Legislation and Regulation
Law 6209 - Section 15 (Brandeis)
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Supplementary Materials
Part 2

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A.L.A. SCHECHTER POULTRY CORPORATION v. UNITED STATES
295 U.S. 495 (1935)

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

[The National Industrial Recovery Act, passed by Congress in 1934, permitted the President to adopt "codes of fair competition." Section 3 of the Act provided that a trade or industrial association or group could present such a code to the President for approval. The President could approve the code if he found (1) that the association or group imposed no inequitable restrictions on membership and was truly representative of its trade or industry, and (2) that the code was not designed to promote monopolies or eliminate or oppress small enterprise and would effectuate the policies of the Act. The President might, as a condition of approval, impose such exceptions and exemptions from the provisions of the code as he deemed necessary to effectuate the policy of the Act. The President might also, upon his own motion, after notice and hearing, prescribe a code of fair competition for a trade or industry that had not applied for one. Once a code of fair competition was prescribed by the President, violation of it was a misdemeanor and upon conviction an offender could be fined not more than $500 per offense.

[Section 1 of the Act declared that a national emergency productive of widespread unemployment and disorganization of industry existed, and declared the policy of the Act to be to remove obstructions to the free flow of interstate and foreign commerce, to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce united action of labor and management, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, and otherwise to rehabilitate industry and to conserve natural resources.

[In April, 1934, the President, upon application as provided in the Act, approved a "Live Poultry Code" governing the live poultry industry in and around New York City. Among other things, the code fixed the number of hours for workdays and workweeks for employees in the industry, set a minimum wage for them, prohibited child labor, guaranteed the right of collective bargaining, fixed a minimum number of employees to be employed by slaughterhouse operators based on their sales, imposed recordkeeping requirements, and banned certain "unfair methods of competition." Among the prohibitions included in this last point was one that prohibited slaughterers from allowing retail dealers and butchers to select particular chickens for sale; slaughterers had to sell chickens by the coop or half coop, with no choice of particular birds available to the buyer.

[Defendants were convicted in federal district court of violating the code. Ten counts of the indictment alleged violation of the wage and hour provisions of the code; ten counts alleged violation of the chicken-selling requirement.]

* * *

The Question of the Delegation of Legislative Power.

We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. * * * The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article 1, § 1. And the Congress is authorized 'To make all

Laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out * * * that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. * * *

Accordingly, we look to the statute to see whether Congress has overstepped these limitations--whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

* * * As to the 'codes of fair competition,' under section 3 of the act, the question is * * * fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by 'fair competition' as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction, and expansion which are stated in the first section of title 1?

The act does not define 'fair competition.' 'Unfair competition,' as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. * * * In recent years, its scope has been extended. * * * But it is evident that in its widest range, 'unfair competition,' as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The government does not contend that the act contemplates such a limitation. It would be opposed both to the declared purposes of the act and to its administrative construction.

The Federal Trade Commission Act * * * introduced the expression 'unfair methods of competition,' which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words 'unfair competition,' in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition; its scope being left to judicial determination as controversies arise. * * * What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. * * * To make this possible, Congress set up a special procedure. A commission, a quasi judicial body, was created. Provision

was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority. * * *

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. * * *

Under section 3, whatever 'may tend to effectuate' [the] general purposes [of the Act as given in section 1] may be included in the 'codes of fair competition.' We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with 'unfair competitive practices' which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. * * *

The government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that industry--by the persons most vitally concerned and most familiar with its problems.' Instances are cited in which Congress has availed itself of such assistance; as, e.g., in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. * * *

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion: First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code 'impose no inequitable restrictions on admission to membership' and are 'truly representative.' That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not 'designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.' And to this is added a proviso that the code 'shall not permit monopolies or monopolistic practices.' But these restrictions leave virtually untouched the field of policy envisaged by section 1, and, in that

wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will, and the President may approve or disapprove their proposals as he may see fit. * * *

Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. * * * And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies. By the Interstate Commerce Act * * * Congress has itself provided a code of laws regulating the activities of the common carriers subject to the act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. * * * When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers, and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. * * *

Similarly, we have held that the Radio Act of 1927 established standards to govern radio communications, and, in view of the limited number of available broadcasting frequencies, Congress authorized allocation and licenses. The Federal Radio Commission was created as the licensing authority, in order to secure a reasonable equality of opportunity in radio transmission and reception. The authority of the Commission to grant licenses 'as public convenience, interest or necessity requires' was limited by the nature of radio communications, and by the scope, character, and quality of the services to be rendered and the relative advantages to be derived through distribution of facilities. These standards established by Congress were to be enforced upon hearing and evidence by an administrative body acting under statutory restrictions adapted to the particular activity. * * *

In *Hampton, Jr. & Company v. United States*, * * * the question related to the 'flexible tariff provision' of the Tariff Act of 1922. We held that Congress had described its plan 'to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States.' As the differences in cost might vary from time to time, provision was made for the investigation and determination of these differences by the executive branch so as to make 'the adjustments necessary to conform the duties to the standard underlying that policy and plan.' * * * The Court found the same principle to be applicable in fixing customs duties as that which permitted Congress to exercise its rate-making power in interstate commerce, 'by declaring the rule which shall prevail in the legislative fixing of rates,' and then remitting 'the fixing of such rates' in accordance

with its provisions 'to a rate-making body.' * * * The Court fully recognized the limitations upon the delegation of legislative power. * * *

To summarize and conclude upon this point: Section 3 of the Recovery Act * * * is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

* * *

MR. JUSTICE CARDOZO (concurring).

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. * * * Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.

I have said that there is no standard, definite or even approximate, to which legislation must conform. Let me make my meaning more precise. If codes of fair competition are codes eliminating 'unfair' methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions. * * * Delegation in such circumstances is born of the necessities of the occasion. The industries of the country are too many and diverse to make it possible for Congress, in respect of matters such as these, to legislate directly with adequate appreciation of varying conditions. Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the imprimatur of the President that begets the quality of law. * * * When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers.

But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may

do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny.

* * *

I am authorized to state that MR. JUSTICE STONE joins in this opinion.

Notes and Questions

1. What, in the Court's view, distinguished the (unconstitutional) National Industrial Recovery Act from the (permissible) instruction by Congress to the Federal Communications Commission to grant broadcast licenses when the "public interest, convenience, or necessity" would be served thereby? What distinguished it from the power previously given, with the Court's approval, to the Federal Trade Commission or the Interstate Commerce Commission?

2. In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), mentioned in the Court's opinion, the Court approved the vesting of power in the executive branch by saying, "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Similarly, in Yakus v. United States, 321 U.S. 414 (1944), the Court said, "Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . ."

Do you think these standards were met in the prior cases described in the Court's opinion in *Schechter Poultry*? Does a congressional instruction that broadcast licenses should be granted when the "public interest, convenience, or necessity" so requires, or that railroad rates shall be "just and reasonable," lay down an intelligible principle for an agency to follow? Could a court tell whether such an agency is obeying the congressional will?

Statutory Background for the *Chevron* Case

Under the Clean Air Act, every state is required to meet the National Ambient Air Quality Standards (the NAAQS). An area within a state that does not meet the NAAQS is called a "non-attainment area." Typically, attainment is determined on a county-by-county basis, so a non-attainment area is typically a county.

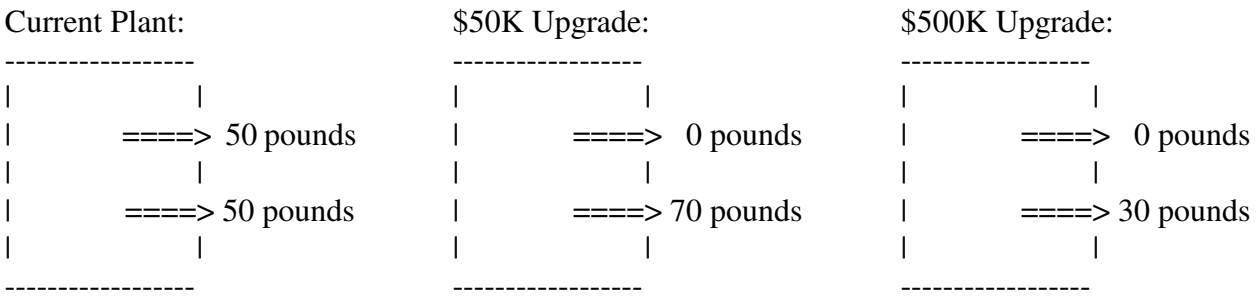
In 1970, Congress amended the Clean Air Act. As amended, the Act provided that any state that has any non-attainment areas must have a state implementation plan (SIP) for the Clean Air Act. Each SIP had to provide that any *new* stationary source of pollution in a non-attainment area must have a permit. The same was true of any *modified* stationary source of pollution in a non-attainment area. Existing stationary sources of pollution in non-attainment areas could continue to exist without permits so long as they were not modified.

The term "modified" had a special statutory definition. A stationary source was "modified" if it was changed so that it emitted more pollution than before. Changing an existing stationary source of pollution so as to reduce its emissions of pollution didn't count as "modifying" it and no permit was required. But to change a source so that it emitted more pollution than before created a "modified" source and required a permit.

The key statutory requirement was this: a permit could be issued for a new or modified stationary source of pollution in a non-attainment area only if the equipment to be used in the new or modified stationary source achieved the "lowest achievable emission rate."

As you will see in the *Chevron* case, a critical issue in the case was the definition of "stationary source of pollution." To understand the importance of this term, consider the following hypothetical situation (see next page):

A manufacturing plant has two emission pipes. Each pipe emits 50 pounds of pollutant per day. The plant owner desires to upgrade the plant's equipment. The upgrade, which will cost $50,000, will result in shutting off one of the plant's pipes entirely, but increasing the emissions of the other to 70 pounds of pollutant per day. Technology exists that would permit the plant owner to upgrade the plant so as to shut off one pipe entirely and reduce the emissions of the other to 30 pounds of pollutant per day, but the plant owner doesn't want to use that technology because it would cost $500,000 to upgrade to it. (See diagram)



Consider these questions carefully (they will be asked in class):

1. Would the owner's desired upgrade require a permit under the Clear Air Act?

2. Could a permit lawfully be issued for the owner's desired upgrade?

3. What effect did the EPA's regulation, discussed in *Chevron*, have on these questions?