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REDISCOVERING THE NONDELEGATION DOCTRINE THROUGH A UNIFIED SEPARATION OF POWERS THEORY

Travis H. Mallen*

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

Justice Felix Frankfurter1

INTRODUCTION

The nondelegation doctrine has proven a seemingly unlimited topic for scholarly comment. In the last decade, no fewer than fifty articles have been published on the subject,2 though this figure is probably an understatement. Such scholarly attention is curious given the remarkable stability of the doctrine. Perhaps this is because of the courts' reluctance to invoke the nondelegation doctrine as a meaningful check on legislative or executive power.

Since 1928, when the Supreme Court first articulated the "intelligible principle" test as the measurement standard for delegated legis-

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1 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

2 Based on a search of Westlaw's database of "Journals & Law Reviews Combined" (JLR) in August 2005 for article titles from the last ten years which include the terms "intelligible principle," "nondelegation doctrine," or "delegation doctrine."
lative power, the Court has only invoked this test to strike down a federal law on two occasions, both times involving the same law. Even in those cases, the use of the intelligible principle test was either irreconcilable with subsequent application of the test or of questionable precedential value. Prior to the intelligible principle test, the Court had never struck down a federal law on the basis of the nondelegation doctrine.

Despite its lack of use, the nondelegation doctrine remains an acknowledged limit on legislative power flowing from the principles of separation of powers. Its importance as a limit, however, has been minimal, even while the nondelegation doctrine itself assumes special importance in the modern administrative state.

This Note argues that the nondelegation doctrine’s lack of importance within broader separation of powers principles is a result of the intelligible principle test. This is so because the intelligible principle test itself is divorced from other separation of powers principles, such as those found in the political question doctrine, the limits on independent executive power, and bicameralism. To remedy this weakness, this Note argues that the intelligible principle test should be abandoned and replaced by a new test for measuring the limits to the nondelegation doctrine. This test, the ancillary powers test, is derived from the broader principles of separation of powers, which recognize both judicial deference to co-equal branches of the government and limits on judicial competence. The ancillary powers test examines the delegation of legislative power by Congress within the framework of independent power held by the Executive and Judiciary. In doing so, it allows for maximum judicial deference, while at the same time providing a meaningful limit on congressional delegation.

Part I begins by summarizing both the origins and the contours of the intelligible principle test. It continues by illustrating the weaknesses of the intelligible principle test as an articulation of separation of powers principles. Finally, drawing on these principles, Part I presents the ancillary powers test in full. Part II provides a practical application of the ancillary powers test in the context of foreign trade, an area with a deep historical connection to both the nondelegation

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3 J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 404–09 (1928).
5 See discussion infra Part I.B.
doctrine and the intelligible principle test. By applying the ancillary powers test to sections 201 and 301 of the Trade Act of 1974, Part II demonstrates the ancillary powers test’s flexible approach to defining the outer limits of delegated power in differing situations as well as its superiority over the intelligible principle test as a meaningful articulation of the nondelegation doctrine.

I. INSTITUTIONAL COMPETENCE AS THE CORNERSTONE OF SEPARATION OF POWERS

The nondelegation doctrine is a function of separation of powers. It recognizes that only Congress may legislate in the true sense of the word. Above all, legislating, in its truest sense, means that only Congress may make the initial policy choice to govern a particular field. This is what it means to be a legislator: deciding when, on what subject, and how to govern. No one could deny that while executive and administrative rulemaking is lawmaking, it is not legislating because the Executive acts after Congress has chosen to govern in the first instance. The Judiciary also engages in substantive lawmaking through the common law and statutory interpretation, as well as procedural lawmaking when it establishes rules of procedure or evidence, whether through the Rules Enabling Act\(^6\) or the common law. This is not legislating in the truest sense as it involves either the courts’ interpretive function or supervisory power. Whether judicial lawmaking involves statutory or common law interpretation or the exercise of supervisory power, Congress has either chosen to act in the first instance or the lawmaking is an inherent function of the Judiciary.

Any time Congress passes a law, it effectively delegates some lawmaking to the Executive, the Judiciary, or both, as either or both will be called upon to interpret that law, either in its execution or application. This sort of delegation does not offend the nondelegation doctrine because, while it involves a delegation of lawmaking power, it does not turn judges or bureaucrats into legislators: those charged with making the initial decision to govern a particular field. While there is room for disagreement over where judicial or executive interpretation ceases to in fact “interpret” a properly enacted statute and become legislating, this does not make the initial delegation an impermissible delegation, nor can restrictive interpretation cure an otherwise impermissible delegation.\(^7\)


\(^7\) In *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2002), the Court stated that the exercise of *any* discretion under an impermissible delegation of power
The line between creating legislators and delegating some legislative authority to those charged with executing or interpreting a law may be a fine one, but it is an important distinction for separation of powers purposes. The Court has tried to identify this line through the intelligible principle test, which focuses on the amount of discretion the law leaves for execution or interpretation. Such a distinction, however, is not founded in separation of powers principles, which look at institutional competence—the type not the amount of discretion granted. At the same time, following separation of powers principles, which focus on competence, the courts are slow to judge when a grant of discretion is too much. By divorcing the nondelegation doctrine from separation of powers' traditional focus on competence, the intelligible principle test virtually assures that no law will ever be found to have violated the nondelegation doctrine. These weaknesses are addressed below in Part I.B.

To answer the weaknesses of the intelligible principle test, this Note proposes an alternative mode of analysis for the nondelegation doctrine: the ancillary powers test. The ancillary powers test overcomes the intelligible principle test's weaknesses by refocusing nondelegation analyses on the heart of separation of powers: institutional competence.8

A. The "Intelligible Principle" Test: A Brief Recap

The Court first recognized the nondelegation doctrine as a constitutional principle in Field v. Clark.9 In Field, the Court upheld a challenge to the Tariff Act of 189010 allowing the President to impose tariffs on certain commodities when the President found a country was exacting a "reciprocally unequal and unreasonable" duty on U.S.

"would itself be an exercise of the forbidden legislative authority." Id. at 473. According to the Court, an agency's interpretation of a statute has no bearing on whether the statute in question impermissibly delegates legislative power, which is a question for the courts. Id. Whether a statute violates the nondelegation doctrine by impermissibly delegating legislative power is determined from the statute itself, not from agency interpretations. Following this logic, because a statute impermissibly delegating legislative power cannot be saved by agency interpretation, an overly broad agency interpretation of a statute that effectively results in impermissible delegation of legislative power does not affect whether the courts will find that the statute itself delegates legislative power.

8 See infra Part I.C.

9 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

10 Ch. 1244, § 3, 26 Stat. 567, 612.
agricultural products.\textsuperscript{11} The statute went on to prescribe the tariffs the President was required to impose in such cases.\textsuperscript{12} The Court engaged in an exhaustive survey of similar statutes enacted since the Washington Administration.\textsuperscript{13} Most of these statutes involved reciprocal treatment of goods based on the actions of foreign governments or provided sanctions in response to military aggression, such as violations of American neutrality by warring nations.\textsuperscript{14} These sorts of statutes have been subsequently described as contingent legislation, whereby upon the President’s proclamation of a certain state of affairs, or condition precedent, a legislatively prescribed response follows.\textsuperscript{15}

In Field, the Court upheld the Tariff Act of 1890 holding that Congress, not the President, had exercised all of the legislative power in question.\textsuperscript{16} Specifically, Congress established the contingency under which duty-free treatment of certain commodities would be suspended, set the rate imposed in case of such contingency, and only left enforcement of this policy to the President, referring to the President as a “mere agent of the law-making department” for purpose of finding a particular set of facts.\textsuperscript{17}

The next major step defining both the nondelegation doctrine and the President’s powers in the area of tariffs came in J. W. Hampton, Jr., & Co. v. United States.\textsuperscript{18} Like the Tariff Act of 1890, the challenged statute permitted the President to increase tariffs upon finding a specific condition precedent, in this case that the tariffs imposed by law failed to equalize the differences in costs of production between the United States and the exporting country.\textsuperscript{19} The President was then required to determine the differences in production costs and increase the tariff to equalize the costs.\textsuperscript{20} The Court found that Congress intended that duties should equalize costs of production.\textsuperscript{21} The Court recognized the difficulty Congress would face in identifying and fixing every rate to meet this goal.\textsuperscript{22} Under this standard, so long as Congress laid down an intelligible principle as well as its policy and

\begin{itemize}
  \item \textsuperscript{11} Field, 143 U.S. at 680.
  \item \textsuperscript{12} Id. at 681.
  \item \textsuperscript{13} Id. at 681–89.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} See Star-Kist Foods, Inc. v. United States, 275 F.2d 472, 479 (C.C.P.A. 1959).
  \item \textsuperscript{16} 143 U.S. at 693.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} 276 U.S. 394 (1928).
  \item \textsuperscript{19} Id. at 401.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id. at 404.
  \item \textsuperscript{22} Id. at 407.
\end{itemize}
plan, and one branch did not assume the constitutional field of another, no forbidden delegation occurred.\footnote{23}{Id. at 404-09.}

In the sixty years following \textit{J. W. Hampton}, the Court elaborated on the functions of the nondelegation doctrine and the intelligible principle test’s role in supporting it.\footnote{24}{See Indus. Union Dep’t v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).} First, the nondelegation doctrine ensures that the most important social policies are made by Congress.\footnote{25}{Id. at 685.} Next, when Congress does delegate authority, it must provide an “intelligible principle” to guide the exercise of the delegated power.\footnote{26}{Id. at 685–86.} This “intelligible principle,” in turn, provides the courts with a standard against which to measure the exercise of the delegated power.\footnote{27}{Id. at 686.} That is, it allows courts to evaluate whether the Executive has stayed within the discretion granted by Congress. If, on the other hand, the courts cannot discern the limits to the Executive’s discretion, that is if Congress fails to provide an “intelligible principle,” Congress has overstepped the nondelegation doctrine.

\textbf{B. The Limits of Current Separation of Powers Doctrines}

Since 1928, the Court has only invoked the nondelegation doctrine to invalidate a statute on two occasions, and both cases dealt with the same act. The first case, \textit{Panama Refining Co. v. Ryan},\footnote{28}{293 U.S. 388 (1935).} has been criticized as irreconcilable with both previous and subsequent decisions.\footnote{29}{1 \textit{KENNETH CULP DAVIS} \& \textit{RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE} § 2.6, at 71 (3d ed. 1994).} The second case, \textit{A. L. A. Schechter Poultry Corp. v. United States},\footnote{30}{295 U.S. 495 (1935).} is not good precedent in other ways.

First, commentators have described the delegation in \textit{Schechter} as “the most sweeping congressional delegation of all time.”\footnote{31}{DAVIS \& PIERCE, supra note 29, § 2.6, at 71.} The \textit{Schechter} Court, however, focused on the vagueness and lack of standards identifiable in section 3 of the National Industrial Recovery Act that could serve as an intelligible principle. The Court described section 3 as nothing more than “general aims of rehabilitation, correction, and expansion.”\footnote{32}{\textit{Schechter}, 295 U.S. at 541–42.} These “general aims,” however, were certainly no less “intelligible” than such standards as “in the public interest”
and "just and reasonable," which the Court has sustained since Schechter. Additionally, in Schechter the Court struck down the statute on separate Commerce Clause grounds, applying the formalistic "direct versus indirect" impact test for interstate commerce long since abandoned by the Court. The Court's reliance on alternate grounds to decide the case gives its discussion of unconstitutional delegation of power the characteristics of *obiter dicta*, particularly given the somewhat tautological manner in which the Court declared the standards lacking an "intelligible principle."

Because of the Court's failure to follow Panama Refining and Schechter in subsequent cases coupled with the absence of any guiding principles in these two cases, it is unsurprising that many commentators and even the courts have come to view the nondelegation doctrine as "moribund." Some commentators have gone so far as to declare that the nondelegation doctrine has never in fact existed.

Of course, the nondelegation doctrine does exist, at least nominally. The Court continues to reaffirm the nondelegation doctrine as a function of separation of powers limiting Congress in its delegation of power. While nominally recognizing the intelligible principle test as the proper test for deciding whether a statute satisfies the nondele-

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33 Davis & Pierce, supra note 29, § 2.6, at 72.
34 Schechter, 295 U.S. at 551.
35 See Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local . . . it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce, . . . irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").
36 See Schechter, 295 U.S. at 541-42 ("In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President . . . is virtually unfettered.").
37 See, e.g., Fed. Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes . . ."); Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More than "A Dime's Worth of Difference,"* 49 Cath. U. L. Rev. 337, 337 (2000) ("In the ensuing six decades, the doctrine has come to be seen as 'moribound' as a tool for enforcing a proper separation of legislative and executive power . . .").
38 See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. Chi. L. Rev. 1721, 1722 (2002) (arguing that the nondelegation doctrine has never existed and that no support for the theory exists in the text, structure, or original understanding of the Constitution).
gation doctrine,\textsuperscript{40} the Court has failed to provide any guidance for identifying an intelligible principle. Instead, the Court has focused on whether the statute provided standards against which a court would measure the Executive's action.\textsuperscript{41} While standards like "in the public interest" provide some criterion against which a court could measure executive action, it does not provide criterion as to what is, in fact, "in the public interest," except perhaps by negative implication (for instance by looking at whether the Executive acted solely for the private benefit of an individual). That is not to say that such broad standards necessarily offend the nondelegation doctrine, it is only to say that recognizing them as intelligible principles is too charitable.

In \textit{Mistretta v. United States}, the Court went so far as to recognize that the nondelegation doctrine has become little more than a tool of statutory construction, employed to narrow delegations to avoid constitutional problems.\textsuperscript{42} The Court added that its primary concern in nondelegation cases, in particular, and separation of powers cases, generally, was preventing encroachment by one branch upon the powers of another, and the resulting aggrandizement.\textsuperscript{43} This general concern of separation of powers—encroachment and aggrandizement at the expense of a coordinate branch of government—deals primarily with institutional competence. In contrast, by asking solely whether Congress provided a coordinate branch of government with enough guidance in a statute, the intelligible principle test focuses on the amount of discretion granted one coordinate branch of government by another. If, in fact, the nondelegation doctrine is about separation of powers and separation of powers is about encroachment and aggrandizement, the intelligible principle test is a poor measure of whether Congress has overstepped its authority to delegate some legislative power. This is so because the intelligible principle test has never approached the question of encroachment and aggrandizement because it does not look at independent sources of power.

In truth, the canon of constitutional avoidance animates the Court's nondelegation jurisprudence, not the fundamental principles of institutional competence underlying other separation of powers problems, such as bicameralism, presentment, and political questions. Rather than face the conflicting separation of powers principles of

\begin{itemize}
  \item Am. Trucking, 531 U.S. at 472; Skinner, 490 U.S. at 218–19; Mistretta, 488 U.S. at 371–72.
  \item Skinner, 490 U.S. at 218–19; Mistretta, 488 U.S. at 379.
  \item 488 U.S. at 373 n.7.
  \item Id. at 382.
\end{itemize}
due respect for coordinate branches of government and adherence to formal limitations on the powers of each branch, the courts avoid the question by characterizing the entire nondelegation question as one of discretion through their reliance on the intelligible principle test.

No other separation of powers question is characterized in terms of discretion. For example, while judicially manageable standards—criterion against which courts may measure adherence to a statutory or constitutional mandate—are an important separation of powers question with respect to the courts, they do not measure the amount of discretion given to courts. Rather, judicially manageable standards recognize the institutional competence of courts to make certain decisions under Article III, which limits the courts' competence to resolving cases and controversies. These judicially manageable standards recognize the far more limited role of courts in lawmaking. They recognize the courts' subordinate role in making policy decisions, a reflection on the courts' institutional competence. Absence of a judicially manageable standard may take a case or controversy out of the judicial power of the courts through the political question doctrine, but this is because of limits on institutional competence not because the issue confers too much discretion on the courts. The inquiry in the case of judicially manageable standards focuses on the type of question the courts are asked to resolve, not the range within which the courts may resolve the question.

The reason for the Court's troubles in managing the nondelegation doctrine has been the intelligible principle test. The intelligible principle test is based on the flawed assumption that separation of powers and nondelegation prohibit any lawmaking by the Executive. It distinguishes discretion in execution of the law from discretion in creating the content of the law. Not only is this a distinction without a difference, but it ignores the fundamental concern of separation of powers: institutional competence.

45 See, e.g., INS v. Chadha, 462 U.S. 919, 957–58 (1983) (“To preserve [constitutional checks on the legislative process], and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.”).
47 U.S. CONST. art. III, § 2.
48 See Field v. Clark, 143 U.S. 649, 693–94 (1892) (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs of Clinton County, 1 Ohio St. 77, 88 (1852)).
49 For example, section 10(b) of the Securities Exchange Act makes use of “any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the pub-
The intelligible principle test is also overly simplistic in defining powers. While the Constitution vests all legislative power in the Congress and all executive power in the President, the Court has recognized that some powers fall within a "twilight zone" of concurrent authority. In areas of this concurrent authority, the Court has declined to invoke a general rule of nondelegation, recognizing that in such cases the President's power is at its height, embodying all of the presidency's independent power plus all of the power Congress may delegate in that area.

The Court added to the confusion by completely ignoring the intelligible principle test and nondelegation doctrine in Clinton v. City of New York. In Clinton, the Court invalidated the Line Item Veto Act of 1996 for failure to conform to the constitutional presentment and bicameralism mandates. The dissent emphasized that the Act did not actually allow the President to change the text of law, but merely allowed the President to refrain from execution under certain circumstances. In his dissent, Justice Breyer took the majority to task for failure to uphold the Act under the nondelegation doctrine, particularly in light of equally broad standards found to satisfy the intelligible principle test. Justice Scalia went further, stating that the Act's title had "faked out" the Court, leading it to invalidate the law when it was substantively no different than other grants of power the Court had upheld in the past.

lic interest" unlawful. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2000). This statute expressly instructs the Securities and Exchange Commission (SEC) to exercise its discretion in the execution of the law to determine the law's content. Clearly, by promulgating rules under this law, the SEC is executing the law, thus any discretion exercised is merely in the law's execution. On the other hand, the law's content is made by reference to the rules promulgated pursuant to the law itself. Thus, to execute the law, the SEC must effectively write the law. Where execution stops and creation begins proves to be a difficult question to answer.

50 U.S. Const. art. I, § 1.
51 Id. art. II, § 1, cl. 1.
52 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
54 See Youngstown, 343 U.S. at 635–36.
57 Clinton, 524 U.S. at 448.
58 Id. at 474–75 (Breyer, J., dissenting).
59 Id. at 484–96.
60 Id. at 465–69 (Scalia, J., concurring in part and dissenting in part).
Not only did the Court not address the nondelegation doctrine, but it went to great lengths to distinguish the Act from the facts of *Field*. The Court emphasized that *Field* involved no discretion on the part of the President, and thus involved mere execution of the law.\(^6^1\) The Court also pointed out that *Field* did not involve a challenge under the Presentment Clause.\(^6^2\) While the Court effectively distinguished the Act from *Field*, it failed to distinguish the Act from subsequent nondelegation cases employing broad application of the nondelegation doctrine.

This was for good reason. On a purely technical level, the Court could not distinguish the vast discretion the Act gave the President from prior nondelegation cases. Technically, the Act did not grant the President the power to change the text of a bill, but instead gave the President the power to prevent certain expenditures or tax benefits from having legal force and effect.\(^6^3\) The Court would have had great trouble distinguishing this discretion from the discretion to prevent duty-free treatment of certain goods from having prospective force and effect, as in *Field*. Further, the Court would be hard pressed to distinguish the factors governing the President’s exercise of this cancellation power, such as that the cancellation would not “harm the national interest,”\(^6^4\) from similarly broad discretion upheld under the intelligible principle test.

Despite these technical distinctions between the Act’s cancellation power and a true line item veto, the Court correctly identified the true effect of the cancellation power: to alter the content of a duly enacted law by refusing to give legal effect to its provisions. The President simply lacks the institutional competence to make law out of whole cloth, to behave as a legislator by deciding when and on what subjects to legislate, in this case, by effectively repealing a properly enacted law. The problem, as Justices Breyer and Scalia correctly pointed out, was that the Court could not rely on the nondelegation doctrine to support its decision without holding that the standards governing the exercise of the cancellation power failed the intelligible principle test. The Court could not hold that the Act lacked an intelligible principle while remaining consistent with its earlier jurisprudence.

\(^{61}\) *Id.* at 443–44 (majority opinion).
\(^{62}\) *Id.* at 444 n.36.
\(^{63}\) *Id.* at 474–75 (Breyer, J., dissenting).
\(^{64}\) *Id.* at 436 (majority opinion) (quoting the Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200).
The problem with relying on the Presentment and Bicameralism Clauses, however, is that the Court relied on formal constitutional requirements while at the same time ignoring the formal requirements of the Act, which did not technically repeal a duly enacted law, even if that was the practical effect. As a result, the Court's decision was internally inconsistent in its application of formalistic distinctions. While reaching the correct result, the Court was left grasping for an ultimately unsatisfactory explanation for why it reached that result.


In *Clinton*, the Court reached the correct result as a matter of separation of powers, but it could only do so by ignoring its entire line of nondelegation doctrine jurisprudence. Effectively, the Court had to choose between distinct lines of separation of powers jurisprudence and its attempt to fit *Clinton* into the proper separation of powers mold. By dividing separation of powers into discrete doctrines, such as nondelegation and bicameralism and presentment, and developing the doctrines independently, the underlying principles of separation of powers become lost as the doctrines grow further apart jurisprudentially.

These underlying separation of powers principles are best articulated in the political question doctrine, itself a function of separation of powers: preventing aggrandizement of one branch at the expense of another. As far as judicial application of these principles, this boils down to respect for coordinate branches of government, standards against which to measure the conduct of one branch against other branches, and a recognition that the Constitution envisions interaction between the various branches, circumscribed by the Constitution taken as a whole.

Justice Jackson's now-famous formulation of executive power in *Youngstown Sheet & Tube Co. v. Sawyer* neatly embodies each of the above principles, and has come to define how the Court evaluates the


67 See *Mistretta*, 488 U.S. at 382.

68 See *id.* at 380–81; *Chadha*, 462 U.S. at 944; *Baker*, 369 U.S. at 217.

69 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

70 *Id.* at 635–38.
exercise of executive power. Justice Jackson broke executive power into three categories: (1) circumstances involving express or implied congressional approval or assent; (2) circumstances involving congressional silence; and (3) circumstances involving express or implied congressional disapproval. The first category is particularly useful in defining the contours of the nondelegation doctrine.

When Congress delegates power, it necessarily approves of the President's actions to act within the scope of the enactment. In such cases, the President acts with the combined power of the Presidency's inherent powers and all congressionally delegated power. These acts are given the greatest judicial deference and enjoy a strong presumption of validity, fully supporting the separation of powers principle of due respect. Such due respect is not absolute. The delegation must satisfy the overarching concern of separation of powers to prevent aggrandizement of one branch of government at the expense of another in an area in which the first branch lacks independent institutional competence. Institutional competence then focuses on the type of discretion involved: whether Congress has told another branch of government to fulfill a legislative mandate by exercising that branch's institutional competence or whether Congress has expanded the institutional competence of another branch wholly apart from that branch's constitutional mandate.

While the intelligible principle test ostensibly serves this purpose, it fails to recognize the full breadth of the Youngstown test. The intelligible principle test casts the entire question in terms of the scope of discretion associated with fulfilling a congressional mandate without accounting for the full amount of independent institutional competence or range of discretion. In cases of express congressional approval, the President acts not only under delegated legislative authority, but under independent executive authority, such as that found in the Vesting Clause or the Take Care Clause. These express bases of executive authority may be further augmented by an inherent executive power in certain areas, such as foreign relations. The President's conduct, then, is not defined solely by Congress's power to delegate, but the combination of the President's independent authority and Congress's delegation power.

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72 Youngstown, 343 U.S. at 635–38 (Jackson, J., concurring).
73 Id. at 635–36.
74 Id. at 637.
76 U.S. Const. art. II, § 1, cl. 1.
77 Id. art. II, § 3.
The intelligible principle test does not recognize these separate bases of executive authority. Instead, the intelligible principle test, recognizing that Congress cannot delegate purely legislative power, attempts to define the nondelegation doctrine solely along this restriction on congressional power. Seeking to reconcile realities of executive practice with the prohibition against delegation absent an intelligible principle, the Court has reduced an intelligible principle to no more than a general policy statement, assigned to a particular agency, with some sort of boundaries on the action. In doing so, however, the Court has virtually eliminated the nondelegation doctrine as a tool for enforcing separation of executive and legislative power.

As the sole test for nondelegation, the intelligible principle test advances the fiction that administrative rulemaking is not an exercise of legislative power when it does not involve too much discretion. This is not the inevitable result of the modern administrative state or simply judicial recognition of practical realities. This result flows from the failure of the Court to follow its own articulation of proper separation of powers principles.

While it is true that Congress cannot delegate purely legislative power, a true delegation of legislative power means a full transfer of legislative power by creating legislators. Such delegation only exists when nothing constrains the Executive’s discretion, when Congress grants the Executive a power to act in a manner wholly divorced from the Executive’s independent institutional competencies. The intelligible principle test confuses this by implying that there must be greater precision in congressional delegation than separation of powers principles require by focusing solely on the scope (or amount) of discretion found in the delegating legislation without accounting for independent sources of authority (the type of discretion). By focusing on institutional competence, a complete separation of powers analysis acknowledges that the type of discretion exercised, not the scope of discretion, controls the proper exercise of power. The full scope of discretion encompasses the sum of delegated authority to act within a given field (such as the power to execute laws or decide a case or

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80 See Huefner, supra note 37, at 337-38.
82 See Mistretta, 488 U.S. at 419 (Scalia, J., dissenting).
controversy) plus any other independent competencies related to that
field which do not require specific authorization before they may be
exercised (such as that of the commander in chief or the courts’ su-
ervisory power). The inquiry then becomes: what sort of power has
Congress instructed a coordinate branch of government to exercise in
the first instance?

Rather than recognizing an independent basis for greater execu-
tive discretion, the intelligible principle test permits such broad dis-
cretion, but only through the fiction that Congress has provided
adequate guidance through standards like “in the public interest.” By
embracing this fiction and declining to trace the contours of the intel-
ligible principle test, the courts have put themselves in the position of
choosing between finding any delegation satisfies the test or contra-
dicting more than a century of nondelegation jurisprudence, not to
mention running afoul of separation of powers principles themselves
by failing to afford due respect to a coordinate branch of government.
The courts have simply left themselves with no principled alternative.
As a result, the intelligible principle test has swallowed the nondele-

gation doctrine, rendering it virtually nonexistent.83

The controlling question in a proper nondelegation analysis is
not the precision of congressional delegation (whether Congress has
enunciated an intelligible principle), but whether that delegation is a
naked delegation of legislative power, unsupported by an indepen-
dent executive power outside of the “faithful” execution of law.84 Just-
place Scalia recognized this in his dissenting opinion in Mistretta v.
United States.85 The correct test, the ancillary powers test, looks not at
whether Congress has delegated any legislative power or provided an
intelligible principle to guide executive discretion, but whether Con-
gress has called on the Executive to exercise an express or inherent
executive power in connection with the delegated legislative
power.86 So long as the exercise of legislative power is ancillary to the exercise
of an independent executive power, as opposed to a naked delegation
of legislative power, the ancillary powers test is satisfied.

Although, in practice, the ancillary powers test would support
many of the broad delegations upheld under the intelligible principle
test, the larger effect would be to breathe new life into the nondelega-

83 See Huefner, supra note 37, at 337–38.
84 In a strict sense, the Take Care Clause, U.S. Const. art. II, § 3, cl. 4, does not
grant the President the power to execute laws, but places a specific duty on how the
President should exercise the executive power granted generally by the Vesting
Clause, id. § 1, cl. 1.
85 488 U.S. at 419–21 (Scalia, J., dissenting).
86 See id. at 420–21.
tion doctrine. Because the intelligible principle test has been stretched so thin, it cannot be principally applied without overruling or contradicting every case finding standards such as "in the public interest" satisfied the test. Under the ancillary powers test, however, the courts could once again look to the nondelegation doctrine as a meaningful separation of powers limit and avoid strained application of other separation of powers limits, such as the use of bicameralism and presentment in *Clinton*, while ignoring the proverbial elephant in the middle of the room.

The ancillary powers test involves three steps. First, the court asks whether legislative power had been delegated. Statutes, such as the one involved in *Field*, with a complete absence of discretion in execution (where the Executive is a "mere agent" of Congress) would still fall within the test. Other statutes, those presented in purposive terms—those which describe a general policy goal, such as the Line Item Veto Act—which clearly delegate legislative power must proceed to the second step.

Next, the court must look at whether the law involves the exercise of an independent executive power. While no mathematical test could answer this question, the primary inquiry focuses on whether and under what circumstances the Executive must or may act. Absent an independent source of executive power beyond the Vesting or Take Care Clauses (institutional competence), an act crosses the line between permissible and impermissible delegation when it grants the Executive the type of discretion reserved to the legislature: the discretion to govern a particular area or not, to make law, in the first instance. Discretion in this sense, the separation of powers sense, is not on the quantity of discretion, which the intelligible principle test examines, but the quality of the discretion, the sort of discretion within a given branch's institutional competence. These powers are in turn found in the Constitution itself and include powers inherent to that branch of government.

Although the quality of the discretion may affect the quantity of discretion which Congress may instruct another branch to execute, quantity is not the concern of separation of powers, which asks whether one branch has aggrandized itself at the expense of another—a qualitative question. When one branch acts within the scope of its institutional competence, it has not aggrandized itself but exercised its own power. On the other hand, when one branch exercises the powers of another, outside its own institutional competence and independent of the exercise of one of its own institutional competencies, then it has aggrandized itself at the expense of another.
The Line Item Veto Act failed this step of the ancillary powers test because it gave the President complete discretion to act or refrain from acting and gave no direction as to what sorts of appropriations or limited tax benefits should be cancelled. This sort of discretion is legislative discretion in the true sense. It aggrandized the Executive at the expense of Congress because it both took the power to make these decisions (to act or not to act) from Congress and effectively left Congress without any means to check the Executive, as the President could simply veto any act which tried to void the cancelled appropriation or limited tax benefit.

In the final step of the ancillary powers test, if the court finds no independent executive power, the law must satisfy the bicameralism and presentment requirements of Chadha to prevent unilateral action by participants in the lawmaking process. The Line Item Veto Act would fail this test, not because the cancellation changed the text of a law, as the Court held, but because the cancellation itself amounted to a separate legislative act repealing a duly enacted law and aggrandized the Presidency at the expense of Congress. It is no argument that Congress may not care about the aggrandizement. Among Congress’s enumerated powers one cannot find the power to create a second national legislature in the person of the President.

Because it is founded in broader separation of powers principles, the ancillary powers test is not limited to legislative-to-executive delegation but includes legislative-to-judiciary delegation. While the exact contours of inherent executive power may be undefined, the federal Judiciary’s inherent power is limited to its supervisory power, which is itself derived from its express Article III power to decide cases or controversies. It is for this reason that the otherwise unlimited grant of authority to develop rules of privilege found in Rule 501 of the Federal Rules of Evidence, as enacted by Congress, does not offend that

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88 Id. at 438 (quoting INS v. Chadha, 462 U.S. 919, 954 (1983)).
89 See, e.g., Myers v. United States, 272 U.S. 52, 118 (1926) (“The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . . .”).
90 See Bank of N.S. v. United States, 487 U.S. 250, 254 (1988) (“In the exercise of its supervisory authority, a federal court ‘may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.’” (quoting United States v. Hastings, 461 U.S. 499, 505 (1983))). While the exact limits of the supervisory power may be disputed, this inherent power is clearly limited to a court’s power to manage its own proceedings or those of inferior courts. See 1 Laurence H. Tribe, American Constitutional Law § 8-23, at 466 n.2 (3d ed. 2000).
ancillary powers test. While developing rules of privilege, or any other rule of procedure or evidence, would otherwise fall outside of the strict case or controversy power, they survive the ancillary powers analysis because the delegation is coupled with an independent source of judicial power: the supervisory power to manage rules of evidence and procedure.

To this point, it may not seem that the ancillary powers test adds much to the intelligible principle test as far as outcomes. Part II, however, demonstrates why the ancillary powers test does more than simply recast the same results by looking at two similar though fundamentally different statutes involving international trade: sections 20192 and 30193 of the Trade Act of 1974.94

II. THE INTELLIGIBLE PRINCIPLE TEST IN ACTION: FOREIGN TRADE

International trade provides a convenient frame of analysis for the ancillary powers test. It involves both the power of Congress to regulate foreign trade and, in some instances, it implicates the President's foreign relations power. Sections 201 and 301 of the Trade Act of 1974 illustrate this well. While section 201 does not implicate foreign relations and was actually intended to be insulated from foreign policy considerations entirely,95 section 301 directly implicates foreign relations as it requires the United State Trade Representative (USTR) to evaluate whether other nations are fulfilling their obligations under international agreements or otherwise unjustifiably burdening United States trade through their official acts.96 This distinction will prove important for purposes of the ancillary powers analysis, as the former invokes no recognized independent executive power,97 while the latter directly implicates the President's plenary and exclusive foreign relations power.98

93 Id. §§ 2411–2420 (2000). For purposes of this Note, “section 301” refers to sections 301 through 310 of the Trade Act of 1974.
97 Indeed, the Court has recognized that Congress has plenary power to regulate international commerce. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).
This Part begins by outlining the provisions of sections 201 and 301 to provide the proper framework for the ancillary powers analysis.\textsuperscript{99} It concludes by applying the ancillary powers test to sections 201 and 301 to illustrate its application and demonstrate how the ancillary powers test provides both deference to the political branches while preserving the nondelegation doctrine.\textsuperscript{100}

A. The Statutes

1. Section 201: Relief for Domestic Industries

Section 201 empowers the President to impose quantitative restrictions, tariffs, or tariff-rate quotas on imports to facilitate positive adjustment by an industry injured by increased imports.\textsuperscript{101} The President may do so only after the International Trade Commission ("ITC") determines that the increased imports have been a substantial cause of serious injury or threatened serious injury to the industry.\textsuperscript{102} While section 201 requires the President to take all "appropriate and feasible action within his power" to facilitate positive adjustment, this requirement is virtually eviscerated by a qualification allowing the President to engage in a cost-benefit analysis and a subjective determination of feasibility.\textsuperscript{103} Section 201 lists a number of factors the President must take into account when determining feasibility, but these factors include such amorphous terms as "factors related to the national economic interest of the United States."\textsuperscript{104} Any restraints these factors place on the President's discretion, in terms of when to act, have been all but eliminated by the courts.\textsuperscript{105}

While the ITC's finding of serious injury is a condition precedent to the President's action, the ITC must initiate an investigation at the request of the President.\textsuperscript{106} Even though the ITC must initiate investigation under certain other circumstances,\textsuperscript{107} the fact remains that the

\textsuperscript{99} See infra Part II.A.
\textsuperscript{100} See infra Part II.B.
\textsuperscript{101} 19 U.S.C. § 2253(a).
\textsuperscript{102} Id.
\textsuperscript{103} Id. § 2253(a)(1).
\textsuperscript{104} Id. § 2253(a)(2)(F).
\textsuperscript{105} See Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985) ("'[T]he President's findings of fact and motivations for his actions are not subject to review.'" (quoting Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984))).
\textsuperscript{106} 19 U.S.C. § 2252(b).
\textsuperscript{107} The ITC must also initiate an investigation at the request of the USTR, upon receipt of a petition from an entity representing the industry (e.g., trade associations, labor unions, groups of workers), at the request of the House of Representatives Ways
President may initiate an investigation at the President's complete discretion.

The ITC must determine whether increased imports have injured or threatened injury to the industry and, in the usual and simplest case, issue the determination within 120 days. To find injury, the ITC must find that an article is

1. being imported in such increased quantities as to
2. constitute a substantial cause of
3. serious injury or threat of serious injury to a domestic industry
4. producing a like or directly competitive article.

Section 201 defines "substantial cause" as "a cause which is important and not less than any other cause," and "serious injury" as "a significant overall impairment in the position of a domestic industry." In identifying serious injury, section 201 directs the ITC to consider such factors as the significant idling of productive facilities, the inability of a significant number of domestic firms to carry on production at a reasonable level of profit, and significant unemployment or underemployment in the industry. While section 201 does not define "like or directly competitive" articles, the committee report accompanying the Trade Act explained that these terms meant articles which are either "substantially identical in inherent or intrinsic characteristics" (like) or "substantially equivalent for commercial purposes" (directly competitive).

After finding injury, the ITC must recommend the action it believes will address the serious injury (or threat of serious injury) and be most effective in facilitating positive adjustment. The ITC then presents its determination and recommendations (if it found injury) to the President. If the ITC is equally divided over whether there

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and Means Committee or the Senate Finance Committee, or upon its own motion.

Id.

108 Id. The ITC has an additional sixty days when the petitioner requests provisional relief, and an additional thirty days if the commission determines that the investigation is "extraordinarily complicated." Id.

109 Id.

110 Id. § 2252(b)(1)(B).

111 Id. § 2252(c).

112 Id.


114 19 U.S.C. § 2252(e).

115 Id. § 2252(f).
has been an injury, the President may consider the ITC to have determined that the industry suffered injury.\textsuperscript{116}

The courts afford the ITC's determination almost complete deference.\textsuperscript{117} The courts limit their review to "clear misconstruction of the governing statute, a significant procedural violation, or action outside [the] delegated authority," leaving the ITC's motivations and findings of fact entirely unreviewable.\textsuperscript{118}

Once the President receives a determination of injury, the President must take "all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition."\textsuperscript{119} While phrased in compulsory terms, this language is devoid of content. The President's determination under section 201 is subject to the President's absolute, unreviewable discretion.\textsuperscript{120} Because the courts have precluded themselves from examining the Executive's decision, "all appropriate and feasible action within his power" means anything the President wishes.

Section 201 makes a perfunctory effort to guide the President's decisionmaking process, "requiring" the President to consider such factors as the ITC's recommendations and "factors related to the national economic interest," such as the social and economic costs on communities if relief is denied and the impact on consumers and domestic competition if relief is granted.\textsuperscript{121} None of these considerations are given any decisive, much less conclusive, weight. Combined with the sheer breadth of these considerations, the lack of any conclusive factors and absence of judicial review grants the President absolute, unfettered authority to grant or deny relief.

This discretion extends with equal force to the form of relief provided. Section 201 allows the President to choose between nine distinct forms of relief, including tariffs, quotas, tariff-rate quotas, and "any other action which may be taken by the President under authority of law and which the President considers appropriate and feasible," as well as any combination of these forms of relief.\textsuperscript{122} Although section 201 places certain limits on the nature of the relief, these limits operate primarily as outer limits on the duration and quantity of relief.

\begin{itemize}
\item \textsuperscript{117}  See Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985).
\item \textsuperscript{118} Id.
\item \textsuperscript{119} 19 U.S.C. § 2253(a)(1)(A).
\item \textsuperscript{120}  See Maple Leaf, 762 F.2d at 89.
\item \textsuperscript{121} 19 U.S.C. § 2253(a).
\item \textsuperscript{122} Id.
\end{itemize}
Despite these limits, the same criteria for finding injury guide the President’s selection of type, quantity, and duration of relief. They provide no limitation on the actual quality or character of the relief granted. In fact, in the forty-one times the ITC has found injury, the President has only followed the ITC’s recommendation without deviation twice. Although Congress retains some oversight when the President deviates from the ITC’s recommendation, Congress has little power to change the outcome.

123 For example, any tariff cannot increase the existing duty by fifty percent, ad valorem (e.g., if the existing duty is twenty-five percent, the total duty cannot exceed seventy-five percent ad valorem after the President imposes a new tariff under section 201). Id. § 2253(e). Quantitative restrictions must allow, at a minimum, an amount of the article equal to the quantity or value imported in the most recent three years which are “representative of imports of such article” unless the President finds a different quantity or value is justified to “prevent or remedy the serious injury.” Id. Additionally, the relief is limited to four years, though the President may extend the relief under certain circumstances. Id.


127 See, e.g., 19 U.S.C. § 2253(b) (requiring the President to explain any deviation from the ITC’s recommendation or decision to take no action).

128 Section 2253(c) of Title 19 allows Congress to overrule the President’s action if it differs from the ITC’s recommendation or if the President declines to take action by passing a joint resolution. Of course, the President may veto the joint resolution, which means that Congress must gather a two-thirds majority for any joint resolution. Section 203 of the Trade Act, 19 U.S.C. § 2253, originally allowed for a two-house legislative veto. However, after the Supreme Court struck down the legislative veto in INS v. Chadha, 462 U.S. 919 (1983), Congress amended section 203 to remedy this
2. Section 301: Enforcement of United States Rights Under International Agreements

Section 301 of the Trade Act compliments section 201 by ensuring that United States commerce receives the full benefit of international agreements. Unlike section 201, section 301 focuses on the acts of other nations. Actions taken under section 301 may be divided into two categories: mandatory and discretionary. This distinction focuses on whether the USTR may or must act, not on how the USTR may act.

Under section 301, the USTR initiates an investigation into the trade practices of another country upon petition by "any interested party," upon the USTR's own motion, or if the USTR identifies the country as a "priority country." The USTR is not required to initiate an investigation in any of these circumstances, though when the USTR determines not to initiate an investigation after receiving a petition, the USTR must make a formal determination, including the reasons for the determination, and publish that determination in the Federal Register. Additionally, the USTR may only decline to initiate an investigation into a "priority country" when the USTR determines such an investigation would be "detrimental to United States economic interests."

After initiating the investigation, the USTR will look into whether

1. the rights of the United States under any trade agreement are being denied; or

2. an act, policy, or practice of a foreign country violates, is inconsistent with, or denies benefits under any trade agreement to which the United States is a party or is an unjustified burden or restriction on United States commerce; or

3. "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce," and action is appropriate.
If the USTR makes either of the first two findings, this triggers section 301’s “mandatory action” provisions. The third finding triggers section 301’s “discretionary action” provisions. In either case, the USTR’s actions are subject to the President’s specific direction.\(^{139}\) In case of the mandatory action, the USTR has additional discretion to act if the USTR makes certain specific findings, including a finding that the action would have a disproportionate adverse impact on the United States economy or seriously harm national security interests.\(^{140}\)

Regardless of whether the USTR’s findings result in mandatory or discretionary action, the USTR has discretion to determine the exact action to take. For both mandatory and discretionary action, the USTR has the same range of discretion.\(^{141}\) These actions include suspending trade benefits under international agreements, imposing duties or other import restrictions, and negotiating agreements with the foreign country to eliminate the act or policy, eliminate the burden created by the act or policy, or provide the United States with a compensatory benefit.\(^{142}\) Unlike section 201, section 301 does not restrict the magnitude or duration of the USTR’s action, and, because section 301 subjects the USTR to the specific direction of the President, by extension places no such limits on the President’s actions.

**B. The Ancillary Powers Test Applied**

On the surface there would not appear to be any difference in the amount of discretion provided under sections 201 and 301, both in terms of how or when to act. In both cases, the Executive has almost unlimited authority to initiate an investigation. In both cases, the Executive has virtually unlimited discretion when making the findings necessary to take action. In both cases, the Executive has virtually unlimited discretion when it chooses to act. Under the intelligible principle test, it would seem that if one were to fail, both should fail. However, as demonstrated below, by breaking from the intelligible principle test’s sole focus on the scope of discretion, and looking instead at the quality or type of discretion within the larger framework of independent executive power, the ancillary powers test provides a measurable improvement over the intelligible principle test.

Sections 201 and 301 both involve one source of federal power: the power of Congress to regulate foreign commerce.\(^{143}\) If that were

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\(^{139}\) Id. § 2411(a), (b).

\(^{140}\) Id. § 2411(a)(2)(B).

\(^{141}\) Id. § 2411(c)(1).

\(^{142}\) Id.

\(^{143}\) U.S. Const. art I. § 8, cl. 3.
the only source of federal power involved, then the outcome under the ancillary powers test would come out no differently. Section 301, however, involves a second source of federal power: the President's foreign relations power. In such cases, the President acts under the combined authority of a plenary executive power as "the sole organ of the federal government in . . . international relations" and pursuant to Congress's plenary power to regulate international commerce, personifying federal sovereignty and embodying the whole of federal power. If the President lacks the authority in such a case then, it is because the federal government itself lacks the power.

While all foreign trade may in some way affect foreign relations, section 201's legislative history clearly shows that Congress intended that section 201 relief would be isolated from foreign policy concerns. Thus, when the President acts under section 201, the President acts solely under the President's power to take care that the laws of the United States be faithfully executed. Section 201 is the product of Congress's plenary power to regulate international trade. When the President acts under section 201, the President acts solely pursuant to delegated authority, and Congress, through its expressed intent, has specifically placed this delegated authority outside of the President's foreign affairs power.

Even if Congress had not specifically placed section 201 outside the President's foreign relations power, it fails to invoke the power by its own terms. Section 201 does not look at the actions of foreign states. Determination of injury is based solely on finding such increased imports of like or directly competitive articles as to substantially cause serious injury or threat thereof to domestic industry. These factors are solely domestic and bear no relation to conditions in foreign countries or the actions of foreign governments. The driving

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145 Id. at 320.
146 See Gibbons v. Ogden, 22 U.S. 1, 197 (1824).
149 U.S. Const. art. II, § 3.
150 Id. art. I, § 8, cl. 3.
purpose of section 201 is to provide relief against fairly traded goods; no evidence of unfair trade practices is required for relief.\textsuperscript{153}

Section 201 fails the ancillary powers test. It clearly involves the exercise of legislative power which is not ancillary to an independent executive power, and relief granted pursuant to section 201 fails to satisfy the Bicameralism and Presentment Clauses, as well as the Origination Clause.\textsuperscript{154}

As discussed above, the President has virtually unfettered discretion both when deciding whether to provide relief and what sort of relief to provide.\textsuperscript{155} In such cases, the President acts as a legislator in the true sense of the word. Under section 201, the President decides to regulate in the first instance (when) and the nature of the regulation (how). The lack of governing guiding principles and conflicting standards not only fail to establish an identifiable congressional policy, but fail to establish criterion against which to measure the President's actions.

While these actions are clearly legislative, the ancillary powers test requires further evaluation for independent executive authority. Although tariffs and quotas necessarily implicate foreign relations to some degree, such implication is not within the scope of the President's independent foreign relations powers. As discussed above, section 201 is grounded in Congress's power to regulate international commerce and does not implicate the President's power as the nation's sole organ for international relations, namely the power to speak and listen on behalf of the nation.\textsuperscript{156} In that case, the only independent executive powers available are the Vesting and Take Care Clauses.\textsuperscript{157}

Section 201 clearly involves execution at the ITC level. Once a proper request is made for the ITC to conduct an investigation, it must act.\textsuperscript{158} The ancillary power test overcomes any lack of guidance in terms of recommending relief because the recommendation is ancillary to the execution of the report. The President, on the other hand, has complete discretion, both in terms of granting relief and defining the remedy.\textsuperscript{159} There is no independent executive authority accompanying this absolute discretion which would provide an ancil-

\textsuperscript{154} U.S. Const. art. I, \S 7, cl. 1.
\textsuperscript{155} See supra Part II.A.1.
\textsuperscript{156} See supra notes 144–51 and accompanying text.
\textsuperscript{157} U.S. Const. art. II, \S 1, cl. 1; id. \S 3.
\textsuperscript{158} 19 U.S.C. \S 2252(b) (2000).
\textsuperscript{159} See supra notes 119–28 and accompanying text.
lary power. For this reason, the President's role under section 201 fails the ancillary powers test.

Lastly, since section 201 does not depend on any action from Congress and has the effect of enacting a tariff, quota, tariff-rate quota, or any combination thereof, it has the effect of enacting a law. Because the relief and remedy are at the President's sole discretion, section 201 does not protect against individual participants in the lawmaking process from enacting statutes unilaterally. As a result, relief in the form of tariffs, quotas, or tariff-rate quotas fail to satisfy the checks guaranteed under the Presentment and Bicameralism Clauses. Relief in the form of tariffs and tariff-rate quotas also fail to satisfy the Origination Clause, since they do not even require approval by the House of Representatives, let alone originate in it. The Origination Clause itself serves an important, additional separation of powers function by ensuring not only that revenue measures satisfy bicameralism and presentment, but that they originate in the "people's House." Absent any ancillary, independent executive power, section 201 must fail the ancillary powers test.

Section 301, on the other hand, survives the ancillary powers test, despite its similar grant of power, because it does involve an ancillary executive power: the President's foreign relations power. The presidency derives its plenary power in international relations from its position as the sole representative of the United States' external sovereignty, and exclusive power to speak or listen on behalf of the nation. Unlike Congress's power to regulate interstate commerce, this power is not derived from the Constitution, but from the Union itself as the sovereign successor to the British Crown. Federal power to regulate international commerce, on the other hand, is derived from the Constitution's enumerated powers. The Constitution vests the absolute and plenary power to regulate international commerce in Congress alone.

When the President acts under section 301 through the USTR, the President acts both under the Vesting and Take Care Clauses and under the President's independent foreign relations power. The President is then acting both as Congress's agent in executing its foreign commerce policy and as an independent operator exercising the Pres-
ident’s own foreign relations power. In essence, Congress gave the President another “arrow” in the President’s foreign relations quiver. Section 201 relief, on the other hand, looks solely at domestic concerns, and was clearly intended to be so limited.167

CONCLUSION

While the Constitution certainly contemplates integration of the powers of the separate branches of government, it also diffuses them to protect liberty.168 Separation of powers, though not indifferent to efficiency, aims to protect against the arbitrary exercise of power;169 the sort of exercise invited by wholesale delegation of power from one branch to another. Where that delegation is accompanied by independent sources of power, however, the risk of arbitrary exercise of power is lessened, or is at least less troubling, as the power exercised falls within the branch’s institutional capacity—its constitutionally defined sphere of power.

Unfortunately, the intelligible principle test, with its focus on the quantity of discretion delegated rather than the nature of such discretion, fails to properly account for the improper delegation of power. By failing to incorporate broader separation of powers principles, the intelligible principle test lost sight of the fundamental concern with preventing arbitrary exercises of power. The intelligible principle test, as it developed, forces courts to either accept limitless delegation or violate separation of powers decisions itself by failing to afford proper deference to coordinate branches of government.

The Court may revive the nondelegation by uniting its separation of powers jurisprudence in the ancillary powers test. By adopting the ancillary powers test, the Court would prevent wholesale delegation of power while still allowing the integration of powers into a workable government. At the same time, the ancillary powers test advances other separation of powers concerns, such as judicially manageable standards against which to measure executive action and respect for coordinate branches of government. Lastly, the ancillary powers test serves the public by shielding against arbitrary exercise of power.

As the discussion of sections 201 and 301 of the Trade Act of 1974 illustrates, the ancillary powers test is more than simply a restatement

168 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
169 Id. at 613 (Frankfurter, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 298 (1926) (Brandeis, J., dissenting)).
of the intelligible principle test. It provides for maximum deference while at the same time allowing for real limits to Congress’s ability to delegate power.