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CONSTITUTIONAL LAW - NATIONAL INDUSTRIAL RECOVERY ACT

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CONSTITUTIONAL LAW — NATIONAL INDUSTRIAL RECOVERY ACT — Defendants conducted wholesale poultry slaughterhouse markets. They had been convicted in a District Court of violating the following provisions of the "Live Poultry Code," promulgated under Section 3 of the National Industrial Recov-

ery Act:¹ (1) Minimum wages; (2) Maximum hours; (3) Requirement of "straight killing";² (4) Requirement of compliance with the inspection ordinances of the City of New York; (5) Requirement of filing of true reports of volume of business, etc., to the Code Authority; (6) Requirement of sale to dealers licensed by the City of New York. On a writ of certiorari to the Supreme Court of the United States, defendants contended that the code under which they had been convicted violated provisions in the Constitution of the United States. *Held*, the code provisions in question were invalid because: (1) They were part of an attempted delegation of legislative power; (2) They were attempts at regulation of intrastate commerce. Conviction reversed. *Joseph Schechter v. United States*, (U. S. Sup. Ct.) 2 U. S. LAW WEEK, index p. 926 (May 28, 1935).

The Court, early in its opinion, briefly disposes of two of the main contentions of counsel for the Government. First, as to a justification of the NIRA on grounds of emergency, the Court had this to say: "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority."³ Second, as to a justification of the codes by the argument that they were voluntary, the Court held that "the statutory plan is not simply one for voluntary effort. . . . It involves the coercive exercise of the law-making power."⁴ Prior to the decision in the so-called "hot oil" cases,⁵ the Supreme Court had never invalidated an act of Congress on the ground that it was an excessive delegation of legislative power.⁶ Many writers had expressed their belief that the NIRA would be held constitutional on this point.⁷ The "hot oil" cases, however, indicated otherwise. Thus, even Mr. Justice Cardozo, who had dissented in the "hot oil" cases on this very point, agreed with the rest of the court in the principal case that there was an excessive delegation of legislative power. In his own inimitable phraseology, "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing."⁸ Aside from the invalidity on that point, the Court found another ground on which to invalidate the code. As Mr. Justice Cardozo put it,

¹ Act of June 16, 1933, c. 90, 48 Stat. 195 at 196, U. S. C. tit. 15, sec. 703.

² "Straight killing" is a word of art; as it is defined in the code, it means the sale of poultry as it comes in the coop, without any selection of particular chickens from particular coops.

³ 2 U. S. LAW WEEK, index p. 928:2 (1935).

⁴ 2 U. S. LAW WEEK, index, p. 928:3 (1935).

⁵ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935); *Amazon Petroleum Corp. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935).

⁶ 47 HARV. L. REV. 85 at 95 (1933).

⁷ Frankham, "An Analysis of the Delegation of Power in Some of the Recent Congressional Enactments," 3 BROOKLYN L. REV. 38 (1933); Carpenter, "Constitutionality of the National Industrial Recovery Act and The Agricultural Adjustment Act," 7 S. CAL. L. REV. 125 (1934); Hervey, "Some Constitutional Aspects of the National Industrial Recovery Act," 8 TEMPLE L. Q. 3 (1933); Maurer, "Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act," 22 GEORGETOWN L. J. 207 (1934); J. Dickinson, "The Major Issues Presented By The Industrial Recovery Act," 33 COL. L. REV. 1095 at 1100 (1933); Handler, "The National Industrial Recovery Act," 19 A. B. A. J. 440 at 446 (1933).

⁸ 2 U. S. LAW WEEK, index p. 933:1 (1935).

"If this code had been adopted by Congress itself, and not by the President . . . it would even then be void unless authority to adopt it is included in the grant of power 'to regulate commerce with foreign nations and among the several states.' . . .

"I find no authority in that grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendants' business."⁹

The Court held that every code provision on which defendants' conviction was based¹⁰ was infected with this usurpation of power and, consequently, was invalid. Although, prior to the decision in the principal case, many writers had urged that the control of industry contemplated by the NIRA was within the scope of the commerce clause,¹¹ the decision of the Court on this point did not cause surprise or consternation. Now that the Supreme Court has "broken the back of the NRA over a coopful of chickens,"¹² if the policies of the New Deal are to be continued it will have to be based on voluntary organization of industry, guided, guarded and limited by the great body of law built up around our anti-trust acts, or else the fundamental law itself will have to be amended.

M. J. M.

⁹ 2 U. S. LAW WEEK, index p. 933:3 (1935).

¹⁰ See the first paragraph of the present note.

¹¹ Robert L. Stern, "That Commerce Which Concerns More States Than One," 47 HARV. L. REV. 1335 (1934); Richberg, "Legal Problems of The National Recovery Administration," 38 COMMERCIAL L. J. 682 (1933); H. E. Wahrenbrock, "Federal Anti-Trust Law and The National Industrial Recovery Act," 31 MICH. L. REV. 1009 at 1045 (1933); Hervey, "Some Constitutional Aspects of the National Industrial Recovery Act," 8 TEMPLE L. Q. 3 (1933); "The Commerce Power and Hours of Labor," 21 GEORGETOWN L. J. 490 (1933). For discussions concluding that the Recovery Act was not within the powers granted to Congress under the commerce clause, see: Elder, "Some Constitutional Aspects of The National Industrial Recovery Act," 28 ILL. L. REV. 636 at 652 (1934); Bruce, "The Constitutionality of The National Recovery Act," 38 COMMERCIAL L. J. 316 (1933); 47 HARV. L. REV. 85, 87 (1933). For a general treatment of the problems involved under the commerce clause, see: E. S. Corwin, "Congress's Power to Prohibit Commerce A Crucial Constitutional Issue," 18 CORN. L. Q. 477 (1933); Brown and Hall, "The Police Power and Economic Reconstruction," 1 UNIV. CHI. L. REV. 224 (1933); Maurer, "Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act," 22 GEORGETOWN L. J. 207 (1934); Ribble, "The 'Current of Commerce,'" 18 MINN. L. REV. 296 (1934).

¹² TIME, vol. 25, p. 13 at 14:3 (June 3, 1935).