

## Sec. 1—The Congress

## Legislative Powers

closer scrutiny of private delegations. Although the Court has emphasized the importance of administrative procedures in upholding broad delegations to administrative agencies,<sup>173</sup> it has not, since *Schechter* and *Carter Coal*, relied on the distinction to strike down a private delegation.

### Particular Subjects or Concerns—Closer Scrutiny or Uniform Standard?

The Court has strongly implied that the same principles govern the validity of a delegation regardless of the subject matter of the delegation. “[A] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.”<sup>174</sup> Holding that “the delegation of discretionary authority under Congress’ taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges,” the Court explained in *Skinner v. Mid-America Pipeline Company*<sup>175</sup> that there was “nothing in the placement of the Taxing Clause” in Article I, § 8 that would distinguish it, for purposes of delegation, from the other powers enumerated in that clause.<sup>176</sup> Thus, the test in the taxing area is the same as for other areas—whether the statute has provided the administrative agency with standards to guide its actions in such a way that a court can determine whether the congressional policy has been followed.

This does not mean that Congress may delegate its power to determine whether taxes should be imposed. What was upheld in *Skinner* was delegation of authority to the Secretary of Transportation to collect “pipeline safety user fees” for users of natural gas and hazardous liquid pipelines. “Multiple restrictions” placed on the Secretary’s discretion left no doubt that the constitutional require-

<sup>173</sup> See, e.g., *Yakus v. United States*, 321 U.S. 414, 424–25 (1944).

<sup>174</sup> *Lichter v. United States*, 334 U.S. 742, 778–79 (1948).

<sup>175</sup> 490 U.S. 212, 223 (1989). In *National Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974), and *FPC v. New England Power Co.*, 415 U.S. 345 (1974), the Court had appeared to suggest that delegation of the taxing power would be fraught with constitutional difficulties. It is difficult to discern how this view could have been held after the many cases sustaining delegations to fix tariff rates, which are in fact and in law taxes. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Field v. Clark*, 143 U.S. 649 (1892); see also *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (delegation to President to raise license “fees” on imports when necessary to protect national security). Nor should doubt exist respecting the appropriations power. See *Synar v. United States*, 626 F. Supp. 1374, 1385–86 (D.D.C.) (three-judge court), *aff’d on other grounds sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>176</sup> 490 U.S. at 221. Nor is there basis for distinguishing the other powers enumerated in section 8. See, e.g., *Loving v. United States*, 517 U.S. 748 (1996). But see *Touby v. United States*, 500 U.S. 160, 166 (1991) (it is “unclear” whether a higher standard applies to delegations of authority to issue regulations that contemplate criminal sanctions), discussed in the next section.