

Sec. 1—The Congress

Legislative Powers

it condemned the involvement of private trade groups in the drawing up of binding codes of competition in conjunction with governmental agencies, but the Court's principal objection was to the statute's lack of adequate standards.¹⁶⁷ In *Carter v. Carter Coal Co.*,¹⁶⁸ the Court struck down the Bituminous Coal Conservation Act in part because the statute penalized persons who failed to observe minimum wage and maximum hour regulations drawn up by prescribed majorities of coal producers and coal employees. But the problem for the Court apparently was not so much that the statute delegated to private entities as that it delegated to private entities whose interests were adverse to the interests of those regulated, thereby denying the latter due process.¹⁶⁹ And several later cases have upheld delegations to private entities.¹⁷⁰

Even though the Court has upheld some delegations to private entities by reference to cases involving delegations to public agencies, some uncertainty remains as to whether identical standards apply in the two situations. *Schechter* contrasted the National Industrial Recovery Act's broad and virtually standardless delegation to the President, assisted by private trade groups,¹⁷¹ with other broad delegations of authority to administrative agencies, characterized by the Court as bodies of experts "required to act upon notice and hearing," and further limited by the requirement that binding orders must be "supported by findings of fact which in turn are sustained by evidence."¹⁷² The absence of these procedural protections, designed to ensure fairness—as well as the possible absence of impartiality identified in *Carter Coal*—could be cited to support

¹⁶⁷ *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935). In two subsequent cases, the Court referred to *Schechter* as having struck down a delegation for its lack of standards. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

¹⁶⁸ 298 U.S. 238 (1936). *But compare* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding a delegation in the Bituminous Coal Act of 1937).

¹⁶⁹ "One person may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311.

¹⁷⁰ *See, e.g., Schweiker v. McClure*, 456 U.S. 188 (1992) (adjudication of Medicare claims, without right of appeal, by hearing officer appointed by private insurance carrier upheld under due process challenge); *Association of Amer. Physicians & Surgeons v. Weinberger*, 395 F. Supp. 125 (N.D. Ill.) (three-judge court) (delegation to Professional Standards Review Organization), *aff'd per curiam*, 423 U.S. 975 (1975); *Noblecraft Industries v. Secretary of Labor*, 614 F.2d 199 (9th Cir. 1980) (Secretary authorized to adopt interim Occupational Safety and Health Administration standards produced by private organization). Executive Branch objections to these kinds of delegations have involved appointments clause arguments rather than delegation issues *per se*.

¹⁷¹ The act conferred authority on the President to approve the codes of competition, either as proposed by the appropriate trade group or with conditions that he added. Thus the principal delegation was to the President, with the private trade groups being delegated only recommendatory authority. 295 U.S. at 538–39.

¹⁷² 295 U.S. at 539.