**DRAFT**

**We are all ‘sick chickens’ now -**

**From National Labor Relations Act to Transnational Labor Relations Act**

**By**

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**I**

On 27 May 1935 the ALA Schechter Poultry Corporation struck lucky. Operating a slaughterhouse in Brooklyn, the US Supreme Court overturned their multiple convictions for violating the ‘Code of Fair Competition for the Live Poultry Industry’.[[1]](#footnote-1) In reversing the convictions, the Court also declared the Live Poultry Code to be unconstitutional, thereby undermining the National Industrial Recovery Act 1933, legislation from which the Code was hatched and a main plank in Roosevelt’s New Deal in the early 1930s.

A good win for Schechter Poultry but a bad defeat for the employees, the company having been convicted of those provisions in the Live Poultry Code relating to the minimum wages and maximum hours of its employees. The Code was one of a growing number of what was already about 500 nationwide that had been made under the radical and far-reaching provisions of NIRA.[[2]](#footnote-2) In what was a hymn to Keynes before the *General Theory*, the Act declared that Roosevelt’s recovery was to take place

by promoting the organization of industry for the purpose of cooperative action among trade groups, **to induce and maintain united action of labor and management under adequate governmental sanctions and supervision**, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment**, to improve standards of labor**, and otherwise to rehabilitate industry and to conserve natural resource.[[3]](#footnote-3)

One way by which these objectives were to be met was by the development of industry-wide codes of fair competition to regulate labour conditions in the sector in question. Once approved by the President, these codes would apply to all enterprises whether or not they were members of the trade or industry associations by which they were concluded. The Live Poultry Code contained ‘general labor provisions, declaring that employees had the right of ‘collective bargaining’, and freedom of choice with respect to labor organizations’, in the terms of s 7(a) of the Act.

So in additions to the guarantees in the sectoral codes, the Act itself included a number of specific guarantees of trade union freedom, providing in strong terms in s 7(a) that

employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Using language familiar to British labour lawyers,[[4]](#footnote-4) however, the Supreme Court gave several reasons for striking down the Live Poultry Code. Thus, the procedure endowed ‘voluntary trade or industrial associations or groups with privileges or immunities’; the codes of fair competition were ‘codes of laws’, placing ‘all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent’; while the President was given ‘virtually unfettered power to approve these codes or not, and on what condition’.

But what about the claim in NIRA, section 1 that the Act was a response to ‘a national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people’. Too bad: according to the Court:

Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.[[5]](#footnote-5)

As a result, the attempt, through the provisions of the Code, to fix the hours and wages of employees of defendants in their intrastate business was deemed not to be a valid exercise of federal power.

**II**

The *Schechter* case is sometimes referred to as the ‘sick chicken’ case, because one of the overturned convictions related to the sale of a diseased bird, the company showing contempt for workers and consumers in equal measure. It was to lead to a major revision of US labor law and the replacement of NIRA with the National Labor Relations Act of 1935, which also professed Keynesian objectives in its text:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

The NLRA was crucial, however, in diluting union influence and the regulatory impact of labor unions. So whereas the NIRA set mandatory sectoral labour standards, the NLRA confined union voice to the enterprise. Yes, there is strong stuff in the NLRA about the right to organize and the right to bargain collectively;[[6]](#footnote-6) but in the latter case that right was diminished by the need for majority support among the ‘unit of employees’ the union sought to represent.[[7]](#footnote-7) Representation was now atomized and fragmented; unions had to win company by company by company.

Yet while the NLRA was being rescued from the debris of the NIRA after the *Schechter Poultry* case, sector wide regulation was being revived in the United Kingdom,[[8]](#footnote-8) where there were no constitutional impediments to its development (at least not of the kind operating in the US). The functional equivalent in the British system of NIRA’s industry codes were the Joint Industrial Councils that had been recommended by the Whitley Committee in 1917, but which had been allowed to wither in the 1920s.[[9]](#footnote-9)

So the same economic logic that led to the introduction of NIRA in the US in 1933 led to the revival in the UK of the Joint Industrial Councils in 1934 under the stewardship of the Ministry of Labour (long since abolished, but badly in need of revival). With the active bureaucratic support of Ministry officials, collective bargaining coverage expanded dramatically, with the result that by 1946 some 86% of British workers were covered by either a collective agreement negotiated by a JIC, or a wages order concluded by a statutory trade board or wages council.

By the end of the Second World War there were thus two ways by which western industrialised nations could promote the provisions of the ILO’s new Declaration of Philadelphia of 1944, committing member States to ‘the effective recognition of the right of collective bargaining. There was the American way or the British way. Both had been developed with the same aim – to raise wages, to equalize incomes, to stimulate demand is depressed economies, to increase employment, and to reduce welfare dependency.

This new orthodoxy was enshrined in the ILO’s new Declaration, the promotion of effective collective bargaining being a key lever

to expand production and consumption, to avoid severe economic fluctuations to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade.

But it was not the only lever, the Declaration of Philadelphia also committing nations to promote ‘the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures’.

**III**

Post war reconstruction saw major divisions in collective bargaining policy. In Europe a system emerged reflecting (coincidentally or not) in large measure something like the British model, albeit with important modifications at enterprise level.[[10]](#footnote-10) And in other parts of the world such as Australia and New Zealand, highly centralized structures continued in place. The Americans in contrast imposed a version of their model on Japan,[[11]](#footnote-11) and it was the US model that was adopted by most of the Canadian provinces from the 1940s onwards.

The development of these two models was beginning to make show that while the world was promoting the Keynesian orthodoxy reflected in the ILO Declaration of Philadelphia, it was an orthodoxy that ironically which the United States was constitutionally unable fully to embrace. In an era before contemporary neo-liberalism, the United States had embraced an ultra-liberal constitution, with neo-conservative judges having constrained the constitution from adapting to changing social, economic and political circumstances.

The position was different in Europe where the building or rebuilding of collective bargaining structures was typically underpinned by new constitutional guarantees. If not explicitly in Germany, then very explicitly in Italy where the Constitution of 1946 opens memorably with the sentence ‘Italy is a Republic founded on labour’,[[12]](#footnote-12) the text continuing to guarantee full recognition to trade unions by providing that:

Registered trade unions are legal persons.  Being represented in proportion to their registered members, they may jointly enter into collective labor contracts, which are mandatory for all who belong to the respective industry of these contracts (art 39(4)).

As other parts of Europe broke from its fascist past, another generation of national constitutions continued to insist that ‘the general conditions of work shall be determined by law and supplemented by collective agreements arrived at by free collective bargaining and, in the event of their having failed, by the regulations fixed by arbitration’ (Greece, 1975), and guarantee the right to collective labour negotiations between the representatives of workers and employers, as well as the binding force of agreements’ (Spain, 1978).

What was being underpinned by these constitutional arrangements were different functions of collective bargaining, revealing sharp ideological differences about the role of trade unions and the different forms of capitalist democracy. This was the difference between trade unions as representative agents (the US vision) and the trade unions as regulatory agencies (the European vision).[[13]](#footnote-13) The constitutional law of liberal democracy tolerated the former, but impliedly prohibited the latter, whereas the constitutional law of social democracy expressly demanded the latter.

The difference is crucial: ideological perspectives affect practical outcomes, not only in terms of the integrated role of trade unions within the economy, but also in terms of their direct impact on the lives of members and non members. A study by the OECD in 1994 revealed these differences very clearly: in none of the countries with representative US style enterprise bargaining was collective bargaining density anywhere near 50%; and in none of the countries with regulatory European style centralized, multi-employer bargaining was it less than 50%.[[14]](#footnote-14)

**IV**

As these fault lines between two different models were being laid bare, so the regulatory model was viciously attacked in the United Kingdom from 1979, with a slow destruction of the British industrial relations and the changing role of trade unions in Thatcher’s neo – liberal experiment. An attempt to impose the US model on the UK under Heath’s Tory government in 1971 had been an ignominious failure.[[15]](#footnote-15) Inspired by a sharper ideological purpose, Thatcher’s attack was both more calculated and more brutal; but also more effective.

In this context, Jacques Delors (then President of the European Commission) offered a seductive future for his TUC audience in 1988, one based on the idea of a ‘Social Europe’ which had escaped the yoke of the EC (as it then was) having been a capitalist club for big business. This idea of a Social Europe was all the more seductive for Delors’ promise that every worker would be protected by a collective agreement, a promise reinforced by the EC Charter of the Fundamental Rights of Workers of 1989.

It is undeniable that Delors changed many people’s minds about the potential of the EU, and that the European Social Dimension grew very quickly following his game-changing speech. But perhaps not as quickly or as far as is sometimes thought. True, trade unions (in the form of the ETUC) were drawn into the legislative process as regulatory agents. True too, a great deal of valuable labour protection was created as a result. But significantly there was no EU instrument on the right to bargain collectively (or the right to strike), even if EU law could be implemented by collective agreements at national level (as in the case of working time).

It is also the case, however, that Delors’ future is now in the past, Social Europe being dismantled from within by three powerful forces. The first is judicial, beginning with the decisions of the European Court of Justice in *Viking* and *Laval*.[[16]](#footnote-16) The ECJ reached back to an earlier European era, where it found less social democracy and more economic liberalism. The judicial subordination of fundamental labour rights (including the right to bargain collectively) to the freedom of establishment of corporations was only the start.

Only the start it may have been, but no one could quite anticipate what was to happen next. In the wake of the global financial crash and the Euro crisis, Europe was to abandon social democracy and to take a neo-liberal turn. The political map turned blue and Thatcherism found a receptive audience in Brussels and in Europe’s national capitals. Under new rules of economic governance adopted in 2010 with a view to harmonizing national economies, the talk was not now of the European Social Model but of greater wage flexibility and the deregulation of collective bargaining closer to the enterprise.[[17]](#footnote-17)

These are developments reinforced in turn by the austerity measures ‘agreed’ with a number of countries, as a condition of financial assistance following the collapse of the Euro. The latter measures led to a major de-centralisation of collective bargaining arrangements, which in the case of Greece were condemned by the ILO as leading to the destruction of the entire collective bargaining system in that country.[[18]](#footnote-18) Yet although a clear violation of many of the provisions of the EU treaties, the ECJ refused to intervene,[[19]](#footnote-19) apparently eschewing the US legal doctrine that ‘extraordinary conditions do not create or enlarge constitutional power’.

**V**

In addition to these internal pressures, there is now an external pressure on the horizon in the shape of the Transatlantic Trade and Investment Partnership (TTIP) – the proposed free trade agreement between the EU and the United States. This of course has been widely condemned for many reasons – its lack of transparency, the threat it presents to the NHS, and the powers it gives to multinational corporations to sue governments in secret forums for any losses caused by various forms of national regulation ‘impeding’ free trade. There are also concerns about workers’ rights.[[20]](#footnote-20)

It is true that the EU is pushing for a labour chapter in TTIP, with the EU’s proposal being leaked last year. This is a slightly stronger version of the labour chapter to be found in the EU-Korea free trade agreement that was signed off in 2010 . It is also stronger than the Trans Pacific Partnership (TPP), the free trade zone for the United States’ Pacific Rim, as well as the multiple bilateral free trade agreements that have been promoted by the USA over the last 25 years or so. Stronger in tone it may be; but there is no question of the EU’s proposals having any significant impact, even if accepted by the US.

Like all modern free trade agreements, the EU’s proposed labour chapter for TTIP contains warm words about collective bargaining. Article 4 of the draft proposes to commit all parties to the ILO Declaration on Fundamental Principles and Rights at Work (1998), and thereby ensure that their laws and practices respect, promote and realize internationally recognized core labour standards, which are ‘the subject of the fundamental ILO Conventions’. The latter include ‘freedom of association and the effective recognition of the right to collective bargaining’.

More importantly for some perhaps is a proposal with no counterpart in TTP that the parties should make ‘sustained efforts towards ratifying the fundamental ILO Conventions and their Protocols’. This reveals a lot, because it reminds us that the United States has one of the lowest levels of ratification of ILO Conventions in the world, having rarified only \*\*, and one of the lowest levels of ratification of the fundamental or core Conventions, having ratified only two of the eight. These two do not include either of the freedom of association conventions (Conventions 87 and 98).

But even if the US agrees to the EU’s toughest demands, all it would be required to do would be to make sustained efforts to ratify, not that it would be under an unconditional obligation to do so. The EU cannot make it an unconditional obligation because everyone knows that US labor law is broken and cannot be fixed. Even modest reforms to patch up the system to meet ILO criticism are impossible, simply because of the political power wielded by special corporate interests (notably in the Senate) that have frustrated Carter, Clinton and now Obama. So nothing will change, because nothing can change.

This means that under TTIP the United States will continue to operate through the dysfunctional medium of the NLRA. In a system of open competition under free trade, there will be compelling pressure towards regulatory convergence, with the US model an irresistible magnetic force. Even if there was the political will to do so (which there is not), the Americans are in no position constitutionally to move in the European direction, which in any event is already moving through internal pressures to embrace the NLRA model. Under TTIP and TTP the NLRA will become the Transnational Labor Relations Act.

**VI**

Which takes us back to the *Schechter* case and its implications for contemporary politics. It is to be recalled that in this case the inflexible, liberal democratic US constitution effectively prohibited regulatory style collective bargaining. The US has a different kind of collective bargaining partly as a result, which because of the power of what Jack London once referred to with great prescience as the oligarchy,[[21]](#footnote-21) or what we might now refer to as American plutocracy,[[22]](#footnote-22) is incapable of improvement. Corporate interests control US politics, and these interests are not prepared to tolerate even modest changes to the existing system.

The world of free trade paradoxically also embraces a doubtful commitment to collective bargaining, quite explicitly to ‘level the playing field for American workers and businesses’.[[23]](#footnote-23) In this world US business is prepared to export its own regulatory standards, but to be bound by nothing higher. These exports include the USA’s dysfunctional system of collective bargaining, which by this process will become the standard for the world. In the case of developing countries this may help raise standards to the US level; but for developed countries in Europe in particular it will create a new logic for a process of deregulation and decentralization already under way.

With the domestic political debate consumed with (i) the existence of the United Kingdom, and (ii) the United Kingdom’s membership of the EU, these are questions that transcend both. If Britain votes to remain in the United Kingdom, it is at least possible if not likely that we will be a party to TTIP. But even if TTIP contains the stronger version of a labour chapter in line with other EU free trade agreements (for example Korea in 2010), the commitments will be hollow and meaningless, and perversely encourage rather than prevent the current programme of deregulation and decentralization currently underway at EU level.

If, however, the United Kingdom votes to leave the EU, there is already talk from the Tory right of a free trade agreement with the US, though it is the US that appears to be less keen, now preferring multilateral rather than bilateral free trade agreements. But even if there was to be a bilateral agreement it would almost certainly follow the example of ALL other US free trade agreements and include a labour chapter, including a commitment of some kind to collective bargaining. The commitment would be meaningless for it would be a commitment to do more than is required by the NLRA, a version of which was already adopted in the Blair government’s Employment Relations Act 1999.[[24]](#footnote-24)

The NLRA is thus set to become the floor and the ceiling for collective bargaining arrangements throughout the world. It is now the floor for TPP and if TTIP is concluded it will be the ceiling for 28 EU countries (Scotland if not the UK in the event of BREXIT being followed by SCENTRY). What is happening to collective bargaining is a global problem bigger than questions of national identity or membership of a regional union. It is about the global power of the US constitution and the transnational influence of American corporations; it is about the successful conflation of constitutional doctrine, economic theory and commercial practice.

In this new world, Social Europe is dying, with the social democratic values to be found in the Treaty of European Union beginning to remind us of Kahn Freund’s famous denunciation of the Weimar Constitution – meaningless platitudes binding on no one, unintended to bind anyone[[25]](#footnote-25). Whatever happens in the EU referendum, the collective bargaining problem will be largely unaffected. The collective bargaining problem is a problem of US capital, protected and empowered by the US constitution in the *Schechte*r case on 27 May 1935. We are all sick chickens now.

1. *Schechter Poultry Corp v US*, 295 US 495 (1935). [↑](#footnote-ref-1)
2. For a good account, see A J Badger, *FDR-The First Hundred Days* (New York, 2008). [↑](#footnote-ref-2)
3. National Industrial Recovery Act, 1933, s 1. [↑](#footnote-ref-3)
4. See *Express Newspapers v McShane* [1979] ICR 210 – Lord Denning criticizing trade union immunities. See R Dukes, ‘The Right to Strike under UK Law: Not Much More than a Slogan?’ (2010) 39 ILJ 32. [↑](#footnote-ref-4)
5. *Schechter Poultry Corp,* above, p 528. [↑](#footnote-ref-5)
6. See esp NLRA, 1935, s 7 [↑](#footnote-ref-6)
7. Ibid, s 9. [↑](#footnote-ref-7)
8. See K D Ewing, ‘The State and Industrial Relations – Collective Laissez Faire Revisited’ (1998) 5 *Historical Studies in Industrial Relations* 1. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. In Germany, for example, works councils operated at enterprise level rather than shop stewards. [↑](#footnote-ref-10)
11. See W B Gould, *Japan’s Reshaping of American Labor Law* (1984). [↑](#footnote-ref-11)
12. But while words are powerful and sometimes beautiful, they are not enough. This was a constitution that could entertain Berlusconi. [↑](#footnote-ref-12)
13. This distinction is explored more fully in K D Ewing, ‘The Function of Trade Unions’ (2005) 34 ILJ 1. [↑](#footnote-ref-13)
14. OECD, *Economic Outlook* (1994). Regulatory design is everything. [↑](#footnote-ref-14)
15. See W Gould, ‘Taft-Hartley Comes to Great Britain’ (1972) 81 Yale LJ 1421. [↑](#footnote-ref-15)
16. On these cases, see T [A Novitz, ‘ Human Rights Analysis of the Viking and Laval Judgments](http://research-information.bristol.ac.uk/en/publications/a-human-rights-analysis-of-the-viking-and-laval-judgments(ddba1f4d-58c3-4f0a-a578-cc4f06921a56).html)’, (2008) *Cambridge Yearbook of European Legal Studies* 541. [↑](#footnote-ref-16)
17. This issue is more fully discussed in K D Ewing, ‘The Death of Social Europe’ (2015) 26 *King’s Law Journal* 76. [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. *Case 370/12, Pringle v Government of Ireland*, 27 November 2012. [↑](#footnote-ref-19)
20. For a lucid account, see John Hendy QC, ‘A Threat to the Sovereignty of Courts and Parliaments’ (2015 (128) *Graya* 52. [↑](#footnote-ref-20)
21. Jack London, *The Iron Heel* (1908). [↑](#footnote-ref-21)
22. See the brilliant piece by Tim Kuhner, ‘American Plutocracy’ (2015) 26 *King’s Law Journal* 1. [↑](#footnote-ref-22)
23. As explained in promotional material by the US Trade Representative: https://ustr.gov/tpp/. [↑](#footnote-ref-23)
24. For a powerful critique of which, see Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (2009). [↑](#footnote-ref-24)
25. O Kahn Freund, ‘The Weimar Constitution’ (1944) *Political Quarterly* 229. [↑](#footnote-ref-25)