Fordham Law Review

Volume 4 | Issue 3 Article 4

1935

The Schechter Case--A Restatement of Familiar Principles

COMMENTS

THE SCHECHTER CASE—A RESTATEMENT OF FAMILIAR PRINCIPLES.—The *Schechter Case*[1] is now history. Seldom has a decision of the Supreme Court been preceded by more heated debate pro[2] and con,[3] attended with greater expectancy, and followed by more vehement argumentation.[4] Interest in the outcome was by no means confined to the legal profession; the humble shopkeeper was as deeply concerned as the great corporation.

The problem immediately before the Court concerned the code provisions of the National Industrial Recovery Act. Section 3[5] of that Act authorized the President to approve and promulgate codes of fair competition under which the various industries would thereafter be required to operate. Under this authority, the President approved the Live Poultry Code of the New York Metropolitan Area.[6] An indictment was brought, charging, *inter alia*, violation

1. A. L. A. Schechter Poultry Corp. v. United States, 55 Sup. Ct. 837 (1935).

2. Many urged that the control of industry as outlined by the N. I. R. A. was within the scope of the commerce clause. Wahrenbrock, *Federal Anti-Trust Law and The National Industrial Recovery Act* (1933) 31 MICH. L. REV. 1009; Hervey, *Some Constitutional Aspects of the National Industrial Recovery Act* (1933) 8 TEMPLE L. Q. 3; Stern, *That Commerce Which Concerns More States Than One* (1934) 47 HARV. L. REV. 1335.

3. That the N.I.R.A. was not within the powers granted to Congress under the commerce clause: (1933) 47 HARV. L. REV. 85; Elder, *Some Constitutional Aspects of the National Industrial Recovery Act* (1934) 28 ILL. L. REV. 636. Many foresaw that the N.I.R.A. would be held unconstitutional on the ground of undue delegation of power; Frankham, *An Analysis of the Delegation of Power in Some of the Recent Congressional Enactments* (1933) 3 BROOKLYN L. REV. 38; Hervey, *Some Constitutional Aspects of the National Industrial Recovery Act* (1933) 8 TEMPLE L. Q. 3; Dickinson, *The Major Issues Presented by the Industrial Recovery Act* (1933) 33 COL. L. REV. 1095; Handler, *The National Industrial Recovery Act* (1933) 19 A. B. A. J. 440; Maurer, *Some Constitutional Aspects of the National Industrial Recovery Act and the Agricultural Adjustment Act* (1934) 22 GEO. L. J. 207; Carpenter, *Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act* (1934) 7 So. CALIF. L. REV. 125.

4. Fuchs, *A Postscript—The Schechter Case* (1935) 20 ST. LOUIS L. REV. 297; (1935) 35 COL. L. REV. 934; (1935) 9 TEMPLE L. Q. 451; (1935) 33 MICH. L. REV. 1254.

5. 48 STAT. 195, 15 U. S. C. A. § 701 (1933).

6. The Code included in its scope the five boroughs of New York City, four other counties of New York, one in Connecticut and two in New Jersey. It contained eight articles headed respectively: Purposes, Definition, Hours, Wages, General Labor Provisions, Administration, Trade Practice Provisions, General. Its declared purpose was "to effect the policies of title I of the N.I.R.A." The "industry" was defined as including "every person engaged in the business of selling, purchasing for resale, transporting or handling and/or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form," and such "related branches" as may from time to time be included by amendment. The Code fixed the number of hours for work days, "no employee, with certain exceptions, being permitted to work over forty hours per week" and the minimum standard of wages (no employee to be paid less than fifty cents per hour). It prohibits the employment of those under sixteen

of the minimum wage, maximum hour and "straight killing"[7] provisions of the Poultry Code. The defendants who operated wholesale poultry slaughterhouse markets in New York and purchased from commission men for sale and resale to local retailers, were convicted for violations of the Code and for conspiracy to commit such violations. The Circuit Court of Appeals reversed the conviction on the counts charging infringement of the provisions relating to minimum wages and hours of labor, holding these not within the congressional power of regulation. On appeal to the Supreme Court the reversal of the conviction was upheld on two grounds: first, that the Code had been adopted pursuant to an unconstitutional delegation of legislative power by Congress, and second, that the attempted regulation exceeded the powers granted to Congress under the commerce clause.

Delegation of Power

In holding that Congress had unconstitutionally delegated its legislative power to the President, the Court invoked a doctrine,[8] traditionally familiar[9] but never, prior to the decision in the "hot oil" case,[10] successfully resorted to as a ground for invalidating an act of Congress. The question of undue delegation of power to the President was not litigated in the Supreme Court until 1813,[11] and did not make its reappearance for more than a half century.[12] But thereafter the doctrine received frequent consideration in attacks both against acts of Con-

years of age. It assures to employees the right of "collective bargaining" and freedom of choice with respect to labor organizations. It fixes the minimum number of employees who shall be employed by slaughterhouse operators. The seventh article, containing "trade practice provision" prohibits various practices which are said to constitute "unfair methods of competition."

7. "Straight killing" is defined in the Code as "the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop or coops as purchased by slaughterhouse operators, except for culls."

8. The doctrine was the subject of much discussion in the Constitutional Convention but it is interesting to note that it does not appear in the Constitution except by implication from the fact that the three powers are there separately treated and vested in three distinct branches of the federal government. In actuality, a complete segregation of powers has never obtained, for example, the President exercises a legislative function when he vetoes Acts of Congress, the Senate exercises judicial power when it sits as a court of impeachment. The Supreme Court legislates when it enunciates rules of practice.

9. That Congress may leave to selected persons the formulation of rules within prescribed limits was always well understood. Interstate Commerce Comm. v. Goodrich Transit Co., 224 U. S. 194 (1912); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932). The rule concerning delegation is well known and stems from the maxim *delegata potestas non potest delegari.*

10. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).

11. Cargo of the Brig Aurora, 11 U. S. 382 (1813).

12. Field v. Clark, 143 U. S. 649 (1892). During the intervening period the Supreme Court determined favorably on questions involving delegation of power to the courts, Wayman v. Southard, 23 U. S. 1 (1825), and to a state railroad commission, Railroad Comm. Cases, 116 U. S. 307 (1886).

gress[13] and against statutes of the state legislatures.[14] Rulings of the Interstate Commerce Commission have been repeatedly challenged on this ground.[15] But in each instance the Court, while reiterating the doctrine that legislative power may not be delegated, found that in the particular case under consideration it had not been violated. The doctrine was to win its first victory in the case which struck the presaging blow at the citadel of the New Deal.[16]

While the "hot oil" cases did not penetrate to the very heart of the N. I. R. A., the code-making power, its "bone and sinew", was involved in the *Schechter Case*. The pivotal issue in the latter case focussed on the power delegated to the President to approve and promulgate codes. Was it merely that required to administer policies defined by Congress, or was it a sweeping delegation of power without adequate circumscription? Chief Justice Hughes, citing the "hot oil" case, observes that there the subject of the statutory prohibition was defined and the objection was merely with respect to the range of discretion given to the President, while here no limits were set to the exercise of the President's discretion, which, in approving or prescribing codes and thus enacting laws for the government of trade and industry throughout the country, was virtually unfettered.[17]

13. *Ex parte* Kollock, 165 U. S. 526 (1897) (an act requiring containers of oleomargerine to be marked as prescribed by the Commissioner of Internal Revenue); Buttfield v. Stranahan, 192 U. S. 470 (1904) (an act requiring that all tea imported should conform with standards to be established by the Secretary of the Treasury); Union Bridge Co. v. United States, 204 U. S. 364 (1907); Monongahela Bridge Co. v. United States, 216 U. S. 177 (1910); United States v. Grimaud, 220 U. S. 506 (1911) (a statute giving the Secretary of Agriculture certain powers with respect to authorized reserves); First Nat. Bank v. Fellows, 244 U. S. 416 (1917) (Federal Reserve Act); Selective Draft Law Cases, 245 U. S. 366 (1918) (Selective Service Act); United States v. Chemical Foundation, 272 U. S. 1 (1926) (Trading with the Enemy Act); Hampton Jr. & Co. v. United States, 276 U. S. 394 (1928) (the flexible provisions of the Tariff Act of 1922); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932) (the Pure Food and Drug Act).

14. Statutes relating to railroad and utility regulation: Reagan v. Farmers Loan & Trust Co., No. 1, 154 U. S. 362 (1894); Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265 (1908); Honolulu Rapid Transit Land Co. v. Hawaii, 211 U. S. 282 (1908); Oklahoma Operating Co. v. Love, 252 U. S. 331 (1920). To the inspection of coal mines: Consolidated Coal Co. v. Illinois, 185 U. S. 203 (1902). The taxation of railroads: Michigan Cent. R. Co. v. Powers, 201 U. S. 245 (1906). The inspection of illuminating oil: Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380 (1912). The licensing of dentists: Douglas v. Noble, 261 U. S. 165 (1923). A motor vehicle act: Sproles v. Binford, 286 U. S. 374 (1932).

15. See for example: Interstate Commerce Comm. v. Goodrich Transit Co., 224 U. S. 194 (1912); Inter-mountain Rate Cases, 234 U. S. 476 (1914); Avent v. United States, 266 U. S. 127 (1924); Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370 (1932); New York Cent. Securities Corp. v. United States, 287 U. S. 12 (1932).

16. (1934) 4 FORDHAM L. REV. 341.

17. The Court found that Section 3 of the N.I.R.A. authorized prohibition which would, in the opinion of the President, bring about the rehabilitation of industry, and that the only limits on his discretion were (1) that the proposed code be truly representative and impose

This conclusion, however, is by no means so consequential nor will it effect such serious repercussions as may, perhaps, the Court's definition of "interstate commerce", in positing as the second ground of the opinion the premise that the transactions involved did not come within the scope of the "commerce clause" of the Constitution. Conceivably, statutes might have been enacted, and existing statutes redrafted to meet the requirement as to delegated authority but this opinion strikes not only at the N. I. R. A., it strikes at the most historic well-spring of federal power.

Interstate Commerce

The "commerce clause"[18] ranks second in importance only to the "due process" clause of the Fourteenth Amendment as the outstanding constitutional recourse, although its full import was not revealed before the year 1824[19] with the case of *Gibbons v. Ogden*.[20] The clause found its inception in the endeavor of the framers of the Constitution to preclude for all time the enervating effect of conflict nurtured by commercial jealousies among the erstwhile colonial entities. Indeed the chief and possibly entire purpose of the clause was to empower the federal government to prevent states' interference with the freedom of commercial intercourse.[21] However, as has been clearly demonstrated, "The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself."[22] Marshall had already ruled[23] that "commerce" is not merely "traffic" in its primary significance, it is also "intercourse" and hence comprehends "transportation."[24] With this enlarged interpretation of the intended purpose and scope of the clause as a point of departure, the Court built up a conception of the word "regulate", discarding Marshall's definition as the power to "govern", and forged a new instrument of federal control by construing the clause as a grant of power to "foster, protect and promote commerce."[25] Still greater vistas of regulation were opened by the

no inequitable restriction on admission to membership, (2) that it be not monopolistic nor operate to oppress small enterprises, (3) that it tend to effectuate the policy of N.I.R.A. which is to promote trade and industry. Counting these limitations no restriction, the Court concluded that the discretion of the President was completely unconfined "to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

18. U. S. CONST. Art. I, § 8. Congress is given power to "regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

19. Before 1840, this clause was involved in but five cases in the Supreme Court.

20. 22 U. S. 1 (1824).

21. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 721.

22. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 228 (1899).

23. Gibbons v. Ogden, 22 U. S. 1 (1824).

24. See CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934) 19, for a criticism of the conflict resulting from this dual interpretation.

25. Southern Ry. Co. v. United States, 222 U. S. 20 (1911); Second Employers Liability Cases, 223 U. S. 1 (1912); Houston E. & W. Texas Ry. Co. v. United States, 234 U. S. 342 (1914); Wilson v. New, 243 U. S. 332 (1917); United States v. Fergen, 250 U. S. 199 (1919); Railroad Comm. of Wis. v. Chicago, B. & Q. R. Co., 257 U. S. 563 (1922).

flexible interpretation of "commerce"—as "transportation"[26] thus embracing such non-commercial activities as driving sheep across state lines,[27] carrying goods from one state to another for personal use, and in a private vehicle,[28] as well as by means of a common carrier,[29] crossing a bridge from state to state,[30] and transporting a woman across state lines for immoral purposes.[31] The breadth of federal powers has not been "confined to the instrumentalities of commerce known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."[32] It has thus been extended to industries unknown and unforeseen when the Constitution was framed, such, for example, as the wireless, radio, telephone and aeroplane industries. So too, the Court's conception of "commerce among the states" has expanded to encompass transportation within a state of goods destined for or brought from another state,[33] as well as the sale by sample of goods to be brought from another state,[34] and the purchase of goods within a state for transportation to another state.[35] These results were achieved mainly in cases involving measures of state taxation, and the introduction of the "Original Package Doctrine"[36] brought with it the further rule that the sale of goods coming into the state in the original package was the subject of federal and not state jurisdiction. Subtle refinements and meticulous distinctions have followed in the train of attempts to define the constituent elements of the "original package."[37] Fre-

26. See Willoughby, *op. cit. supra* note 21, at 733 for a criticism of the Court's expansion of the inherent meaning of "commerce".

27. Kelley v. Rhoads, 188 U. S. 1 (1903).

28. United States v. Simpson, 252 U. S. 465 (1920). Clarke J., dissenting pointed out at p. 468 that the grant of power to Congress is over *commerce*.

29. In United States v. Hill, 248 U. S. 420 (1919) liquor was carried by a private individual for his own personal use, but was transported across state lines by a common carrier. The decision is therefore somewhat less questionable.

30. Covington Bridge Co. v. Kentucky, 154 U. S. 204 (1894).

31. This is so even where there is present neither coercion nor expectation of pecuniary gain, the mere idea of transportation being sufficient. In Caminetti v. United States, 242 U. S. 470 (1917) there was transportation by means of a public carrier. But in Wilson v. United States, 232 U. S. 563 (1914) the court had held it immaterial whether or not the transportation was by a common carrier.

32. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 9 (1877).

33. State Freight Tax Case, 82 U. S. 232 (1872).

34. Robbins v. Shelby Taxing Dist., 120 U. S. 489 (1887).

35. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921).

36. In Brown v. Maryland, 25 U. S. 419 (1827), Marshall attempted to indicate the point at which federal control ceased and state control resumed over goods moving in interstate commerce. He argued that the right of importation carries with it the right to sell the article imported, and that consequently, while such goods remain in their original packages, they are within federal control. When the articles have become mingled with and incorporated into the mass of general property in the state, by sale or by breaking of the original packages, federal regulation ceases.

37. Leisy v. Harden, 135 U. S. 100 (1890) (state statute prescribing conditions upon which liquor could be imported held a regulation of interstate commerce as applied to sale

quently a functional approach was necessary for the adjustment of the original doctrine to the spirit of pertinent statutes.[38] Thus when the Constitution stated merely that Congress shall have power to regulate commerce among the states, it left matters of degree open to future determination, and the reasons for expansion obviously could not and have not come from the Constitution. They have come from the Supreme Court. The history of this development furnishes ample illustration of the truth that "We are under a Constitution, but the Constitution is what the judges say it is."[39]

The chief question involved in the *Schechter Case*—whether the effect of local practices upon the general stream of interstate commerce was direct or indirect—is not a novel one. The answer of the Court has been a vacillating process swerving from the ultra-conservative decision in the *Sugar Trust Case*[40] to the liberal holding of the *Swift Case*[41] and swinging back again to the reactionary rationale of the *Child Labor Case*.[42] In the *Sugar Trust Case*, the Court ruled, in interpreting the Sherman Anti-Trust Act, that the particular combination under attack involved a purely local process, the manufacture of a commodity, and that consequently the regulatory power of Congress sanctioned by the commerce clause could not be extended to the defendant. However, nine years later,[43] the Court held that a combination organized to acquire control of two competing railway systems by means of stock purchases was violative of the Act.[44] The substantial similarity between these two cases is difficult to ignore. The explanation for the disparity in result is probably to

in original packages by importer); Schollenberger v. Pennsylvania, 171 U. S. 1 (1898) (state statute prohibiting sale of oleomargarine held unconstitutional to extent it prohibited importation and sale while in original package). But *cf.* Austin v. Tennessee, 179 U. S. 343 (1900) (small packages of cigarettes imported in baskets held not original packages); McDermott v. Wisconsin, 228 U. S. 115 (1913) (cans of corn syrup removed from original wooden boxes in which they had been shipped held within federal regulation).

38. However in Baldwin v. Seelig, 294 U. S. 511 (1935) Justice Cardozo stressed the fact that the "Original Package Doctrine" was not an inflexible rule, nor the breaking of bulk the sole test, and that for some purposes imports still in the original package will be treated as part of the general mass of property at the state of destination, while on the other hand the mere breaking of bulk does not necessarily put an end to federal control.

39. HUGHES, ADDRESSES (1908) 139.

40. United States v. E. C. Knight Co., 156 U. S. 1 (1895).

41. Swift & Co. v. United States, 196 U. S. 375 (1905).

42. Hammer v. Daggenhart, 247 U. S. 251 (1918).

43. Northern Securities Case, 193 U. S. 197 (1904).

44. The majority reiterated the language of the Sugar Trust Case to the effect that the Act had no reference to the mere manufacture or production of articles or commodities within the limits of the States, but added that it embraced every contract, combination or conspiracy which directly operates in restraint of interstate commerce. The dissent arguing that the case fell exactly within the holding of the Sugar Trust Case said, at 396: "The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership."

be discovered in the decided leaning of the Court manifested in a host of decisions in favor of congressional control of railroads,—the backbone of interstate commerce. Nevertheless, in the first *Employers' Liability Cases*[45] the rule was definitely laid down that even carriers engaged in interstate commerce do not thereby submit all their business concerns to the regulating power of Congress.[46]

In the *Swift Case*,[47] which dealt with purchases and sales by livestock dealers, the Court in effect overruled its decision in the *Sugar Trust Case* and speaking through Justice Holmes said, that granting the acts in question were in themselves local, they nevertheless were ingredients of a scheme which as a whole affected interstate commerce.

The same question was again posed, though in a new form in *United States v. Delaware & Hudson Co.*[48] with regard to legislation forbidding a carrier to haul in interstate commerce articles or commodities in which it had any interest, direct or indirect.[49] In upholding this legislation, the Court recognized the authority of Congress to control mining, manufacturing and production, activities which, while inherently local were held to have acquired an interstate aspect when subjected to the control of carriers. The decision while seemingly a departure from conservative moorings, was emasculated by the rigid requirement of proving a dominating control of the local corporation by the carrier corporation. The pendulum of conservatism now swung to its full arc[50] in the decision rendered in the *Child Labor Case*.[51] There the note was struck with finality that manufacture is not a part of interstate commerce[52] and that it does not become such because of an intention to transport. By a bare majority the Court reverted to a doctrine whose significance, owing to attacks directed in

45. 207 U. S. 463 (1908).

46. The Court held an Employers' Liability Act unconstitutional on the ground that its scope was not confined to a master-servant relationship bearing on the direct operation of interstate commerce. *Cf.* Railroad Retirement Board v. Alton R. Co., 295 U. S. 330 (1935); (1935) 4 FORDHAM L. REV. 498.

47. In Chicago Board of Trade v. Olsen, 262 U. S. 1, 35 (1923) Chief Justice Taft paid tribute to the broad outlook and deep significance of this case when he wrote, "That case was a milestone in the interpretation of the commerce clause. . . . It recognized the great changes and development in the business of this vast country. . . . It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such."

48. 213 U. S. 366 (1909).

49. This was the famous "commodity clause" of the Hepburn Act of 1906. 34 STAT. 584 (1906), 49 U. S. C. A. §§ 1, 6, 11, 15, 16, 16(a), 18, 20, 41 (1926).

50. See Powell, *Would the Supreme Court Block a Planned Economy* (Aug. 1935) 12 FORTUNE 48, to the effect that this case so long as it stands prevents Congress from prohibiting interstate shipment of goods because of elements in the mode of production which do not affect the inherent quality of the goods.

51. It is interesting to note that this decision was not cited in the Schechter opinion, although the Government brief devotes several pages to an effort to distinguish the cases.

52. Coe v. Errol, 116 U. S. 517 (1886).

the decisions already considered, had been substantially impaired—the doctrine that interstate commerce begins only with actual delivery to a common carrier for transportation, or actual commencement of its transfer to another state.[53]

On the other hand the Court has repeatedly treated the power of Congress under the commerce clause as operative before any act of transportation has begun.[54] The regulation of the buying and selling of grain to be shipped in interstate commerce is, for example, within the power granted to Congress.[55] In like manner the business of live stock dealers and commission men in the principal stockyards of the country has been placed under federal supervision.[56] In such cases the sales regulated are clearly local activities but, as the Court has observed, exchanges and stockyards are not a place of rest or final destination, they are "but a throat through which the current flows," they are "factors in the middle of the current of commerce." In the *Schechter Case,* on the other hand, the acts complained of, involving selling practices, wages and hours of labor in the defendants' New York markets, clearly occurred after transportation had completely ceased and the facts afford no warrant for the argument that the poultry handled by defendants at their markets was in a "current" or "flow" of interstate commerce.

Another group of decisions, in addition to those which deal with the temporarily interrupted "flow" of interstate commerce must be considered. In cases dealing with carrier regulations[57] the Court applied the yardstick of "direct

53. The mere fact that goods are manufactured to be transported and sold in another state or even segregated for that purpose is not enough to stamp them as subjects of interstate commerce. United States v. E. C. Knight Co., 156 U. S. 1 (1895).

54. State Freight Tax Case, 82 U. S. 232 (1872); Robbins v. Shelby Taxing Dist., 120 U. S. 489 (1887); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921).

55. Shafer v. Farmers Grain Co., 268 U. S. 189 (1925) (state regulation held void). In Lemke v. Farmers Grain Co., 258 U. S. 50 (1922) the court having declared the transactions to be beyond the state's powers of regulation, answered the objection that after loading on cars, wheat might have been sent to local markets or mills, by observing that the usual course of business was otherwise. In Board of Trade v. Olsen, 262 U. S. 1 (1923) which upheld the validity of the Grain Futures Act, the sales were between buyers and sellers in Chicago but the Court held that these sales affected the price at which grain was sold throughout the country, thus creating a direct burden on interstate commerce. But *cf.* Butler v. United States, 78 F. (2d) 1 (C.C.A. 1st, 1935) (holding A.A.A. invalid on ground Congress has no authority to tax products before entering interstate commerce, though their production may indirectly affect interstate commerce).

56. Stafford v. Wallace, 258 U. S. 495 (1922) (holding the Packers and Stockyards Act constitutional).

57. Baltimore & Ohio R. Co. v. Interstate Commerce Comm., 221 U. S. 612 (1911) (Congress may regulate hours of labor of railway employees engaged in interstate commerce since such hours have a direct relation to efficiency of service); Southern Ry. Co. v. United States, 222 U. S. 20 (1911) (the Safety Appliance Act is not confined exclusively to vehicles engaged in interstate commerce but covers the same railroad whether engaged in interstate or intrastate commerce); Mondou v. New York N. H. & H. R. Co., 223 U. S. 1 (1912) (Congress may regulate relations of carriers and employees while both are engaged in interstate commerce, but only those relations which have a substantial connection

effect on interstate commerce" liberally, but these decisions and some of their sweeping statements must be viewed in light of the fact that the subject matter concerns the very medium of commerce. Furthermore, even as applied to railroads the desired regulation must still operate directly upon interstate commerce as a whole.[58]

Conclusion

Viewed in the perspective of constitutional history, the *Schechter Case* cannot be regarded as a radical deviation from established doctrine. Rather is it to be viewed as a redefinition of boundaries, narrowly skirted in many instances, yet never completely abandoned. Clearly the wages, hours, and selling practices of an industry at the final and receiving end of the "flow" of commerce could have been included within those boundaries on only one theory, and that theory the Court refused to accept. The Government had urged that the N. I. R. A. was based on the interdependence of every phase of American economic life, that local wages, for example, generate reverberations in commodity prices and purchasing power, which shake the very structure of interstate commerce.[59] But while conceding that modern society "is an elastic medium which transmits all tremors throughout its territory"[60] the Court parried with the foil that immediacy of causation is the determining factor, and called *touché* with the telling blow that "To find immediacy or directness here is to find it almost everywhere."[61]

Sweeping though the decision must inevitably appear, its scope must not be regarded as all inclusive. Clearly excepted from its purview is a vast field of industrial enterprise. Left open to federal regulation is the entire field of transportation and communication.[62] Control of the rapidly growing industries

with interstate commerce); Houston, E. & W. Texas Ry. Co. v. United States, 234 U. S. 342 (1914) (held constitutional an order made by the Interstate Commerce Commission that interstate carriers should desist from charging higher rates between specific interstate than between certain specified intrastate points); Wilson v. New, 243 U. S. 332 (1917) (in an emergency Congress may prescribe a standard minimum of wages for employees engaged in interstate commerce to be enforced for a reasonable time); United States v. Fergen, 250 U. S. 199 (1919) (Congress has power to prohibit and punish the forgery and utterance of fictitious bills of lading).

58. *Cf.* First Employers Liability Cases, 207 U. S. 463 (1908); Railroad Retirement Board v. Alton R. Co., 295 U. S. 330 (1935); (1935) 4 FORDHAM L. REV. 498.

59. *Cf.* "Primitive conditions have passed; business is now transacted on a national scale." Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204, 211 (1930) quoted in Burnet v. Brooks, 288 U. S. 378, 402 (1933).

60. A.L.A. Schechter Poultry Corp. v. United States, 76 F. (2d) 617, 624 (C.C.A. 2d, 1935).

61. A.L.A. Schechter Poultry Corp. v. United States, 55 Sup. Ct. 837, 853 (1935).

62. See Fuchs, *A Postscript—The Schechter Case* (1935) 20 ST. LOUIS L. REV. 297 for a discussion of activities over which federal regulation may nevertheless hold sway.

of aviation and radio communication is assured.[63] So too, myriad transactions which concededly exert a direct effect on interstate commerce. But the decision stands as a warning signal that the integrity of state lines will be zealously guarded lest "the federal authority . . . embrace practically all the activities of the people and the authority of the State over its domestic concerns . . . exist only by sufferance of the federal government."[64]

RELIEF FOR MISTAKE OF LAW.—Firmly embedded in the fields of quasi-contracts[1] and equity[2] is the principle that relief will be afforded against the consequences of a material mistake of fact. That the rule denying relief where the mistake is of law remains in sharp contradistinction is clearly indicated by several recent decisions.[3]

In the realm of the law of crimes and torts there exists a conclusive presumption that every man knows the law. Hardly anyone would question its necessity for the adequate administration of justice.[4] The application of this conclusive presumption to cases where the object sought is the prevention of unjust gain by another is directly attributable to the decision of Lord Ellenborough in the famous case of *Bilbie v. Lumley*.[5] In that case quasi-contractual recovery of money paid upon an insurance policy, with full knowledge of the facts, but under the mistaken belief that the facts constituted no legal defense, was denied upon the express ground that the mistake was of law. This conclusion was reached in direct contravention of several earlier decisions,

63. Powell, *Would the Supreme Court Block a Planned Economy* (Aug. 1935) 12 FORTUNE 48, suggests that goods within the Original Package Doctrine may likewise be excepted from the scope of the Schechter decision.

64. A.L.A. Schechter Poultry Corp. v. United States, 55 Sup. Ct. 837, 850 (1935).

1. 3 WILLISTON, CONTRACTS (1920) § 1574; WOODWARD, QUASI-CONTRACTS (1913) § 11. Of course, the mere existence of a mistake of fact is not sufficient for relief. The retention of the benefit conferred by reason of the mistake must be inequitable.

2. 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 852.

3. Standard Oil Co. of Ky. v. Gramling, 160 So. 725 (Ala. App. 1935); Jordan v. Johns, 79 S. W. (2d) 798 (Tenn. 1935); State v. Perlstein, 79 S. W. (2d) 143 (Tex. Civ. App. 1935); Alderson v. Gauley Fuel Co., 178 S. E. 626 (W. Va. 1935); see New York City Employees' Retirement System v. Eliot, 267 N. Y. 193, 200, 196 N. E. 23, 25 (1935).

4. A conclusive presumption of knowledge of the law is unquestionably necessary in criminal law and torts. The result of allowing a plea of mistake of law in these fields can well be imagined. Naturally, no one's rights would be safe were the plea of mistake of law allowed.

5. 2 East 469, 102 Eng. Reprints 448 (K. B. 1802). It is submitted that recovery here could have been denied upon the ground that the plaintiff owed at least a moral obligation, thus rendering retention by the defendant not against conscience.

An explanation for Lord Ellenborough's decision possibly may be found in the fact that he received his early training in criminal trials. See 2 WILLISTON, CONTRACTS § 1581.