

## Sec. 1—The Congress

## Legislative Powers

an endorsement of whatever might be thought to promote the recovery and expansion of the particular trade or industry. The President's authority to approve, condition, or adopt codes on his own initiative was similarly devoid of meaningful standards, and "virtually unfettered."<sup>65</sup> This broad delegation was "without precedent." The act supplied "no standards" for any trade or industry group, and, unlike other broad delegations that had been upheld, did not set policies that could be implemented by an administrative agency required to follow "appropriate administrative procedure." "Instead of prescribing rules of conduct, [the act] authorize[d] the making of codes to prescribe them."<sup>66</sup>

Since 1935, however, the Court has not struck down a delegation to an administrative agency.<sup>67</sup> Rather, the Court has approved, "without deviation, Congress' ability to delegate power under broad standards."<sup>68</sup> The Court has upheld, for example, delegations to administrative agencies to determine "excessive profits" during war-time;<sup>69</sup> to determine "unfair and inequitable distribution of voting power" among securities holders;<sup>70</sup> to fix "fair and equitable" commodities prices;<sup>71</sup> to determine "just and reasonable" rates;<sup>72</sup> and to regulate broadcast licensing as the "public interest, convenience, or necessity require."<sup>73</sup> During all this time the Court "has not seen fit . . . to enlarge in the slightest [the] relatively narrow holdings" of *Panama Refining* and *Schechter*.<sup>74</sup> Again and again, the Court has distinguished the two cases, sometimes by finding adequate standards in the challenged statute,<sup>75</sup> sometimes by contrasting the vast scope of the power delegated by the National Industrial Recovery Act (NIRA),<sup>76</sup> and sometimes by pointing to required administra-

<sup>65</sup> 295 U.S. at 542.

<sup>66</sup> 295 U.S. at 541. Other concerns were that the industrial codes were backed by criminal sanction, and that regulatory power was delegated to private individuals. See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

<sup>67</sup> A year later, the Court invalidated the Bituminous Coal Conservation Act on delegation grounds, but that delegation was to private entities. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>68</sup> *Mistretta v. United States*, 488 U.S. 361, 373 (1989).

<sup>69</sup> *Lichter v. United States*, 334 U.S. 742 (1948).

<sup>70</sup> *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946).

<sup>71</sup> *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>72</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

<sup>73</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

<sup>74</sup> *Hampton v. Mow Sun Wong*, 426 U.S. 88, 122 (1976) (Justice Rehnquist, dissenting).

<sup>75</sup> *Mistretta v. United States*, 488 U.S. 361, 373–79 (1989).

<sup>76</sup> See, e.g., *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (contrasting the delegation to deal with "unprecedented economic problems of varied industries" with the delegation of authority to deal with problems of the banking industry, where there was "accumulated experience" derived from long regulation and close supervision);