

Sec. 1—The Congress

Legislative Powers

cers, the argument was rejected as “too wanting in merit to require further notice.” Congress continues to empower state officers to act.¹⁵⁸ Presidents who have objected have done so not on delegation grounds, but rather on the basis of the Appointments Clause.¹⁵⁹

The Court has upheld statutory delegations to private persons in the form of contingency legislation. It has upheld, for example, statutes providing that restrictions upon the production or marketing of agricultural commodities are to become operative only upon a favorable vote by a prescribed majority of those persons affected.¹⁶⁰ The Court’s rationale has been that such a provision does not involve any delegation of legislative authority, because Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.¹⁶¹

The Court has also upheld statutes that give private entities actual regulatory power, rather than merely make regulation contingent on such entities’ approval. The Court, for example, upheld a statute that delegated to the American Railway Association, a trade group, the authority to determine the standard height of draw bars¹⁶² for freight cars and to certify the figure to the Interstate Commerce Commission, which was required to accept it.¹⁶³ The Court simply cited *Buttfield v. Stranahan*,¹⁶⁴ in which it had sustained a delegation to the Secretary of the Treasury to promulgate minimum standards of quality and purity for imported tea, as a case “completely in point” that resolved the issue without need of further consideration.¹⁶⁵ Similarly, the Court had enforced statutes that gave legal effect to local customs of miners with respect to claims on public lands.¹⁶⁶

The Court has also struck down delegations to private entities, but not solely because they were to private entities. In *Schechter*,

¹⁵⁸ *E.g.*, Pub. L. 94–435, Title III, 90 Stat. 1394, 15 U.S.C. § 15c (state attorneys general may bring antitrust *parens patriae* actions); Medical Waste Tracking Act, Pub. L. 100–582, 102 Stat. 2955, 42 U.S.C. § 6992f (states may impose civil and possibly criminal penalties against violators of the law).

¹⁵⁹ See 24 *Weekly Comp. of Pres. Docs.* 1418 (1988) (President Reagan). The only judicial challenge to such a practice resulted in a rebuff to the presidential argument. *Seattle Master Builders Ass’n v. Pacific N.W. Elec. Power Council*, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

¹⁶⁰ *Currin v. Wallace*, 306 U.S. 1 (1939); *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 577 (1939); *Wickard v. Filburn*, 317 U.S. 111, 115–116 (1942); *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

¹⁶¹ *Currin v. Wallace*, 306 U.S. 1, 15, 16 (1939).

¹⁶² A draw bar is the coupling between a hauling vehicle and its load.

¹⁶³ *St. Louis, Iron Mt. & So. Ry. v. Taylor*, 210 U.S. 281 (1908).

¹⁶⁴ 192 U.S. 470 (1904).

¹⁶⁵ 210 U.S. at 287.

¹⁶⁶ *Jackson v. Roby*, 109 U.S. 440 (1883); *Erhardt v. Boaro*, 113 U.S. 527 (1885); *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905).