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A Postscript—The Schechter Case

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In the preceding issue of this Review some of the indications of the possible conclusions of the Supreme Court with regard to the constitutionality of the National Industrial Recovery Act were pointed out.[1] The Court, of course, has now spoken in a decision which in sweeping terms declares the invalidity of the challenged statute.[2] It remains for commentators to consider the validity of the Court's methods and conclusions and for the nation to formulate, if it can, substitute measures for coping with its continuing economic and social difficulties.

I. THE SCOPE OF THE FEDERAL POWER

First in importance among the results of the Court's disposition of the case is the uncertainty in which it leaves the key question of the scope of the Federal power to regulate the conduct of business enterprises. Reflecting, to some extent, a lack of discrimination in the Government's brief, the Court has come forth with an utterance upon this point which, until it is clarified by future decisions or by constitutional amendment, is certain to constitute the outstanding enigma in American public affairs.

In its relation to interstate commerce the businesses involved in the Schechter case exemplify the third of the four classes of enterprises previously pointed out in these pages[3]—that is, they are businesses which furnish a market for a product (live poultry) which moves in interstate commerce. New York City, in which the businesses are located, contains by far the principal

[1] Fuchs, Judicial Method and the Constitutionality of the N. I. R. A. (1935) 20 St. Louis L. Rev. 199.
[2] A. L. A. Schechter Poultry Corp. v. United States (1935) 55 S. Ct. 837.
[3] 20 St. Louis L. Rev. at 210.

market for this product, outweighing all others combined in the volume of receipts. Consequently the price obtained for the product there sets the prices in other markets and the farm prices throughout the country. Loss of consumer confidence in the quality of live poultry sold in the New York market is quickly reflected in the demand for the product and results in a lowering of the retail price there and of the wholesale and farm prices everywhere, as well as in a diminution of shipments. Closing the New York market to unfit poultry drives such poultry from interstate commerce. Ninety-six percent of the live poultry entering the New York market comes from other states. The state from which the largest volume of poultry moves is Missouri. These facts were established by evidence to the satisfaction of the trial court, are stated in the opinion of the circuit court of appeals,[4] and appear to be accepted by the Supreme Court.

In accordance with the provisions of the National Industrial Recovery Act the "Code of Fair Competition for the Live Poultry Industry in the Metropolitan Area in and about the City of New York" was approved by the President, April 13, 1934. Its provisions included prohibitions in regard to what were deemed abuses in the handling and sale of live poultry by the operators of wholesale slaughter houses, who kill the poultry for customers immediately upon its purchase. The purchasers are retail meat dealers. The wholesale slaughter house operators purchase the poultry from "receivers" at the freight terminals and at West Washington Street Market. These transactions have been adjudicated to be in interstate commerce in a previous decision of the Supreme Court.[5] The Live Poultry Code also established minimum wages and maximum hours for the employees of wholesale slaughter house operators.

The defendants in the trial court, operators of wholesale slaughter houses, were convicted of violations of both "fair practice" and wage and hour provisions of the Live Poultry Code. The convictions as to the former were upheld in the circuit court of appeals; those as to the latter were reversed upon the ground that the wages and hours of the defendants' employees did not

[4] United States v. A. L. A. Schechter Poultry Corp. (C. C. A. 2, 1935) 76 F. (2d) 617.

[5] Local 167, Int'l Brotherhood of Teamsters v. United States (1934) 291 U. S. 293, 20 St. Louis L. Rev. at 207-208.

have so direct an effect upon interstate commerce as to sustain the application of the Federal regulatory power to them. The Supreme Court held that the convictions upon all counts should have been reversed upon the dual ground that the provisions of the National Industrial Recovery Act authorizing the President to approve codes of fair competition contained an unconstitutional delegation of legislative power which invalidated all such codes and that none of the aspects of the defendants' businesses which were sought to be controlled were subject to the Federal regulatory power.

The decision, of course, is limited to the facts of the case. By it, in the first place, the Court rejects the "purchasing power" basis for Federal regulation of wages and hours. That is, the fact that the movement of products in interstate commerce depends partly upon the demand for such products and that, in turn, the demand depends largely upon employment and wages,[6] does not establish a sufficiently direct relationship between employment and interstate commerce to support Federal regulation. The case decides also that efforts to stimulate interstate commerce by preserving fair competition in intrastate markets and to bar deleterious products by preventing their sale after they have left interstate commerce are without constitutional warrant.

If the Court had stopped there, the situation would at least be clear. But the Government in its brief,[7] in the course of arguing that the wages paid by the defendants have an economic effect which reaches beyond the boundaries of New York, cited as analogous the subversive results of low-cost competition by foreign producers, which flexible tariffs are designed to meet, and referred to similar problems attending the competition among producers in the several states. Presidential and Congressional utterances and excerpts from committee hearings in regard to this aspect of the economic situation were reproduced in the appendix. Obviously the case did not involve this problem. Perhaps taking its cue from the Government's elision of the distinction, the Court in its opinion slides over the essential difference between wages in establishments such as the defendants' and wages in establishments whose product afterward enters inter-

[6] 20 St. Louis L. Rev. at 210.
[7] Pp. 50-52.

state commerce and competes in markets in other states with the product of producers located elsewhere. In the latter situation the cost at which the product can be "laid down" in the market is the all-important factor in the survival of producers, and it may be that the need of establishing a fairly uniform level of competition as a condition of preserving any regulation at all justifies Federal control in such situations—a justification which certainly was not available to sustain the Live Poultry Code.

The Court may or may not have been aware of the distinction just emphasized. If it was, it probably intended to ignore it and to condemn Federal regulation of labor conditions outside the interstate transportation, communication, and power industries, although this is by no means certain. If it did not have the distinction in mind, it is impossible to tell from the opinion whether Federal control of labor relations and other factors affecting costs in industries which ship across state lines would be sustained. Therein lies the enigma. In a single paragraph Mr. Chief Justice Hughes, speaking for the Court, points out that the question of the wages and hours of defendants' employees "differs in no essential respect from similar questions in other local businesses which handle commodities brought into a state" and then goes on to say that if the Government's argument were accepted, "All the processes of production and distribution that enter into cost could likewise be controlled." One cannot tell whether in the course of this paragraph there has been a shift from consideration of businesses like the defendants' to businesses of other types as well. In the following paragraph the Court summarizes the Government's broader contention, referred to above, as a statement "that efforts to enact state legislation establishing high labor standards have been impeded by the belief that, unless similar action is taken generally, commerce will be diverted from the states adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours," leading to the view "that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in interstate trade and industry generally throughout the country, thus overriding the authority of the states to deal with domestic problems arising from labor conditions in their internal commerce." This argument, of course, is rejected. If the Chief Justice intended

by this utterance to strike down Federal control of wages and hours in the manufacture of products for the interstate market, his statement of the opposing belief that in the absence of Federal control "commerce will be diverted" from the states adopting high standards was not very felicitous. The fear is, rather, that producers in such states will not be able to enter into commerce with fair competitive prospects. In a sense this is "diverting" commerce, but not in the modern every-day sense of the words.

The remainder of the Chief Justice's opinion leaves the matter of the scope of the Federal power similarly in doubt. The accepted propositions are restated and most of the cases, strict and liberal, are cited. A quotation to the effect that "building is as essentially local as mining, manufacturing, or growing crops" perhaps is balanced by the conspicuous absence of *Hammer v. Dagenhart*[8] from among the authorities relied upon; by the notation that "Defendants do not sell poultry in interstate commerce"; and by the assertion that the precise line between interstate and intrastate matters "can be drawn only as individual cases arise." The Federal power has been restricted by the Schechter decision, but how severely no one can say with certainty. And even if the Court intended to exclude Federal regulation of wages and hours to the utmost extent, it will be a simple matter for it to repudiate in future, if it wishes, the dicta which go beyond the facts of the case. The way is pointed anew in the welcome *Rathbun* case, decided on the same day.[9]

It seems fair to criticize the Government on account of four blunders in bringing its test case in regard to the N. I. R. A. before the court. These are: (1) the evasion and delay which postponed a decision until the acute economic emergency seemed

[8] (1918) 247 U. S. 251, 20 St. Louis L. Rev. at 210-211.

[9] 55 S. Ct. 869. In this decision the Court held that Congress might restrict the President's power to remove such quasi-judicial officers of the government as members of the Federal Trade Commission. In the earlier case of Myers v. United States (1926) 272 U. S. 52, the Court overthrew a legislative restriction upon the President's removal of a third-class postmaster and in sweeping terms asserted that the power to remove officers of the executive department is inherent in the President. Mr. Justice Sutherland, speaking for the Court in the Rathbun case, admitted that in the earlier opinion "expressions occur which tend to sustain the government's contention" in support of the President, but stated that "these are beyond the point involved and therefore do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved."

past and public sentiment had cooled; (2) the selection of a case which involved the less obvious rather than the more obvious interrelations between intrastate transactions and interstate commerce; (3) the introduction into the case of irrelevant points of the highest importance, whose decision should only be had in controversies directly involving them, in which their significance can be fully developed; and (4) inadequate presentation of the all-important point which had been dragged into the case.

The fourth critcism applies to the argument that the wages and hours of labor throughout industry and trade should be held to be subject to Federal regulation. The Government's brief and the appendix contain well-phrased statements of some of the reasons why competition and interdependence call for uniform economic legislation over the entire country; indications of a widespread feeling to this effect in regard to wages and hours; a limited number of statements by prominent individuals upon the justification for Federal control; an analysis of the legal precedents tending to uphold the Federal power; and fragmentary data indicating the extent and concentration of industrial enterprise in the United States. Apparently judicial notice was relied upon to bring to the minds of the justices, without the stimulus of further data or opinions in the brief, a reasonably accurate and complete picture of the integrated economic structure of the nation. Needless to say, much more was called for.

In contrast to this inadequacy stands the apparently thorough and careful record[10] and argument which were constructed to support the application of the Federal power to the regulated aspects of the live poultry industry of New York City. That the presentation of this branch of the case was not more convincing to the Court is perhaps a valid reason for contending that equal care in regard to the broader issue would have been similarly futile. The theory of litigation, however, is that truth will be attained after thorough presentation and argument. A fatalistic attitude on the part of one of the contenders is not an aid either to victory or to correctness in the outcome.

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[10] The writer has not had the opportunity to examine the record in the Schechter case, but it is reflected in the opinions and in the Government's brief. There is no indication that it contains material relating to the larger question of Federal power whose presentation is discussed in the text of this article above, nor would testimony upon this question have been pertinent to the issues before the jury at the trial.

Criticism of the actual decision in the *Schechter* case is difficult to offer. If the "purchasing power" basis for Federal regulation of wages and hours be rejected, the writer believes the decision of the circuit court of appeals to be sounder than that of the Supreme Court. The relation of wages and hours in the defendants' establishments to the welfare of the national live poultry industry is tenuous if not non-existent. The repercussions of bad trade practices upon prices and volume of commerce throughout the country were, however, clearly established, and the practicability of excluding "sick chickens" by choking off the market for them was hardly disputed. It is a bit difficult to see why if combinations which affect prices and volume of business in interstate commerce are subject to Federal control, unfair trade practices which have the same effect should not be, even where they are carried on in a single community. Nor is it clear why, if inspection of goods before shipment in order to bar harmful products from interstate commerce is a Federal function, the imposition of restrictions upon their sale afterward is not a legitimate means to the same end. Admittedly, however, the economic consequences upon which the scope of the Federal power depends are a matter of degree and the Court could not do otherwise than draw the line where its best judgment dictated.

In so far, however, as the Court may have intended to assert that, regardless of consequences, the Federal power must remain restricted in order to preserve a field for the independent action of the states in economic matters, its utterance may be criticized on the basis of another view which has considerable historical warrant. If, as there is reason to believe,[11] it was the intention of the framers of the Constitution to create a Federal Government which should have all the power necessary to deal with national economic concerns, assuring to the states only the power to control those economic matters whose significance is confined to their own boundaries, the Court's assumed dicta would amend the Constitution to the detriment of the Federal power at the very time when that power is most needed to cope with national problems. If such is the outcome of the *Schechter* decision, the result will constitute one of the most ironic tragedies of modern

[11] Corwin, The Twilight of the Supreme Court (1934) c. I; Stern, That Commerce Which Concerns More States than One (1934) 47 Harv. L. Rev. 1335.

times. Nor does the unanimity of the Court preclude the correctness of this view; for it may still be true that the conclusions of the national administration and of a few students and observers[12] are nearer to the truth than those of the justices. If such be the case, the Court may be the victim of its own earnestness and public spirit in disposing of the Schechter case along with many others in less than four weeks' time. Its performance in that regard is little short of phenomenal.

Nor is it necessarily an answer to the foregoing that a constitutional amendment enlarging the Federal power, if such an enlargement really is necessary, will eliminate the difficulty. Granting that the wisdom to amend the Constitution to meet present-day needs or even to frame a new constitution exists in the nation, it seems doubtful whether that wisdom can be brought to bear in a deliberative manner upon a sufficient scale to arrive at a conclusion upon constitutional questions that are subject to severe conflicts of interest. The lobbying which attends the ordinary legislative process, the fierce light of publicity which beats upon the statesman, and the pitiless pressure from the four corners of the land which in a few hours can be made to descend upon the legislator would be multiplied many fold when applied to a constitutional convention meeting in public or to the legislatures or state conventions called to consider constitutional amendments of a fundamental nature. It is doubtful, on the other hand, whether the product of executive sessions could command sufficient confidence to win adoption. Thus it may be that the existing government can evolve only through piecemeal growth at the hands of the sole central deliberative body that as yet exists, namely Congress. If the opportunity for such growth has been cut off, the consequences are difficult to foretell.

II. THE DELEGATION OF LEGISLATIVE POWER

In dealing with the question of the delegation of power by Congress to the President the Court in the *Schechter* case has made a distinction which has not been made previously in express terms and which may be helpful in the drafting of future legislation and the decision of future cases. In the *Panama Refining* case,[13] as Mr. Chief Justice Hughes points out in the

[12] Ibid.
[13] (1935) 55 S. Ct. 241, 20 St. Louis L. Rev. at 217.

Schechter opinion, "The question was with respect to the range of discretion given to the President" in deciding whether to issue or not to issue an order establishing a Federal offense defined in the statute. As respects the codes of fair competition, on the other hand, the President was given discretion not only in regard to whether codes should issue for particular industries but also as to their content. This point is emphasized especially in the concurring opinion of Mr. Justice Cardozo and is covered also by Mr. Chief Justice Hughes' statement that the more important question in the *Schechter* case is "whether there is any adequate definition of the subject to which the codes are to be addressed." In other words, the adequacy of the legislatively prescribed guides contained in the National Industrial Recovery Act had to be considered with reference to the dual aspect imparted to the President's discretion; and of these aspects the determination of the content of the codes was much the more significant. Conceivably, although the two questions are intertwined, the guides might be sufficient for the one purpose and not for the other, as Mr. Justice Cardozo in fact seems to have concluded.[14]

In addition to the purposes of the N. I. R. A. set forth in section 1, which the President was specifically directed in section 3 to find would be served by any code which he undertook to promulgate, the fact that the codes were to be codes of fair competition furnished the Government's chief reliance in its endeavor to convince the Court that the Act contained sufficient guides to the President. Its effort was to read into the term "fair competition" in this connection the meaning which it has acquired at common law and under the Federal Trade Commission Act. This effort was doomed to failure before it was made, for, as the Court easily saw, "The 'fair competition' of the codes has a much broader range and a new significance." The President was expressly authorized to include anything in the codes that would effectuate the policy of the Act as declared in section 1, including, as the Court pointed out, "the elimination of unfair competitive practices." The words "unfair competitive practices" pretty clearly had the connotations which have developed previously in

[14] Mr. Justice Cardozo, it will be remembered, dissented in the Panama Refining case upon the ground that the declaration of policy in the N. I. R. A. furnished a sufficient guide to the President in deciding whether or not to prohibit the interstate shipment of petroleum illegally produced.

the law and, just as clearly, the phrase "fair competition" elsewhere in the Act had a much wider content. The provisions of the codes themselves show that the administration acted upon this assumption. Thus remitted to section 1 for the guides to the President, the Court held them to be inadequate, as it had indicated previously that they were.

Equally futile was the Government's attempt to convince the Court that the opportunity given to trade associations to propose codes to the President somehow made a difference. Clearly these proposals had no force; the President was not bound by them in the slightest degree; and the Act would, if that were possible, have been even more unconstitutional than it was if it had attempted to confer actual rule-making power upon private groups. For: "Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

Sympathizing with the Court, as one naturally does, in its rejection of irrelevant arguments, it is still possible to question whether the decision in regard to the delegation of legislative power is sound. To some it seems that Congress had indicated with reasonable clarity the ends which it wished to have served by means of the powers conferred upon the executive. Assuming, as did the Court, that the procedure laid down for the President to follow was not wanting in due process, it is questionable at best whether under modern conditions a sufficiently comprehensive, varied, and flexible control of economic activity can be established with greater initial participation by the legislature or whether in the long run, if the system does not break down in the meanwhile, the Court will not be compelled to accept legislation which does not differ substantially in this respect from the National Industrial Recovery Act. With the legislature continuously available to checkmate possible excesses on the part of the executive and to clarify and improve deficient legislation, it is doubtful at best whether "dictatorship" or "tyranny" will be brought appreciably nearer by such means.

Be that as it may, the clarification introduced by the *Schechter* decision into the situation left by the *Panama Refining* case cannot but be welcome. This much at least is definite: (1) Congress must define its policy in future legislation which delegates discretion to the executive with somewhat greater particularity than

in section 1 of the N. I. R. A.; (2) Congress must state with some definiteness the permissible content of rules which it authorizes the President to promulgate with binding effect upon private persons; and (3) Congress must require express findings on the part of the executive that the statutory conditions precedent to such executive rule-making actually exist. Nevertheless one shrinks from contemplating the volume of litigation which will attend the attempt to enforce each new statute that confers powers of this nature and the paralysis in administration which is certain to prevail in each instance until the matter has been disposed of.

III. THE STATUS OF JUDICIAL REVIEW

The situation precipitated by the *Schechter* decision exemplifies perfectly the price that is paid for the system of judicial review of legislation that has developed in this country. So great is the doubt regarding the scope of the Federal power, that Congress and the administration must either refrain from adopting measures deemed essential to the country's welfare or else run the chance of having them overthrown in court by judges who are in no way responsible for the solution of the economic and social problems involved and who could not offer suggestions if they would. The debate upon pending measures is shifted to a large degree from their merits to their constitutionality and the effectiveness of any laws that are adopted is certain to be postponed until litigation has been concluded. Such a situation is tolerable only if it is true that "That government is best which governs least"—a proposition which few would care openly to avow at the present time.

The very uncertainty of the situation, however, suggests a possible way out. Well-planned presentation of future cases involving the constitutionality of existing and contemplated Federal regulatory legislation may result in judicial recognition of a Federal power adequate to cope with the more important problems. The effort to achieve such an outcome will appear illegitimate only to those who believe that the Supreme Court has already spoken with clarity, that its views necessarily are correct, and that under no circumstances would it repudiate anything it has said. Such a view, of course, is at variance with experience as well as with reason.