an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." [106]

The only two instances in which the Court has found an unconstitutional delegation to a public entity have involved grants of discretion that the Court found to be unbounded, hence standardless. Thus, in *Panama Refining Co. v. Ryan*,[107] as discussed previously, the President was authorized to prohibit the shipment in interstate commerce of "hot oil"—oil produced in excess of state quotas. Nowhere—not in the language conferring the authority, nor in the "declaration of policy," nor in any other provision—did the statute specify a policy to guide the President in determining when and under what circumstances to exercise the power.[108] Although the scope of granted authority in *Panama Refining* was narrow, the grant in *A. L. A. Schechter Poultry Corp. v. United States* [109] was sweeping. The NIRA devolved on the Executive Branch the power to formulate codes of "fair competition" for all industry in order to promote "the policy of this title." The policy was "to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, . . . and otherwise to rehabilitate industry. . . ." [110] Though much of the opinion is written in terms of the failure of these policy statements to provide meaningful standards, the Court was also concerned with the delegation's vast scope—the "virtually unfettered" discretion conferred on the President of "enacting laws for the government of trade and industry throughout the country." [111]

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[106] Arizona v. California, 373 U.S. 546, 626 (1963) (Justice Harlan, dissenting).

[107] 293 U.S. 388 (1935).

[108] The Court, in the view of many observers, was influenced heavily by the fact that the President's orders were nowhere published and notice of regulations bearing criminal penalties for their violations was spotty at best. *Cf.* E. Corwin, The President: Office and Powers 1787–1957 394–95 (4th ed. 1958). The result of the government's discomfiture in Court was the enactment of the Federal Register Act, 49 Stat. 500 (1935), 44 U.S.C. § 301, providing for publication of executive orders and agency regulations in the daily Federal Register.

[109] 295 U.S. 495 (1935).

[110] 48 Stat. 195 (1933), Tit. I, § 1.

[111] 295 U.S. at 542. A delegation of narrower scope led to a different result in Fahey v. Mallonee, 332 U.S. 245, 250 (1947), the Court finding explicit standards unnecessary because "[t]he provisions are regulatory" and deal with but one enterprise, banking, the problems of which are well known and the authorized remedies as equally well known. "A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields." The Court has recently explained that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 475 (2001) (Congress need not provide "any direction" to EPA in defining "country elevators," but "must provide substantial guidance on setting air standards that affect the entire national economy").