

Constitutional Law—Constitutionality of Chapter 781 of Laws of 1933 (State Recovery Act, Schackno Act) (*Darweger v. Staats*, 267 N.Y. 290 (1935))

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so only indirectly.²² The "Code," therefore, and the statute which purports to authorize the "Code," are unconstitutional as contravening the Tenth Amendment.

J. C. O'C.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF CHAPTER 781 OF LAWS OF 1933 (STATE RECOVERY ACT, SCHACKNO ACT).—The plaintiff was a retail coal dealer and conducted a small intrastate business in Binghamton, N. Y. The defendants were the Divisional Code Authority of the Retail Solid Fuel Industry, having jurisdiction of New York State except New York City and Long Island. In accordance with the provisions of the National Industrial Recovery Act¹ and in furtherance of the Code of Fair Competition for the Retail Solid Fuel Industry,² the defendants declared an emergency to exist in their jurisdiction and issued an executive order³ establishing minimum prices for the retail sale of coal therein. By virtue of the authority given them by the New York State Recovery Act⁴ the defendants sought to compel the plaintiff to conform to their executive order. Because of a threatened prosecution by the defendants for his failure to maintain the minimum prices set by them, the plaintiff sued here for a permanent injunction to restrain the defendants from interfering with his intrastate coal business. This appeal is by the defendants from two orders, (1) granting the plaintiff's motion for an injunction *pendente lite*, and (2) denying the defendants' motion to dismiss the complaint for failure to state a cause of action. Question certified—"Does the complaint set forth a cause of action?" Held, orders affirmed. The question certified answered in the affirmative. Chapter 781, Laws of 1933 (The State Recovery Act also called the Schackno Act) held as an unconstitutional delegation of legislative power, and unconstitutional because

local companies operating under special franchises, constituted any part of interstate commerce. * * * Interstate movement ended when the gas passed into local mains."

²² *Simpson v. Shepard*, 230 U. S. 352, 410, 33 Sup. Ct. 729 (1912); *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6 (1887); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259, 260, 43 Sup. Ct. 83 (1922); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 410, 411, 42 Sup. Ct. 570 (1921); *Levering & Garrigues v. Morris*, 289 U. S. 103, 107, 108, 53 Sup. Ct. 549, 551 (1933).

¹ 48 STAT. 195, 15 U. S. C. A. §§701 *et seq.* (1933).

² Code No. 280 established with the approval of the President on Feb. 14, 1934, pursuant to the N.I.R.A., *supra* note 1.

³ Executive Order No. 3E of the Divisional Code Authority for the Retail Solid Fuel Industry, Div. No. 3, dated June 29, 1934.

⁴ N. Y. Laws of 1933, c. 781, also called the Schackno Act and The State Recovery Act.

it incorporates by reference other legislation as the law of this state. *Darweger v. Staats*, 267 N. Y. 290, 196 N. E. 61 (1935).

The power to legislate was granted by constitutional enactment to the Senate and Assembly.⁵ By judicial interpretation it is unconstitutional for those bodies to delegate their power to anyone.⁶ This is the rule, not only in New York State, but in the national government,⁷ in many of the state governments,⁸ and in England.⁹ It is a fundamental precept of our form of government, is an integral part of the time-honored system of checks and balances¹⁰ and is founded on solid reasoning.¹¹ It is true that for the sake of expediency and practicability in our complex society it has become an established practice to delegate to minor administrative groups the power to promulgate rules and regulations for the satisfactory government of

⁵ N. Y. CONST. art. III, §1.

⁶ "The people, who have intrusted them (the legislature—author) with legislative power, have the right to demand the exercise of their knowledge, judgment and discretion in the framing and in the enactment of laws, and insofar as their duties are strictly legislative, have prohibited them from delegating that power to others." *Stanton v. Bd. of Supervisors*, 191 N. Y. 428, 432, 84 N. E. 380 (1908); and see *Bartha v. Himrod*, 8 N. Y. 483 (1853); *People v. Stout*, 23 Barb. 349 (Spec. T., N. Y. Co., 1856); *Thorne v. Cramer*, 15 Barb. 112 (Gen. T., Kings Co., 1851); *People ex rel. Unger v. Kennedy*, 207 N. Y. 533, 101 N. E. 442 (1913). The legislature cannot delegate their power to a commission, Note (1932-3) 10 N. Y. U. L. Q. REV. 77; 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 224.

It is true that California has adopted legislation similar to the Schackno Act in that Codes adopted by the federal authorities for the operation of industry should automatically become state law. This legislation (Cal. Stat. 1933, p. 2635 *et seq.*) has been held constitutional. *Ex parte Lasswell* (Dist. Ct. of App., 2d Dist., Div. 2, Cal.) 36 P. (2d) 678 (1934); *People of the State of Cal. v. Economy Cleaners*, Cal. Super. Ct., Santa Clara Co., 1 U. S. Law Week, index p. 696 (1934); although there has been judicial opinion in that state to the contrary. See (1935) 33 MICH. L. REV. 599, footnote, discussing *People of the State of Cal. v. Capital Cleaners and Dyers*, Cal. Super. Ct., Los Angeles Co., 1 U. S. Law Week, index p. 633 (1934).

⁷ *Wayman v. Southard*, 23 U. S. 1, 42 (1825); *Field v. Clarke*, 143 U. S. 649, 12 Sup. Ct. 495 (1892); *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480 (1910); and see *United States v. Louisville & N. R. Co.*, 176 Fed. 942 (N. D. Ala. 1910); *Mutual Film Corp. v. Ohio Ind. Comm.*, 236 U. S. 230, 35 Sup. Ct. 387 (1914), where it was declared that if the law is perfect, final and decisive in all its parts, and the discretion given relates only to its execution, then it is a proper delegation of the law-making power, otherwise it is not, and hence is unconstitutional.

⁸ *State v. Intoxicating Liquors*, 121 Me. 438, 117 Atl. 588 (1922); *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922); *People v. J. O. Beekman*, 347 Ill. 92, 179 N. E. 435 (1931); *State v. Watkins*, 176 La. 837, 147 So. 8 (1933); *State v. Malone*, 176 La. 846, 147 So. 11 (1933); see *In re Burke*, 190 Cal. 326, 212 Pac. 193 (1923).

⁹ M. L. GWYER, 5 J. of Pub. Ad. 404, 409 (1915).

¹⁰ "The Schackno Act is not only an unconstitutional attempt to delegate legislative authority, but it amounts to complete abdication by the legislature." *Darweger v. Staats*, 243 App. Div. 380, 278 N. Y. Supp. 87 (3d Dept. 1934), citing *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1934); *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278 (1915).

¹¹ *Supra* note 6.

certain economic institutions such as interstate commerce, the public utilities, and the like. In each instance, however, the legislature itself has laid down a fair and adequate standard, particularizing the duties and powers of the agency created, and defining strict limits and boundaries beyond which the agency could not go. This is constitutional.¹² But in the present case the legislature did not define any standard for an agency of its own creation to follow, nor did it define any limits.¹³ Instead it delegated its power to create the standard to the President of the United States. Not only did it relinquish its power to make civil law, but also its power to create and define what shall be a crime in New York State and the punishment therefor. The legislature did this despite the fact that the power to define crime is one of its highest and most sacred duties.¹⁴

¹² *United States v. Calistan Packers*, 4 F. Supp. 660 (N. D. Cal. 1933), in which it was ruled that Congress, having laid down fairly definite standards by statute, may delegate to administrative agencies power to prescribe procedure thereunder even to the extent of providing rules and regulations, violations of which may be punished. Also *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480 (1910); *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light and Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908); *Wichita R. R. & Light Co. v. Public Utilities Comm. of the State of Kansas*, 260 U. S. 48, 49, 43 Sup. Ct. 51 (1922); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1934). Authority to make administrative rules is not a delegation of legislative power. *United States v. Grimaud*, *supra*; *Trustees of Village of Saratoga, etc.*, *supra*, at 145.

¹³ The instant case in the Appellate Division, 243 App. Div. 380, 278 N. Y. Supp. 87 (3d Dept. 1934). This case points to the similarity of §1 of the State Recovery Act to §1 of tit. I of the N.I.R.A., and then quotes Chief Justice Hughes in *Panama Refining Co. v. Ryan*, *supra* note 12, with reference to that section of the N.I.R.A.:

"The first section is a 'declaration of policy.' It declares that a national emergency exists * * *. It is manifest that this broad outline is simply an introduction to the Act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections."

Returning to the Darweger case:

"In the state act there are no subsequent sections which declare and define the legislative policy." (See *supra* note 12.)

Also see *Cline v. Consumers Cooperative Gas & Oil Co.*, 152 Misc. 653, 274 N. Y. Supp. 362 (Sup. Ct., Jefferson Co., 1934).

¹⁴ *Barker v. People*, 3 Cow. 686, 704, 705 (N. Y. 1824); *People v. Persce*, 204 N. Y. 397, 97 N. E. 877 (1912); *Matter of Mandel v. Board of Regents*, 250 N. Y. 173, 164 N. E. 895 (1928); the instant case in the Supreme Court, 153 Misc. 522, 275 N. Y. Supp. 394 (Sup. Ct., Broome Co., 1934); *People v. Grant*, 242 App. Div. 310, 275 N. Y. Supp. 74 (3d Dept. 1934):

"While the legislature may delegate the power to make rules and regulations and give them the force of law it may not delegate the power to create crimes and prescribe the penalties therefor."

De Agostina v. Parkshire Ridge Amusements, Inc., 155 Misc. 518, 278 N. Y. Supp. 622 (Sup. Ct., Kings Co., 1935), referring to the State Recovery Act:

"The legislature has not alone created a policy, but has created a new crime, the definition of which is left to agencies foreign to the state."

Finally, the State Recovery Act incorporates by reference, as the law of New York State, rules and regulations to be made in the future by an administrative agency of the federal government.¹⁵ This is contrary to the state constitution¹⁶ and to all judicial reasoning.¹⁷ This is a two-fold fault because, in New York State, at least, it would be unconstitutional to adopt another law in such fashion even though that law were in existence and well defined.¹⁸ On two major counts, therefore, Chapter 781, Laws of 1933, is unconstitutional and an extremely liberal viewpoint would be required to rule otherwise.

J. C. O'C.

CONSTITUTIONAL LAW—PHYSICIANS AND SURGEONS—CONSTITUTIONALITY OF STATUTE FORBIDDING ADVERTISING BY DENTISTS.—Plaintiff, alleging unconstitutionality, seeks to enjoin the defendant from enforcing a statute of the state of Oregon¹ which gives the

¹⁵ *Darweger v. Staats*, 153 Misc. 522, 275 N. Y. Supp. 394 (Sup. Ct. Broome Co., 1934), at 528:

"The Schackno Act does more than merely declare a policy and provide means to carry it into effect. The National Industrial Recovery Act * * * is declared to be the policy of the State of New York * * *. Codes adopted under the National Industrial Recovery Act are made, though not in existence, by reference those of the State of New York."

¹⁶ N. Y. CONST. art. III, §17.

¹⁷ *People ex rel. Comm. v. Banks*, 67 N. Y. 568, 575 (1876); *People v. Squire*, 107 N. Y. 593, 602, 14 N. E. 820 (1888); *Atkinson v. Hotel Pennsylvania*, 195 App. Div. 624, 187 N. Y. Supp. 278 (3d Dept. 1921), *aff'd*, 231 N. Y. 562, 132 N. E. 889; *State v. Intoxicating Liquors*, 121 Me. 438, 117 Atl. 588 (1922), and *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922). In *People v. Squire*, *supra*, the court said:

"The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly."

And in the *De Agostina* case, 155 Misc. 518, 278 N. Y. Supp. 622, cited *supra* note 14, the court, in referring to the Schackno Act, said:

"It (the legislature—author) has thus accomplished the very evil sought to be avoided by the constitutional prohibition."

It is true that in *Spielmann Motor Sales Co. v. Dodge*, 8 F. Supp. 437 (S. D. N. Y. 1934), the court held that the Schackno Act did not violate the N. Y. STATE CONST. art. III, §17. This case, however, is not controlling on the state courts even though it does control later federal cases. *Price v. Illinois*, 238 U. S. 446, 451, 35 Sup. Ct. 892 (1914); *Des Moines Nat. Bank v. Fairweather*, 263 U. S. 103, 105, 44 Sup. Ct. 23 (1923); *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 52 Sup. Ct. 512 (1931).

¹⁸ *People ex rel. Comm. v. Banks*, *People v. Squire*, *Atkinson v. Hotel Pennsylvania*, *State v. Intoxicating Liquors*, and *State v. Gauthier*, all *supra* note 17.

¹ Oregon Laws 1933, c. 166.