclusion

If a plausible nondelegation doctrine can be had, it must look beyond itself—away from a search for rules or a one-dimensional standard. It must instead look to the broader constitutional and institutional considerations that animated *Schechter*.

Those considerations were disaggregated and marginalized in the post-New Deal Court’s jurisprudence. The contemporary Court has sought to arrest and, perhaps, partially reverse that process by pushing back, as it were, on the margins, the better to re-impose meaningful constraints on the administrative state. On one side, it has

²⁶⁰ *Cnty. Fin. Servs. Assoc. of Am.*, 51 F.4th at 638–39 (“Congress did not merely cede direct control over the Bureau’s budget by insulating it from annual or other time limited appropriations. It also ceded indirect control by providing that the Bureau’s self-determined funding be drawn from a source that is itself outside the appropriations process—a double insulation from Congress’s purse strings that is “unprecedented” across the government [...] And where the Federal Reserve at least remains tethered to the Treasury by the requirement that it remits funds above a statutory limit, Congress cut that tether for the Bureau, such that the Treasury will never regain one red cent of the funds unilaterally drawn by the Bureau.”) (citation omitted).

²⁶¹ *Cnty. Fin. Servs. Assoc. of Am.*, 51 F.4th at 641–42 (internal citation and footnotes omitted).

mobilized brute formalism about appointments, removal, and bicameralism as a substitute for nondelegation concerns. On the other side, it has mobilized aggressive canons of statutory interpretation and administrative law, to the same end. Yet one wonders how durable and consequential those moves will prove, and one wonders about their constitutional plausibility. One would think that the Constitution's procedural provisions regarding appointments, appropriations, or presentment and its substantive allocations of powers are complements, not substitutes. And as for the canons, where again do they come from?

Aware of those difficulties, some Justices have sought to articulate a more coherent nondelegation doctrine. This Article has attempted to widen the lens for that search; to explicate precedents that support such a doctrine; and to identify strands in current jurisprudence that re-connect in substance, though never by way of affirmative citation, to *Schechter* and its constitutional world. All in all, the legal building blocks of tenable, constitutionally grounded nondelegation are readily available.

The full-blown emergence of such a doctrine presupposes a judicial willingness to temper clause-bound textualism and neo-Holmesian originalist positivism, enough so to make room for substantive constitutional thought and argument; as well as a recognition that the Court's doctrinal separation-of-powers improvisations eventually need a constitutional anchor. The tempering of positivist temptations, though, seems well underway; and by the lights of *Gundy*, the need for a constitutional anchor is acutely felt by a significant number of Justices. A closer look at *Schechter* and its legacy, I hope to have shown, would yield further progress in those welcome directions.