Boreali

v.

Axelrod

517 N.E.2d 1350 (1987)

FRED BOREALI ET AL., RESPONDENTS

V.

DAVID M. AXELROD, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, ET AL., APPELLANTS

COURT OF APPEALS OF NEW YORK

71 N.Y.2d 1; 517 N.E.2d 1350; 523 N.Y.S.2d 464

October 13, 1987, Argued
November 15, 1987, Decided

Order affirmed, without costs.

«1351» **OPINION OF THE COURT**

We hold that the Public Health Council overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public. While the Legislature has given the Council broad authority to promulgate regulations on matters concerning the public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body. In this instance, the Council usurped the latter role and thereby exceeded its legislative mandate, when, following the Legislature's inability to reach an acceptable balance, the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests. In view of the political, social and economic, rather than technical, focus of the resulting regulatory scheme, we conclude that the Council's actions were ultra vires and that the order and judgment of the courts below, which declared the Council's regulations invalid, should be affirmed.

I

LEGISLATIVE BACKGROUND AND REGULATORY SCHEME

More than two decades ago, the Surgeon General of the United States began warning the American public that tobacco smoking poses a serious health hazard. Within the past five

years, there has been mounting evidence that even non-smokers face a risk of lung cancer as a result of their exposure to tobacco smoke in the environment. As a consequence, smoking in the workplace and other indoor settings has become a cause for serious concern among health professionals *(see, e.g.*, Collishaw, *Tobacco Smoke in the Workplace, an Occupational Health Hazard*, 131 Canadian Med Assocs J [Nov. 15, 1984]; Repace, *The Problems of Passive Smoking*, Bull of **«1352»** NY Acad of Med, at 936-946 [Dec. 1981]).

This growing concern about the deleterious effects of tobacco smoking led our State Legislature to enact a bill in 1975 restricting smoking in certain designated areas, specifically, libraries, museums, theaters and public transportation facilities (L 1975, ch 80, codified at Public Health Law, art 13-E, § § 1399-o -- 1399-q). Efforts during the same year to adopt more expansive restrictions on smoking in public places were, however, unsuccessful *(see*, A-4768, introduced Mar. 4, 1975 [Hevesi] [covering school auditoriums, sports arenas, commercial stores and public elevators]; A-5772, introduced Mar. 4, 1975 [Orazio] [covering elevators and school or college classrooms]; A-7796, introduced Mar. 25, 1975 [Orazio] [covering elevators and school or college classrooms]; A-7199, introduced Mar. 25, 1975 [Cooperman] [elevators, public areas of health care institutions, public waiting rooms of designated health care practitioners, school buildings and indoor sports arenas]). Subsequent attempts to broaden the coverage of the antismoking statute have similarly failed (see, *e.g.*, A-2746, introduced Feb. 1, 1983 [Grannis, Hevesi, Levy and Bennett] [banning smoking in workplace and other indoor areas open to the public, with certain specifically delineated exceptions]). In fact, it is undisputed that while some 40 bills on the subject have been introduced in the Legislature since 1975, none have passed both houses.

In late 1986 the Public Health Council (PHC) took action of its own. Purportedly acting pursuant to the broad grant of authority contained in its enabling statute (Public Health Law § 225 [5] [a]), the PHC published proposed rules, held public hearings and, in February of 1987, promulgated the final set of regulations prohibiting smoking in a wide variety of indoor areas that are open to the public, including schools, hospitals, auditoriums, food markets, stores, banks, taxicabs and limousines. Under these rules, restaurants with seating capacities of more than 50 people are required to provide contiguous nonsmoking areas sufficient to meet customer demand. Further, employers are required to provide smoke-free work areas for nonsmoking employees and to keep common areas free of smoke, with certain limited exceptions for cafeterias and lounges. Affected businesses are permitted to prohibit all smoking on the premises if they so choose. Expressly excluded from the regulations' coverage are restaurants with seating capacities of less than 50, conventions, trade shows, bars, private homes, private automobiles, private social functions, hotel and motel rooms and retail tobacco stores. Additional "waivers" of the regulations' restrictions may be obtained from the Commissioner upon a showing of financial hardship (10 NYCRR part 25). Implementation of these regulations, which were to become effective May 7, 1987, has been suspended during the pendency of this litigation.

II

PROCEDURAL HISTORY

Commenced by several parties affected by the PHC's anti-smoking regulations, the present litigation was initially brought as an article 78 proceeding, but was later converted to an action for declaratory relief. On motions by all sides for summary judgment, the trial court concluded that the challenged regulations were inconsistent with the policies expressed in Public Health Law article 13-E (imposing more limited restrictions on indoor smoking) and were, accordingly, invalid and unenforceable.

The Appellate Division affirmed the judgment, albeit on a somewhat different theory. Although it rejected the analysis of the trial court, the majority at the Appellate Division was troubled by the possibility of the PHC having virtually "limitless" authority and noted the need to conduct a "realistic appraisal of [that agency's] powers * * * to constitutionally 'limit the field' of authority delegated." (130 AD2d, at 114.) Observing that the PHC's antismoking regulations "[effectuated] a profound change in social and economic policy" and that the agency had obviously based the details of its regulatory scheme as much on concerns about "economic «1353» impact" as on considerations of public health, the court held that the PHC must be deemed to have acted in excess of its delegated authority.

III

ANALYSIS

Preliminarily, we stress that this case presents no question concerning the wisdom of the challenged regulations, the propriety of the procedures by which they were adopted or the right of government in general to promulgate restrictions on the use of tobacco in public places. The degree of scientific support for the regulations and their unquestionable value in protecting those who choose not to smoke are, likewise, not pertinent except as background information. Finally, there has been no argument made concerning the personal freedoms of smokers or their "right" to pursue in public a habit that may inflict serious harm on others who must breathe the same air. The only dispute is whether the challenged restrictions were properly adopted by an administrative agency acting under a general grant of authority and in the face of the Legislature's apparent inability to establish its own broad policy on the controversial problem of passive smoking. Accordingly, we address no other issue in this appeal.

A. The Delegation/Separation of Powers Issue

Section 225 (5) (a) of the Public Health Law authorizes the PHC to "deal with any matters affecting the * * * public health". At the heart of the present case is the question whether this broad grant of authority contravened the oft-recited principle that the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency. As a related matter, we must also inquire whether, assuming the propriety of the Legislature's grant of authority, the agency exceeded the permissible scope of its mandate by using it as a basis for engaging in inherently legislative activities. While the separation of

powers doctrine gives the Legislature considerable leeway in delegating its regulatory powers, enactments conferring authority on administrative agencies in broad or general terms must be interpreted in light of the limitations that the Constitution imposes (NY Const, art III, § 1).

However facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits *(see*, Tribe, American Constitutional Law § 5-17, at 288-289). Even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives *(see, e.g., Matter of Council for Owner Occupied Hous. v Abrams,* 125 AD2d 10). Here, we cannot say that the broad enabling statute in issue is itself an unconstitutional delegation of legislative authority. However, we do conclude that the agency stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be. Our reasons follow.

Derived from the separation of powers doctrine, the principle that the legislative branch may not delegate all of its lawmaking powers to the executive branch has been applied with the utmost reluctance -- even in the early case law. In *Wayman v Southard* (10 Wheat [23 U.S.] 1, 42-43), for example, Chief Justice Marshall observed: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself * * * [A] general [statutory] provision may be made, and power given to those who are to act under such general provisions to fill up the details" *(see also, Buttfield v Stranahan,* 192 U.S. 470; *Field v Clark,* 143 U.S. 649). Similarly, this court stated in *Matter of Trustees of Vil. of Saratoga Springs v Saratoga Gas, Elec. Light &* **«1354»** *Power Co.* (191 NY 123, 138) that "[a] review of the * * * judicial authorities in this state * * * clearly shows that while powers inherently and exclusively legislative cannot be delegated, there is a large field in which the legislature * * * 'may certainly delegate to others powers which the legislature may rightfully exercise itself'" *(see, e.g., Ross v Arbury,* 206 Misc 74, affd 285 App Div 886).[1]

The modern view is reflected in this court's statement in *Matter of Levine v Whalen* (39 NY2d 510, 515 [citations omitted]): "Because of the constitutional provision that '[the] legislative power of this State shall be vested in the Senate and the Assembly' (NY Const, art III, § 1), the

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[1] For a brief period in the 1930's, the Supreme Court dusted off the "nondelegation" principle and breathed new life into it by using the doctrine as a basis for striking down certain New Deal legislation (see, Schechter Corp. v United States, 295 U.S. 495; Panama Ref. Co. v Ryan, 293 U.S. 388). Our court also invoked the doctrine on several occasions to invalidate legislation giving an executive officer or administrative agency what was deemed to be overly broad discretion to establish policy (see, e.g., Packer Coll. Inst. v University of State of N. Y., 298 NY 184, 189-192; Matter of Small v Moss, 279 NY 288; People v Klinck Packing Co., 214 NY 121, 138-139). However, the Schechter-Panama line of cases has, quite rightfully, fallen into disrepute.

Legislature cannot pass on its law-making functions to other bodies * * * but there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature". *(Accord, Matter of County of Oneida v Berle,* 49 NY2d 515; *Matter of Bates v Toia,* 45 NY2d 460, 464; *Matter of City of Utica v Water Pollution Control Bd.,* 5 NY2d 164.) It is also reflected in many of this court's decisions upholding legislative delegations of authority that are circumscribed in only the most general of terms *(see, e.g., Matter of Levine v Whalen, supra, at 516-517* ["protection and promotion of the health of the inhabitants of the State"; "fit and adequate" facilities]; *Matter of Sullivan County Harness Racing Assn. v Glasser,* 30 NY2d 269, 277 ["public interest, convenience or necessity"; "best interests of racing generally"]; *Martin v State Liq. Auth.,* 15 NY2d 707 [public convenience and advantage"]). Indeed, the precise provision that is at issue in this case -- Public Health Law § 225 (5) (a) -- has been upheld against a constitutional challenge based upon the "nondelegation" doctrine *(Chiropractic Assn. v HIlleboe,* 12 NY2d 109, 119-120).[2]

This does not mean, however, that the regulations at issue here should be deemed valid without further analysis. To the contrary, the courts have previously struck down administrative actions undertaken under otherwise permissible enabling legislation where the challenged action could not have been deemed within that legislation without giving rise to a constitutional separation of powers problem *(see, e.g., Industrial Union Dept. v American Petroleum Inst., 448* U.S. 607, 645-646; *National Cable Tel. Assn. v United States,* 415 U.S. 336, 341-342; *Moore v Board of Regents, 44 NY2d 593, 602; Matter of Natilson v Hodson,* 264 App Div 384, *affd* 289 NY 842; *cf., Kent v Dulles, 357* U.S. 116; *see also, Matter of Consolidated Edison Co. v Public Serv. Commn.,* 47 NY2d 94, 102).

A number of coalescing circumstances that are present in this case persuade us that the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed. While none of these circumstances, standing alone, is sufficient to warrant the conclusion that the PHC has usurped the Legislature's prerogative, all of these circumstances, when viewed in combination, paint a portrait of an agency that has improperly assumed for itself "[the] open-ended discretion to choose ends" (Tribe, *op. cit.*, at 285), which characterizes the elected Legislature's role in our system of government.

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[2] To be distinguished from the cases challenging legislative delegations of authority to administrative agencies are those cases in which an elected executive's rule-making activities are challenged on the ground that the legislative policy-making prerogative has been usurped. In such cases, we have had less difficulty striking down executive fiats under the separation of powers doctrine, presumably because the challenged actions depended wholly on the executives' implied authority to enforce the laws, rather than on an express legislative delegation of authority (Matter of Nicholas v Kahn, 47 NY2d 24, 33, n 2; see, e.g., Under 21 v City of New York, 65 NY2d 344; Subcontractors Trade Assn. v Koch, 62 NY2d 422; Rapp v Carey, 44 NY2d 157, 163; Matter of Broidrick v Lindsay, 39 NY2d 641; cf., Clark v Cuomo, 66 NY2d 185; see also, Youngstown Co. v Sawyer, 343 U.S. 579).

First, while generally acting to further the laudable goal of protecting nonsmokers from the harmful effects of "passive smoking," the PHC has, in reality, constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns. The exemptions the PHC has carved out for bars, convention centers, small restaurants, and the like, as well as the provision it has made for "waivers" based on financial hardship, have no foundation in considerations of public health. Rather, they demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise. Indeed, in its "declaration of findings and intent," the PHC itself asserted: "[Regulations] addressing [this] hazard will cause certain economic dislocations and governmental intrusions which must be justified by the nature and extent of the public health hazard. A balance must be struck between safeguarding citizens from involuntary exposure to secondhand smoke on the one hand, and minimizing governmental intrusion into the affairs of its citizens on the other" (10 NYCRR 25.1 [g]).

Striking the proper balance among health concerns, cost and privacy interests, however, is a uniquely legislative function. While it is true that many regulatory decisions involve weighing economic and social concerns against the specific values that the regulatory agency is mandated to promote, the agency in this case has not been authorized to structure its decision making in a "cost-benefit" model *(cf., American Textile Mfrs. Inst. v Donovan,* 452 U.S. 490, 543-548 [Rehnquist, J., dissenting]) and, in fact, has not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed. Thus, to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was "acting solely on [its] own ideas of sound public policy" and was therefore operating outside of its proper sphere of authority *(Matter of Picone v Commissioner of Licenses,* 241 NY 157, 162; see, *Packer Coll. Inst. v University of State of N. Y.,* 298 NY 184, 191). This conclusion is particularly compelling here, where the focus is on administratively created exemptions rather than on rules that promote the legislatively expressed goals, since exemptions ordinarily run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values *(see, Matter of Nicholas v Kahn, 47 NY2d 24; see also, People v Klinck Packing Co.,* 214 NY 121, 138-139). In this regard, the regulations at issue here are fundamentally different from those challenged in *Chiropractic Assn. v Hilleboe* (*supra,* at 114-118), where the specific limits on the use of X-ray and fluoroscopic equipment were all promulgated in direct furtherance of the health-related goal of **«1356»** avoiding unnecessary exposure to harmful radiation.

The second, and related, consideration is that in adopting the antismoking regulations challenged here the PHC did not merely fill in the details of broad legislation describing the over-all policies to be implemented. Instead, the PHC wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance. Viewed in that light, the agency's actions were a far cry from the "interstitial" rule making that typifies administrative regulatory activity *(see, Matter of Nicholas v Kahn, supra,* at 31; *Packer Coll. Inst. v University of State of N. Y., supra,* at 190; see also, Tribe, op. cit., at 285).

A third indicator that the PHC exceeded the scope of the authority properly delegated to it by the Legislature is the fact that the agency acted in an area in which the Legislature had repeatedly tried -- and failed -- to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions. While we have often been reluctant to ascribe persuasive significance to legislative inaction *(see, e.g., Brooklyn Union Gas Co. v State Human Rights Appeal Bd.,* 41 NY2d 84, 89-90; *cf., 41 Kew Gardens Rd. Assocs. v Tyburski,* 70 NY2d 325, 335; but see, *Matter of Knight-Ridder Broadcasting v Greenberg,* 70 NY2d 151; *Matter of Bliss v Bliss,* 66 NY2d 382, 389), our usual hesitancy in this area has no place here. Unlike the cases in which we have been asked to consider the Legislature's failure to act as some indirect proof of its actual intentions (see, *e.g., Clark v Cuomo,* supra, at 190-191), in this case it is appropriate for us to consider the significance of legislative inaction as evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem. Here, the repeated failures by the Legislature to arrive at such an agreement do not automatically entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own. Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.

Finally, although indoor smoking is unquestionably a health issue, no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged here. Faced with mounting evidence about the hazards to bystanders of indoor smoking, the PHC drafted a simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups. The antismoking regulations at issue here are thus distinguishable from those at issue in *Chiropractic Assn. v Hilleboe* (*supra,* at 120), in which we stressed that the PHC's technical competence was necessary to flesh out details of the broadly stated legislative policies embodied in the Public Health Law.

In summary, we conclude that while Public Health Law § 225 (5) (a) is a valid delegation of regulatory authority, it cannot be construed to encompass the policy-making activity at issue here without running afoul of the constitutional separation of powers doctrine. Further, the "separability" provision of the agency's rules (10 NYCRR 25.7) cannot be used to save those rules from the conclusion that, taken as a whole, they are invalid. The PHC's own "Declaration of findings and intent" makes clear that the agency considered the regulatory scheme it adopted to be an integrated code in which the need to protect citizens from "involuntary exposure to secondhand smoke" was delicately balanced against the goal of minimizing "economic dislocations and governmental intrusions" (10 NYCRR 25.1 [g]). It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder of **«1357»** the PHC's antismoking code intact, since the product of such an effort would be a regulatory scheme that neither the Legislature nor the PHC intended.

B. Preemption and the Legislature's Intentions

Plaintiffs have also argued that the Legislature "preempted the field" of indoor smoking by enacting Public Health Law article 13-E, which imposes restrictions on smoking in a narrow class of public locations. However, we decline to adopt this contention as an alternative ground for our holding. The preemption doctrine is most often applied where inferior levels of government have attempted to regulate despite pronouncements on the same subject at a higher governmental level *(see, e.g., New York State Club Assn. v City of New York,* 69 NY2d 211; *Consolidated Edison Co. v Town of Red Hook,* 60 NY2d 99; *Monroe-Livingston Sanitary Landfill v Town of Caledonia,* 51 NY2d 679). It has limited utility where, as here, a perceived conflict between legislative policy and administrative action at the same level of government is at issue. In such cases, the salient inquiry is not whether a higher level of government has demonstrated an intention to preclude local regulation in a particular area, but rather whether the legislative branch of government has shown an intent to grant regulatory authority over a specific subject matter to an administrative agency which exists as part of the coequal executive branch (see, *Clark v Cuomo,* 66 NY2d 185, 190, supra). The inquiry includes an examination of both the scope of the statute authorizing the regulatory activity and the degree to which the administrative rules are either consistent or "out of harmony" with the policies expressed in the statute (see, e.g., *Matter of McNulty v New York State Tax Commn.,* 70 NY2d 788; *Clark v Cuomo, supra; Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.,* 45 NY2d 471; *Matter of Jones v German,* 37 NY2d 42, 53; see also, *Subcontractors Trade Assn. v Koch,* 62 NY2d 422).

Here, it is apparent that the Legislature has given the PHC a wide field for the exercise of its regulatory authority (Public Health Law § 225 [5] [a]; *see, Chiropractic Assn. v Hilleboe, supra,* at 119-120), and nothing in the Legislature's 1975 adoption of a limited antismoking provision (Public Health Law art 13-E) suggests a legislative intention to narrow the statutory mandate or exclude the area of smoking restrictions. Although the PHC's regulations prohibit smoking in a wider variety of indoor settings than do the Legislature's enactments on the subject, both the regulations and the relevant statutes have a common underlying policy objective -- minimizing nonsmokers' exposure to environmental tobacco smoke *(see, Clark v Cuomo, supra).* Thus, whether phrased in terms of "preemption" or in terms of consistency with the existing statutory scheme, plaintiffs' arguments concerning the effect of Public Health Law article 13-E on the PHC's power to regulate public smoking must fail.

IV

CONCLUSION

Although Public Health Law *§ 225* (5) (a) confers broad powers on the Public Health Council and there is no indication that the Legislature intended to circumscribe those powers when it enacted a limited antismoking measure of its own (see, Public Health Law art 13-E), the fundamental constitutional limitations on the respective powers of the legislative and executive branches foreclose a construction of the statute that would include the administrative activity challenged here. In promulgating its antismoking rules, the PHC transgressed the line that separates administrative rule making from legislating and thereby exceeded its statutory powers. Consequently, its actions cannot be upheld.

«1358» Accordingly, the order of the Appellate Division should be affirmed.

BELLACOSA, J. (dissenting). I would reverse and uphold the Public Health Council (PHC) regulation, adopted to preserve and improve the public health, prohibiting smoking indoors in some public places and in designated portions of workplaces (10 NYCRR 25.2). This comprehensive plan, based on a thoroughly documented record and a carefully deliberated public procedure, was promulgated to protect innocent bystanders from involuntary exposure to the environmental smoke and others.

The majority accepts the Legislature's delegation of broad authority to the PHC to make regulations concerning a wide range of issues affecting the public health *(see, Matter of Levine v Whalen,* 39 NY2d 510, 515). They recognize that the legislative delegation may be granted in the most generous terms (*Chiropractic Assn. v Hilleboe,* 12 NY2d 109, 120), that the regulation is in harmony with the statute *(State Div. of Human Rights [Valdemarsen] v Genesee Hosp.,* 50 NY2d 113, 118; *Matter of Jones v Berman,* 37 NY2d 42, 53), and that this court has held the particular delegation under Public Health Law § 225 (4), (5) (a) to be valid *(Chiropractic Assn. v Hilleboe, supra)*. They even acknowledge that the Legislature did not preempt the field of public smoking or evince an intent to constrict the PHC mandate by enacting its own 1975 narrow smoking ban in Public Health Law article 13-E.

Yet, the majority, wrongly I respectfully submit, concludes that the separation of powers doctrine has been transgressed by the Legislature and by the PHC and, on that basis alone, they uphold the judicial invalidation of the smoking ban regulation.

The statutory authority for protecting the public health was delegated by the Legislature to the PHC 75 years ago in the broadest possible mandate and it has not been withdrawn or narrowed. Indeed, it has been exercised regularly with this court's express approbation *(Matter of Levine v Whalen,* 39 NY2d 510, 517, *supra; Chiropractic Assn. v Hilleboe,* 12 NY2d 109, 120, *supra)*. That power includes adoption and amendment to the Sanitary Code dealing with the root source of authority here -- "matters affecting the security of life or health or the preservation and improvement of public health" (Public Health Law § 225 [4], [5] [a]). This court, in a definitive ruling, has held that mission, that delegation and its broad implementation, to be constitutionally proper *Chiropractic Assn. v Hilleboe, supra,* at 120 [under State Constitution the Legislature properly delegated power to the PHC in Public Health Law § 225]).

This antismoking regulation is a fortiori valid compared to the regulation in *Chiropractic Assn. v Hilleboe (supra)*, which was a restriction on the freedom and access to chiropractic X-ray treatments, protecting patients from their own choices. Inasmuch as the Public Health Council could do that with our approbation, we search in vain for reasons in the majority's decision that the same statutory source of authority cannot protect the public health of innocent, involuntary *third-party victims* from others with this limited regulation.

> "[It] is not necessary that the Legislature supply administrative officials with rigid formulas in fields where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute the very essence of the

> programs. Rather, the standards prescribed by the Legislature are to be read in light of the conditions in which they are to be applied" *(Matter of Nicholas v Kahn*, 47 NY2d 24, 31).

The Legislature declared its intent that there be a PHC in this State and empowered it to adopt a Sanitary Code for the preservation and improvement of the public health. The Legislature also wisely refrained from enacting a rigid formula for the exercise of the PHC's critical agenda of **«1359»** concerns because that calls for expert attention. That legislative forbearance represents both a sound administrative law principle and, at the threshold, a constitutional one as well *Matter of Levine v Whalen*, 39 NY2d 510, 515, *supra; Chiropractic Assn. v Hilleboe*, 12 NY2d 109, 120, *supra*). The Legislature could not have foreseen in 1913 the specific need for PHC regulations in areas of human blood collection, care and storage; X-ray film usage; pesticide labels; drinking water contamination; or a myriad of other public health topics (see, New York State Sanitary Code, 10 NYCRR parts 1-25). It was prescient and sound governance as well to grant flexibility to the objective expert entity so it could in these exceptional instances prescribe demonstrably needed administrative regulation for the public health, free from the sometimes paralyzing polemics associated with the legislative process. Just as many of the other specified categories in the State Sanitary Code have properly been regulated by the PHC, so, too, does the subject of public indoor smoking and its impact on the health and well-being of innocent third-party victims comfortably fall within that identical, broad legislative embrace.

While the court admits the difficulty under the high separation of powers standard of articulating the basis for drawing, and even finding, some line limiting the PHC's conceded exercise of authority, it nevertheless goes ahead and does so. Its line is no line, but rather an arbitrary judgment call of its own. It is this judicial branch intrusion which constitutes the truly egregious separation of powers breach into the exercise of prerogative of the Legislature (Public Health Law § 225 [4], [5] [a] [enabling legislation]) and of the executive (10 NYCRR 25.2 [implementing regulation]).

It is painfully ironic that the PHC, as the legislatively designated body of experts for a vast litany of public health concerns *(see, Chiropractic Assn. v Hilleboe*, 12 NY2d 109, 119-120, *supra)*, is declared for the first time and against a long line of precedents to lack expertise in this instance. The majority assertion in this regard collapses under the weight of the medically proven fact that environmental tobacco smoke, especially indoors, is hazardous and even deadly to the health of thousands of innocent bystander nonsmokers *(see*, Health Consequences of Involuntary Smoking, A Report of the Surgeon General [Dec. 1986]; Friedman, *Prevalence and Correlates of Passive Smoking*, 73 Am J of Pub Health, No. 4 [1983]; Repace, *Problems of Passive Smoking*, Bull of NY Acad of Med, at 936-946 [Dec. 1981]). The context and the record upon which the PHC exercised, carefully and narrowly, its conceded authority and its medical and scientific expertise on an overwhelming record are directly relevant and compel reversal. The legal denigration of the PHC and its work is a grave mistake.

Along the way to its decision, the majority somewhat hesitantly deals with a legislative history aspect of the case. It concludes that the law passed by the Legislature and on the

books for 75 years (Public Health Law § 225 [4], [5] [a]) is nullified or neutralized by the inability of the Legislature to broaden its existing narrow ban (Public Health Law § 1399-o). The functional consequence of the negatively implied repeal of the broader authorization, Public Health Law § 225 (4), (5) (a), imputed by the majority to these recent failed legislative efforts, will be welcomed by opponents of all kinds of existing laws from now on, because the majority's rule dramatically changes the use of legislative history and of the principles of ordinary statutory construction. This willl come back to haunt us as much as the apologetic side step of directly controlling recent authority *(41 Kew Gardens Rd. Assocs. v Tyburski,* 70 NY2d 325, 335).

No decision of this court and no relevant administrative law principle have been found where general rule-making power was nullified by a court because exceptions to the rule were also promulgated by the regulating entity in response to ancillary social, economic or even policy factors. The majority argument in this respect seems to assert that the PHC was too **«1360»** reasonable and too forthright, and that what it perhaps should have done was create an absolute ban on indoor smoking expressly and pristinely premised on public health concerns. Life and government are not so neatly categorized. Surely, if the greater power exists, the lesser, as responsibly exercised here, should not be forbidden! In any event, the regulatory provisions at issue contain a severability provision (10 NYCRR 25.7) which would permit the invalidation of objectionable exceptions without overturning the validity of the adopted limited ban on indoor smoking.

Finally, there should be great concern about another and broader precedential regression lurking behind the diaphanous analysis of the majority's holding. Modern administrative and regulatory law principles are profoundly implicated by the majority's expression of and reliance on the anachronistic nondelegation theory embodied in a concurring opinion of Chief Justice Rehnquist *(Industrial Union Dept. v American Petroleum Inst.,* 448 U.S. 495; *see also, Industrial Union Dept. v American Petroleum Inst., supra,* at 717, n 30 [Marshall, J., dissenting]), and arises from a line of Supreme Court decisions responsible for a historical upheaval in the Supreme Court and in the main subsequently overruled anyway *(Industrial Union Dept. v American Petroleum Inst., supra,* at 674 [Rehnquist, J., concurring]).

The cloud deposited by the instant case on modern administrative and regulatory law is bad enough in the legal sense. But nothing could be more tragic than the harm and hazard inflicted involuntarily on many thousands of innocent third persons, nonsmokers, whose public health was entrusted to the expert protection of the PHC. Its effort is crushed without analytical or precedential justification. That is the human dimension of this case which the court cannot avoid, however awkwardly it tries, by its dry doctrinal discussion. The case expert authorized action of an agency which is a "[creature] of the Legislature * * * possessed only of those powers expressly or impliedly delegated by that body" (*Matter of Nicholas v Kahn,* 47 NY2d 24, 31, *supra; Matter of City of Utica v Water Pollution Control Bd.,* 5 NY2d 164, 168-169).

Neither the Legislature nor the PHC has transgressed the gossamer lines marked by the separation of powers doctrine, either in delegation or in implementation. That doctrine demands respect from all three branches of goverment, including this one.

****** END OF CASE ******