**1932-1941: The New Deal**

Democratic Platform of 1932. June 30, 1932

The foreshadowing of presidential candidate FDR's "New Deal" plan for economic recovery from the great depression. The statement calls for a series of reforms including the repeal of the Volstead Act.

Republican Platform of 1932

The Republican solutions to the severe economic conditions under incumbent presidential candidate Herbert Hoover.

Franklin D. Roosevelt's First Inaugural Address, March 4, 1933

FDR begins to outline his reforms for his first hundred days.

Recognition of Soviet Russia, November 16, 1933

Reversal of a long-held position of non-recognition of Soviet Russia following the Bolshevik overthrow nearly fifteen years earlier.

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934)

Citing the Constitution's contracts clause, this decision affirmed the ability of legislation to clarify unenumerated areas of the Constitution without extending or lessening its controls.

Nebbia v. New York, 291 U.S. 502 (1934)

In a dispute over setting milk prices, the Court laid down the doctrine that there is no closed category of "businesses affected with a public interest," but that the State by virtue of its police power may regulate prices whenever it is "reasonably necessary" to do so for the public interest.

Roosevelt's Veto of the Soldiers' Bonus Bill, May 22, 1935

The President's veto of special compensation to World War I veterans

Humphrey's Executor v. United States, 295 U.S. 602 (1935)

The President has practically unrestricted power of removal of a person from an appointed office, but Congress may qualify this power in the case of agencies whose powers are derived from Congress.

United States v. Butler, 297 U.S. 1 (1936)

The Court overturned the Agricultural Adjustment Act (AAA) because it required farmers to sign contracts agreeing to limit production in order to receive certain payments under the act, which "coerced" the farmers into limiting production. In this case, limiting production was a matter reserved for the States and not the Federal government to decide.

Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936)

The decision protected newspapers from certain taxes aimed at limiting their circulation and held that "a corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment."

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)

Hydroelectric power produced through the Wilson Dam under the Tennessee Valley Authority is the property of the United States Government to dispose of as it sees fit.

Republican Platform, June 11, 1936

Republican charter for the future under candidate Alfred M. Landon.

Democratic Platform, June 25, 1936

FDR's plans for a second term using the phrase "We hold this truth to be self-evident."

Carter v. Carter Coal Co., 298 U.S. 238 (1936)

The decision invalidated the Bituminous Coal Conservation Act of 1935 holding that it delegated legislative power to private citizens in regulating the coal industry and limited federal jurisdiction in intrastate commerce.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)

The Court upheld the President's power to oversee foreign policy. It involved an arms embargo affecting a U.S. company and its involvement in supplying arms to both sides of the Chaco War between Bolivia and Paraguay.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)

The decision upheld the National Labor Relations Act and the concept of a "stream of commerce." It allowed expanded Congressional control of interstate commerce.

Steward Mach. Co. v. Collector, 301 U.S. 548 (1937)

The Court upheld the constitutionality of the Social Security Administration and its system of insurance and old-age pension benefits created in 1935.

DeJonge v. Oregon, 299 U.S. 353 (1937)

The decision declared the Criminal Syndicalism Law of Oregon unconstitutional, stressing that "The rights of free speech and peaceable assembly are fundamental rights which are safeguarded against state interference by the due process clause of the Fourteenth Amendment."

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937)

The decision involved defining the jurisdiction and causes of "controversies" in insurance cases.

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

The Court allowed Washington state to enact legislation providing for minimum-wage laws for women.

Virginian Railway Co. v. Railway Employees, 300 U.S. 515 (1937)

The Court ruled Congress can control railroad workers' ability to organize labor unions.

Herndon v. Lowry, 301 U.S. 242 (1937)

The Court upheld the power of a state to control freedom of speech with the warning, "The power of a State to abridge freedom of speech and of assembly is the exception, rather than the rule."

Helvering v. Davis, 301 U.S. 619 (1937)

The Court held that, "The concept of 'general welfare' is not static, but adapts itself to the crises and necessities of the times. The problem of security for the aged, like the general problem of unemployment, is national, as well as local."

Roosevelt's Press Conference, February 5, 1937

Proposal to Reform Judiciary

Roosevelt's "Fireside Chat," March 9, 1937

Reform of the Judiciary "Fireside Chat." Roosevelt begins to detail his proposal to increase the number of Supreme Court Justices in part to lessen the Court's ability to block New Deal reforms.

United States v. Carolene Products Co., 304 U.S. 144 (1938)

The Court assists in defining the boundaries of control the government can exert in interstate commerce.

Roosevelt's "Hands Off the Western Hemisphere," April 14, 1939

Speech to promote unity in North and South America during the early days of war in Europe.

Roosevelt's Address to Adolf Hitler and Benito Mussolini, April 14, 1939

FDR's effort to avoid escalation of events that will lead to global conflict, while reaffirming U.S. strength, resolve and readiness.

Einstein's Atomic Bomb Proposal, 1939

Letter to President Roosevelt recommending the U.S. begin an atomic weapons research program.

Roosevelt's Message to Congress Regarding the Hatch Act, August 2, 1939

Clarifications and affirmations regarding the act which limits civil servants' ability to use their office to promote political causes.

Chambers v. Florida, 309 U.S. 227 (1940)

The Court, relying on interpretations of the du process clause of the Fourteenth Amendment further clarifies rights of the accused and the accusers in improperly obtained confessions.

United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940)

The decision affirmed the powers of Congress to protect the American people from monopolies and price fixing.

Roosevelt Address at University of Virginia, June 10, 1940

"Again today the young men and the young women of America ask themselves with earnestness and with deep concern this same question: "What is to become of the country we know?"

Minersville Sch. Dist. v. Board of Educ., 310 U.S. 586 (1940)

A decision involving Lillian Gobitis, a Jehovah's Witness, affirmed the state's ability to enact and enforce legislation that makes reciting the pledge of allegiance mandatory. This decision was reversed in 1943 in the case of West Virginia State Board of Education v. Barnette.

Democratic Platform of 1940

FDR's third term plan for American security and solvency on the eve of war.

Republican Platform of 1940

Republican plans under presidential challenger Wendell L. Wilkie.

Roosevelt's Statement on a Joint Board of Defense of Canada and the United States, August 18, 1940

Creation of a board to oversee defense of North America.

Roosevelt's Press Conference Announcing Exchange of Destroyers for Air and Naval Bases, September 3, 1940

Beginnings of agreements for U.S. use of British airfields in the Caribbean.

Roosevelt's "Four Freedoms" Speech, January 6, 1941

FDR's famous inaugural address stating his domestic objectives for his third term and his vision of freedoms for the world.

Roosevelt's Statement on the Atlantic Charter Meeting with Prime Minister Churchill, August 14, 1941

U.S. and Great Britain detail their alliance in light of Axis Power aggression.

Democratic Platform of 1932

Title: Democratic Platform of 1932

Author: Democratic Party

Date: 1932

Source: National Party Platforms, pp.331-333

Democratic Platform of 1932, p.331

In this time of unprecedented economic and social distress the Democratic Party declares its conviction that the chief causes of this condition were the disastrous policies pursued by our government since the World War, of economic isolation, fostering the merger of competitive businesses into monopolies and encouraging the indefensible expansion and contraction of credit for private profit at the expense of the public.

Democratic Platform of 1932, p.331

Those who were responsible for these policies have abandoned the ideals on which the war was won and thrown away the fruits of victory, thus rejecting the greatest opportunity in history to bring peace, prosperity, and happiness to our people and to the world.

Democratic Platform of 1932, p.331

They have ruined our foreign trade; destroyed the values of our commodities and products, crippled our banking system, robbed millions of our people of their life savings, and thrown millions more out of work, produced wide-spread poverty and brought the government to a state of financial distress unprecedented in time of peace.

Democratic Platform of 1932, p.331

The only hope for improving present conditions, restoring employment, affording permanent relief to the people, and bringing the nation back to the proud position of domestic happiness and of financial, industrial, agricultural and commercial leadership in the world lies in a drastic change in economic governmental policies.

Democratic Platform of 1932, p.331

We believe that a party platform is a covenant with the people to have [sic] faithfully kept by the party when entrusted with power, and that the people are entitled to know in plain words the terms of the contract to which they are asked to subscribe. We hereby declare this to be the platform of the Democratic Party:

Democratic Platform of 1932, p.331

The Democratic Party solemnly promises by appropriate action to put into effect the principles, policies, and reforms herein advocated, and to eradicate the policies, methods, and practices herein condemned. We advocate an immediate and drastic reduction of governmental expenditures by abolishing useless commissions and offices, consolidating departments and bureaus, and eliminating extravagance to accomplish a saving of not less than twenty-five per cent in the cost of the Federal Government. And we call upon the Democratic Party in the states to make a zealous effort to achieve a proportionate result.

Democratic Platform of 1932, p.331

We favor maintenance of the national credit by a federal budget annually balanced on the basis of accurate executive estimates within revenues, raised by a system of taxation levied on the principle of ability to pay.

Democratic Platform of 1932, p.331

We advocate a sound currency to be preserved at all hazards and an international monetary conference called on the invitation of our government to consider the rehabilitation of silver and related questions.

Democratic Platform of 1932, p.331

We advocate a competitive tariff for revenue with a fact-finding tariff commission free from executive interference, reciprocal tariff agreements with other nations, and an international economic conference designed to restore international trade and facilitate exchange.

Democratic Platform of 1932, p.331

We advocate the extension of federal credit to the states to provide unemployment relief wherever the diminishing resources of the states makes it impossible for them to provide for the needy; expansion of the federal program of necessary and useful construction effected [sic] with a public interest, such as adequate flood control and waterways.

Democratic Platform of 1932, p.331

We advocate the spread of employment by a substantial reduction in the hours of labor, the encouragement of the shorter week by applying that principle in government service; we advocate advance planning of public works.

Democratic Platform of 1932, p.331

We advocate unemployment and old-age insurance under state laws.

Democratic Platform of 1932, p.331

We favor the restoration of agriculture, the nation's basic industry; better financing of farm mortgages through recognized farm bank agencies at low rates of interest on an amortization plan, giving preference to credits for the redemption of farms and homes sold under foreclosure.

Democratic Platform of 1932, p.331

Extension and development of the Farm co-operative movement and effective control of crop surpluses so that our farmers may have the full benefit of the domestic market.

Democratic Platform of 1932, p.331

The enactment of every constitutional measure that will aid the farmers to receive for their basic farm commodities prices in excess of cost.

Democratic Platform of 1932, p.331

We advocate a Navy and an Army adequate for national defense, based on a survey of all facts [p.332] affecting the existing establishments, that the people in time of peace may not be burdened by an expenditure fast approaching a billion dollars annually.

Democratic Platform of 1932, p.332

We advocate strengthening and impartial enforcement of the anti-trust laws, to prevent monopoly and unfair trade practices, and revision thereof for the better protection of labor and the small producer and distributor.

Democratic Platform of 1932, p.332

The conservation, development, and use of the nation's water power in the public interest.

Democratic Platform of 1932, p.332

The removal of government from all fields of private enterprise except where necessary to develop public works and natural resources in the common interest.

Democratic Platform of 1932, p.332

We advocate protection of the investing public by requiring to be filed with the government and carried in advertisements of all offerings of foreign and domestic stocks and bonds true information as to bonuses, commissions, principal invested, and interests of the sellers.

Democratic Platform of 1932, p.332

Regulation to the full extent of federal power, of:

Democratic Platform of 1932, p.332

(a) Holding companies which sell securities in interstate commerce;

Democratic Platform of 1932, p.332

(b) Rates of utilities companies operating across State lines;

Democratic Platform of 1932, p.332

(c) Exchanges in securities and commodities. We advocate quicker methods of realizing on assets for the relief of depositors of suspended banks, and a more rigid supervision of national banks for the protection of depositors and the prevention of the use of their moneys in speculation to the detriment of local credits.

Democratic Platform of 1932, p.332

The severance of affiliated security companies from, and the divorce of the investment banking business from, commercial banks, and further restriction of federal reserve banks in permitting the use of federal reserve facilities for speculative purposes.

Democratic Platform of 1932, p.332

We advocate the full measure of justice and generosity for all war veterans who have suffered disability or disease caused by or resulting from actual service in time of war and for their dependents.

Democratic Platform of 1932, p.332

We advocate a firm foreign policy, including peace with all the world and the settlement of international disputes by arbitration; no interference in the internal affairs of other nations; and sanctity of treaties and the maintenance of good faith and of good will in financial obligations; adherence to the World Court with appending reservations; the Pact of Paris abolishing war as an instrument of national policy, to be made effective by provisions for consultation and conference in case of threatened violations of treaties.

Democratic Platform of 1932, p.332

International agreements for reduction of armaments and cooperation with nations of the Western Hemisphere to maintain the spirit of the Monroe Doctrine.

Democratic Platform of 1932, p.332

We oppose cancelation of the debts owing to the United States by foreign nations.

Democratic Platform of 1932, p.332

Independence for the Philippines; ultimate statehood for Puerto Rico.

Democratic Platform of 1932, p.332

The employment of American citizens in the operation of the Panama Canal.

Democratic Platform of 1932, p.332

Simplification of legal procedure and reorganization of the judicial system to make the attainment of justice speedy, certain, and at less cost.

Democratic Platform of 1932, p.332

Continuous publicity of political contributions and expenditures; strengthening of the Corrupt Practices Act and severe penalties for misappropriation of campaign funds.

Democratic Platform of 1932, p.332

We advocate the repeal of the Eighteenth Amendment. To effect such repeal we demand that the Congress immediately propose a Constitutional Amendment to truly represent [sic] the conventions in the states called to act solely on that proposal; we urge the enactment of such measures by the several states as will actually promote temperance, effectively prevent the return of the saloon, and bring the liquor traffic into the open under complete supervision and control by the states.

Democratic Platform of 1932, p.332

We demand that the Federal Government effectively exercise its power to enable the states to protect themselves against importation of intoxicating liquors in violation of their laws.

Democratic Platform of 1932, p.332

Pending repeal, we favor immediate modification of the Volstead Act; to legalize the manufacture and sale of beer and other beverages of such alcoholic content as is permissible under the Constitution and to provide therefrom a proper and needed revenue.

Democratic Platform of 1932, p.332

We condemn the improper and excessive use of money in political activities.

Democratic Platform of 1932, p.332

We condemn paid lobbies of special interests to influence members of Congress and other public servants by personal contact.

Democratic Platform of 1932, p.332

We condemn action and utterances of high public officials designed to influence stock exchange prices.

Democratic Platform of 1932, p.333

We condemn the open and cover resistance of [p.333] administrative officials to every effort made by Congressional Committees to curtail the extravagant expenditures of the Government and to revoke improvident subsidies granted to favorite interests.

Democratic Platform of 1932, p.333

We condemn the extravagance of the Farm Board, its disastrous action which made the Government a speculator in farm products, and the unsound policy of restricting agricultural products to the demands of domestic markets.

Democratic Platform of 1932, p.333

We condemn the usurpation of power by the State Department in assuming to pass upon foreign securities offered by international bankers as a result of which billions of dollars in questionable bonds have been sold to the public upon the implied approval of the Federal Government.

Democratic Platform of 1932, p.333

And in conclusion, to accomplish these purposes and to recover economic liberty, we pledge the nominees of this convention the best efforts of a great Party whose founder announced the doctrine which guides us now in the hour of our country's need: equal rights to all; special privilege to none.

Republican Platform of 1932

Title: Republican Platform of 1932

Author: Republican Party

Date: 1932

Source: National Party Platforms, pp.339-351

Republican Platform of 1932, p.339

We, the representatives of the Republican Party, in convention assembled, renew our pledge to the principles and traditions of our party and dedicate it anew to the service of the nation.

Republican Platform of 1932, p.339

We meet in a period of widespread distress and of an economic depression that has swept the world. The emergency is second only to that of a great war. The human suffering occasioned may well exceed that of a period of actual conflict.

Republican Platform of 1932, p.339

The supremely important problem that challenges our citizens and government alike is to break the back of the depression, to restore the economic life of the nation and to bring encouragement and relief to the thousands of American families that are sorely afflicted.

Republican Platform of 1932, p.339

The people themselves, by their own courage, their own patient and resolute effort in the readjustments of their own affairs, can and will work out the cure. It is our task as a party, by leadership and a wise determination of policy, to assist that recovery.

Republican Platform of 1932, p.339

To that task we pledge all that our party possesses in capacity, leadership, resourcefulness and ability. Republicans, collectively and individually, in nation and State, hereby enlist in a war which will not end until the promise of American life is once more fulfilled.[p.340]

Leadership

Republican Platform of 1932, p.340

For nearly three years the world has endured an economic depression of unparalleled extent and severity. The patience and courage of our people have been severely tested, but their faith in themselves, in their institutions and in their future remains unshaken. When victory comes, as it will, this generation will hand on to the next a great heritage unimpaired.

Republican Platform of 1932, p.340

This will be due in large measure to the quality of the leadership that this country has had during this crisis. We have had in the White House a leader—wise, courageous, patient, understanding, resourceful, ever present at his post of duty, tireless in his efforts and unswervingly faithful to American principles and ideals.

Republican Platform of 1932, p.340

At the outset of the depression, when no man could foresee its depth and extent, the President succeeded in averting much distress by securing agreement between industry and labor to maintain wages and by stimulating programs of private and governmental construction. Throughout the depression unemployment has been limited by the systematic use of part-time employment as a substitute for the general discharge of employees. Wage scales have not been reduced except under compelling necessity. As a result there have been fewer strikes and less social disturbance than during any similar period of hard times.

Republican Platform of 1932, p.340

The suffering and want occasioned by the great drought of 1930 were mitigated by the prompt mobilization of the resources of the Red Cross and of the government. During the trying winters of 1930-31 and 1931-32 a nation-wide organization to relieve distress was brought into being under the leadership of the President. By the Spring of 1931 the possibility of a business upturn in the United States was clearly discernible when, suddenly, a train of events was set in motion in Central Europe which moved forward with extraordinary rapidity and violence, threatening the credit structure of the world and eventually dealing a serious blow to this country.

Republican Platform of 1932, p.340

The President foresaw the danger. He sought to avert it by proposing a suspension of intergovernmental debt payments for one year, with the purpose of relieving the pressure at the point of greatest intensity. But the credit machinery of the nations of Central Europe could not withstand the strain, and the forces of disintegration continued to gain momentum until in September

Republican Platform of 1932, p.340

Great Britain was forced to depart from the gold standard. This momentous event, followed by tremendous raid on the dollar, resulted in a series of bank suspensions in this country, and the hoarding of currency on a large scale.

Republican Platform of 1932, p.340

Again the President acted. Under his leadership the National Credit Association came into being. It mobilized our banking resources, saved scores of banks from failure, helped restore confidence and proved of inestimable value in strengthening the credit structure.

Republican Platform of 1932, p.340

By the time the Congress met the character of our problems was clearer than ever. In his message to Congress the President outlined a constructive and definite program which in the main has been carried out; other portions may yet be carried out.

Republican Platform of 1932, p.340

The Railroad Credit Corporation was created. The capital of the Federal Land Banks was increased. The Reconstruction Finance Corporation came into being and brought protection to millions of depositors, policy holders and others.

Republican Platform of 1932, p.340

Legislation was enacted enlarging the discount facilities of the Federal Reserve System, and, without reducing the legal reserves of the Federal Reserve Banks, releasing a billion dollars of gold, a formidable protection against raids on the dollar and a greatly enlarged basis for an expansion of credit.

Republican Platform of 1932, p.340

An earlier distribution to depositors in closed banks has been brought about through the action of the Reconstruction Finance Corporation. Above all, the national credit has been placed in an impregnable position by provision for adequate revenue and a program of drastic curtailment of expenditures. All of these measures were designed to lay a foundation for the resumption of business and increased employment.

Republican Platform of 1932, p.340

But delay and the constant introduction and consideration of new and unsound measures has kept the country in a state of uncertainty and fear, and offset much of the good otherwise accomplished.

Republican Platform of 1932, p.340

The President has recently supplemented his original program to provide for distress, to stimulate the revival of business and employment, and to improve the agricultural situation, he recommended extending the authority of the Reconstruction Finance Corporation to enable it:

Republican Platform of 1932, p.341

(a) To make loans to political subdivisions [p.341] of public bodies or private corporations for the purpose of starting construction of income-producing or self-liquidating projects which will at once increase employment;

Republican Platform of 1932, p.341

(b) To make loans upon security of agricultural commodities so as to insure the carrying of normal stocks of those commodities, and thus stabilize their loan value and price levels:

Republican Platform of 1932, p.341

(c) To make loans to the Federal Farm Board to enable extension of loans to farm co-operatives and loans for export of agricultural commodities to quarters unable to purchase them;

Republican Platform of 1932, p.341

(d) To loan up to $300,000,000 to such States as are unable to meet the calls made on them by their citizens for distress relief.

Republican Platform of 1932, p.341

The President's program contemplates an attack on a broad front, with far-reaching objectives, but entailing no danger to the budget. The Democratic program, on the other hand, contemplates a heavy expenditure of public funds, a budget unbalanced on a large scale, with a doubtful attainment of at best a strictly limited objective.

Republican Platform of 1932, p.341

We strongly endorse the President's program.

Unemployment and Relief

Republican Platform of 1932, p.341

True to American traditions and principles of government, the administration has regarded the relief problem as one of State and local responsibility. The work of local agencies, public and private has been coordinated and enlarged on a nation-wide scale under the leadership of the President.

Republican Platform of 1932, p.341

Sudden and unforeseen emergencies such as the drought have been met by the Red Cross and the Government. The United States Public Health Service has been of inestimable benefit to stricken areas.

Republican Platform of 1932, p.341

There has been magnificent response and action to relieve distress by citizens, organizations and agencies, public and private throughout the country.

Public Economy

Republican Platform of 1932, p.341

Constructive plans for financial stabilization cannot be completely organized until our national, State and municipal governments not only balance their budgets but curtail their current expenses as well to a level which can be steadily and economically maintained for some years to come.

Republican Platform of 1932, p.341

We urge prompt and drastic reduction of public expenditure and resistance to every appropriation not demonstrably necessary to the performance of government, national or local.

Republican Platform of 1932, p.341

The Republican Party established and will continue to uphold the gold standard and will oppose any measure which will undermine the government's credit or impair the integrity of our national currency. Relief by currency inflation is unsound in principle and dishonest in results. The dollar is impregnable in the marts of the world today and must remain so. An ailing body cannot be cured by quack remedies. This is no time to experiment upon the body politic or financial.

Banks and the Banking System

Republican Platform of 1932, p.341

The efficient functioning of our economic machinery depends in no small measure on the aid rendered to trade and industry by our banking system. There is need of revising the banking laws so as to place our banking structure on a sounder basis generally for all concerned, and for the better protection of the depositing public there should be more stringent supervision and broader powers vested in the supervising authorities. We advocate such a revision.

Republican Platform of 1932, p.341

One of the serious problems affecting our banking system has arisen from the practice of organizing separate corporations by the same interests as banks, but participating in operations which the banks themselves are not permitted legally to undertake. We favor requiring reports of and subjecting to thorough and periodic examination all such affiliates of member banks until adequate information has been acquired on the basis of which this problem may definitely be solved in a permanent manner.

International Conference

Republican Platform of 1932, p.341

We favor the participation by the United States in an international conference to consider matters relating to monetary questions, including the position of silver, exchange problems, and commodity prices, and possible co-operative action concerning them.

Home Loan Discount Bank System

Republican Platform of 1932, p.341

The present Republican administration has initiated legislation for the creation of a system of Federally supervised home loan discount banks, designed to serve the home owners of all parts of the country and to encourage home ownership [p.342] by making possible long term credits for homes on more stable and more favorable terms.

Republican Platform of 1932, p.342

There has arisen in the last few years a disturbing trend away from home ownership. We believe that everything should be done by Governmental agencies, national State and local, to reverse this tendency; to aid home owners by encouraging better methods of home financing; and to relieve the present inequitable tax burden on the home. In the field of national legislation we pledge that the measures creating a home loan discount system will be pressed in Congress until adopted.

Agriculture

Republican Platform of 1932, p.342

Farm distress in America has its root in the enormous expansion of agricultural production during the war, the deflation of 1919, 1920 and the dislocation of markets after the war. There followed, under Republican Administrations, a long record of legislation in aid of the co-operative organization of farmers and in providing farm credit. The position of agriculture was gradually improved. In 1928 the Republican Party pledged further measures in aid of agriculture, principally tariff protection for agricultural products and the creation of a Federal Farm Board "clothed with the necessary power to promote the establishment of a farm marketing system of farmer-owned and controlled stabilization corporations."

Republican Platform of 1932, p.342

Almost the first official act of President Hoover was the calling of a special session of Congress to redeem these party pledges. They have been redeemed.

Republican Platform of 1932, p.342

The 1930 tariff act increased the rates on agricultural products by 30 per cent, upon industrial products only 12 per cent. That act equalized, so far as legislation can do so, the protection afforded the farmer with the protection afforded industry, and prevented a vast flood of cheap wool, grain, livestock, dairy and other products from entering the American market.

Republican Platform of 1932, p.342

By the Agricultural Marketing Act, the Federal Farm Board was created and armed with broad powers and ample funds. The object of that act, as stated in its preamble, was:

Republican Platform of 1932, p.342

"To promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that \* \* \* agriculture will be placed on the basis of economic equality with other industries \* \* \* By encouraging the organization of producers into effective association for their own control \* \* \* and by promoting the establishment of a farm marketing system of producer-owned and producer-controlled co-operative associations ."

Republican Platform of 1932, p.342

The Federal Farm Board, created by the agricultural marketing act, has been compelled to conduct its operations during a period in which all commodity prices, industrial as well as agricultural, have fallen to disastrous levels. A period of decreasing demand and of national calamities such as drought and flood has intensified the problem of agriculture.

Republican Platform of 1932, p.342

Nevertheless, after only a little more than two years' efforts, the Federal Farm Board has many achievements of merit to its credit. It has increased the membership of the co-operative farms marketing associations to coordinate efforts of the local associations. By cooperation with other Federal agencies, it has made available to farm marketing associations a large value of credit, which, in the emergency, would not have otherwise been available. Larger quantities of farm products have been handled co-operatively than ever before in the history of the co-operative movement. Grain crops have been sold by the farmer through his association directly upon the world market.

Republican Platform of 1932, p.342

Due to the 1930 tariff act and the agricultural marketing act, it can truthfully be stated that the prices received by the American farmer for his wheat, corn, rye, barley, oats, flaxseed, cattle, butter and many other products, cruelly low though they are, are higher than the prices received by the farmers of any competing nation for the same products.

Republican Platform of 1932, p.342

The Republican Party has also aided the American farmer by relief of the sufferers in the drought-stricken areas, through loans for rehabilitation and through road building to provide employment, by the development of the inland waterway system, by the perishable product act, by the strengthening of the extension system, and by the appropriation of $125,000,000 to recapitalize the Federal land banks and enable them to extend time to worthy borrowers.

Republican Platform of 1932, p.342

The Republican Party pledges itself to the principle of assistance to co-operative marketing associations, owned and controlled by the farmers themselves, through the provisions of the agricultural marketing act, which will be promptly amended or modified as experience shows to be [p.343] necessary to accomplish the objects set forth in the preamble of that act.

Tariff and the Marketing Act

Republican Platform of 1932, p.343

The party pledges itself to make such revision of tariff schedules as economic changes require to maintain the parity of protection to agriculture with other industry.

Republican Platform of 1932, p.343

The American farmer is entitled not only to tariff schedules on his products but to protection from substitutes therefor.

Republican Platform of 1932, p.343

We will support any plan which will help to balance production against demand, and thereby raise agricultural prices, provided it is economically sound and administratively workable without burdensome bureaucracy.

Republican Platform of 1932, p.343

The burden of taxation borne by the owners of farm land constitutes one of the major problems of agriculture.

Republican Platform of 1932, p.343

President Hoover has aptly and truly said, "Taxes upon real property are easiest to enforce and are the least flexible of all taxes. The tendency under pressure of need is to continue these taxes unchanged in times of depression, despite the decrease in the owner's income. Decreasing price and decreasing income results in an increasing burden upon property owners \* \* \* which is now becoming almost unbearable. The tax burden upon real estate is wholly out of proportion to that upon other forms of property and income. There is no farm relief more needed today than tax relief."

Republican Platform of 1932, p.343

The time has come for a reconsideration of our tax systems, Federal State and local, with a view to developing a better coordination, reducing duplication and relieving unjust burdens. The Republican Party pledges itself to this end.

Republican Platform of 1932, p.343

More than all else, we point to the fact that, in the administration of executive departments, and in every plan of the President for the coordination of national effort and for strengthening our financial structure, for expanding credit, for rebuilding the rural credit system and laying the foundations for better prices, the President has insisted upon the interest of the American farmer.

Republican Platform of 1932, p.343

The fundamental problem of American agriculture is the control of production to such volume as will balance supply with demand. In the solution of this problem the co-operative organization of farmers to plan production, and the tariff, to hold the home market for American farmers, are vital elements. A third element equally as vital is the control of the acreage of land under cultivation, as an aid to the efforts of the farmer to balance production.

Republican Platform of 1932, p.343

We favor a national policy of land utilization which looks to national needs, such as the administration has already begun to formulate. Such a policy must foster reorganization of taxing units in areas beset by tax delinquency and divert lands that are submarginal for crop production to other uses. The national welfare plainly can be served by the acquisition of submarginal lands for watershed protection, grazing, forestry, public parks and game preserves. We favor such acquisition.

The Tariff

Republican Platform of 1932, p.343

The Republican Party has always been the staunch supporter of the American system of a protective tariff. It believes that the home market, built up under that policy, the greatest and richest market in the world, belongs first to American agriculture, industry and labor. No pretext can justify the surrender of that market to such competition as would destroy our farms, mines and factories, and lower the standard of living which we have established for our workers.

Republican Platform of 1932, p.343

Because many foreign countries have recently abandoned the gold standard, as a result of which the costs of many commodities produced in such countries have, at least for the time being, fallen materially in terms of American currency, adequate tariff protection is today particularly essential to the welfare of the American people.

Republican Platform of 1932, p.343

The Tariff Commission should promptly investigate individual commodities so affected by currency depreciation and report to the President any increase in duties found necessary to equalize domestic with foreign costs of production.

Republican Platform of 1932, p.343

To fix the duties on some thousands of commodities, subject to highly complex conditions, is necessarily a difficult technical task. It is unavoidable that some of the rates established by legislation should, even at the time of their enactment, to be too low or too high. Moreover, a subsequent change in costs or other conditions may render obsolete a rate that was before appropriate. The Republican Party has, therefore, long supported the policy of a flexible tariff, giving power to the President, after investigation by an impartial commission and in accordance with prescribed [p.344] principles, to modify the rates named by the Congress.

Republican Platform of 1932, p.344

We commend the President's veto of the measure, sponsored by Democratic Congressmen, which would have transferred from the President to Congress the authority to put into effect the findings of the Tariff Commission. Approval of the measure would have returned tariff making to politics and destroyed the progress made during ten years of effort to lift it out of log-rolling methods. We pledge the Republican Party to a policy which will retain the gains made and enlarge the present scope of greater progress.

Republican Platform of 1932, p.344

We favor the extension of the general Republican principle of tariff protection to our natural resource industries, including the products of our farms, forests, mines and oil wells, with compensatory duties on the manufactured and refined products thereof.

Veterans

Republican Platform of 1932, p.344

Our country is honored whenever it bestows relief on those who have faithfully served its flag. The Republican Party, appreciative of this solemn obligation and honor, has made its sentiments evident in Congress.

Republican Platform of 1932, p.344

Increased hospital facilities have been provided, payments in compensation have more than doubled and in the matter of rehabilitations, pensions and insurance, generous provision has been made.

Republican Platform of 1932, p.344

The administration of laws dealing with the relief of the veterans and their dependents has been a difficult task, but every effort has been made to carry service to the veterans and bring about not only a better and generous interpretation of the law but a sympathetic consideration of the many problems of the veteran.

Republican Platform of 1932, p.344

We believe that every veteran incapacitated in any degree by reason of illness should be cared for and compensated, so far as compensation is possible, by a grateful nation, and that the dependents of those who lost their lives in war or whose death since the war in which service was rendered is traceable to service causes, should be provided for adequately. Legislation should be in accord with this principle.

Republican Platform of 1932, p.344

Disability from causes subsequent and not attributable to war and the support of dependents of deceased veterans whose death is unconnected with war have been to some measure accepted obligations of the nation as a part of the debt due.

Republican Platform of 1932, p.344

A careful study should be made of existing veterans' legislation with a view to elimination of inequalities and injustices and effecting all possible economies, but without departing from our purpose to provide on a sound basis full and adequate relief for our service disabled men, their widows and orphans.

Foreign Affairs

Republican Platform of 1932, p.344

Our relations with foreign nations have been carried on by President Hoover with consistency and firmness, but with mutual understanding and peace with all nations. The world has been overwhelmed with economic strain which has provoked extreme nationalism in every quarter, has overturned many governments, stirred the springs of suspicion and distrust and tried the spirit of international cooperation, but we have held to our own course steadily and successfully.

Republican Platform of 1932, p.344

The party will continue to maintain its attitude of protecting our national interests and policies wherever threatened but at the same time promoting common understanding of the varying needs and aspirations of other nations and going forward in harmony with other peoples without alliances or foreign partnerships.

Republican Platform of 1932, p.344

The facilitation of world intercourse, the freeing of commerce from unnecessary impediments, the settlement of international difficulties by conciliation and the methods of law and the elimination of war as a resort of national policy have been and will be our party program.

Friendship and Commerce

Republican Platform of 1932, p.344

We believe in and look forward to the steady enlargement of the principles of equality of treatment between nations great and small, the concessions of sovereignty and self-administration to every nation which is capable of carrying on stable government and conducting sound orderly relationships with other peoples, and the cultivation of trade and intercourse on the basis of uniformity of opportunity of all nations.

Republican Platform of 1932, p.344

In pursuance of these principles, which have steadily gained favor in the world, the administration has asked no special favors in commerce, has protested discriminations whenever they arose, and has steadily cemented this procedure by reciprocal treaties guaranteeing equality for trade and residence.

Republican Platform of 1932, p.345

[p.345] The historic American plan known as the most-favored-nation principle has been our guiding program, and we believe that policy to be the only one consistent with a full development of international trade, the only one suitable for a country having as wide and diverse a commerce as America, and the one most appropriate for us in view of the great variety of our industrial, agricultural and mineral products and the traditions of our people.

Republican Platform of 1932, p.345

Any other plan involves bargains and partnerships with foreign nations, and as a permanent policy is unsuited to America's position.

Conditions on the Pacific

Republican Platform of 1932, p.345

Events in the Far East, involving the employment of arms on a large scale in a controversy between Japan and China, have caused worldwide concern in the past year and sorely tried the bulwarks erected to insure peace and pacific means for the settlement of international disputes.

Republican Platform of 1932, p.345

The controversy has not only threatened the security of the nations bordering the Pacific but has challenged the maintenance of the policy of the open door in China and the administrative and political integrity of that people, programs which upon American initiation were adopted more than a generation ago and secured by international treaty.

Republican Platform of 1932, p.345

The President and his Secretary of State have maintained throughout the controversy a just balance between Japan and China, taking always a firm position to avoid entanglements in the dispute, but consistently upholding the established international policies and the treaty rights and interests of the United States, and never condoning developments that endangered the obligation of treatises or the peace of the world.

Republican Platform of 1932, p.345

Throughout the controversy our government has acted in harmony with the governments represented in the League of Nations, always making it clear that American policy would be determined at home, but always lending a hand in the common interest of peace and order.

Republican Platform of 1932, p.345

In the application of the principles of the Kellogg pact the American Government has taken the lead, following the principle that a breach of the pact or a threat of infringement thereof was a matter of international concern wherever and however brought about.

Republican Platform of 1932, p.345

As a further step the Secretary of State, upon the instruction of the President, adopted the principle later enlarged upon in his letter to the chairman of the Committee on Foreign Relations of the Senate that this government would not recognize any situation, treaty or agreement brought about between Japan and China by force and in defiance of the covenants of the Kellogg pact.

Republican Platform of 1932, p.345

This principle, associated as it is with the name of President Hoover, was later adopted by the Assembly of the League of Nations at Geneva as a rule for the conduct of all those governments. The principle remains today as an important contribution to international law and a significant moral and material barrier to prevent a nation obtaining the fruits of aggressive warfare. It thus opens a new pathway to peace and order.

Republican Platform of 1932, p.345

We favor enactment by Congress of a measure that will authorize our government to call or participate in an international conference in case of any threat of non-fulfillment of Article 2 of the Treaty of Paris (Kellogg-Briand pact).

Latin-America

Republican Platform of 1932, p.345

The policy of the administration has proved to our neighbors of Latin-America that we have no imperialistic ambitions, but that we wish only to promote the welfare and common interest of the independent nations in the western hemisphere.

Republican Platform of 1932, p.345

We have aided Nicaragua in the solution of its troubles and our country, in greatly reduced numbers, at the request of the Nicaraguan Government only to supervise the coming election. After that they will all be returned to the United States.

Republican Platform of 1932, p.345

In Haiti, in accord with the recommendations of the Forbes commission, appointed by the President, the various services of supervision are being rapidly withdrawn, and only those will be retained which are mandatory under the treaties.

Republican Platform of 1932, p.345

Throughout Latin America the policy of the government of the United States has been and will, under Republican leadership, continue to be one of frank and friendly understanding.

World Court

Republican Platform of 1932, p.345

The acceptance by America of membership in the World Court has been approved by three successive Republican Presidents and we commend this attitude of supporting in this form the settlement of international disputes by the rule of law. America should join its influence and gain [p.346] a voice in this institution, which would offer us a safer, more judicial and expeditious instrument for the constantly recurring questions between us and other nations than is now available by arbitration.

Reduction of Armament

Republican Platform of 1932, p.346

Conscious that the limitation of armament will contribute to security against war, and that the financial burdens of military preparation have been shamefully increased throughout the world, the Administration under President Hoover has made steady efforts and marked progress in the direction of proportional reduction of arms by agreement with other nations.

Republican Platform of 1932, p.346

Upon his initiative a treaty between the chief naval powers at London in 1930, following the path marked by the Washington Conference of 1922, established a limitation of all types of fighting ships on a proportionate basis as between the three great naval powers. For the first time, a general limitation of a most costly branch of armament was successfully accomplished.

Republican Platform of 1932, p.346

In the Geneva disarmament conference, now in progress, America is an active participant and a representative delegation of our citizens is laboring for progress in a cause to which this country has been an earnest contributor. This policy will be pursued.

Republican Platform of 1932, p.346

Meanwhile maintenance of our navy on the basis of parity with any nation is a fundamental policy to which the Republican Party is committed. While in the interest of necessary government retrenchment, humanity and relief of the taxpayer we shall continue to exert our full influence upon the nations of the world in the cause of reduction of arms, we do not propose to reduce our navy defenses below that of any other nation.

National Defense

Republican Platform of 1932, p.346

Armaments are relative and, therefore, flexible and subject to changes as necessity demands. We believe that in time of war every material resource in the nation should bear its proportionate share of the burdens occasioned by the public need and that it is a duty of government to perfect plans in time of peace whereby this objective may be attained in war.

Republican Platform of 1932, p.346

We support the essential principles of the National Defense Act as amended in 1920 and by the Air Corps Act of 1926, and believe that the army of the United States has, through successive reductions accomplished in the last twelve years, reached an irreducible minimum consistent with the self-reliance, self-respect and security of this country.

Wages and Work

Republican Platform of 1932, p.346

We believe in the principle of high wages. We favor the principle of the shorter working week and shorter work day with its application to government as well as to private employment, as rapidly and as constructively as conditions will warrant.

Republican Platform of 1932, p.346

We favor legislation designed to stimulate, encourage and assist in home building.

Immigration

Republican Platform of 1932, p.346

The restriction of immigration is a Republican policy. Our party formulated and enacted into law the quota system, which for the first time has made possible an adequate control of foreign immigration.

Republican Platform of 1932, p.346

Rigid examination of applicants in foreign countries prevented the coming of criminals and other undesirable classes, while other provisions of the law have enabled the President to suspend immigration of foreign wage-earners who otherwise, directly or indirectly, would have increased unemployment among native-born and legally resident foreign-born wage-earners in this country. As a result, immigration is now less than at any time during the past one hundred years.

Republican Platform of 1932, p.346

We favor the continuance and strict enforcement of our present laws upon this subject.

Department of Labor

Republican Platform of 1932, p.346

We commend the constructive work of the United States Department of Labor.

Labor

Republican Platform of 1932, p.346

Collective bargaining by responsible representatives of employers and employes of their own choice, without the interference of any one, is recognized and approved.

Republican Platform of 1932, p.346

Legislation, such as laws, prohibiting alien contract labor, peonage labor and the shanghaiing of sailors; the eight-hour law on government contracts and in government employment; provision for railroad safety devices, of methods of conciliation, mediation and arbitration in industrial labor [p.347] disputes, including the adjustment of railroad disputes; the providing of compensation for injury to government employes (the forerunner of Federal workers' compensation acts), and other laws to aid and protect labor are of Republican origin, and have had and will continue to have the unswerving support of the party.

Employment

Republican Platform of 1932, p.347

We commend the constructive work of the United States Employment Service in the Department of Labor. This service was enlarged and its activities extended through an appropriation made possible by the President with the cooperation of the Congress. It has done high service for the unemployed in the ranks of civil life and in the ranks of the former soldiers of the World War.

Freedom of Speech

Republican Platform of 1932, p.347

Freedom of speech, press and assemblages are fundamental principles upon which our form of government rests. These vital principles should be preserved and protected.

Public Utilities

Republican Platform of 1932, p.347

Supervision, regulation and control of interstate public utilities in the interest of the public is an established policy of the Republican Party, to the credit of which stands the creation of the Interstate Commerce Commission, with its authority to assure reasonable transportation rates, sound railway finance and adequate service.

Republican Platform of 1932, p.347

As proof of the progress made by the Republican Party in government control of public utilities, we cite the reorganization under this administration of the Federal Power Commission, with authority to administer the Federal water power act. We urge legislation to authorize this commission to regulate the charges for electric current when transmitted across State lines.

Transportation

Republican Platform of 1932, p.347

The promotion of agriculture, commerce and industry requires coordination of transportation by rail, highway, air and water. All should be subjected to appropriate and constructive regulation.

Republican Platform of 1932, p.347

The public will, of course, select the form of transportation best fitted to its particular service, but the terms of competition fixed by public authority should operate without discrimination, so that all common carriers by rail, highway, air and water shall operate under conditions of equality.

Inland Waterways

Republican Platform of 1932, p.347

The Republican Party recognizes that low cost transportation for bulk commodities will enable industry to develop in the midst of agriculture in the Mississippi Valley, thereby creating a home market for farm products in that section. With a view to aiding agriculture in the middle west the present administration has pushed forward as rapidly as possible the improvement of the Mississippi waterway system, and we favor the continued vigorous prosecution of these works to the end that agriculture and industry in that great area may enjoy the benefits of these improvements at the earliest possible date.

Republican Platform of 1932, p.347

The railroads constitute the backbone of our transportation system and perform an essential service for the country. The railroad industry is our largest employer of labor and the greatest consumer of goods. The restoration of their credit and the maintenance of their ability to render adequate service are of paramount importance to the public, to their many thousands of employes and to savings banks, insurance companies and other similar institutions, to which the savings of the people have been entrusted.

Republican Platform of 1932, p.347

We should continue to encourage the further development of the merchant marine under American registry and ownership.

Republican Platform of 1932, p.347

Under the present administration the American merchant fleet has been enlarged and strengthened until it now occupies second place among the merchant marines of the world.

Republican Platform of 1932, p.347

By the gradual retirement of the government from the field of ship operations and marked economics in costs, the United States Shipping Board will require no appropriation for the fiscal year 1933 for ship operations.

St. Lawrence Seaway

Republican Platform of 1932, p.347

The Republican Party stands committed to the development of the Great Lakes-St. Lawrence seaway. Under the direction of President Hoover negotiation of a treaty with Canada for this development is now at a favorable point. Recognizing the inestimable benefits which will accrue to the nation from placing the ports of the Great Lakes on an ocean base, the party reaffirms [p.348] allegiance to this great project and pledges its best efforts to secure its early completion.

Highways

Republican Platform of 1932, p.348

The Federal policy to cooperate with the States in the building of roads was thoroughly established when the Federal highway act of 1921 was adopted under a Republican Congress. Each year since that time appropriations have been made which have greatly increased the economic value of highway transportation and helped to raise the standards and opportunities of rural life.

Republican Platform of 1932, p.348

We pledge our support to the continuation of this policy in accordance with our needs and resources.

Crime

Republican Platform of 1932, p.348

We favor the enactment of rigid penal laws that will aid the States in stamping out the activities of gangsters, racketeers and kidnappers. We commend the intensive and effective drive made upon these public enemies by President Hoover and pledge our party to further efforts to the same purpose.

Narcotics

Republican Platform of 1932, p.348

The Republican Party pledges itself to continue the present relentless warfare against the illicit narcotic traffic and the spread of the curse of drug addiction among our people. This administration has by treaty greatly strengthened our power to deal with this traffic.

Civil Service

Republican Platform of 1932, p.348

The merit system has been amply justified since the organization of the Civil Service by the Republican Party. As a part of our governmental system it is now unassailable. We believe it should remain so.

The Eighteenth Amendment

Republican Platform of 1932, p.348

The Republican Party has always stood and stands today for obedience to and enforcement of the law as the very foundation of orderly government and civilization. There can be no national security otherwise. The duty of the President of the United States and the officers of the law is dear. The law must be enforced as they find it enacted by the people. To these courses of action we pledge our nominees.

Republican Platform of 1932, p.348

The Republican Party is and always has been the party of the Constitution. Nullification by non-observance by individuals or State action threatens the stability of government.

Republican Platform of 1932, p.348

While the Constitution makers sought a high degree of permanence, they foresaw the need of changes and provided for them. Article V limits the proposals of amendments to two methods: (1) Two-thirds of both houses of Congress may propose amendments or (2) on application of the Legislatures of two-thirds of the States a national convention shall be called by Congress to propose amendments. Thereafter ratification must be had in one of two ways: (1) By the Legislatures of three-fourths of the several States or (2) by conventions held in three-fourths of the several States. Congress is given power to determine the mode of ratification.

Republican Platform of 1932, p.348

Referendums without constitutional sanction cannot furnish a decisive answer. Those who propose them innocently are deluded by false hopes; those who propose them knowingly are deceiving the people.

Republican Platform of 1932, p.348

A nation wide controversy over the Eighteenth Amendment now distracts attention from the constructive solution of many pressing national problems. The principle of national prohibition as embodied in the amendment was supported and opposed by members of both great political parties. It was submitted to the States by members of Congress of different political faith and ratified by State Legislatures of different political majorities. It was not then and is not now a partisan political question.

Republican Platform of 1932, p.348

Members of the Republican Party hold different opinions with respect to it and no public official or member of the party should be pledged or forced to choose between his party affiliations and his honest convictions upon this question.

Republican Platform of 1932, p.348

We do not favor a submission limited to the issue of retention or repeal, for the American nation never in its history has gone backward, and in this case the progress which has been thus far made must be preserved, while the evils must be eliminated.

Republican Platform of 1932, p.348

We therefore believe that the people should have an opportunity to pass upon a proposed amendment the provision of which, while retaining in the Federal Government power to preserve the gains already made in dealing with the evils inherent in the liquor traffic, shall allow the States to deal with the problem as their citizens may [p.349] determine, but subject always to the power of the Federal Government to protect those States where prohibition may exist and safeguard our citizens everywhere from the return of the saloon and attendant abuses.

Republican Platform of 1932, p.349

Such an amendment should be promptly submitted to the States by Congress, to be acted upon by State conventions called for that sole purpose in accordance with the provisions of Article V of the Constitution and adequately safeguarded so as to be truly representative.

Conservation

Republican Platform of 1932, p.349

The wise use of all natural resources freed from monopolistic control is a Republican policy, initiated by Theodore Roosevelt. The Roosevelt, Coolidge and Hoover reclamation projects bear witness to the continuation of that policy. Forestry and all other conservation activities have been supported and enlarged.

Republican Platform of 1932, p.349

The conservation of oil is a major problem to the industry and the nation. The administration has sought to bring coordination of effort through the States, the producers and the Federal Government. Progress has been made and the effort will continue.

The Negro

Republican Platform of 1932, p.349

For seventy years the Republican Party has been the friend of the American Negro. Vindication of the rights of the Negro citizen to enjoy the full benefits of life, liberty and the pursuit of happiness is traditional in the Republican Party, and our party stands pledged to maintain equal opportunity and rights for Negro citizens. We do not propose to depart from that tradition nor to alter the spirit or letter of that pledge.

Hawaii

Republican Platform of 1932, p.349

We believe that the existing status of self-government which for many years has been enjoyed by the citizens of the Territory of Hawaii should be maintained, and that officials appointed to administer the government should be bona-fide residents of the Territory.

Puerto Rico

Republican Platform of 1932, p.349

Puerto Rico being a part of the United States and its inhabitants American citizens, we believe that they are entitled to a good-faith recognition of the spirit and purposes of their organic act.

Republican Platform of 1932, p.349

We, therefore, favor the inclusion of the island in all legislative and administrative measures enacted or adopted by Congress or otherwise for the economic benefit of their fellow-citizens of the mainland.

Republican Platform of 1932, p.349

We also believe that, in so far as possible, all officials appointed to administer the affairs of the island government should be qualified by at least five years of bona-fide residence therein.

Alaska

Republican Platform of 1932, p.349

We favor the policy of giving to the people of Alaska the widest possible territorial self-government and the selection so far as possible of bona-fide residents for positions in that Territory and the placing of its citizens on an equality with those in the several States.

Welfare Work and Children

Republican Platform of 1932, p.349

The children of our nation, our future citizens, have had the most solicitous thought of our President. Child welfare and protection has been a major effort of this administration. The organization of the White House Conference on Child Health and Protection is regarded as one of the outstanding accomplishments of this administration.

Republican Platform of 1932, p.349

Welfare work in all its phases has had the support of the President and aid of the administration. The work of organized agencies—local, State and Federal has been advanced and an increased impetus given by that recognition and help. We approve and pledge a continuation of that policy.

Indians

Republican Platform of 1932, p.349

We favor the fullest protection of the property rights of the American Indians and the provision for them of adequate educational facilities.

Reorganization of Government Bureaus

Republican Platform of 1932, p.349

Efficiency and economy demand reorganization of government bureaus. The problem is nonpartisan and must be so treated if it is to be solved. As a result of years of study and personal contact with conflicting activities and wasteful duplication of effort, the President is particularly fitted to direct measures to correct the situation. We favor legislation by Congress which will give him the required authority.[p.350]

Democratic Failure

Republican Platform of 1932, p.350

The vagaries of the present Democratic House of Representatives offer characteristic and appalling proof of the existing incapacity of that party for leadership in a national crisis. Individualism running amuck has displaced party discipline and has trampled under foot party leadership. A bewildered electorate has viewed the spectacle with profound dismay and deep misgivings.

Republican Platform of 1932, p.350

Goaded to desperation by their confessed failure, the party leaders have resorted to "pork barrel" legislation to obtain a unity of action which could not otherwise be achieved. A Republican President stands resolutely between the helpless citizen and the disaster threatened by such measures; and the people, regardless of party, will demand his continued service.

Republican Platform of 1932, p.350

Many times during his useful life has Herbert Hoover responded to such a call, and his response has never disappointed. He will not disappoint us now.

Party Government

Republican Platform of 1932, p.350

The delays and differences which recently hampered efforts to obtain legislation imperatively demanded by prevailing critical conditions strikingly illustrate the menace to self-government brought about by the weakening of party ties and party fealty.

Republican Platform of 1932, p.350

Experience has demonstrated that coherent political parties are indispensable agencies for the prompt and effective operation of the functions of our government under the Constitution.

Republican Platform of 1932, p.350

Only by united party action can consistent, well-planned and wholesome legislative programs be enacted. We believe that the majority of the Congressmen elected in the name of a party have the right and duty to determine the general policies of that party requiring Congressional action, and that Congressmen belonging to that party are, in general, bound to adhere to such policies. Any other course inevitably makes of Congress a body of detached delegates which, instead of representing the collective wisdom of our people, become the confused voices of a heterogeneous group of unrelated local prejudices.

Republican Platform of 1932, p.350

We believe that the time has come when Senators and Representatives of the United States should be impressed with the inflexible truth that their first concern should be the welfare of the United States and the well-being of all of its people, and that stubborn pride of individual opinion is not a virtue, but an obstacle to the orderly and successful achievement of the objects of representative government.

Republican Platform of 1932, p.350

Only by cooperation can self-government succeed. Without it election under a party aegis becomes a false pretense.

Republican Platform of 1932, p.350

We earnestly request that Republicans throughout the Union demand that their representatives in the Congress pledge themselves to these principles, to the end that the insidious influences of party disintegration may not undermine the very foundations of the Republic.

Conclusion

Republican Platform of 1932, p.350

In contrast with the Republican policies and record, we contrast those of the democratic as evidenced by the action of the House of Representatives under Democratic leadership and control, which includes:

Republican Platform of 1932, p.350

1. The issuance of fiat currency.

Republican Platform of 1932, p.350

2. Instructions to the Federal Reserve Board and the Secretary of the Treasury to attempt to manipulate commodity prices.

Republican Platform of 1932, p.350

3. The guarantee of bank deposits.

Republican Platform of 1932, p.350

4. The squandering of the public resources and the unbalancing of the budget through pork-barrel appropriations which bear little relation to distress and would tend through delayed business revival to decrease rather than increase employment.

Republican Platform of 1932, p.350

Generally on economic matters we pledge the Republican Party:

Republican Platform of 1932, p.350

1. To maintain unimpaired the national credit.

Republican Platform of 1932, p.350

2. To defend and preserve a sound currency and an honest dollar.

Republican Platform of 1932, p.350

3. To stand steadfastly by the principle of a balanced budget.

Republican Platform of 1932, p.350

4. To devote ourselves fearlessly and unremittingly to the task of eliminating abuses and extravagance and of drastically cutting the cost of government so as to reduce the heavy burden of taxation.

Republican Platform of 1932, p.350

5. To use all available means consistent with sound financial and economic principles to promote an expansion of credit to stimulate business and relieve unemployment.

Republican Platform of 1932, p.350

6. To make a thorough study of the conditions which permitted the credit and the credit machinery of the country to be made available, with [p.351] out adequate check, for wholesale speculation in securities, resulting in ruinous consequences to millions of our citizens and to the national economy, and to correct those conditions so that they shall not recur.

Republican Platform of 1932, p.351

Recognizing that real relief to unemployment must come through a revival of industrial activity and agriculture, to the promotion of which our every effort must be directed, our party in State and nation undertakes to do all in its power that is humanly possible to see that distress is fully relieved in accordance with American principles and traditions.

Republican Platform of 1932, p.351

No successful solution of the problems before the country today can be expected from a Congress and a President separated by partisan lines or opposed in purposes and principles. Responsibility cannot be placed unless a clear mandate is given by returning to Washington a Congress and a Chief Executive united in principles and program.

Republican Platform of 1932, p.351

The return to power of the Republican Party with that mandate is the duty of every voter who believes in the doctrines of the party and its program as herein stated. Nothing else, we believe, will insure the orderly recovery of the country and that return to prosperous days which every American so ardently desires.

Republican Platform of 1932, p.351

The Republican Party faces the future unafraid! With courage and confidence in ultimate success, we will strive against the forces that strike at our social and economic ideals, our political institutions.

Franklin D. Roosevelt, First Inaugural Address, 4 March 1933

Franklin D. Roosevelt's First Inaugural Address, 1933

Title: Franklin D. Roosevelt's First Inaugural Address

Author: Franklin D. Roosevelt

Date: March 4, 1933

Source: Public Papers of the Presidents, F. D. Roosevelt, 1933, Item 1

Public Papers of FDR, 1933, Item 1

I AM CERTAIN that my fellow Americans expect that on my induction into the Presidency I will address them with a candor and a decision which the present situation of our Nation impels. This is preeminently the time to speak the truth, the whole truth, frankly and boldly. Nor need we shrink from honestly facing conditions in our country today. This great Nation will endure as it has endured, will revive and will prosper. So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance. In every dark hour of our national life a leadership of frankness and vigor has met with that understanding and support of the people themselves which is essential to victory. I am convinced that you will again give that support to leadership in these critical days.

Public Papers of FDR, 1933, Item 1

In such a spirit on my part and on yours we face our common difficulties. They concern, thank God, only material things. Values have shrunken to fantastic levels; taxes have risen; our ability to pay has fallen; government of all kinds is faced by serious curtailment of income; the means of exchange are frozen in the currents of trade; the withered leaves of industrial enterprise lie on every side; farmers find no markets for their produce; the savings of many years in thousands of families are gone.

Public Papers of FDR, 1933, Item 1

More important, a host of unemployed citizens face the grim problem of existence, and an equally great number toil with little return. Only a foolish optimist can deny the dark realities of the moment.

Public Papers of FDR, 1933, Item 1

Yet our distress comes from no failure of substance. We are stricken by no plague of locusts. Compared with the perils which our forefathers conquered because they believed and were not afraid, we have still much to be thankful for. Nature still offers her bounty and human efforts have multiplied it. Plenty is at our doorstep, but a generous use of it languishes in the very sight of the supply. Primarily this is because rulers of the exchange of mankind's goods have failed through their own stubbornness and their own incompetence, have admitted their failure, and have abdicated. Practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men.

Public Papers of FDR, 1933, Item 1

True they have tried, but their efforts have been cast in the pattern of an outworn tradition. Faced by failure of credit they have proposed only the lending of more money. Stripped of the lure of profit by which to induce our people to follow their false leadership, they have resorted to exhortations, pleading tearfully for restored confidence. They know only the rules of a generation of self-seekers. They have no vision, and when there is no vision the people perish.

Public Papers of FDR, 1933, Item 1

The money changers have fled from their high seats in the temple of our civilization. We may now restore that temple to the ancient truths. The measure of the restoration lies in the extent to which we apply social values more noble than mere monetary profit.

Public Papers of FDR, 1933, Item 1

Happiness lies not in the mere possession of money; it lies in the joy of achievement, in the thrill of creative effort. The joy and moral stimulation of work no longer must be forgotten in the mad chase of evanescent profits. These dark days will be worth all they cost us if they teach us that our true destiny is not to be ministered unto but to minister to ourselves and to our fellow men.

Public Papers of FDR, 1933, Item 1

Recognition of the falsity of material wealth as the standard of success goes hand in hand with the abandonment of the false belief that public office and high political position are to be valued only by the standards of pride of place and personal profit; and there must be an end to a conduct in banking and in business which too often has given to a sacred trust the likeness of callous and selfish wrongdoing. Small wonder that confidence languishes, for it thrives only on honesty, on honor, on the sacredness of obligations, on faithful protection, on unselfish performance; without them it cannot live. Restoration calls, however, not for changes in ethics alone. This Nation asks for action, and action now.

Public Papers of FDR, 1933, Item 1

Our greatest primary task is to put people to work. This is no unsolvable problem if we face it wisely and courageously. It can be accomplished in part by direct recruiting by the Government itself, treating the task as we would treat the emergency of a war, but at the same time, through this employment, accomplishing greatly needed projects to stimulate and reorganize the use of our natural resources.

Public Papers of FDR, 1933, Item 1

Hand in hand with this we must frankly recognize the overbalance of population in our industrial centers and, by engaging on a national scale in a redistribution, endeavor to provide a better use of the land for those best fitted for the land. The task can be helped by definite efforts to raise the values of agricultural products and with this the power to purchase the output of our cities. It can be helped by preventing realistically the tragedy of the growing loss through foreclosure of our small homes and our farms. It can be helped by insistence that the Federal, State, and local governments act forthwith on the demand that their cost be drastically reduced. It can be helped by the unifying of relief activities which today are often scattered, uneconomical, and unequal. It can be helped by national planning for and supervision of all forms of transportation and of communications and other utilities which have a definitely public character. There are many ways in which it can be helped, but it can never be helped merely by talking about it. We must act and act quickly.

Public Papers of FDR, 1933, Item 1

Finally, in our progress toward a resumption of work we require two safeguards against a return of the evils of the old order: there must be a strict supervision of all banking and credits and investments, so that there will be an end to speculation with other people's money; and there must be provision for an adequate but sound currency.

Public Papers of FDR, 1933, Item 1

These are the lines of attack. I shall presently urge upon a new Congress, in special session, detailed measures for their fulfillment, and I shall seek the immediate assistance of the several States.

Public Papers of FDR, 1933, Item 1

Through this program of action we address ourselves to putting our own national house in order and making income balance outgo. Our international trade relations, though vastly important, are in point of time and necessity secondary to the establishment of a sound national economy. I favor as a practical policy the putting of first things first. I shall spare no effort to restore world trade by international economic readjustment, but the emergency at home cannot wait on that accomplishment.

Public Papers of FDR, 1933, Item 1

The basic thought that guides these specific means of national' recovery is not narrowly nationalistic. It is the insistence, as a first considerations, upon the interdependence of the various elements in and parts of the United States—a recognition of the old and permanently important manifestation of the American spirit of the pioneer. It is the way to recovery. It is the immediate way. It is the strongest assurance that the recovery will endure.

Public Papers of FDR, 1933, Item 1

In the field of world policy I would dedicate this Nation to the policy of the good neighbor—the neighbor who resolutely respects himself and, because he does so, respects the rights of others—the neighbor who respects his obligations and respects the sanctity of his agreements in and with a world of neighbors.

Public Papers of FDR, 1933, Item 1

If I read the temper of our people correctly, we now realize as we have never realized before our interdependence on each other; that we cannot merely take but we must give as well; that if we are to go forward, we must move as a trained and loyal army willing to sacrifice for the good of a common discipline, because without such discipline no progress is made, no leadership becomes effective. We are, I know, ready and willing to submit our lives and property to such discipline, because it makes possible a leadership which aims at a larger good. This I propose to offer, pledging that the larger purposes will bind upon us all as a sacred obligation with a unity of duty hitherto evoked only in time of armed strife.

Public Papers of FDR, 1933, Item 1

With this pledge taken, I assume unhesitatingly the leadership of this great army of our people dedicated to a disciplined attack upon our common problems.

Public Papers of FDR, 1933, Item 1

Action in this image and to this end is feasible under the form of government which we have inherited from our ancestors. Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. That is why our constitutional system has proved itself the most superbly enduring political mechanism the modern world has produced. It has met every stress of vast expansion of territory, of foreign wars, of bitter internal strife, of world relations.

Public Papers of FDR, 1933, Item 1

It is to be hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

Public Papers of FDR, 1933, Item 1

I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.

Public Papers of FDR, 1933, Item 1

But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.

Public Papers of FDR, 1933, Item 1

For the trust reposed in me I will return the courage and the devotion that befit the time. I can do no less.

Public Papers of FDR, 1933, Item 1

We face the arduous days that lie before us in the warm courage of national unity; with the clear consciousness of seeking old and precious moral values; with the clean satisfaction that comes from the stern performance of duty by old and young alike. We aim at the assurance of a rounded and permanent national life.

Public Papers of FDR, 1933, Item 1

We do not distrust the future of essential democracy. The people of the United States have not failed. In their need they have registered a mandate that they want direct, vigorous action. They have asked for discipline and direction under leadership. They have made me the present instrument of their wishes. In the spirit of the gift I take it.

Public Papers of FDR, 1933, Item 1

In this dedication of a Nation we humbly ask the blessing of God. May He protect each and every one of us. May He guide me in the days to come.

Establishment of Diplomatic Relations Between the U.S. and the U.S.S.R., 1933

Title: Establishment of Diplomatic Relations Between the U.S. and the U.S.S.R.

Author: Franklin D. Roosevelt and Maxim Litvinov

Date: November 16, 1933

Source: Public Papers of the Presidents, F. D. Roosevelt, 1933, Item 174

Public Papers of FDR, 1933, Item 174

The White House, Washington, November 16, 1933

Public Papers of FDR, 1933, Item 174

My dear Mr. Litvinov:

Public Papers of FDR, 1933, Item 174

I am very happy to inform you that as a result of our conversations the Government of the United States has decided to establish normal diplomatic relations with the Government of the Union of Soviet Socialist Republics and to exchange ambassadors.

Public Papers of FDR, 1933, Item 174

I trust that the relations now established between our peoples may forever remain normal and friendly, and that our Nations henceforth may cooperate for their mutual benefit and for the preservation of the peace of the world. I am, my dear Mr. Litvinov,

Public Papers of FDR, 1933, Item 174

Very sincerely yours,

 FRANKLIN D. ROOSEVELT

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Public Papers of FDR, 1933, Item 174

Washington, November 16, 1933

Public Papers of FDR, 1933, Item 174

My dear Mr. President:

Public Papers of FDR, 1933, Item 174

I am very happy to inform you that the Government of the Union of Soviet Socialist Republics is glad to establish normal diplomatic relations with the Government of the United States and to exchange ambassadors.

Public Papers of FDR, 1933, Item 174

I, too, share the hope that the relations now established between our peoples may forever remain normal and friendly, and that our Nations henceforth may cooperate for their mutual benefit and for the preservation of the peace of the world.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. President,

 Very sincerely yours,

Public Papers of FDR, 1933, Item 174

MAXIM LITVINOV

People's Commissar for Foreign Affairs,

Union of Soviet Socialist Republics

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Public Papers of FDR, 1933, Item 174

Washington, November 16, 1933

Public Papers of FDR, 1933, Item 174

My dear Mr. President:

Public Papers of FDR, 1933, Item 174

I have the honor to inform you that coincident with the establishment of diplomatic relations between our two Governments it will be the fixed policy of the Government of the Union of Soviet Socialist Republics:

Public Papers of FDR, 1933, Item 174

1. To respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States, its territories or possessions.

Public Papers of FDR, 1933, Item 174

2. To refrain, and to restrain all persons in Government service and all organizations of the Government or under its direct or indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, its territories or possessions, and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim, the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States, its territories or possessions.

Public Papers of FDR, 1933, Item 174

3. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which makes claim to be the Government of, or makes attempt upon the territorial integrity of, the United States, its territories or possessions; not to form, subsidize, support or permit on its territory military organizations or groups having the aim of armed struggle against the United States, its territories or possessions, and to prevent any recruiting on behalf of such organizations and groups.

Public Papers of FDR, 1933, Item 174

4. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. President,

 Very sincerely yours,

Public Papers of FDR, 1933, Item 174

MAXIM LITVINOV

People's Commissar for Foreign Affairs,

Union of Soviet Socialist Republics

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Public Papers of FDR, 1933, Item 174

The White House, Washington, November 16, 1933

Public Papers of FDR, 1933, Item 174

My dear Mr. Litvinov:

Public Papers of FDR, 1933, Item 174

I am glad to have received the assurance expressed in your note to me of this date that it will be the fixed policy of the Government of the Union of Soviet Socialist Republics:

Public Papers of FDR, 1933, Item 174

1. To respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States, its territories or possessions.

Public Papers of FDR, 1933, Item 174

2. To refrain, and to restrain all persons in Government service and all organizations of the Government or under its direct or indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, its territories or possessions, and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim, the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States, its territories or possessions.

Public Papers of FDR, 1933, Item 174

3. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which makes claim to be the Government of, or makes attempt upon the territorial integrity of, the United States, its territories or possessions; not to form, subsidize, support or permit on its territory military organizations or groups having the aim of armed struggle against the United States, its territories or possessions, and to prevent any recruiting on behalf of such organizations and groups.

Public Papers of FDR, 1933, Item 174

4. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions.

Public Papers of FDR, 1933, Item 174

It will be the fixed policy of the Executive of the United States within the limits of the powers conferred by the Constitution and the laws of the United States to adhere reciprocally to the engagements above expressed.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. Litvinov,

Very sincerely yours,

 FRANKLIN D. ROOSEVELT

Public Papers of FDR, 1933, Item 174

The White House, Washington, November 16, 1933

My dear Mr. Litvinov:

As I have told you in our recent conversations, it is my expectation that after the establishment of normal relations between our two countries many Americans will wish to reside temporarily or permanently within the territory of the Union of Soviet Socialist Republics, and I am deeply concerned that they should enjoy in all respects the same freedom of conscience and religious liberty which they enjoy at home.

Public Papers of FDR, 1933, Item 174

As you well know, the Government of the United States, since the foundation of the Republic, has always striven to protect its nationals, at home and abroad, in the free exercise of liberty of conscience and religious worship, and from all disability or persecution on account of their religious faith or worship. And I need scarcely point out that the rights enumerated below are those enjoyed in the United States by all citizens and foreign nationals and by American nationals in all the major countries of the world.

Public Papers of FDR, 1933, Item 174

The Government of the United States, therefore, will expect that nationals of the United States of America within the territory of the Union of Soviet Socialist Republics will be allowed to conduct without annoyance or molestation of any kind religious services and rites of a ceremonial nature, including baptismal, confirmation, communion, marriage and burial rites, in the English language, or in any other language which is customarily used in the practice of the religious faith to which they belong, in churches, houses, or other buildings appropriate for such service, which they will be given the right and opportunity to lease, erect or maintain in convenient situations.

Public Papers of FDR, 1933, Item 174

We will expect that nationals of the United States will have the right to collect from their co-religionists and to receive from abroad voluntary offerings for religious purposes; that they will be entitled without restriction to impart religious instruction to their children, either singly or in groups, or to have such instruction imparted by persons whom they may employ for such purpose; that they will be given and protected in the right to bury their dead according to their religious customs in suitable and convenient places established for that purpose, and given the right and opportunity to lease, lay out, occupy and maintain such burial grounds subject to reasonable sanitary laws and regulations.

Public Papers of FDR, 1933, Item 174

We will expect that religious groups or congregations composed of nationals of the United States of America in the territory of the Union of Soviet Socialist Republics will be given the right to have their spiritual needs ministered to by clergymen, priests, rabbis or other ecclesiastical functionaries who are nationals of the United States of America, and that such clergymen, priests, rabbis or other ecclesiastical functionaries will be protected from all disability or persecution and will not be denied entry into the territory of the Soviet Union because of their ecclesiastical status.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. Litvinov,

Very sincerely yours,

 FRANKLIN D. ROOSEVELT

Public Papers of FDR, 1933, Item 174

Washington, November 16, 1933

My dear Mr. President:

Public Papers of FDR, 1933, Item 174

In reply to your letter of November 16, 1933, I have the honor to inform you that the Government of the Union of Soviet Socialist Republics as a fixed policy accords the nationals of the United States within the territory of the Union of Soviet Socialist ' Republics the following rights referred to by you:

Public Papers of FDR, 1933, Item 174

1. The right to "free exercise of liberty of conscience and religious worship" and protection "from all disability or persecution on account of their religious faith or worship."

Public Papers of FDR, 1933, Item 174

This right is supported by the following laws and regulations existing in the various republics of the Union:

Public Papers of FDR, 1933, Item 174

Every person may profess any religion or none. All restrictions of rights connected with the profession of any belief whatsoever, or with the non-profession of any belief, are annulled. (Decree of Jan. 23, 1918, art. 3.)

Public Papers of FDR, 1933, Item 174

Within the confines of the Soviet Union it is prohibited to issue any local laws or regulations restricting or limiting freedom of conscience, or establishing privileges or preferential rights of any kind based upon the religious profession of any person. (Decree of Jan. 23, 1918, art. 2.)

Public Papers of FDR, 1933, Item 174

2. The right to "conduct without annoyance or molestation of any kind religious services and rites of a ceremonial nature."

Public Papers of FDR, 1933, Item 174

This right is supported by the following laws:

Public Papers of FDR, 1933, Item 174

A free performance of religious rites is guaranteed as long as it does not interfere with public order and is not accompanied by interference with the rights of citizens of the Soviet Union. Local authorities possess the right in such cases to adopt all necessary measures to preserve public order and safety. (Decree of Jan. 23, 1918, art. 5.)

Public Papers of FDR, 1933, Item 174

Interference with the performance of religious rites, in so far as they do not endanger public order and are not accompanied by infringements on the rights of others, is punishable by compulsory labor for a period up to six months. (Criminal Code, art. 127.)

Public Papers of FDR, 1933, Item 174

3. "The right and opportunity to lease, erect or maintain in convenient situations" churches, houses or other buildings appropriate for religious purposes.

Public Papers of FDR, 1933, Item 174

This right is supported by the following laws and regulations:

Public Papers of FDR, 1933, Item 174

Believers belonging to a religious society with the object of making provision for their requirements in the matter of religion: may lease under contract, free of charge, from the Sub-District or District Executive Committee or from the Town Soviet, special buildings for the purpose of worship and objects intended exclusively for the purposes of their cult. (Decree of April 8, 1929, art. 10.)

Public Papers of FDR, 1933, Item 174

Furthermore, believers who have formed a religious society or a group of believers may use for religious meetings other buildings which have been placed at their disposal on lease by private persons or by local Soviets and Executive Committees. All rules established for houses of worship are applicable to these buildings. Contracts for the use of such buildings shall be concluded by individual believers who will be held responsible for their execution. In addition, these buildings must comply with the sanitary and technical building regulations. (Decree of April 8, 1929, art. 10.)

Public Papers of FDR, 1933, Item 174

The place of worship and religious property shall be handed over for the use of believers forming a religious society under a contract concluded in the name of the competent District Executive Committee or Town Soviet by the competent administrative department or branch, or directly by the Sub-District Executive Committee. (Decree of April 8, 1929, art. 15.)

Public Papers of FDR, 1933, Item 174

The construction of new places of worship may take place at the desire of religious societies provided that the usual technical building regulations and the special regulations laid down by the People's Commissariat for Internal Affairs are observed. (Decree of April 8, 1929, art. 45.)

Public Papers of FDR, 1933, Item 174

4. "The right to collect from their co-religionists…voluntary offerings for religious purposes." This right is supported by the following law: Members of groups of believers and religious societies may raise subscriptions among themselves and collect voluntary offerings, both in the place of worship itself and outside it, but only amongst the members of the religious association concerned and only for purposes connected with the upkeep of the place of worship and the religious property, for the engagement of ministers of religion and for the expenses of their executive body. Any form of forced contribution in aid of religious associations is punishable under the Criminal Code. (Decree of April 8, 1929, art. 54.)

Public Papers of FDR, 1933, Item 174

5. Right to "impart religious instruction to their children either singly or in groups or to have such instruction imparted by persons whom they may employ for such purpose."

Public Papers of FDR, 1933, Item 174

This right is supported by the following law:

Public Papers of FDR, 1933, Item 174

The school is separated from the Church. Instruction in religious doctrines is not permitted in any governmental and common schools, nor in private teaching institutions where general subjects are taught. Persons may give or receive religious instruction in a private manner. (Decree of Jan. 23, 1918, art. 9.)

Public Papers of FDR, 1933, Item 174

Furthermore, the Soviet Government is prepared to include in a consular convention to be negotiated immediately following the establishment of relations between our two countries provisions in which nationals of the United States shall be granted rights with reference to freedom of conscience and the free exercise of religion which shall not be less favorable than those enjoyed in the Union of Soviet Socialist Republics by nationals of the Nation most favored in this respect. In this connection, I have the honor to call to your attention Article 9 of the Treaty between German), and the Union of Soviet Socialist Republics, signed at Moscow October 12, 1925, which reads as follows:

Public Papers of FDR, 1933, Item 174

Nationals of each of the Contracting Parties…shall be entitled to hold religious services in churches, houses or other buildings, rented, according to the laws of the country, in their national language or in any other language which is customary in their religion. They shall be entitled to bury their dead in accordance with their religious practice in burial-grounds established and maintained by them with the approval of the competent authorities, so long as they, comply with the police regulations of the other Party in respect of buildings and public health.

Public Papers of FDR, 1933, Item 174

Furthermore, I desire to state that the rights specified in the above paragraphs will be granted to American nationals immediately upon the establishment of relations between our two countries.

Public Papers of FDR, 1933, Item 174

Finally I have the honor to inform you that the Government of the Union of Soviet Socialist Republics, while reserving to itself the right of refusing visas to Americans desiring to enter the Union of Soviet Socialist Republics on personal grounds, does not intend to base such refusals on the fact of such persons having an ecclesiastical status.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. President,

Very sincerely yours,

 MAXIM LITVINOV

People's Commissar for Foreign Affairs,

Union of Soviet Socialist Republics

Public Papers of FDR, 1933, Item 174

Washington, November 16, 1933

My dear Mr. President:

Public Papers of FDR, 1933, Item 174

Following our conversations I have the honor to inform you that the Soviet Government is prepared to include in a consular convention to be negotiated immediately following the establishment of relations between our two countries provisions in which nationals of the United States shall be granted rights with reference to legal protection which shall not be less favorable than those enjoyed in the Union of Soviet Socialist Republics by nationals of the Nation most favored in this respect. Furthermore, I desire to state that such rights will be granted to American nationals immediately upon the establishment of relations between our two countries.

Public Papers of FDR, 1933, Item 174

In this connection I have the honor to call to your attention Article 11 and the Protocol to Article 11, of the Agreement Concerning Conditions of Residence and Business and Legal Protection in General concluded between Germany and the Union of Soviet Socialist Republics on October 12, 1925.

ARTICLE 11

Public Papers of FDR, 1933, Item 174

Each of the Contracting Parties undertakes to adopt the necessary measures to inform the consul of the other Party as soon as possible whenever a national of the country which he represents is arrested in his district.

Public Papers of FDR, 1933, Item 174

The same procedure shall apply if a prisoner is transferred from one place of detention to another.

FINAL PROTOCOL

Ad Article 11.

Public Papers of FDR, 1933, Item 174

1. The Consul shall be notified either by a communication from the person arrested or by the authorities themselves direct. Such communications shall be made within a period not exceeding seven times twenty-four hours, and in large towns, including capitals of districts, within a period not exceeding three times twenty-four hours.

Public Papers of FDR, 1933, Item 174

2. In places of detention of all kinds, requests made by consular representatives to visit nationals of their country under arrest, or to have them visited by their representatives, shall be granted without delay. The consular representative shall not be entitled to require officials of the courts or prisons to withdraw during his interview with the person under arrest.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. President,

Very sincerely yours,

 MAXIM LITVINOV

People's Commissar for Foreign Affairs,

Union of Soviet Socialist Republics

Public Papers of FDR, 1933, Item 174

The White House, Washington, November 16, 1933

My dear Mr. Litvinov:

Public Papers of FDR, 1933, Item 174

I thank you for your letter of November 16, 1933, informing me that the Soviet Government is prepared to grant to nationals of the United States rights with reference to legal protection not less favorable than those enjoyed in the Union of Soviet Socialist Republics by nationals of the Nation most favored in this respect. I have noted the provisions of the treaty and protocol concluded between Germany and the Union of Soviet Socialist Republics on October 12, 1925.

Public Papers of FDR, 1933, Item 174

I am glad that nationals of the United States will enjoy the protection afforded by these instruments immediately upon the establishment of relations between our countries and I am fully prepared to negotiate a consular convention covering these subjects as soon as practicable. Let me add that American diplomatic and consular officers in the Soviet Union will be zealous in guarding the rights of American nationals, particularly the right to a fair, public and speedy trial and the right to be represented by counsel of their choice. We shall expect that the nearest American diplomatic or consular officer shall be notified immediately of any arrest or detention of an American national, and that he shall promptly be afforded the opportunity to communicate and converse with such national.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. Litvinov,

Very sincerely yours,

 FRANKLIN D. ROOSEVELT

Public Papers of FDR, 1933, Item 174

In reply to a question of the President in regard to prosecutions for economic espionage, Mr. Litvinov gave the following explanation:

Public Papers of FDR, 1933, Item 174

"The widespread opinion that the dissemination of economic information from the Union of Soviet Socialist Republics is allowed only in so far as this information has been published in newspapers or magazines, is erroneous. The right to obtain economic information is limited in the Union of Soviet Socialist Republics, as in other countries, only in the case of business and production secrets and in the case of the employment of forbidden methods (bribery, theft, fraud, etc.) to obtain such information. The category of business and production secrets naturally includes the official economic plans, in so far as they have not been made public, but not individual reports concerning the production conditions and the general conditions of individual enterprises.

Public Papers of FDR, 1933, Item 174

"The Union of Soviet Socialist Republics has also no reason to complicate or hinder the critical examination' of its economic organization. It naturally follows from this that everyone has the right to talk about economic matters or to receive information about such matters in the Union, in so far as the information for which he has asked or which has been imparted to him is not such as may not, on the basis of special regulations issued by responsible officials or by the appropriate State enterprises, be made known to outsiders. (This principle applies primarily to information concerning economic trends and tendencies.)"

Public Papers of FDR, 1933, Item 174

Washington, November 16, 1933

My dear Mr. President:

Public Papers of FDR, 1933, Item 174

Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

Public Papers of FDR, 1933, Item 174

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. President,

Very sincerely yours,

 MAXIM LITVINOV

People's Commissar for Foreign Affairs,

Union of Soviet Socialist Republics

Public Papers of FDR, 1933, Item 174

The White House, Washington, November 16, 1933

My dear Mr. Litvinov:

Public Papers of FDR, 1933, Item 174

I am happy to acknowledge the receipt of your letter of November 16, 11933, in which you state that:

Public Papers of FDR, 1933, Item 174

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of an amount realized by the Government of the United States from such release and assignment.

Public Papers of FDR, 1933, Item 174

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

Public Papers of FDR, 1933, Item 174

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any, amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

 FRANKLIN D. ROOSEVELT

Public Papers of FDR, 1933, Item 174

Washington, November 16, 1933

My dear Mr. President:

Public Papers of FDR, 1933, Item 174

I have the honor to inform you that, following our conversations and following my examination of certain documents of the years 1918 to 1921 relating to the attitude of the American Government toward the expedition into Siberia, the operations there of foreign military forces and the inviolability of the territory of the Union of Soviet Socialist Republics, the Government of the Union of Soviet Socialist Republics agrees that it will waive any and all claims of whatsoever character arising out of activities of military forces of the United States in Siberia, or assistance to military forces in Siberia subsequent to January 1, 1918, and that such claims shall be regarded as finally settled and disposed of by this agreement.

Public Papers of FDR, 1933, Item 174

I am, my dear Mr. President,

Very sincerely yours,

 MAXIM LITVINOV

People's Commissar for Foreign Affairs,

Union of Soviet Socialist Republics

Home Building & Loan Assn. v. Blaisdell, 1934

Title: Home Building & Loan Assn. v. Blaisdell

Author: U.S. Supreme Court

Date: January 8, 1934

Source: 290 U.S. 398

This case was argued November 8 and 9, 1933, and was decided January 8, 1934.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398

APPEAL FROM THE SUPREME COURT OF MINNESOTA

Syllabus

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398

1. Emergency does not increase constitutional power, nor diminish constitutional restrictions. P. 425.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398

2. Emergency may, however, furnish occasion for exercise of power possessed. P. 426.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398

3. The clause providing that no State shall pass any law impairing the obligation of contracts is not to be applied with literal exactness, like a mathematical formula, but is one of the broad clauses of the Constitution which require construction to fill out details. Pp. 426, 428.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398

4. The necessity of construction of the contract clause is not obviated by its association in the same section with other and more specific provisions which may not admit of construction. P. 427.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398

5. The exact scope of the contract clause is not fixed by the debates in the Constitutional Convention or by the plain historical reasons, including the prior legislation in the States, which led to the adoption of that clause and of other prohibitions in the same section of the Constitution. Pp. 427, 428.

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6. The obligation of a contract is not impaired by a law modifying the remedy for its enforcement, but not so as to impair substantial rights secured by the contract. P. 430.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398

7. Decisions of this Court in which statutes extending the period of redemption from foreclosure sales were held unconstitutional do not control where the statute in question safeguards the interests [290 U.S. 399] of the mortgagee purchaser by conditions imposed on the extension. P. 431.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 399

8. The contract clause must be construed in harmony with the reserved power of the State to safeguard the vital interests of her people. Reservation of such essential sovereign power is read into contracts. P. 434.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 399

9. The legislation is to be tested not by whether its effect upon contracts is direct or is merely incidental, but upon whether the end is legitimate, and the means reasonable and appropriate to the end. P. 438.

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10. The principle of harmonizing the contract clause and the reserved power precludes a construction permitting the State to repudiate debts, destroy contracts, or deny means to enforce them. P. 439.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 399

11. Economic conditions may arise in which a temporary restraint of enforcement of contracts will be consistent with the spirit and purpose of the contract clause, and thus be within the range of the reserved power of the State to protect the vital interests of the community. Marcus Brown Co. v. Feldman, 256 U.S. 170; Block v. Hirsh, id., 135. Pp. 434, 440.

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12. Whether the emergency still exists upon which the continued operation of the law depends is always open to judicial inquiry. P. 442.

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13. The great clauses of the Constitution must be considered in the light of our whole experience, and not merely as they would be interpreted by its framers in the conditions and with the outlook of their time. P. 443.

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14. A Minnesota statute, approved April 18, 1933, declares the existence of an emergency demanding an exercise of the police power for the protection of the public and to promote the general welfare of the people, by temporarily extending the time allowed by existing law for redeeming real property from foreclosure and sale under existing mortgages. In support of this proposition, it recites: that a severe financial and economic depression has existed for several years, resulting in extremely low prices for the products of farms and factories, in much unemployment, in almost complete lack of credit for farmers, business men and property owners, and in extreme stagnation of business, agriculture and industry; that many owners of real property, by reason of these conditions, are unable and, it is believed, for some time will be unable, to meet all payments as they come due, of taxes, interest [290 U.S. 400] and principal of mortgages, and are, therefore, threatened with the loss of their property through foreclosure sale; that much property has been bid in on foreclosure for prices much below what it is believed was its real value, and often for much less than the mortgage indebtedness, resulting in deficiency judgments; that, under the existing conditions, foreclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding in the manner contemplated by law.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 400

The Act then provides, inter alia, as to foreclosure sales, that, where the period for redemption has not already expired, the mortgagor or owner in possession, by applying to a state court before its expiration, may obtain an extension for such time as the court may deem just and equitable, but in no case beyond May 1, 1935. The application is to be made on notice to the mortgagee. The court is to find the reasonable income or rental value of the property, and, as a condition to any extension allowed, is to order the applicant to pay all, or a reasonable part, of that value, in or towards the payment of taxes, insurance, interest and mortgage indebtedness, at such times and in such manner as to the court, under all the circumstances, shall appear just and equitable. If the applicant default in any payment so ordered, his right to redeem shall terminate in 30 days. The court is empowered to alter the terms of extensions as change of conditions may require. The Act automatically extends, to 30 days from its date, redemption periods which otherwise would expire within that time. It is to remain in effect only during the emergency, and in no event beyond May 1, 1935. Prior to that date, no action shall be maintained for a deficiency judgment until the period of redemption, as allowed by existing law or as extended under the Act, shall have expired.

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In a proceeding under the statute, it appeared that the applicants, man and wife, owned a lot in a closely built section of a large city on which were a house and garage; that they lived in part of the house and offered the remainder for rent; that the reasonable present market value of the property was $6,000, and the reasonable value of the income and of the rental value, $40 per month; that, on May 2, 1932, under a power of sale in a mortgage held by a building and loan association, this property had been sold for $3,700, the amount of the debt, and bid in by the mortgagee, leaving no deficiency; that taxes and insurance since paid by the mortgagee increased this amount to $4,056. The court extended the period of redemption, which would have expired May 2, 1933, to May 1, 1935, upon condition that the mortgagor [290 U.S. 401] pay $40 per month from date of sale throughout the extended period, to be applied on taxes, insurance, interest and mortgage indebtedness.

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Held:

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 401

(1) An emergency existed furnishing proper occasion for exertion of the reserved power of the State to protect the vital interests of the community. P. 444.

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(2) The findings of emergency by legislature and state supreme court cannot be regarded as subterfuge, or as lacking adequate basis, but are, indeed, supported by facts of which this Court takes judicial notice. P. 444.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 401

(3) The legislation was addressed to a legitimate end, i.e., it was not for the advantage of particular individuals, but for the protection of the basic interest of society. P. 445.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 401

(4) In view of the nature of the contracts affected—mortgages of unquestionable validity—the relief would not be justified by the emergency, but would contravene the contract clause of the Constitution, if it were not appropriate to the emergency and granted only upon reasonable conditions. P. 445.

1934, Home Building & Loan Assn. v. Blaisdell, 290 U.S. 401

(5) The conditions upon which the period of redemption was extended do not appear to be unreasonable. The initial 30-day extension is to give opportunity for the application to the court. The integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of the mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained, and the conditions of redemption, if redemption there be, stand as under the prior law. The mortgagor in possession must pay the rental value of the premises as ascertained in judicial proceedings, and this amount is applied in the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser thus is not left without compensation for the withholding of possession. P. 445.

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(6) Important to the question of reasonableness is the fact, shown by official reports of which the Court takes judicial notice, that mortgagees in Minnesota are, predominantly, not home owners or farmers, but are corporations concerned chiefly with the reasonable protection of their investment security. The legislature was entitled to deal with this general or typical situation, though there may be individual cases of another aspect. P. 445.

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(7) The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. P. 446.

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(8) The procedure and relief provided are cognate to the historic exercise of equitable jurisdiction in cases of mortgage foreclosure. P. 446.

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(9) Since the contract clause is not an absolute and utterly unqualified restriction of the States' protective power, the legislation is clearly so reasonable as to be within the legislative competency. P. 447.

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(10) The legislation is temporary in operation—limited to the emergency. The period of postponement to May, 1935, may be reduced by order of the state court, under the statute, in case of change of circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy contracts. P. 447.

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(11) Whether the legislation is wise or unwise as a matter of policy does not concern the Court. P. 447.

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(12) For the same reasons that sustain it under the contract clause, the legislation, as applied in this case, is consistent with the due process clause of the Fourteenth Amendment. P. 448.

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(13) The statute does not deny the equal protection of the laws; its classification is not arbitrary. P. 448.

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189 Minn. 422, 448; 249 N.W. 334, 893, affirmed.

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APPEAL from a judgment which affirmed an order extending the period of redemption from a foreclosure and sale of real property under a power of sale mortgage. The statute through which this relief was sought by the mortgagors was at first adjudged to be unconstitutional by the trial court; but this was reversed by the state supreme court. The present appeal, by the mortgagee, is from the second decision of that court, sustaining the trial court's final order.

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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Appellant contests the validity of Chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, [290 U.S. 416] as being repugnant to the contract clause (Art. I, § 10) and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution. The statute was sustained by the Supreme Court of Minnesota, 189 Minn. 422, 448, 249 N.W. 334, 893, and the case comes here on appeal.

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The Act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The Act does not apply to mortgages subsequently made, nor to those made previously which shall be extended for a period ending more than a year after the passage of the Act (Part One, § 8). There are separate provisions in Part Two relating to homesteads, but these are to apply "only to cases not entitled to relief under some valid provision of Part One." The Act is to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date. Part Two, § 8.

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The Act declares that the various provisions for relief are severable; that each is to stand on its own footing with respect to validity. Part One, § 9. We are here concerned with the provisions of Part One, § 4, authorizing the District Court of the county to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," subject to the above described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or, if it has no income, then the reasonable rental value of the property, and directing the mortgagor

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to pay all or a reasonable part of such [290 U.S. 417] income or rental value, in or toward the payment of taxes, insurance, interest, mortgage…indebtedness at such times and in such manner

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as shall be determined by the court. 1 The section also provides that the time for redemption [290 U.S. 418] from foreclosure sales theretofore made, which otherwise would expire less than thirty days after the approval of the Act shall be extended to a date thirty days after its approval, and application may be made to the court within that time for a further extension as provided in the section. By another provision of the Act, no action, prior to May 1, 1935, may be maintained for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of the Act has expired. Prior to the expiration of the extended period of redemption, the court may revise or alter the terms of the extension as changed circumstances may require. Part One, § 5.

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Invoking the relevant provision of the statute, appellees applied to the District Court of Hennepin County for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot [290 U.S. 419] in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement and that, by reason of their default, the mortgage had been foreclosed and sold to appellant on May 2, 1932, for $3,700.98; that appellant was the holder of the sheriff's certificate of sale; that, because of the economic depression appellees had been unable to obtain a new loan or to redeem, and that, unless the period of redemption were extended, the property would be irretrievably lost, and that the reasonable value of the property greatly exceeded the amount due on the mortgage, including all liens, costs and expenses.

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On the hearing, appellant objected to the introduction of evidence upon the ground that the statute was invalid under the federal and state constitutions, and moved that the petition be dismissed. The motion was granted, and a motion for a new trial was denied. On appeal, the Supreme Court of the State reversed the decision of the District Court. 189 Minn. 422, 249 N.W. 334. Evidence was then taken in the trial court, and appellant renewed its constitutional objections without avail. The court made findings of fact setting forth the mortgage made by the appellees on August 1, 1928, the power of sale contained in the mortgage, the default and foreclosure by advertisement, and the sale to appellant on May 2, 1932, for $3,700.98. The court found that the time to redeem would expire on May 2, 1933, under the laws of the State as they were in effect when the mortgage was made and when it was foreclosed; that the reasonable value of the income on the property, and the reasonable rental value, was $40 a month; that the bid made by appellant on the foreclosure sale, and the purchase price, were the full amount of the mortgage indebtedness, and that there was no deficiency after the sale; that the reason [290 U.S. 420] total amount of the purchase price, with taxes and insurance premiums subsequently paid by appellant, but exclusive of interest from the date of sale, was $4,056.39. The court also found that the property was situated in the closely built-up portions of Minneapolis; that it had been improved by a two-car garage, together with a building two stories in height which was divided into fourteen rooms; that the appellees, husband and wife, occupied the premises as their homestead, occupying three rooms and offering the remaining rooms for rental to others.

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The court entered its judgment extending the period of redemption to May 1, 1935, subject to the condition that the appellees should pay to the appellant $40 a month through the extended period from May 2, 1933, that is, that, in each of the months of August, September, and October, 1933, the payments should be $80, in two instalments, and thereafter $40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness. 2 It is this judgment, sustained by the Supreme Court of the State on the authority of its former opinion, which is here under review. 189 Minn. 448, 249 N.W. 893.

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The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract clause of the Federal Constitution, within the police power of the State as that power was called into exercise by the public economic emergency which the legislature had found to exist. Attention is thus directed to the preamble and first section of the [290 U.S. 421] statute, which described the existing emergency in terms that were deemed to justify the temporary relief which the statute affords. 3 The state court, declaring that it [290 U.S. 422] could not say that this legislative finding was without basis, supplemented that finding by it own statement of conditions of which it took judicial notice. The court said:

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In addition to the weight to be given the determination of the legislature that an economic emergency exists which demands relief, the court must take notice of other considerations. The members of the legislature come from every community of the state and from all the walks of life. They are familiar with conditions generally in every calling, occupation, profession, and business in the state. Not only they but the courts must be guided by what is common knowledge. It is common knowledge that, in the last few years, land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values. We all know that, when this law was enacted, the large financial companies which had made it their business to invest in mortgages had ceased to do so. No bank would directly or indirectly loan on real estate mortgages. Life insurance companies, large investors in such mortgages, had even declared a moratorium as to the loan provisions of their policy contracts. The President had closed banks temporarily. The Congress, [290 U.S. 423] in addition to many extraordinary measures looking to the relief of the economic emergency, had passed an act to supply funds whereby mortgagors may be able within a reasonable time to refinance their mortgages or redeem from sales where the redemption has not expired. With this knowledge, the court cannot well hold that the legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief.

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189 Minn. 429, 249 N.W. 336.

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Justice Olsen of the state court, in a concurring opinion, added the following:

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The present nationwide and worldwide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people, in this state; it has resulted in such widespread want and suffering among our people that private, state, and municipal agencies are unable to adequately relieve the want and suffering, and congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises. 4

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189 Minn. 437, 249 N.W. 340. [290 U.S. 424]

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We approach the questions thus presented upon the assumption made below, as required by the law of the State, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that, under the law then applicable, the period of redemption from the sale was one year, and that it has been extended by the judgment of the court over the opposition of the mortgagee-purchaser, and that, during the period thus extended, and unless the order for extension is modified, the mortgagee-purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute [290 U.S. 425] not been enacted. The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

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In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

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Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions [290 U.S. 426] which have always been, and always will be, the subject of close examination under our constitutional system.

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While emergency does not create power, emergency may furnish the occasion for the exercise of power.

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Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.

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Wilson v. New, 243 U.S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. 5 When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to "coin money" or to "make anything but gold and silver coin a tender in payment of debts." But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. The necessity of construction is not obviated by [290 U.S. 427] the fact that the contract clause is associated in the same section with other and more specific prohibitions. Even the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature. See Groves v. Slaughter, 15 Pet. 449, 505; Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434.

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In the construction of the contract clause, the debates in the Constitutional Convention are of little aid. 6 But the reasons which led to the adoption of that clause, and of the other prohibitions of Section 10 of Article I, are not left in doubt, and have frequently been described with eloquent emphasis. 7 The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations. Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened. "The sober people of America" were convinced that some "thorough reform" was needed which would "inspire a general prudence and industry, and give a regular course to the business of society." The Federalist, No. 44. It was necessary to interpose the restraining power of a central authority in order to secure the foundations even of "private faith." The occasion and general purpose of [290 U.S. 428] the contract clause are summed up in the terse statement of Chief Justice Marshall in Ogden v. Saunders, 12 Wheat. pp. 213, 354, 355:

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The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

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But full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope. Nor does an examination of the details of prior legislation in the States yield criteria which can be considered controlling. To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one, and is not to be read with literal exactness, like a mathematical formula. Justice Johnson, in Ogden v. Saunders, supra, p. 286, adverted to such a misdirected effort in these words:

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It appears to me that a great part of the difficulties of the cause arise from not giving sufficient weight to the general intent of this clause in the constitution and subjecting it to a severe literal construction which would be better adapted to special pleadings.

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And after giving his view as to the purport of the clause—

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that the States shall pass no law [290 U.S. 429] attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date, and all contracts thus construed shall be enforced according to their just and reasonable purport

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—Justice Johnson added:

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But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfillment of contracts as over the form and measure of the remedy to enforce them.

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The inescapable problems of construction have been: what is a contract? 8 What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character,

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of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation.

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Story on the Constitution, § 1375.

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The obligation of a contract is "the law which binds the parties to perform their agreement." Sturges v. Crowninshield, 4 Wheat. 122, 197; Story, op. cit., § 1378. This Court has said that

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the laws which subsist at the time and place of the making of a contract, and where it [290 U.S. 430] is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement…. Nothing can be more material to the obligation than the means of enforcement…. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.

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Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 552. See also Walker v. Whitehead, 16 Wall. 314, 317. But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. Sturges v. Crowninshield, supra, p. 200. Said he:

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The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.

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And in Von Hoffman v. City of Quincy, supra, pp. 553, 554, the general statement above quoted was limited by the further observation that

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It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.

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And Chief Justice Waite, quoting this language in Antoni v. Greenhow, 107 U.S. 769, 775, added: "In all such cases, the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge." [290 U.S. 431]

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The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them 9 (Sturges v. Crowninshield, supra, pp. 197, 198) and impairment, as above noted, has been predicated of laws which, without destroying contracts, derogate from substantial contractual rights. 10 In Sturges v. Crowninshield, supra, a state insolvent law which discharged the debtor from liability was held to be invalid as applied to contracts in existence when the law was passed. See Ogden v. Saunders, supra. In Green v. Biddle, 8 Wheat. 1, the legislative acts, which were successfully assailed, exempted the occupant of land from the payment of rents and profits to the rightful owner and were

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parts of a system the object of which was to compel the rightful owner to relinquish his lands or pay for all lasting improvements made upon them, without his consent or default.

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In Bronson v. Kinzie, 1 How. 311, state legislation which had been enacted for the relief of debtors in view of the seriously depressed condition of business 11 following the panic of 1837, and which provided that the equitable estate of the mortgagor should not be extinguished [290 U.S. 432] for twelve months after sale on foreclosure, and further prevented any sale unless two-thirds of the appraised value of the property should be bid therefor, was held to violate the constitutional provision. It will be observed that, in the Bronson case, aside from the requirement as to the amount of the bid at the sale, the extension of the period of redemption was unconditional, and there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period. McCracken v. Hayward, 2 How. 608, Gantly's Lessee v. Ewing, 3 How. 707, and Howard v. Bugbee, 24 How. 461, followed the decision in Bronson v. Kinzie; that of McCracken, condemning a statute which provided that an execution sale should not be made of property unless it would bring two-thirds of its value according to the opinion of three householders; that of Gantly's Lessee, condemning a statute which required a sale for not less than one-half the appraised value, and that of Howard, making a similar ruling as to an unconditional extension of two years for redemption from foreclosure sale. In Planters' Bank v. Sharp, 6 How. 301, a state law was found to be invalid which prevented a bank from transferring notes and bills receivable which it had been duly authorized to acquire. In Von Hoffman v. City of Quincy, supra., a statute which restricted the power of taxation which had previously been given to provide for the payment of municipal bonds was set aside. Louisiana v. Police Jury, 111 U.S. 716, and Seibert v. Lewis, 122 U.S. 284 are similar cases.

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In Walker v. Whitehead, 16 Wall. 314, the statute, which was held to be repugnant to the contract clause, was enacted in 1870, and provided that, in all suits pending on any debt or contract made before June 1, 1865, the plaintiff should not have a verdict unless it appeared that all taxes chargeable by law on the same had been [290 U.S. 433] duly paid for each year since the contract was made, and further, that in all cases of indebtedness of the described class, the defendant might offset any losses he had suffered in consequence of the late war either from destruction or depreciation of property. See Daniels v. Tearney, 102 U.S. 415, 419. In Gunn v. Barry, 15 Wall. 610, and Edwards v. Kearzey, 96 U.S. 595, statutes applicable to prior contracts were condemned because of increases in the amount of the property of judgment debtors which were exempted from levy and sale on execution. But, in Penniman's Case, 103 U.S. 714, 720, the Court decided that a statute abolishing imprisonment for debt did not, within the meaning of the Constitution, impair the obligation of contracts previously made, 12 and the Court said:

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The general doctrine of this court on this subject may be thus stated: in modes of proceeding and forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right.

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In Barnitz v. Beverly, 163 U.S. 118, the Court held that a statute which authorized the redemption of property sold on foreclosure, where no right of redemption previously existed, or which extended the period of redemption beyond the time formerly allowed, could not constitutionally apply to a sale under a mortgage executed before its passage. This ruling was to the same effect as that in Bronson v. Kinzie, supra, and Howard v. Bugbee, supra. But in the Barnitz case, the statute contained a provision for the prevention of waste, and authorized the appointment of a receiver of the premises sold. Otherwise, the extension of the period for redemption was unconditional, and, in case a receiver was appointed, [290 U.S. 434] the income during the period allowed for redemption, except what was necessary for repairs and to prevent waste, was still to go to the mortgagor.

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None of these case, and we have cited those upon which appellant chiefly relies, is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period. And broad expressions contained in some of these opinions went beyond the requirements of the decision, and are not controlling. Cohens v. Virginia, 6 Wheat. 264, 399.

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Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, 13 but the State also continues to possess authority to safeguard the vital interests of its people. It does [290 U.S. 435] not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." Stephenson v. Binford, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

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While the charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against the State. Charles River Bridge v. Warren Bridge, 11 Pet. 420. And all contracts are subject to the right of eminent domain. West River Bridge v. Dix, 6 How. 507. 14 The reservation of this necessary authority of the State is deemed to be a part of the contract. In the case last cited, the Court answered the forcible challenge of the State's power by the following statement of the controlling principle—a statement reiterated by this Court speaking through Mr. Justice Brewer, nearly fifty years later, in Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 692:

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But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal [290 U.S. 436] terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.

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The legislature cannot "bargain away the public health or the public morals." Thus, the constitutional provision against the impairment of contracts was held not to be violated by an amendment of the state constitution which put an end to a lottery theretofore authorized by the legislature. Stone v. Mississippi, 101 U.S. 814, 819. See also Douglas v. Kentucky, 168 U.S. 488, 497-499; compare New Orleans v. Houston, 119 U.S. 265, 275. The lottery was a valid enterprise when established under express state authority, but the legislature, in the public interest, could put a stop to it. A similar rule has been applied to the control by the State of the sale of intoxicating liquors. Beer Co. v. Massachusetts, 97 U.S. 25, 32, 33; see Mugler v. Kansas, 123 U.S. 623, 664, 665. The States retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts. Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667; Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 750. Legislation to protect the public safety comes within the same category of reserved power. Chicago, B. & Q. R. Co. v. Nebraska, 170 U.S. 57, 70, 74; Texas & N.O. R. Co. v. Miller, 221 US. 408, 414; Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558. This principle has had recent and noteworthy application to the regulation of the use of public highways by common carriers and "contract carriers," where the assertion of [290 U.S. 437] interference with existing contract rights has been without avail. Sproles v. Binford, 286 U.S. 374, 390, 391; Stephenson v. Binford, supra.

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The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. In Manigault v. Springs, 199 U.S. 473, riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions. Later, the legislature of the State, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek. The Court sustained the statute upon the ground that the private interests were subservient to the public right. The Court said (id., p. 480):

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It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

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A statute of New Jersey prohibiting the transportation of water of the State into any other State was sustained against the objection that the statute impaired the obligation of contracts which had been made for furnishing such water to persons without the State. Hudson Water Co. v. McCarter, 209 U.S. 349. Said the Court, by Mr. Justice Holmes (id., p. 357):

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One whose rights, such as they are, are subject to state restriction cannot remove them from the power of the State by making [290 U.S. 438] a contract about them. The contract will carry with it the infirmity of the subject matter.

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The general authority of the legislature to regulate, and thus to modify, the rates charged by public service corporations affords another illustration. Stone v. Farmers Loan & Trust Co., 116 U.S. 307, 325, 326. In Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372, a statute fixing reasonable rates, to be charged by a corporation for supplying electricity to the inhabitants of a city, superseded lower rates which had been agreed upon by a contract previously made for a definite term between the company and a consumer. The validity of the statute was sustained. To the same effect are Producers Transportation Co. v. Railroad Comm'n, 251 U.S. 228, 232, and Sutter Butte Canal Co. v. Railroad Comm'n, 279 U.S. 125, 138. Similarly, where the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 363; see also St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, 274.

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The argument is pressed that, in the cases we have cited, the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly, or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare, or [290 U.S. 439] where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that, in the latter case, the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

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Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision, and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. See American Land Co. v. Zeiss, 219 U.S. 47. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that [290 U.S. 440] power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes.

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Whatever doubt there may have been that the protective power of the State, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations, by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. Block v. Hirsh, 256 U.S. 135; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170; Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242. The case of Block v. Hirsh, supra, arose in the District of Columbia, and involved the due process clause of the Fifth Amendment. The cases of the Marcus Brown Company and the Levy Leasing Company arose under legislation of New York, and the constitutional provision against the impairment of the obligation of contracts was invoked. The statutes of New York, 15 declaring that a public emergency existed, directly interfered with the enforcement of covenants for the surrender of the possession of premises on the expiration of leases. Within the City of New York and contiguous counties, the owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September, 1920, lodging houses for transients and the larger hotels), were wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect (save in certain specified instances), providing the tenants or occupants were ready, able and willing to pay a reasonable rent or price for their use and [290 U.S. 441] occupation. People v. La Fetra, 230 N.Y. 429, 438, 130 N.E. 601; Levy Leasing Co. v. Siegel, id. 634, 130 N.E. 923. In the case of the Marcus Brown Company, the facts were thus stated by the District Court (269 Fed. 306, 312):

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the tenant defendants herein, by law older than the state of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff had then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession, forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and, for the next two years, Feldman et al. may, if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, i.e., pay what "a court of competent jurisdiction" regards as fair and reasonable compensation for such enforced use and occupancy.

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Answering the contention that the legislation, as thus applied, contravened the constitutional prohibition, this Court, after referring to its opinion in Block v. Hirsh, supra, said:

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In the present case, more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be.

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256 U.S. p. 198. This decision was followed in the case of the Levy Leasing Company, supra.

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In these cases of leases, it will be observed that the relief afforded was temporary and conditional, that it was sustained because of the emergency due to scarcity of housing, and that provision was made for reasonable compensation to the landlord during the period he was [290 U.S. 442] prevented from regaining possession. The Court also decided that, while the declaration by the legislature as to the existence of the emergency was entitled to great respect, it was not conclusive, and, further, that a law

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depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.

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It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. Chastleton Corp. v. Sinclair, 264 U.S. 543, 547, 548.

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It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected, and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

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It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If, by the statement that what the Constitution meant at the time [290 U.S. 443] of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution we are expounding" (McCulloch v. Maryland, 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Id., p. 415. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U.S. 416, 433,

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we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters…. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.

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Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been warped by these decisions from its proper significance, or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility in the conditions of the later day. The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. With a growing recognition of public needs [290 U.S. 444] and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests. This development is a growth from the seeds which the fathers planted. It is a development forecast by the prophetic words of Justice Johnson in Ogden v. Saunders, already quoted. And the germs of the later decisions are found in the early cases of the Charles River Bridge and the West River Bridge, supra, which upheld the public right against strong insistence upon the contract clause. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the State is read into all contracts, and there is no greater reason for refusing to apply this principle to Minnesota mortgages than to New York leases.

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Applying the criteria established by our decisions we conclude:

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1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge, or as lacking in adequate basis. Block v. Hirsh, supra. The finding of the legislature and state court has support in the facts of which we take judicial notice. Atchison, T. & S.F. Ry. Co. v. United States, 284 U.S. 248, 260. It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said, the economic emergency which threatened "the [290 U.S. 445] loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.

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2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals, but for the protection of a basic interest of society.

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3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions.

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4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the Act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment if the mortgagor fails to redeem within the extended period are maintained, and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor, during the extended period, is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings, and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser, during the time that he cannot obtain possession, thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as [290 U.S. 446] insurance companies, banks, and investment and mortgage companies. 16 These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.

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In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience. 17 The "equity of redemption" is the creature of equity. While courts of equity could not alter the legal effect of the forfeiture of the estate at common law on breach of condition, they succeeded, operating on the conscience of the mortgagee, in maintaining that it was unreasonable that he should retain for his own benefit what was intended as a mere security; that the breach of condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, [290 U.S. 447] notwithstanding the forfeiture at law. This principle of equity was victorious against the strong opposition of the common law judges, who thought that, by "the Growth of Equity on Equity, the Heart of the Common Law is eaten out." The equitable principle became firmly established, and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim "once a mortgage, always a mortgage, and nothing but a mortgage." 18 Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency.

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5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

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We are of the opinion that the Minnesota statute, as here applied, does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or [290 U.S. 448] unwise as a matter of policy is a question with which we are not concerned.

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What has been said on that point is also applicable to the contention presented under the due process clause. Block v. Hirsh, supra.

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Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one. Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283; Clark v. Titusville, 184 U.S. 329; Quong Wing v. Kirkendall, 223 U.S. 59; Ohio Oil Co. v. Conway, 281 U.S. 146; Sproles v. Binford, 286 U.S. 374.

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The judgment of the Supreme Court of Minnesota is affirmed.

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Judgment affirmed.

SUTHERLAND, J., dissenting

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MR. JUSTICE SUTHERLAND, dissenting.

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Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.

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A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. [290 U.S. 449] It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. The true rule was forcefully declared in Ex parte Milligan, 4 Wall. 2, 120-121, in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist today. In that great case, this court said that the provisions of the Constitution there under consideration had been expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them, but that, after the lapse of more than seventy years, they were sought to be avoided. "Those great and good men," the court said,

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foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek, by sharp and decisive measures, to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future.

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And then, in words the power and truth of which have become increasingly evident with the lapse of time, there was laid down the rule without which the Constitution would cease to be the "supreme law of the land," binding equally upon governments and governed at all times [290 U.S. 450] and under all circumstances, and become a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour:

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The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism….

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Chief Justice Taney, in Dred Scott v. Sandford, 19 How. 393, 426, said that, while the Constitution remains unaltered, it must be construed now as it was understood at the time of its adoption; that it is not only the same in words, but the same in meaning,

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and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

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And in South Carolina v. United States, 199 U.S. 437, 448-449, in an opinion by Mr. Justice Brewer, this court quoted these words with approval, and said:

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The Constitution is a written instrument. As such, its meaning does not alter. That which it met when adopted, it means now…. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. [290 U.S. 451]

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The words of Judge Campbell, speaking for the Supreme Court of Michigan in Twitchell v. Blodgett, 13 Mich. 127, 139-140, are peculiarly apposite. "But it may easily happen," he said,

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that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill-adapted to a new state of things.

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…Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances…. But, where evils arise from the application of such regulations, their force cannot be denied or evaded, and the remedy consists in repeal or amendment, and not in false constructions.

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The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that, in appropriate cases, they have the capacity of bringing within their grasp every new condition which falls within their meaning. 1 But their meaning is changeless; it is only their application which is extensible. See South Carolina v. United States, supra, pp. 448-449. Constitutional grants of [290 U.S. 452] power and restrictions upon the exercise of power are not flexible as the doctrines of the common law are flexible. These doctrines, upon the principles of the common law itself, modify or abrogate themselves whenever they are or whenever they become plainly unsuited to different or changed conditions. Funk v. United States, ante p. 371. The distinction is clearly pointed out by Judge Cooley, 1 Constitutional Limitations, 8th ed., 124:

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A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed, and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections, and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty, and if its course could become a precedent, these instruments would be of little avail…. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, [290 U.S. 453] and it is not different at any subsequent time when a court has occasion to pass upon it.

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The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. Lake County v. Rollins, 130 U.S. 662, 770. The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. Knowlton v. Moore, 178 U.S. 41, 95. The history of the times, the state of things existing when the provision was framed and adopted, should be looked to in order to ascertain the mischief and the remedy. Rhode Island v. Massachusetts, 12 Pet. 657, 723; Craig v. Missouri, 4 Pet. 410, 431-432. As nearly as possible, we should place ourselves in the condition of those who framed and adopted it. Ex parte Bain, 121 U.S. 1, 12. And if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted. Maxwell v. Dow, 176 U.S. 581, 602; Jarrolt v. Moberly, 103 U.S. 580, 586.

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An application of these principles to the question under review removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the obligation of contracts of indebtedness. A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress. Indeed, [290 U.S. 454] it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the Dartmouth College Case, 4 Wheat. 518, 644-645.

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Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. In these circumstances, they incurred indebtedness, in the purchase of imported goods and otherwise, far beyond their capacity to pay. From this situation there arose a divided sentiment. On the one hand, an exact observance of public and private engagements was insistently urged. A violation of the faith of the nation or the pledges of the private individual, it was insisted, was equally forbidden by the principles of moral justice and of sound policy. Individual distress, it was urged, should be alleviated only by industry and frugality, not by relaxation of law or by a sacrifice of the rights of others. Indiscretion or imprudence was not to be relieved by legislation, but restrained by the conviction that a full compliance with contracts would be exacted. On the other hand, it was insisted that the case of the debtor should be viewed with tenderness, and efforts were constantly directed toward relieving him from an exact compliance with his contract. As a result of the latter view, state laws were passed suspending the collection of debts, remitting or suspending the collection of taxes, providing for the emission of paper money, delaying legal proceedings, etc. There followed, as there must always follow from such a course, a long trail of ills, one of the direct [290 U.S. 455] consequences being a loss of confidence in the government and in the good faith of the people. Bonds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of thirty, forty, or fifty percent. Real property could be sold only at a ruinous loss. Debtors, instead of seeking to meet their obligations by painful effort, by industry and economy, began to rest their hopes entirely upon legislative interference. The impossibility of payment of public or private debts was widely asserted, and, in some instances, threats were made of suspending the administration of justice by violence. The circulation of depreciated currency became common. Resentment against lawyers and courts was freely manifested, and, in many instances, the course of the law was arrested and judges restrained from proceeding in the execution of their duty by popular and tumultuous assemblages. This state of things alarmed all thoughtful men, and led them to seek some effective remedy. Marshall, Life of Washington (1807), Vol. 5, pp. 88-131.

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That this brief outline of the situation is entirely accurate is borne out by all contemporaneous history, as well as by writers of distinction of a later period. 2 Compare [290 U.S. 456] Edwards v. Kearzey, 96 U.S. 595, 604-607. The appended note might be extended for many pages by the addition of similar quotations from the same and other writers, but enough appears to establish beyond all question [290 U.S. 457] the extreme gravity of the emergency, the great difficulty and frequent impossibility which confronted debtors generally in any effort to discharge their obligations. [290 U.S. 458]

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In an attempt to meet the situation, recourse was had to the legislatures of the several states under the Confederation, and these bodies passed, among other acts, the following: laws providing for the emission of bills of credit and making them legal tender for the payment of debts, and providing also for such payment by the delivery of specific property at a fixed valuation; instalment laws, authorizing payment of overdue obligations at future intervals of time; stay laws and laws temporarily closing access to the courts, and laws discriminating against British creditors. I have selected, out of a vast number, a few historical comments upon the character and effect of these legislative devices. 3 [290 U.S. 459]

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In the midst of this confused, gloomy, and seriously exigent condition of affairs, the Constitutional Convention of 1787 met at Philadelphia. The defect's of the Articles of Confederation were so great as to be beyond all hope of amendment, and the Convention, acting in technical excess of its authority, proceeded to frame for submission to the people of the several states an entirely new Constitution. Shortly prior to the meeting of the convention, Madison had assailed a bill, pending in the Virginia Assembly, proposing the payment of private debts in three annual instalments, on the ground that "no legislative principle could vindicate such an interposition [290 U.S. 460] of the law in private contracts." The bill was lost by a single vote. 4 Pelatiah Webster had likewise assailed similar laws as altering the value of contracts, and William Paterson, of New Jersey, had insisted that "the legislature should leave the parties to the law under which they contracted." 5

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In the plan of government especially urged by Sherman and Ellsworth, there was an article proposing that the legislatures of the individual states ought not to possess a right to emit bills of credit, etc.,

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or in any manner to obstruct or impede the recovery of debts, whereby the [290 U.S. 461] interests of foreigners or the citizens of any other state may be affected. 6

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And on July 13, 1787, Congress, in New York, acutely conscious of the evils engendered by state laws interfering with existing contracts, 7 passed the Northwest Territory Ordinance, which contained the clause:

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And, in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts, or engagements bona fide and without fraud previously formed. 8

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It is not surprising, therefore, that, after the Convention had adopted the clauses, no state shall "emit bills of credit," or "make anything but gold and silver coin a tender in payment of debts," Mr. King moved to add a "prohibition on the states to interfere in private contracts." This was opposed by Gouverneur Morris and Colonel Mason. Colonel Mason thought that this would be carrying the restraint too far; that cases would happen that could not be foreseen where some kind of interference would be essential. This was on August 28. But Mason's view did not prevail, for, on September 14 following, the first clause of Art. I, § 10, was altered so as to include the provision, "No state shall…pass any…law impairing the obligation of contracts," and in that form it was adopted. 9

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Luther Martin, in an address to the Maryland House of Delegates, declared his reasons for voting against the provision. He said that he considered there might be times of such great public calamity and distress as should render [290 U.S. 462] it the duty of a government in some measure to interfere by passing laws totally or partially stopping courts of justice, or authorizing the debtor to pay by instalments; that such regulations had been found necessary in most or all of the states

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to prevent the wealthy creditor and the moneyed man from totally destroying the poor, though industrious, debtor. Such times may again arrive.

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And he was apprehensive of any proposal which took from the respective states the power to give their debtor citizens "a moment's indulgence, however necessary it might be, and however desirous to grant them aid." 10

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On the other hand, Sherman and Ellsworth defended the provision in a letter to the Governor of Connecticut. 11 In the course of the Virginia debates, Randolph declared that the prohibition would be promotive of virtue and justice, and preventive of injustice and fraud, and he pointed out that the reputation of the people had suffered because of frequent interferences by the state legislatures with private contracts. 12 In the North Carolina debates, Mr. Davie declared that the prohibition against impairing the obligation of contracts and other restrictions ought to supersede the laws of particular states. He thought the constitutional provisions were founded on the strongest principles of justice. 13 Pinckney, in the South Carolina debates, said that he considered the section including the clause in question as "the soul of the Constitution," teaching the states "to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness." 14 [290 U.S. 463]

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The provision was strongly defended in The Federalist, both by Hamilton in No. 7 and Madison in No. 44. Madison concluded his defense of the clause by saying: [290 U.S. 464]

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…one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

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Contemporaneous history is replete with evidence of the sharp conflict of opinion with respect to the advisability of adopting the clause. Dr. Ramsay (The History of South Carolina (1809), Vol. II, pp. 431-433), already referred to, writing of the action of South Carolina and especially referring to the contract impairment clause, says that this Constitution was accepted and ratified on behalf of the state, and speaks of it as an act of great self-denial:

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The power thus given up by South Carolina was one she thought essential to her welfare, and had freely exercised for several preceding years. Such a relinquishment she would not have made at any period of the last five years, for in them, she had passed no less than six acts interfering between debtor and creditor, with the view of obtaining a respite for the former under particular circumstances of public distress. To tie up the hands of future legislatures so as to deprive them of a power of repeating similar acts on any emergency was a display both of wisdom and magnanimity. It would seem as if experience had convinced the state of its political errors, and induced a willingness to retrace its steps and relinquish a power which had been improperly used.

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There is an old case, Glaze v. Drayton, 1 Desaus.Eq. (S.C.) 109, decided in 1784, where the South Carolina court of chancery entered a decree for the specific performance of a contract for the purchase of land, but providing for the payment of the balance due under the contract [290 U.S. 465] "by instalments, at the times mentioned in the acts of assembly respecting the recovery of old debts." In reporting that case soon after the adoption of the Constitution, Chancellor Desaussure added the following explanatory and illuminating note [p. 110]:

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The legislature, in consideration of the distressed state of the country after the war, had passed an act preventing the immediate recovery of debts and fixing certain periods for the payment of debts far beyond the periods fixed by the contract of the parties. These interferences with private contracts became very common with most of the state legislatures, even after the distresses arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community to such an extent that new troubles were apprehended, and nothing contributed more to prepare the public mind for giving up a portion of the state sovereignty and adopting an efficient national government than these abuses of power by the state legislatures.

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If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency. And if further proof be required to strengthen what already is inexpungable, such proof will be found in the previous decisions of this court. There are many such decisions; but it is necessary to refer to a few only which bear directly upon the question, namely: Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; Gantly's Lessee v. Ewing, 3 How. 707; Howard v. Bugbee, 24 How. 461; Gunn v. Barry, 15 Wall. 610; Walker v. Whitehead, [290 U.S. 466] 16 Wall. 314; Edwards v. Kearzey, 96 U.S. 595; Barntz v. Beverly, 163 U.S. 118, and Bradley v. Lightcap, 195 U.S. 1.

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Bronson v. Kinzie was decided at the January Term, 1843. The case involved an Illinois statute extending the period of redemption for a period of twelve months after a sale under a decree in chancery, and another statute preventing a sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor. This court held both statutes invalid, when applied to an existing mortgage, as infringing the contract impairment clause. No more need now be said as to the points decided. The opinion of the court says nothing about an emergency; but it is clear that the statute was passed for the purpose of meeting the panic and depression which began in 1837 and continued for some years thereafter. 15 And in the light of what is now to be said, it is evident that the question of that emergency as a basis for the legislation was so definitely involved that it must have been considered by the court. The emergency was quite as serious as that which the country has faced during the past three years. Indeed, it was so great that, in one instance, at least, a state repudiated a portion of its public debt, and others were strongly tempted to do so. 16 Mr. Warren, in his book, "The Supreme Court in United States History," Vol. 2, pp. 376-379, gives a vivid picture of the situation. After referring to Bronson v. Kinzie and the statute extending the period of redemption therein dealt with, he points to the prevailing state of business and finance [290 U.S. 467] which had called the statute into existence; to the bank failures, state debt repudiations, scarcity of hard money, the inability to pay debts except by disposing of property at ruinous prices; to the enactment of statutes for the relief of debtors, stay laws postponing collection of debts, etc., which had been passed by state after state, and to the action of this court in striking down the state statute in the face of these conditions.

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"Unquestionably," he continues,

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the country owes much of its prosperity to the unflinching courage with which, in the face of attack, the Court has maintained its firm stand in behalf of high standards of business morale, requiring honest payment of debts and strict performance of contracts, and its rigid construction of the Constitution to this end has been one of the glories of the Judiciary. That its decisions should, at times, have met with disfavor among the debtor class was, however, entirely natural, and while, ultimately, these debtor relief laws have always proved to be injurious to the very class they were designed to relieve, and to increase the financial distress, fraud and extortion temporarily, debtors have always believed such laws to be their salvation, and have resented judicial decisions holding them invalid. Consequently, this opinion of the Court in the Bronson Case aroused great antagonism in the Western States. In Illinois, a mass meeting was held which resolved that the decision ought not to be heeded…. Later, deference to the antagonism aroused against the Court by this decision was made when the Senator from Illinois, James Semple, introduced in the Senate, in 1846, a joint resolution proposing a Constitutional Amendment to prohibit the Supreme Court from declaring void "any Act of Congress or any State regulation on the ground that it is contrary to the Constitution of the United States…. "

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McMaster (supra, note 2), Vol. VII, pp. 44-48, is to the same effect. [290 U.S. 468]

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McCracken v. Hayward, decided at the January Term, 1844, dealt with the same Illinois statute, but involved a sale on execution after judgment, whereas Bronson v. Kinzie involved a mortgage. The decision simply followed the Bronson case. What has been said in respect of the background and setting of that case is equally applicable, and need not be repeated.

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Gantly's Lessee v. Ewing was decided at the January Term, 1845. It held unconstitutional, as applied to a preexisting mortgage, an act of Indiana providing that no real property should be sold on execution for less than half its appraised value. The statute, like those of Illinois, was enacted for the benefit of hard-pressed debtors as a result of the same emergency. It is referred to by McMaster, supra, as one of the "marks on the statute books" which the "evil times through which the people were passing" had left.

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Howard v. Bugbee, decided at the December Term, 1860, dealt with an Alabama statute authorizing a redemption of mortgaged property in two years after the sale under a decree. The statute was declared unconstitutional principally upon the authority of Bronson v. Kinzie. The opinion is very short, and does not refer to the question of emergency. The statute was passed, however, in 1842 (the mortgage having been executed prior thereto), and was, therefore, one of the emergency statutes of that period. The Alabama Supreme Court, whose decision was under review here, so treated it, and justified the statute upon that ground. 32 Ala. 713, 716-717. It is worthy of note that, after the decision of this court in the Bugbee case, Judge Walker, who delivered the opinion therein for the Alabama court, filed a dissenting opinion in Ex parte Pollard, Ex parte Woods, 40 Ala. 77, 110, in the course of which he said that his former opinion had been overruled by this court, and he could no longer perceive [290 U.S. 469] any ground upon which the convictions of a legislature as to the welfare of the people could enlarge the authority to interfere, through the manipulation of the remedy, with the obligation of contracts. The basis of the legislation was, and is shown by the decision of the Alabama Supreme Court sustaining it to be, the existence of the great emergency beginning in 1837, and that question, since the Alabama decision was reviewed, was quite plainly before this court for consideration.

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Walker v. Whitehead, decided at the December Term, 1872, held unconstitutional a Georgia statute requiring the plaintiff, suing on a debt or contract, to prove as a condition precedent to the entry of judgment in his favor that all legal taxes chargeable by law thereon had been duly paid for each year since the making of the debt or contract. The Georgia Supreme Court, 43 Ga. 538, 544-546, had sustained the act as a measure made necessary by the desperate financial and economic conditions in that state due to the Civil War. This court, making no response to the somewhat fervid presentation of this view of the matter by the state court, simply said that the degree of impairment was immaterial; that any impairment of the obligation of a contract is within the prohibition of the Constitution; that "[a] clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur."

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Edwards v. Kearzey, decided at the October Term, 1877, held invalid, as applied to a preexisting debt, the provision of the North Carolina constitution of 1868 increasing the exemptions to which a debtor was entitled. The North Carolina Supreme Court, in a series of decisions, had sustained the state constitutional provision, principally upon the ground (Garrett v. Chesire, 69 N.C. 396, 401-405) that it was adopted at a time when "probably one-half of the debtor class are owing more old debts than [290 U.S. 470] they can pay", and that, "[i]f, under our circumstances, our people are to be left without any exemptions, the policy of christian civilization is lost sight of…. " In the brief of defendant in error in this court (pp. 7-8), the view was strongly urged that the provision was not so much for the benefit of the debtor as for that of the state, to prevent the evils of almost universal pauperism. Attention was called to the desperate condition of the people of the state following the Civil War, and it was said that one-third of the whole population were paupers, all their property except lands having disappeared; that one-half of the people did not own land enough to afford burial for that proportion of the population, and, against those who did own land, the ante-war debts were piled mountain-high. It was submitted that the state, on being rehabilitated, was not bound to allow the creditor to strip the few self-supporting landowners of their means of existence, and thereby add them to the vast army of the impoverished, but that it had the right to defer a portion of the creditor's claim until the prostrated community had opportunity to recoup some of its losses.

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This court, in response, reviewed the history of the adoption of the contract impairment clause, and held the state constitutional provision invalid. "`Policy and humanity,'" it said,

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are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it.

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[Italics added.]

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Barnitz v. Beverly was decided May 18, 1896. A law of Kansas extended the period of redemption from a sale under a mortgage for a period of eighteen months, during which time the mortgagor was to remain in possession and receive rents and profits, except as necessary for repairs. [290 U.S. 471] The act was passed in 1893, in the midst of another panic, the severity of which, still within the memory of the members of this court, is a matter of common knowledge. The effects of that panic extended into every form of industry; bank failures were on an unprecedented scale; more than half the railroads of the country were in the hands of receivers; securities fell to fifty percent, often to twenty-five percent, of their former value; commercial failures and unemployment became general; heavy inroads were made upon public and private resources in caring for the hungry and destitute; 17 great bodies of idle men—the so-called "industrial armies"—marched toward Washington, feeding like locusts upon the country through which they passed.

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These conditions were brought to the attention of this court. In addition, the Supreme Court of Kansas, 55 Kans. 466, 484-485, 42 Pac. 725, 731, had relied upon them as a justification for the legislation, and had inquired why the state legislature, in a time of general depression, could not

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extend the indefinite estate impliedly reserved by the mortgagor, as the federal courts of equity do in particular cases, beyond the six months allowed by the general practice?

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In response to all of which, this court, after reviewing its former decisions, held the statute invalid as applied to a sale under a mortgage executed before its passage.

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The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, [290 U.S. 472] financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned, and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

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The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this court. That defense should not now succeed, because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it.

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The lower court, and counsel for the appellees in their argument here, frankly admitted that the statute does constitute a material impairment of the contract, but contended that such legislation is brought within the state power by the present emergency. If I understand the opinion just delivered, this court is not wholly in accord with that view. The opinion concedes that emergency does not create power, or increase granted power, or remove or diminish restrictions upon power granted or reserved. It then proceeds to say, however, that, while emergency does not create power, it may furnish the occasion for the exercise of power. I can only interpret what is said on that subject as meaning that, while an emergency does not diminish a restriction upon power, it furnishes an occasion for diminishing it, and this, as it seems to me, is merely to say the same thing by the use of another set of words, with the effect of affirming that which has just been denied. [290 U.S. 473]

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It is quite true that an emergency may supply the occasion for the exercise of power, depending upon the nature of the power and the intent of the Constitution with respect thereto. The emergency of war furnishes an occasion for the exercise of certain of the war powers. This the Constitution contemplates, since they cannot be exercised upon any other occasion. The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence. Const. Art. IV, § 4. But we are here dealing not with a power granted by the Federal Constitution, but with the state police power, which exists in its own right. Hence, the question is not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause, and the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts. That clause restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

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The Minnesota statute either impairs the obligation of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power, and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were nonexistent. And so, while, in form, the suggested distinction seems to put us forward in a straight line, in reality, it simply carries us back in a [290 U.S. 474] circle, like bewildered travelers lost in a wood, to the point where we parted company with the view of the state court.

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If what has now been said is sound, as I think it is, we come to what really is the vital question in the case: does the Minnesota statute constitute an impairment of the obligation of the contract now under review?

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In answering that question, we must first of all distinguish the present legislation from those statutes which, although interfering in some degree with the terms of contracts, or having the effect of entirely destroying them, have nevertheless been sustained as not impairing the obligation of contracts in the constitutional sense. Among these statutes are such as affect the remedy merely, as to which this court said in Bronson v. Kinzie, supra, at p. 316, and repeated in Edwards v. Kearzey, supra, p. 604,

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Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case, it is prohibited by the Constitution.

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Another class of statutes is illustrated by those exempting from execution and sale certain classes of property like the tools of an artisan. Chief Justice Taney, in Bronson v. Kinzie, supra, speaking obiter, said that a state might properly exempt necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture. But this court, in Edwards v. Kearzey, supra, struck down a provision of the North Carolina constitution which exempted every homestead, and the dwelling and buildings used therewith, not exceeding in value $1,000, on the ground of its unconstitutionality as applied to a contract already in existence. Referring to the opinion in Bronson v. Kinzie, the court said (p. 604) [290 U.S. 475] that the Chief Justice seems to have had in his mind the maxim "de minimis," etc. "Upon no other ground can any exemption be justified."

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It is quite true also that "the reservation of essential attributes of sovereign power is also read into contracts", and that the legislature cannot "bargain away the public health or the public morals." General statutes to put an end to lotteries, the sale or manufacture of intoxicating liquors, the maintenance of nuisances, to protect the public safety, etc., although they have the indirect effect of absolutely destroying private contracts previously made in contemplation of a continuance of the state of affairs then in existence but subsequently prohibited, have been uniformly upheld as not violating the contract impairment clause. The distinction between legislation of that character and the Minnesota statute, however, is readily observable. It may be demonstrated by an example. A, engaged in the business of manufacturing intoxicating liquor within a state, makes a contract, we will suppose, with B to manufacture and deliver, at a stipulated price and at some date in the future, a quantity of whisky. Before the day arrives for the performance of the contract, the state passes a law prohibiting the manufacture and sale of intoxicating liquor. The contract immediately falls, because its performance has ceased to be lawful. This is so because the contract is made upon the implied condition that a particular state of things shall continue to exist, "and, when that state of things ceases to exist, the bargain itself ceases to exist." Marshall v. Glanvill, [1917] 2 K.B. 87, 91. In that case, the plaintiff had been employed by the defendants upon a contract of service. While the contract was in force, the country became involved in the World War, and plaintiff was called into the military service. The court held that this rendered performance unlawful, and that the contract was at an end. It said: [290 U.S. 476]

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Here, the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end.

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In In re Shipton, Anderson & Co., [1915] 3 K.B. 676, a parcel of wheat then lying in a warehouse was sold for future payment and delivery. The wheat was subsequently requisitioned by the English government, and the sellers became unable to deliver. The Court of King's Bench Division held that the sellers were not liable. Darling, Justice, agreeing with the opinion of Lord Reading, said (pp. 683-684):

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If one contracts to do what is then illegal, the contract itself is altogether bad. If, after the contract has been made, it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case, the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject matter of this contract has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it.

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The general subject is discussed by this court in Omnia Co. v. United States, 261 U.S. 502, and it is there pointed out (p. 513) that the effect of such a requisition is not to appropriate the contract, but to frustrate it—an essentially different thing.

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The same distinction properly may be made as to the contract impairment clause, in respect of subsequent state legislation rendering unlawful a state of things which was lawful when an obligation relating thereto was contracted. [290 U.S. 477] By such legislation, the obligation is not impaired in the constitutional sense. The contract is frustrated—it disappears in virtue of an implied condition to that effect read into the contract itself. Thus, in F.A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A.C. 397, the House of Lords had before it a case where a steamer, then subject to a charter party having nearly three years to run, had been requisitioned by the Admiralty. The applicable rule was there stated to be that the court should examine the contract and the circumstances in which it was made in order to see whether or not, from their nature, the parties must have made their bargain on the footing that a particular state of things would continue to exist. And if they must have done so, a term to that effect would be implied, though not expressed in the contract. In Metropolitan Water Board v. Dick, Kerr & Co., [1918] A.C. 119, 127-128, 137, that rule was reaffirmed, with the additional statement that a subsequent law might be the cause of an impossibility of performance by taking away something from the control of the party as to which thing he had contracted to do or not to do something else, and that the court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties when the contract was made.

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Bearing in mind these aids toward determining whether such an implied condition may be read into a particular contract, let us revert to the example already given with respect to an agreement for the manufacture and sale of intoxicating liquor. And let us suppose that the state, instead of passing legislation prohibiting the manufacture and sale of the commodity, in which event the doctrine of implied conditions would be pertinent, continues to recognize the general lawfulness of the business, but, because of what it conceives to be a justifying emergency, provides that the time for the performance of existing [290 U.S. 478] contracts for future manufacture and sale shall be extended for a specified period of time. It is perfectly admissible, in view of the state power to prohibit the business, to read into the contract an implied proviso to the effect that the business of manufacturing and selling intoxicating liquors shall not, prior to the date when performance is due, become unlawful; but in the case last put, to read into the contract a pertinent provisional exception in the event of intermeddling state action would be more than unreasonable, it would be absurd, since we must assume that the contract was made on the footing that, so long as the obligation remained lawful, the impairment clause would effectively preclude a law altering or nullifying it, however exigent the occasion might be.

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That, in principle, is precisely the case here. The contract is to repay a loan within a fixed time, with the express condition that, upon failure, the property given as security shall be sold, and that, in the absence of a timely redemption, title shall be vested absolutely in the purchaser. This contract was lawful when made, and it has never been anything else. What the legislature has done is to pass a statute which does not have the effect of frustrating the contract by rendering its performance unlawful, but one which, at the election of one of the parties, postpones for a time the effective enforcement of the contractual obligation, notwithstanding the obligation, under the exact terms of the contract, remains lawful and possible of performance after the passage of the statute as it was before.

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The rent cases—Block v. Hirsh, 256 U.S. 135; Marcus Brown Co. v. Feldman, 256 U.S. 170; Levy Leasing Co. v. Siegel, 258 U.S. 242—which are here relied upon dealt with an exigent situation due to a period of scarcity of housing caused by the war. I do not stop to consider the distinctions between them and the present case, or to do more than point out that the question of contract impairment [290 U.S. 479] received little, if any, more than casual consideration. The writer of the opinions in the first two cases, speaking for this court in a later case, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, characterized all of them as having gone "to the verge of the law." It therefore seems pertinent to say that decisions which confessedly escape the limbo of unconstitutionality by the exceedingly narrow margin suggested by this characterization should be applied toward the solution of a doubtful question arising in a different field with a very high degree of caution. Reasonably considered, they do not foreclose the question here involved, and it should be determined upon its merits, without regard to those cases.

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We come back, then, directly to the question of impairment. As to that, the conclusion reached by the court here seems to be that the relief afforded by the statute does not contravene the constitutional provision because it is of a character appropriate to the emergency and allowed upon what are said to be reasonable conditions.

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It is necessary, first of all, to describe the exact situation. Appellees obtained from appellant a loan of $3,800, and, to secure its payment, executed a mortgage upon real property consisting of land and a fourteen-room house and garage. The mortgage contained the conventional Minnesota provision for foreclosure by advertisement. The mortgagors agreed to pay the debt, together with interest and the taxes and insurance on the property. They defaulted, and, in strict accordance with the bargain, appellant foreclosed the mortgage by advertisement and caused the premises to be sold. Appellant itself bought the property at the sale for a sum equal to the amount of the mortgage debt. The period of redemption from that sale was due to expire on May 2, 1933, and, assuming no redemption at the end of that day, under the law in force [290 U.S. 480] when the contract was made and when the property was sold, and in accordance with the terms of the mortgage, appellant would at once have become the owner in fee, and entitled to the immediate possession of the property. The statute here under attack was passed on April 18, 1933. It first recited and declared that an economic emergency existed. As applied to the present case, it arbitrarily extended the period of redemption expiring on May 2, 1933, to May 18, 1933—a period of sixteen days, and provided that the mortgagor might apply for a further extension to the district court of the county. That court was authorized to extend the period to a date not later than May 1, 1935, on the condition that the mortgagor should pay to the creditor all or a reasonable part of the income or rental value, as to the court might appear just and equitable, toward the payment of taxes, insurance, interest and principal mortgage indebtedness, and at such times and in such manner as should be fixed by the court. The court to whom the application in this case was made extended the time until May 1, 1935, upon the condition that payment by the mortgagor of the rental value, forty dollars per month, should be made.

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It will be observed that, whether the statute operated directly upon the contract or indirectly by modifying the remedy, its effect was to extend the period of redemption absolutely for a period of sixteen days, and conditionally for a period of two years. That this brought about a substantial change in the terms of the contract reasonably cannot be denied. If the statute was meant to operate only upon the remedy, it nevertheless, as applied, had the effect of destroying for two years the right of the creditor to enjoy the ownership of the property, and consequently the correlative power, for that period, to occupy, sell or otherwise dispose of it as might seem fit. This postponement, if it had been unconditional, undoubtedly would have constituted an unconstitutional [290 U.S. 481] impairment of the obligation. This court so decided in Bronson v. Kinzie, supra, where the period of redemption was extended for a period of only twelve months after a sale under a decree; in Howard v. Bugbee, supra, where the extension was for two years, and in Barnitz v. Beverly, supra, where the period was extended for eighteen months. Those cases, we may assume, still embody the law, since they are not overruled.

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The only substantial difference between those cases and the present one is that, here, the extension of the period of redemption, and postponement of the creditor's ownership, is accompanied by the condition that the rental value of the property shall, in the meantime, be paid. Assuming, for the moment, that a statute extending the period of redemption may be upheld if something of commensurate value be given the creditor by way of compensation, a conclusion that payment of the rental value during the two years' period of postponement is even the approximate equivalent of immediate ownership and possession is purely gratuitous. How can such payment be regarded, in any sense, as compensation for the postponement of the contract right? The ownership of the property to which petitioner was entitled carried with it not only the right to occupy or sell it, but, ownership being retained, the right to the rental value as well. So that, in the last analysis, petitioner simply is allowed to retain a part of what is its own as compensation for surrendering the remainder. Moreover, it cannot be foreseen what will happen to the property during that long period of time. The buildings may deteriorate in quality; the value of the property may fall to a sum far below the purchase price; the financial needs of appellant may become so pressing as to render it urgently necessary that the property shall be sold for whatever it may bring.

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However these or other supposable contingencies may be, the statute denies appellant for a period of two years [290 U.S. 482] the ownership and possession of the property—an asset which, in any event, is of substantial character, and which possibly may turn out to be of great value. The statute, therefore, is not merely a modification of the remedy; it effects a material and injurious change in the obligation. The legally enforceable right of the creditor when the statute was passed was, at once upon default of redemption, to become the fee simple owner of the property. Extension of the time for redemption for two years, whatever compensation be given in its place, destroys that specific right and the correlative obligation, and does so nonetheless though it assume to create in invitum another and different right and obligation of equal value. Certainly, if A should contract with B to deliver a specified quantity of wheat on or before a given date, legislation, however much it might purport to act upon the remedy, which had the effect of permitting the contract to be discharged by the delivery of corn of equal value, would subvert the constitutional restriction.

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A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy merely; it destroys, for the period of delay, all remedy so far as the enforcement of that right is concerned. The phrase, "obligation of a contract," in the constitutional sense, imports a legal duty to perform the specified obligation of that contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. It cannot do so either by acting directly upon the contract or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear. [290 U.S. 483] As this court has well said, whatever tends to postpone or retard the enforcement of a contract, to that extent weakens the obligation. According to one Latin proverb, "He who gives quickly gives twice," and, according to another, "He who pays too late pays less."

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Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.

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Louisiana v. New Orleans, 102 U.S. 203, 207. I am not able to see any real distinction between a statute which in substantive terms alters the obligation of a debtor-creditor contract so as to extend the time of its performance for a period of two years, and a statute which, though in terms acting upon the remedy, is aimed at the obligation (as distinguished, for example, from the judicial procedure incident to the enforcement thereof), and which does, in fact, withhold from the creditor, for the same period of time, the stipulated fruits of his contract.

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I quite agree with the opinion of the court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch, as well as when they comfort, they may as well be abandoned. Being unable to reach any other conclusion than that the Minnesota statute infringes the constitutional restriction under review, I have no choice but to say so.

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I am authorized to say that MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE BUTLER concur in this opinion.

Footnotes

HUGHES, J., lead opinion (Footnotes)

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1. That section is as follows:

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Sec. 4. Period of Redemption May be Extended.—Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond May 1st, 1935; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption, apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court, and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at such times and in such manner as to the court shall, under all the circumstances, appear just and equitable. Provided that, upon the service of the notice or demand aforesaid that the running of the period of redemption shall be tolled until the court shall make its order upon such application. Provided, further, however, that, if such mortgagor or judgment debtor, or personal representative, shall default in the payments, or any of them, in such order required, on his part to be done, or commits waste, his right to redeem from said sale shall terminate 30 days after such default and holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the filing of notice of such default with the clerk of such District Court, and his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to the immediate possession of said premises. If default is claimed by allowance of waste, such 30 day period shall not begin to run until the filing of an order of the court finding such waste. Provided, further, that the time of redemption from any real estate mortgage foreclosure or judgment or execution sale heretofore made, which otherwise would expire less than 30 days after the passage and approval of this Act, shall be and the same hereby is extended to a date 30 days after the passage and approval of this Act, and in such case, the mortgagor, or judgment debtor, or the assigns or personal representative of either, as the case may be, or the owner in the possession of the property, may, prior to said date, apply to said court for and the court may thereupon grant the relief as hereinbefore and in this section provided. Provided, further, that, prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this Act, has expired.

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2. A joint statement of the counsel for both parties, filed with the court on the argument in this Court, shows that, after providing for taxes, insurance, and interest, and crediting the payments to be made by the mortgagor under the judgment, the amount necessary to redeem May 1, 1935, would be $4,258.82

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3. The preamble and the first section of the Act are as follows:

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Whereas, the severe financial and economic depression existing for several years past has resulted in extremely low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit for farmers, business men and property owners and a general and extreme stagnation of business, agriculture and industry, and

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Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed, will for some time be unable to meet all payments as they come due of taxes, interest and principal of mortgages on their properties and are, therefore, threatened with loss of such properties through mortgage foreclosure and judicial sales thereof, and

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Whereas, many such properties have been and are being bid in at mortgage foreclosure and execution sales for prices much below what is believed to be their real values and often for much less than the mortgage or judgment indebtedness, thus entailing deficiency judgments against the mortgage and judgment debtors, and

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Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of redemption from mortgage foreclosure and execution sales and other relief of a like character; and

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Whereas, The State of Minnesota possesses the right under its police power to declare a state of emergency to exist, and

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Whereas, the inherent and fundamental purpose of our government is to safeguard the public and promote the general welfare of the people; and

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Whereas, Under existing conditions the foreclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding at the time of sale in the manner now contemplated by law, and

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Whereas, It is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth have created an emergency of such a nature that justifies and validates changes in legislation providing for the temporary manner, method, terms and conditions upon which mortgage foreclosure sales may be had or postponed and jurisdiction to administer equitable relief in connection therewith may be conferred upon the District Court, and

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Whereas, Mason's Minnesota Statutes of 1927, Section 9608, which provides for the postponement of mortgage foreclosure sales, has remained for more than thirty years a provision of the statutes in contemplation of which provisions for foreclosure by advertisement have been agreed upon;

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\* \* \* \*

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Section 1. Emergency Declared to Exist.—In view of the situation hereinbefore set forth, the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota.

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4. The Attorney General of the State, in his argument before this court, made the following statement of general conditions in Minnesota:

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Minnesota is predominantly an agricultural state. A little more than one half of its people live on farms. At the time this law was passed, the prices of farm products had fallen to a point where most of the persons engaged in farming could not realize enough from their products to support their families, and pay taxes and interest on the mortgages on their homes. In the fall and winter of 1932 in the villages and small cities where most of the farmers must market their produce, corn was quoted as low as eight cents per bushel, oats two cents and wheat twenty-nine cents per bushel, eggs at seven cents per dozen, and butter at ten cents per pound. The industry second in importance is mining. In normal times, Minnesota produces about sixty percent of the iron of the United States and nearly thirty percent of all the iron produced in the world. In 1932, the production of iron fell to less than fifteen percent of normal production. The families of idle miners soon became destitute, and had to be supported by public funds. Other industries of the state, such as lumbering and the manufacture of wood products, the manufacture of farm machinery and various goods of steel and iron have also been affected disastrously by the depression. Because of the increased burden on the state and its political subdivisions which resulted from the depression, taxes on lands, which provide by far the major portion of the taxes in this state, were increased to such an extent that, in many instances, they became confiscatory. Tax delinquencies were alarmingly great, rising as high as 78% in one county of the state. In seven counties of the state, the tax delinquency was over 50%. Because of these delinquencies, many towns, school districts, villages and cities were practically bankrupt. In many of these political subdivisions of the state, local government would have ceased to function, and would have collapsed had it not been for loans from the state.

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The Attorney General also stated that serious breaches of the peace had occurred.

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5. See Ex parte Milligan, 4 Wall. 2, 120-127; United States v. Russell, 13 Wall. 623, 627; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155; United States v. Cohen Grocery Co., 255 U.S. 81, 88.

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6. Farrand, Records of the Federal Convention, vol. II, pp. 439, 440, 597, 610; Elliot's Debates, vol. V, pp. 485, 488, 545, 546; Bancroft, History of the U.S. Constitution, vol. 2, pp. 137-139; Warren, The Making of the Constitution, pp. 552-555. Compare Ordinance for the Government of the Northwest Territory, Art. 2.

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7. The Federalist, No. 44 (Madison); Marshall, Life of Washington, vol. 5, pp. 85-90, 112, 113; Bancroft, History of the U.S. Constitution, vol. 1, pp. 228 et seq.; Black, Constitutional Prohibitions, pp. 1-7; Fiske, The Critical Period of American History, 8th ed., pp. 168 et seq.; Adams v. Storey, 1 Paine's Rep. 79, 90-92.

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8. Contracts, within the meaning of the clause, have been held to embrace those that are executed, that is, grants, as well as those that are executory. Fletcher v. Peck, 6 Cranch. 87, 137; Terrett v. Taylor, 9 Cranch 43. They embrace the charters of private corporations. Dartmouth College v. Woodward, 4 Wheat. 518. But not the marriage contract, so as to limit the general right to legislate on the subject of divorce. Id., p. 629; Maynard v. Hill, 125 U.S. 190, 210. Nor are judgments, though rendered upon contracts, deemed to be within the provision. Morley v. Lake Shore & M. S. Ry. Co., 146 U.S. 162, 169. Nor does a general law, giving the consent of a State to be sued, constitute a contract. Beers v. Arkansas, 20 How. 527.

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9. But there is held to be no impairment by a law which removes the taint of illegality, and thus permits enforcement, as, e.g., by the repeal of a statute making a contract void for usury. Ewell v. Daggs, 108 U.S. 143, 151.

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10. See, in addition to cases cited in the text, the following: Farmers & Mechanics Bank v. Smith, 6 Wheat. 131; Piqua Bank v. Knoop, 16 How. 369; Dodge v. Woolsey, 18 How. 331; Jefferson Branch Bank v. Skelly, 1 Black 436; State Tax on Foreign-held Bonds, 15 Wall. 300; Farrington v. Tennessee, 95 U.S. 679; Murray v. Charleston, 96 U.S. 432; Hartman v. Greenhow, 102 U.S. 672; McGahey v. Virginia, 135 U.S. 662; Bedford v. Eastern Bldg. & Loan Assn., 181 U.S. 227; Wright v. Central of Georgia Ry. Co., 236 U.S. 674; Central of Georgia Ry. Co. v. Wright, 248 U.S. 525; Ohio Public Service Co. v. Fritz, 274 U.S. 12.

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11. See Warren, The Supreme Court in United States History, vol. 2, pp. 376-379.

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12. See Sturges v. Crowninshield, 4 Wheat. 122, 200, 201; Mason v. Haile, 12 Wheat. 370, 378; Beers v. Haughton, 9 Pet. 329, 359.

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13. Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: Jackson v. Lamphire, 3 Pet. 280; Hawkins v. Barney's Lessee, 5 Pet. 457; Crawford v. Branch Bank, 7 How. 279; Curtis v. Whitney, 13 Wall. 68; Railroad Co. v. Hecht, 95 U.S. 168; Terry v. Anderson, 95 U.S. 628; Tennessee v. Sneed, 96 U.S. 69; South Carolina v. Gaillard, 101 U.S. 433; Louisiana v. New Orleans, 102 U.S. 203; Connecticut Mutual Life Ins. Co. v. Cushman, 108 U.S. 51; Vance v. Vance, 108 U.S. 514; Gilfillan v. Union Canal Co., 109 U.S. 401; Hill v. Merchants' Ins. Co., 134 U.S. 515; New Orleans City & Lake R. Co. v. New Orleans, 157 U.S. 219; Red River Valley Bank v. Craig, 181 U.S. 548; Wilson v. Standefer, 184 U.S. 399; Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437; Waggoner v. Flack, 188 U.S. 595; Bernheimer v. Converse, 206 U.S. 516; Henley v. Myers, 215 U.S. 373; Selig v. Hamilton, 234 U.S. 652; Security Savings Bank v. California, 263 U.S. 282.

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Compare the following illustrative cases, where changes in remedies were deemed to be of such a character as to interfere with substantial rights: Wilmington & Weldon R. Co. v. King, 91 U.S. 3; Memphis v. United States, 97 U.S. 293; Virginia Coupon Cases, 114 U.S. 269, 270, 298, 299; Effinger v. Kenney, 115 U.S. 566; Fisk v. Jefferson Police Jury, 116 U.S. 131; Bradley v. Lightcap, 195 U.S. l; Bank of Minden v. Clement, 256 U.S. 126.

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14. See also New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 673; Offield v. New York, N.H. & N. R. Co., 203 U.S. 372; Cincinnati v. Louisville & N. R. Co., 223 U.S. 390; Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 23; Galveston Wharf Co. v. Galveston, 260 U.S. 473, 476; Georgia v. Chattanooga, 264 U.S. 472.

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15. Law of 1920 (New York), chapter 942-947, 951.

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16. Department of Agriculture, Technical Bulletin No. 288, February, 1932, pp. 22, 23; Year Book, Department of Agriculture, 1932, p. 913.

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17. Graffman v. Burgess, 117 U.S. 180, 191, 192; Schroeder v. Young, 161 U.S. 334, 337; Ballentyne v. Smith, 205 U.S. 285, 290; Howell v. Baker, 4 Johns.Ch. 118, 121; Gilbert v. Haire, 43 Mich. 283, 286, 5 N.W. 321; Littell v. Zuntz, 2 Ala. 256, 260, 262; Farmer's Life Ins. Co. v. Stegink, 106 Kans. 730, 189 Pac. 965; Strong v. Smith, 68 N.J.Eq. 650, 653, 58 Atl. 301, 64 id. 1135. Compare Suring State Bank v. Giese, 210 Wis. 489, 246 N.W. 556.

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18. See Coote's Law of Mortgages, 8th ed., vol. 1, pp. 11, 12; Jones on Mortgages, 8th ed., vol. 1, §§ 7, 8; Langford v. Barnard, Tothill, 134, temp. Eliz.; Emmanuel College v. Evans, 1 Rep. in Ch. 10, temp. Car. I; Roscarrick v. Barton, 1 Ca. in Ch. 217; Noakes v. Rice, (1902) A.C. 24, per Lord Macnaghten; Fairclough v. Swan Brewery, 81 L.J.P.C. 207.

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1. In such cases, it is no more necessary to modify constitutional rules to govern new conditions than it is to create new words to describe them. The commerce clause is a good example. When that was adopted, its application was necessarily confined to the regulation of the primitive methods of transportation then employed; but railroads, automobiles and aircraft automatically were brought within the scope and subject to the terms of the commerce clause the moment these new means of transportation came into existence, just as they were at once brought within the meaning of the word "carrier" as defined by the dictionaries.

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2. Thus, McMaster (History of the People of the United States, Vol. 1, p. 425)—after referring to the conditions in Rhode Island, where "the bonds of society were dissolved by paper money and tender laws"; in New Jersey, where the people nailed up the doors of their courthouses; in Virginia, where the debtors "set fire to theirs in order to stop the course of justice"—says:

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The newspapers were full of bankrupt notices. The farmers' taxes amounted to near the rent of their farms. Mechanics wandered up and down the streets of every city destitute of work. Ships, shut out from every port of Europe, lay rotting in the harbors.

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Channing (History of the United States, Vol. III, pp. 410-411, 482-483) paints this graphic picture of the situation:

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Nowhere was the immediate prospect more gloomy than in South Carolina…. In Massachusetts, at the other end of the line, the case was as bad, if not worse…the resources of New England were insufficient to pay even what was then owing. The case of New York was even more desperate, and, for the moment, Philadelphia alone seemed prosperous, for the wastage of the later years of the war had been severely felt in Virginia….

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…Virginia was honeycombed with debt….

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In South Carolina, the planters were even more heavily in debt…. The case of Thomas Bee is to the point. His creditors had secured executions against him; the sheriff had seized his property and had sold it at one-thirteenth of what it would have brought at private sale in ordinary times.

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Nevins (The American States During and After the Revolution, p. 536) says:

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The town of Greenwich computed that, during each of the five years preceding 1786, the farmers had paid in taxes the entire rental value of their land.

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John Fiske (The Critical Period of American History, 8th ed., pp. 175, 180) thus describes conditions:

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…about the marketplaces, men spent their time angrily discussing politics, and scarcely a day passed without street fights, which at times grew into riots. In the country, too, no less than in the cities, the goddess of discord reigned. The farmers determined to starve the city people into submission, and they entered into an agreement not to send any produce into the cities until the merchants should open their shops and begin selling their goods for paper [money] at its face value…. [T]he farmers threw away their milk, used their corn for fuel, and let their apples rot on the ground….

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…the courts were broken up by armed mobs. At Concord, one Job Shattuck brought several hundred armed men into the town and surrounded the courthouse, while, in a fierce harangue, he declared that the time had come for wiping out all debts.

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Dr. David Ramsay (History of the United States, 2d ed., 1818, Vol. III, pp. 447), a member of the old Congress under the Confederation, and who lived in the midst of the events of which he speaks, says:

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The nonpayment of public debts sometimes inferred a necessity, and always furnished an apology, for not discharging private contracts. Confidence between man and man received a deadly wound. Public faith being first violated, private engagements lost much of their obligatory force….

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From the combined operation of these causes, trade languished; credit expired; gold and silver vanished, and real property was depreciated to an extent equal to that of the depreciation of continental money….

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And, finally, George Ticknor Curtis, in his History of the Origin, Formation, and Adoption of the Constitution of the United States, Vol. 1, pp. 332-333:

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All contemporary evidence assures us that this [1783 to 1787] was a period of great pecuniary distress, arising from the depreciation of the vast quantities of paper money issued by the Federal and State governments; from rash speculations; from the uncertain and fluctuating condition of trade, and from the great amount of foreign goods forced into the country as soon as its ports were opened. Naturally, in such a state of things, the debtors were disposed to lean in favor of those systems of government and legislation which would tend to relieve or postpone the payment of their debts, and as such relief could come only from their State governments, they were naturally the friends of State rights and State authority, and were consequently not friendly to any enlargement of the powers of the Federal Constitution. The same causes which led individuals to look to legislation for irregular relief from the burden of their private contracts led them also to regard public obligations with similar impatience. Opposed to this numerous class of persons were all those who felt the high necessity of preserving inviolate every public and private obligation; who saw that the separate power of the States could not accomplish what was absolutely necessary to sustain both public and private credit, and they were as naturally disposed to look to the resources of the Union for these benefits, as the other class were to look in an opposite direction. These tendencies produced, in nearly every State, a struggle not as between two organized parties, but one that was all along a contest for supremacy between opposite opinions, in which it was at one time doubtful to which side the scale would turn.

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3. Charles Warren, The Making of the Constitution, pp. 6:

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The actual evils which led to the Federal Convention of 1787 are familiar to every reader of history, and need no detailed description here. As is well known, they arose, in general,…; second, from State legislation unjust to citizens and productive of dissensions with neighboring States—the State laws particularly complained of being those staying process of the Courts, making property a tender in payment of debts, issuing paper money, interfering with foreclosure of mortgages….

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Fiske, supra, note 2, p. 168:

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By 1786, under the universal depression and want of confidence, all trade had well nigh stopped, and political quackery, with its cheap and dirty remedies, had full control of the field…. [A] craze for fictitious wealth in the shape of paper money ran like an epidemic through the country. There was a Barmecide feast of economic vagaries;…And when we have threaded the maze of this rash legislation, we shall the better understand that clause in our federal constitution which forbids the making of laws impairing the obligation of contracts.

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Beard, An Economic Interpretation of the Constitution of the United States, pp. 31-32:

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Money capital was…being positively attacked by the makers of paper money, stay laws, pine barren acts, and other devices for depreciating the currency or delaying the collection of debts. In addition, there was a widespread derangement of the monetary system….

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Creditors, naturally enough, resisted all of these schemes in the state legislatures, and…turned to the idea of a national government so constructed as to prevent laws impairing the obligation of contract, emitting paper money, and otherwise benefiting debtors. It is idle to inquire whether the rapacity of the creditors or the total depravity of the debtors…was responsible for this deep and bitter antagonism. It is sufficient for our purposes to discover its existence, and to find its institutional reflex in the Constitution.

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Fisher Ames, "Eulogy on Washington," The Life and Works of Fisher Ames, Vol. II, p. 76:

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Accordingly, in some of the States, creditors were treated as outlaws; bankrupts were armed with legal authority to be persecutors, and, by the shock of all confidence and faith, society was shaken to its foundations.

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Illuminating comment upon some of this state legislation is to be found in Chapter VI (Vol. I) of Bancroft's "History of the Formation of the Constitution of the United States," under the heading, "State Laws Impairing the Obligation of Contracts Prove the Need of an Overruling Union," pp. 230-236:

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[In Massachusetts] Repeated temporary stay laws gave no real relief; they flattered and deceived the hope of the debtor, exasperating alike him and his creditor….

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…[In Pennsylvania] in December, 1784, debts contracted before 1777 were made payable in three annual instalments….

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Maryland,…In 1782,…enacted a stay law extending to January, 1784,…

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Georgia, in August, 1782, stayed execution for two years from and after the passing of the act….

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…[In South Carolina in 1782] the commencement of suits was suspended till ten days after the sitting of the next general assembly…. On the twenty-sixth day of March, 1784, came the great ordinance for the payment of debts in four annual instalments,…

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Ramsay, supra, note 2, Vol. 3, 65-66, 106:

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The distrust which prevailed among the people respecting the punctual fulfillment of contracts arose from the powers claimed and, in too many instances, exercised by the state legislatures, for impairing the obligation of contracts;…These prolific sources of evil were completely done away by the new constitution….

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…State legislatures in too many instances yielded to the necessities of their constituents and passed laws by which creditors were compelled either to wait for payment of their just demands, on the tender of security or to take property at a valuation or paper money falsely purporting to be the representative of specie. These laws were considered by the British as inconsistent with…the treaty…. The Americans palliated these measures by the plea of necessity….

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Ramsay, The History of South Carolina (1809), Vol. II, pp. 429-430:

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The effects of these laws interfering between debtors and creditors were extensive. They destroyed public credit and confidence between man and man; injured the morals of the people, and, in many instances, ensured and aggravated the final ruin of the unfortunate debtors for whose temporary relief they were brought forward.

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4. Bancroft, supra, note 3, Vol. I, p. 239.

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5. Id., Vol. I, p. 241.

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6. Id., Vol. II, p. 136.

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7. See Curtis, supra, note 2, Vol. 2, pp. 366-367.

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8. Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. II; Thorpe, American Charters, Constitutions and Organic Laws, Vol. 2, pp. 957, 961.

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9. Elliott's Debates, Vol. V, pp. 485, 488, 545-546; id. Vol. I pp. 271, 311; Farrand, The Records of the Federal Convention, Vol. II, pp. 439-440, 596-597, 610.

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10. Elliot's Debates, Vol. I, pp. 344, 376-377.

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11. Id. Vol. I, pp. 491 492.

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12. Id., Vol. III, p. 478.

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13. Id., Vol. IV, pp. 156, 191.

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14. Id., Vol. IV, p. 333.

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Mr. Warren, in his book, "The Making of the Constitution," pp. 552-555, has an interesting resume of the proceedings in the Convention and of the conflicting views which were before the state conventions for consideration. He says in part:

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The Convention then was asked to perfect their action in favor of honesty and morality by adding a prohibition on the States which would put an end to statutes enacting laws for special individuals, setting aside Court judgments, repealing vested rights, altering corporate charters, staying the bringing or prosecution of suits, preventing foreclosure of mortgages, altering the terms of contracts, and allowing tender in payment of debts of something other than that contracted for. The State Legislatures had hitherto passed such laws in abundant measure, and the situation was graphically described later by Chief Justice Marshall in one of his most noted decisions [Ogden v. Saunders, 12 Wheat. 213, 354], as follows:

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The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State Legislatures as to break in upon the ordinary intercourse of society and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as virtuous of this great community, and was one of the important benefits expected from a reform of the government.

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To obviate the conditions thus described, King of Massachusetts proposed the insertion of a new restriction on the States…. Wilson and Madison supported his motion. Mason and G. Morris, however believed that it went too far in interfering with the powers of the States…. There was also a genuine belief by some delegates that, under some circumstances and in financial crises, such stay and tender laws might be necessary to avert calamitous loss to debtors…. The other delegates had been deeply impressed by the disastrous social and economic effects of the stay and tender laws which had been enacted by most of the States between 1780 and 1786, and they decided to make similar legislation impossible in the future.

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15. See Dewey, Financial History of the United States, p. 229, et seq.; Schouler, History of the United States, Vol. IV, p. 276, et seq.; McMaster, supra, note 2, Vol. VI, pp. 389, et seq., 523, et seq., 623, et seq.

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16. See Dewey, supra, note 15, p. 243, et seq.; McMaster, supra, note 2, Vol. VI, p. 627, et seq., Vol. VII, p. 19, et seq.; Centennial History of Illinois, Vol. II, p. 231, et seq.

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17. See Dewey, supra, note 15, p. 444, et seq.; Andrews, The Last Quarter Century in the United States, Vol. II, p. 301, et seq.

Nebbia v. New York, 1934

Title: Nebbia v. New York

Author: U.S. Supreme Court

Date: March 5, 1934

Source: 291 U.S. 502

This case was argued December 4 and 5, 1933, and was decided March 5, 1934.

1934, Nebbia v. New York, 291 U.S. 502

APPEAL FROM THE COUNTY COURT OF MONROE COUNTY, NEW YORK

Syllabus

1934, Nebbia v. New York, 291 U.S. 502

1. As a basis for attacking a discriminatory regulation of prices, under the equal protection clause of the Fourteenth Amendment, the party complaining must show that he himself is adversely affected by it. P. 520.

1934, Nebbia v. New York, 291 U.S. 502

2. A regulation fixing the price at which storekeepers may buy milk from milk dealers at a higher figure than that allowed dealers in buying from producers, and allowing dealers a higher price than it allows storekeepers in sales to consumers, held consistent with the equal protection clause of the Fourteenth Amendment because of the distinctions between the two classes of merchants. P. 521.

1934, Nebbia v. New York, 291 U.S. 502

3. As part of a plan to remedy evils in the milk industry which reduced the income of the producer below cost of production and threatened to deprive the community of an assured supply of milk, a New York statute sought to prevent destructive price-cutting by stores which, under the peculiar circumstances, were able to buy at much lower prices than the larger distributors and to sell without incurring delivery costs, and, to that end, an order of a state board acting under the statute fixed a minimum price of ten cents per quart for sales by distributors to consumers and of nine cents per quart for sales by stores to consumers. Held that, as applied to a storekeeper, the regulation could not be adjudged in conflict with the due process clause of the Fourteenth Amendment, since, in view of the facts set forth in the opinion, it appeared not to be unreasonable or arbitrary or without relation to the purpose of the legislation. Pp. 530 et seq.

1934, Nebbia v. New York, 291 U.S. 502

4. The use of private property and the making of private contracts are, as a general rule, free from governmental interference; but they are subject to public regulation when the public need requires. P. 523.

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5. The due process clause of the Fourteenth Amendment conditions the exertion of regulatory power by requiring that the end shall be accomplished by methods consistent with due process, that the regulation shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. P. 525. [291 U.S. 503]

1934, Nebbia v. New York, 291 U.S. 503

6. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. P. 525.

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7. The power of a State to regulate business in the public interest extends to the control and regulation of prices for which commodities may be sold, where price regulation is a reasonable and appropriate means of rectifying the evil calling for the regulation. Pp. 531 et seq.

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8. There is no principle limiting price regulation to businesses which are public utilities, or which have a monopoly or enjoy a public grant or franchise. Munn v. Illinois, 94 U.S. 113. P. 531.

1934, Nebbia v. New York, 291 U.S. 503

9. To say that property is "clothed with a public interest," or an industry is "affected with a public interest," means that the property or the industry, for adequate reason, is subject to control for the public good. Pp. 531-536.

1934, Nebbia v. New York, 291 U.S. 503

10. There is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. P. 536.

1934, Nebbia v. New York, 291 U.S. 503

11. Decisions denying the power to control prices in businesses found not to be "affected with a public interest" or "clothed with a public use" must rest finally upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. P. 536.

1934, Nebbia v. New York, 291 U.S. 503

12. So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. P. 503.

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13. The legislature is primarily the judge of the necessity of such an enactment; every possible presumption is in favor of its validity, and though the court may think the enactment unwise, it may not be annulled unless palpably in excess of legislative power. P. 537. [291 U.S. 504]

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14. If the lawmaking body, within its sphere of government, concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices—reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. P. 538.

1934, Nebbia v. New York, 291 U.S. 504

15. This is especially clear where the economic maladjustment is one of price, which threatens harm to the producer at one end of the series, and the consumer, at the other. P. 538.

1934, Nebbia v. New York, 291 U.S. 504

16. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people. P. 539.

1934, Nebbia v. New York, 291 U.S. 504

17. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. P. 539.

1934, Nebbia v. New York, 291 U.S. 504

262 N.Y. 259; 186 N.E. 694, affirmed.

1934, Nebbia v. New York, 291 U.S. 504

The New York Court of Appeals affirmed the conviction of a storekeeper for selling milk at a price below that allowed by an order promulgated by a state board pursuant to statutory authority. The appeal here is from the judgment of the County Court entered on remittitur. [291 U.S. 515]

ROBERTS, J., lead opinion

1934, Nebbia v. New York, 291 U.S. 515

MR. JUSTICE ROBERTS delivered the opinion of the Court.

1934, Nebbia v. New York, 291 U.S. 515

The Legislature of New York established, by Chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things, to "fix minimum and maximum…retail prices to be charged by…stores to consumers for consumption off the premises where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a five cent loaf of bread for eighteen cents, and was convicted for violating the Board's order. At his trial, he asserted the statute and order contravene the equal protection clause and the due process clause of the Fourteenth Amendment, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction. 1

1934, Nebbia v. New York, 291 U.S. 515

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation, and its history.

1934, Nebbia v. New York, 291 U.S. 515

During 1932, the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate, and called for state aid similar to that afforded the unemployed, if conditions should not improve. [291 U.S. 516]

1934, Nebbia v. New York, 291 U.S. 516

On March 10, 1932, the senate and assembly resolved

1934, Nebbia v. New York, 291 U.S. 516

That a joint Legislative committee is hereby created…to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer.

1934, Nebbia v. New York, 291 U.S. 516

The committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2,350 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction, an extensive research program was prosecuted by experts and official bodies and employees of the state and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated, and the information obtained analyzed. As a result of the study of this material, a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the legislature April 10, 1933. This document included detailed findings, with copious references to the supporting evidence; appendices outlining the nature and results of prior investigations of the milk industry of the state, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions.

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In part, those conclusions are:

1934, Nebbia v. New York, 291 U.S. 516

Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase [291 U.S. 517] the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

1934, Nebbia v. New York, 291 U.S. 517

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

1934, Nebbia v. New York, 291 U.S. 517

In addition to the general price decline, other causes for the low price of milk include: a periodic increase in the number of cows and in milk production; the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets, and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

1934, Nebbia v. New York, 291 U.S. 517

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand, the industry must carry a surplus of about 20 percent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable, and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus, surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. [291 U.S. 518] So long as the surplus burden is unequally distributed, the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price, to his own and the producer's detriment.

1934, Nebbia v. New York, 291 U.S. 518

Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers, and so remove the cause of price-cutting.

1934, Nebbia v. New York, 291 U.S. 518

The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. The provisions of the statute are summarized in the margin. 2 [291 U.S. 519]

1934, Nebbia v. New York, 291 U.S. 519

Section 312(e), on which the prosecution in the present case is founded, provides:

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After the board shall have fixed prices to be charged or paid for milk in any form [291 U.S. 520] …, it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price…, and no method or device shall be lawful whereby milk is bought or sold…at a price less or more than such price…, whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise….

1934, Nebbia v. New York, 291 U.S. 520

First. The appellant urges that the order of the Milk Control Board denies him the equal protection of the laws. It is shown that the order requires him, if he purchases his supply from a dealer, to pay eight cents per quart and [291 U.S. 521] five cents per pint, and to resell at not less than nine and six, whereas the same dealer may buy his supply from a farmer at lower prices and deliver milk to consumers at ten cents the quart and six cents the pint. We think the contention that the discrimination deprives the appellant of equal protection is not well founded. For aught that appears, the appellant purchased his supply of milk from a farmer as do distributors, or could have procured it from a farmer, if he so desired. There is therefore no showing that the order placed him at a disadvantage, or, in fact, affected him adversely, and this alone is fatal to the claim of denial of equal protection. But if it were shown that the appellant is compelled to buy from a distributor, the difference in the retail price he is required to charge his customers, from that prescribed for sales by distributors, is not, on its face, arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment, if the legislature possesses the power to control the prices to be charged for fluid milk. Compare American Sugar Refining Co. v. Louisiana, 179 U.S. 89; Brown-Forman Co. v. Kentucky, 217 U.S. 563; State Board of Tax Commissioners v. Jackson, 283 U.S. 527.

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Second. The more serious question is whether, in the light of the conditions disclosed, the enforcement of § 312(e) denied the appellant the due process secured to him by the Fourteenth Amendment.

1934, Nebbia v. New York, 291 U.S. 521

Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862, 3 and subsequent statutes 4 have been carried into the general [291 U.S. 522] codification known as the Agriculture and Markets Law. 5 A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control. 6 The producer or dairy farmer is in certain circumstances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surroundings of his barns and buildings used for production of milk, the utensils used, and the persons employed in milking (§§ 46, 47, 55, 72-88). Proprietors of milk gathering stations or processing plants are subject to regulation (§ 54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices (§§ 57, 57a, 252). In addition, there is a large volume of legislation intended to promote cleanliness and fair trade practices, affecting all who are engaged in the industry. 7 The challenged amendment [291 U.S. 523] of 1933 carried regulation much farther than the prior enactments. Appellant insists that it went beyond the limits fixed by the Constitution.

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Under our form of government, the use of property and the making of contracts are normally matters of private, and not of public, concern. The general rule is that both shall be free of governmental interference. But neither property rights 8 nor contract rights 9 are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form

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a portion of that immense mass of legislation which embraces every thing within the territory of a State…, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State…are component parts of this mass. 10

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Justice Barbour said for this court:

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…it is not only the right, but the bounden and solemn duty, of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. [291 U.S. 524] That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive. 11

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And Chief Justice Taney said upon the same subject:

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But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case, it exercises the same powers—that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, except insofar as it has been restricted by the constitution of the United States. 12

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Thus has this court, from the early days, affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, 13 as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government, as shown by the quotations above given. These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be [291 U.S. 525] imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But, subject only to constitutional restraint, the private right must yield to the public need.

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The Fifth Amendment, in the field of federal activity, 14 and the Fourteenth, as respects state action, 15 do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

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The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

1934, Nebbia v. New York, 291 U.S. 525

The court has repeatedly sustained curtailment of enjoyment of private property in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. 16 The state may control the [291 U.S. 526] use of property in various ways; may prohibit advertising billboards except of a prescribed size and location, 17 or their use for certain kinds of advertising; 18 may in certain circumstances authorize encroachments by party walls in cities; 19 may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public health or safety; 20 or may establish zones within which certain types of buildings or businesses are permitted and others excluded. 21 And although the Fourteenth Amendment extends protection to aliens as well as citizens, 22 a state may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land. 23

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Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process. 24 These measures not [291 U.S. 527] only affected the use of private property, but also interfered with the right of private contract. Other instances are numerous where valid regulation has restricted the right of contract, while less directly affecting property rights. 25

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The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one [291 U.S. 528] pleases. Certain kinds of business may be prohibited; 26 and the right to conduct a business, or to pursue a calling, may be conditioned. 27 Regulation of a business to prevent waste of the state's resources may be justified. 28 And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency. 29 [291 U.S. 529]

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Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, 30 by giving trade inducement to purchasers, 31 and by other forms of price discrimination. 32 The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, 33 which have been upheld. On the other hand, where the policy of the state dictate that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. 34 Moreover, the state or a municipality may itself enter into business in competition with private proprietor, and thus effectively [291 U.S. 530] although indirectly control the prices charged by them. 35

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The milk industry in New York has been the subject of longstanding and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that, for this and other reasons, unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that, in these circumstances, the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made, the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store and endeavoring to establish a differential which would be just to both. In the light of the facts, the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk. [291 U.S. 531]

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But we are told that, because the law essays to control prices, it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

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We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing [291 U.S. 532] maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. Munn v. Illinois, 94 U.S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated, and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased, and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a "virtual monopoly." This meant only that their elevator was strategically situated, and that a large portion of the public found it highly inconvenient to deal with others. This court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the court cited a statement from Lord Hale's De Portibus Maris, to the effect that, when private property is "affected with a public interest, it ceases to be juris privati only"; but the court proceeded at once to define what it understood by [291 U.S. 533] the expression, saying:

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Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.

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(P. 126.) Thus, understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power", and it is plain that nothing more was intended by the expression. The court had been at pains to define that power (pp. 124, 125) ending its discussion in these words:

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From this, it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances, they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation. 36

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In the further discussion of the principle, it is said that, when one devotes his property to a use "in which the public has an interest," he, in effect, "grants to the public an interest in that use," and must submit to be controlled for the common good. The conclusion is that, if Munn and Scott wished to avoid having their business regulated, they should not have embarked their property in an industry which is subject to regulation in the public interest.

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The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only [291 U.S. 534] to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that, if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.

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In the same volume, the court sustained regulation of railroad rates. 37 After referring to the fact that railroads are carriers for hire, are incorporated as such, and given extraordinary powers in order that they may better serve the public, it was said that they are engaged in employment " affecting the public interest," and therefore, under the doctrine of the Munn case, subject to legislative control as to rates. And in another of the group of railroad cases then heard, 38 it was said that the property of railroads is "clothed with a public interest" which permits legislative limitation of the charges for its use. Plainly, the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affection or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers.

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The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state, Munn v. Illinois, supra. Nor is it the enjoyment of a monopoly; for in Brass v. [291 U.S. 535] North Dakota, 153 U.S. 391, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that, at the very station where the defendant's elevator was located, two others operated, and that the business was keenly competitive throughout the state.

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In German Alliance Insurance Co. v. Lewis, 233 U.S. 389, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the state, and there was no threat of monopoly, two factors rendered the regulation reasonable. These were the almost universal need of insurance protection and the fact that, while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates. The court was at pains to point out that it was impossible to lay down any sweeping and general classification of businesses as to which price-regulation could be adjudged arbitrary or the reverse.

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Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The usury laws fix the price which may be exacted for the use of money, although no business more essentially private in character can be imagined than that of loaning one's personal funds. Griffith v. Connecticut, 218 U.S. 563. Insurance agents' compensation may be regulated, though their contracts are private, because the business of insurance is considered one properly subject to public control. O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251. Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature, [291 U.S. 536] are not a deprivation of due process. Frisbie v. United States, 157 U.S. 160; Capital Trust Co. v. Calhoun, 250 U.S. 208; Calhoun v. Massie, 253 U.S. 170; Newman v. Moyers, 253 U.S. 182; Yeiser v. Dysart, 267 U.S. 540; Margolin v. United States, 269 U.S. 93. A stockyards corporation, "while not a common carrier, nor engaged in any distinctively public employment, is doing a work in which the public has an interest," and its charges may be controlled. Cotting v. Kansas City Stockyards Co., 183 U.S. 79, 85. Private contract carriers, who do not operate under a franchise, and have no monopoly of the carriage of goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers for corresponding services, if the state, in pursuance of a public policy to protect the latter, so determines. Stephenson v. Binford, 287 U.S. 251, 274.

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It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535. The phrase "affected with a public interest " can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest" and "clothed with a public use" have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were [291 U.S. 537] not met, because the laws were found arbitrary in their operation and effect. 39 But there can be no doubt that, upon proper occasion and by appropriate measures, the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

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So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.

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Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.

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Northern Securities Co. v. United States, 193 U.S. 197, 337-338. And it is equally clear that, if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number, we have said that the legislature is primarily the judge of the necessity of such an enactment, [291 U.S. 538] that every possible presumption is in favor of its validity, and that, though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. 40

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The lawmaking bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. 41 Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. 42 If the lawmaking body, within its sphere of government, concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, 43 produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does [291 U.S. 539] not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the pubic at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

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Tested by these considerations, we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

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The judgment is

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Affirmed.

MCREYNOLDS, J., separate opinion

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Separate opinion of MR. JUSTICE McREYNOLDS.

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By an act effective April 10, 1933 (Laws, 1933, Ch. 158), when production of milk greatly exceeded the demand, the Legislature created a Control Board with power to

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regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale….

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The

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board may adopt and enforce all rules and all orders necessary to carry out the provisions of this article…. A rule of the board, when duly posted and filed as provided in this section, shall have the force and effect of law…; a violation of any provision of this article or of any rule or order of the board lawfully made, except as otherwise expressly provided by this article, shall be a misdemeanor….

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After considering

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all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer…

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the board

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shall fix by official order the minimum wholesale and retail prices, and may fix by official order the maximum wholesale and retail prices to be charged for milk handled within the state. [291 U.S. 540]

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April 17, this Board prescribed nine cents per quart as the minimum at which "a store" might sell.\* April 19, appellant Nebbia, a small storekeeper in Rochester, sold two bottles at a less price. An information charged that, by so doing, he committed a misdemeanor. A motion to dismiss, which challenged the validity of both statute and order, being overruled, the trial proceeded under a plea of not guilty. The Board's order and statements by two witnesses tending to show the alleged sale constituted the entire evidence. Notwithstanding the claim, that, under the XIV Amendment, the State lacked power to [291 U.S. 541] prescribe prices at which he might sell pure milk, lawfully held, he was adjudged guilty and ordered to pay a fine.

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The Court of Appeals affirmed the conviction. Among other things, it said, pp. 264 et seq.:—

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The sale by Nebbia was a violation of the statute "inasmuch as the Milk Control Board had fixed a minimum price for milk at nine cents per quart."

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The appellant not unfairly summarizes this law by saying that it first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials. As an aid in enforcing the rate regulation, the milk industry in the State of New York is made a business affecting the public health and interest until March 31, 1934, and the Board can exclude from the milk business any violator of the statute or the Board's orders.

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In fixing sale prices. the Board

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must take into consideration the amount necessary to yield a "reasonable return" to the producer and the milk dealer…. The fixing of minimum prices is one of the main features of the act. The question is whether the act, so far as it provides for fixing minimum prices for milk, is unconstitutional…in that it interferes with the right of the milk dealer to carry on his business in such manner as suits his convenience without state interference as to the price at which he shall sell his milk. The power thus to regulate private business can be invoked only under special circumstances. It may be so invoked when the Legislature is dealing with a paramount industry upon which the prosperity of the entire State in large measure depends. It may not be invoked when we are dealing with an ordinary business, essentially private in its nature. [291 U.S. 542] This is the vital distinction pointed out in New State Ice Co. v. Liebmann (285 U.S. 262, 277)….

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The question is as to whether the business justifies the particular restriction, or whether the nature of the business is such that any competent person may, conformably to reasonable regulation, engage therein. The production of milk is, on account of its great importance as human food, a chief industry of the State of New York…. It is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State, in a very large and real sense, depend upon it…. The State seeks to protect the producer by fixing a minimum price for his milk to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss…. Price is regulated to protect the farmer from the exactions of purchasers against which he cannot protect himself….

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Concededly, the Legislature cannot decide the question of emergency and regulation free from judicial review, but this court should consider only the legitimacy of the conclusions drawn from the facts found.

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We are accustomed to rate regulation in cases of public utilities and other analogous cases, and to the extension of such regulative power into similar fields…. This case, for example, may be distinguished from the Oklahoma ice case (New State Ice Co. v. Liebmann, 285 U.S. 262, 277), holding that the business of manufacturing and selling ice cannot be made a public business, to which it bears a general resemblance. The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater family necessity than ice…. Mechanical concepts of jurisprudence make easy a decision on the strength of seeming authority….

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Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference [291 U.S. 543] with the rights of property and contract…, with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government, and that it extends to all the great public needs;…that statutes…aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view;…

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With full respect for the Constitution as an efficient frame of government in peace and war, under normal conditions or in emergencies; with cheerful submission to the rule of the Supreme Court that legislative authority to bridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review, we do not feel compelled to hold that the "due process" clause of the Constitution has left milk producers unprotected from oppression, and to place the stamp of invalidity on the measure before us.

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With the wisdom of the legislation, we have naught to do. It may be vain to hope, by laws, to oppose the general course of trade….

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We are unable to say that the Legislature is lacking in power not only to regulate and encourage the production of milk, but also, when conditions require, to regulate the prices to be paid for it, so that a fair return may be obtained by the producer and a vital industry preserved from destruction…. The policy of noninterference with individual freedom must at times give way to the policy of compulsion for the general welfare.

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Our question is whether the Control Act, as applied to appellant through the order of the Board, number five, deprives him of rights guaranteed by the XIV Amendment. He was convicted of a crime for selling his own [291 U.S. 544] property—wholesome milk—in the ordinary course of business at a price satisfactory to himself and the customer. We are not immediately concerned with any other provision of the act, or later orders. Prices at which the producer may sell were not prescribed—he may accept any price—nor was production in any way limited. "To stimulate the production of a vital food product" was not the purpose of the statute. There was an oversupply of an excellent article. The affirmation is

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that milk has been selling too cheaply…, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime.

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The opinion below points out that the statute expires March 31, 1934, "and is avowedly a mere temporary measure to meet an existing emergency," but the basis of the decision is not explicit. There was no definite finding of an emergency by the court upon consideration of established facts, and no pronouncement that conditions were accurately reported by a legislative committee. Was the legislation upheld because only temporary, and for an emergency, or was it sustained upon the view that the milk business bears a peculiar relation to the public, is affected with a public interest, and, therefore, sales prices may be prescribed irrespective of exceptional circumstances? We are left in uncertainty. The two notions are distinct, if not conflicting. Widely different results may follow adherence to one or the other.

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The theory that legislative action which ordinarily would be ineffective because of conflict with the Constitution may become potent if intended to meet peculiar conditions and properly limited was lucidly discussed, and its weakness disclosed, by the dissenting opinion in Home [291 U.S. 545] Building & Loan Assn. v. Blaisdell, 290 U.S. 398. Sixty years ago, in Milligan's case, this Court declared it inimical to Constitutional government, and did "write the vision and make it plain upon tables that he may run that readeth it."

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Milligan, charged with offenses against the United States committed during 1863 and 1864, was tried, convicted and sentenced to be hanged by a military commission proceeding under an Act of Congress passed in 1862. The crisis then existing was urged in justification of its action. But this Court held the right of trial by jury did not yield to emergency, and directed his release.

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Those great and good men [who drafted the Constitution] foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrepealable law…. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.

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Ex parte Milligan (1866), 4 Wall. 2, 120.

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The XIV Amendment wholly disempowered the several States to "deprive any person of life, liberty, or property, without due process of law." The assurance of each of these things is the same. If now liberty or property may be struck down because of difficult circumstances, we must expect that, hereafter, every right must yield to the voice of an impatient majority when stirred by distressful [291 U.S. 546] exigency. Amid the turmoil of civil war, Milligan was sentenced; happily, this Court intervened. Constitutional guaranties are not to be "thrust to and fro and carried about with every wind of doctrine." They were intended to be immutable so long as within our charter. Rights shielded yesterday should remain indefeasible today and tomorrow. Certain fundamentals have been set beyond experimentation; the Constitution has released them from control by the State. Again and again, this Court has so declared.

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Adams v. Tanner, 244 U.S. 590, condemned a Washington initiative measure which undertook to destroy the business of private employment agencies because it unduly restricted individual liberty. We there said—

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The fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

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Buchanan v. Warley, 245 U.S. 60, held ineffective an ordinance which forbade negroes to reside in a city block where most of the houses were occupied by whites.

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It is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases.

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Southern Ry. Co. v. Virginia, 290 U.S. 190, 196—

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The claim that the questioned statute was enacted under the police power of the State, and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every State power is limited by the inhibitions of the XIV Amendment.

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Akins v. Children's Hospital, 261 U.S. 525, 545.

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That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause [291 U.S. 547] [Fifth Amendment] is settled by the decisions of this Court, and is no longer open to question.

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Meyer v. Nebraska, 262 U.S. 390, 399, held invalid a State enactment (1919) which forbade the teaching in schools of any language other than English.

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While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

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Schlesinger v. Wisconsin, 270 U.S. 230, 240. "The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

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Near v. Minnesota, 283 U.S. 697, overthrew a Minnesota statute designed to protect the public against obvious evils incident to the business of regularly publishing malicious, scandalous and defamatory matters, because of conflict with the XIV Amendment.

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In the following, among many other cases, much consideration has been given to this subject. United States v. Cohen Grocery Co., 255 U.S. 81, 88; Wolff Co. v. Industrial Court, 262 U.S. 522, and 267 U.S. 552; Pierce v. Society of Sisters, 268 U.S. 510; Tyson & Bro. v. Banton, 273 U.S. 418; Fairmont Creamery Co. v. Minnesota, 274 U.S. 1; Ribnik v. McBride, 277 U.S. 350; Williams v. Standard Oil Co., 278 U.S. 235; Sterling v. Constantin, 287 U.S. 378. All stand in opposition to the views apparently approved below. [291 U.S. 548]

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If validity of the enactment depends upon emergency, then, to sustain this conviction, we must be able to affirm that an adequate one has been shown by competent evidence of essential facts. The asserted right is federal. Such rights may demand, and often have received, affirmation and protection here. They do not vanish simply because the power of the State is arrayed against them. Nor are they enjoyed in subjection to mere legislative findings.

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If she relied upon the existence of emergency, the burden was upon the State to establish it by competent evidence. None was presented at the trial. If necessary for appellant to show absence of the asserted conditions, the little grocer was helpless from the beginning—the practical difficulties were too great for the average man.

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What circumstances give force to an "emergency" statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If, three days after this act became effective, another "very grievous murrain" had descended, and half of the cattle had died, would the emergency then have ended, also, the prescribed rates? If prices for agricultural products become high, can consumers claim a crisis exists, and demand that the Legislature fix less ones? Or are producers alone to be considered, consumers neglected? To these questions, we have no answers. When emergency gives potency, its subsidence must disempower; but no test for its presence or absence has been offered. How is an accused to know when some new rule of conduct arrived, when it will disappear?

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It is argued that the report of the Legislative Committee, dated April 10th, 1933, disclosed the essential facts. May one be convicted of crime upon such findings? Are [291 U.S. 549] federal rights subject to extinction by reports of committees? Heretofore, they have not been.

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Apparently the Legislature acted upon this report. Some excerpts from it follow. We have no basis for determining whether the findings of the committee or legislature are correct, or otherwise. The court below refrained from expressing any opinion in that regard, notwithstanding its declaration

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that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review.

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On the other hand it asserted—"This court should consider only the legitimacy of the conclusions drawn from the facts found."

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In New York, there are twelve million possible consumers of milk; 130,000 farms produce it. The average daily output approximates 9,500,000 quarts. For ten or fifteen years prior to 1929 or 1930, the per capita consumption steadily increased; so did the supply. "Realizing the marked improvement in milk quality, the public has tended to increase its consumption of this commodity." "In the past two years, the per capita consumption has fallen off, [possibly] 10 percent."

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These marked changes in the trend of consumption of fluid milk and cream have occurred in spite of drastic reductions in retail prices. The obvious cause is the reduced buying power of consumers.

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These cycles of overproduction and underproduction, which average about 15 years in length, are explained by the human tendency to raise too many heifers when prices of cows are high, and too few when prices of cows are low. A period of favorable prices for milk leads to the raising of more than the usual number of heifers, but it is not until seven or eight years later that the trend is reversed as a result of the falling prices [291 U.S. 550] of milk and cows.

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"Farmers all over the world raise too many heifers whenever cows pay, and raise too few heifers when cows do not pay."

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During the years 1925 to 1930, inclusive, the prices which the farmers of the state received for milk were favorable as compared with the wholesale prices of all commodities. They were even more favorable as compared with the prices received for other farm products, for, not only in New York, but throughout the United States, the general level of prices of farm products has been below that of other prices since the World War.

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The comparatively favorable situation enjoyed by the milk producers had an abrupt ending in 1932. Even before that, in 1930 and 1931, milk prices dropped very rapidly.

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The prices which farmers received for milk during 1932 were much below the costs of production. After other costs were paid, the producers had practically nothing left for their labor. The price received for milk in January, 1933, was little more than half the cost of production.

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Since 1927, the number of dairy cows in the state has increased about 10 percent. The effect of this has been to increase the surplus of milk.

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Similar increases in the number of cows have occurred generally in the United States, and are due to the periodic changes in number of heifer calves raised on the farms. Previous experience indicates that, unless some form of arbitrary regulation is applied, the production of milk will not be satisfactorily adjusted to the demand for a period of several years.

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Close adjustment of the supply of fluid milk to the demand is further hindered by the periodic changes in the number of heifers raised for dairy cows.

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The purpose of this emergency measure is to bring partial relief to dairymen from the disastrously low prices for milk which have prevailed in recent months. It is recognized that the dairy industry of the state cannot be [291 U.S. 551] placed upon a profitable basis without a decided rise in the general level of commodity prices.

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Thus, we are told, the number of dairy cows had been increasing, and that favorable prices for milk bring more cows. For two years, notwithstanding low prices, the per capita consumption had been falling. "The obvious cause is the reduced buying power of consumers." Notwithstanding the low prices, farmers continued to produce a large surplus of wholesome milk for which there was no market. They had yielded to "the human tendency to raise too many heifers" when prices were high, and "not until seven or eight years" after 1930 could one reasonably expect a reverse trend. This failure of demand had nothing to do with the quality of the milk—that was excellent. Consumers lacked funds with which to buy. In consequence, the farmers became impoverished, and their lands depreciated in value. Naturally, they became discontented.

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The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised, but voluntary, efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then, whenever there is too much or too little of an essential thing—whether of milk or grain or pork or coal or shoes or clothes—constitutional provisions may be declared inoperative, and the "anarchy and despotism" prefigured in Milligan's case are at the door. The futility of such legislation in the circumstances is pointed out below.

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Block v. Hirsh, 256 U.S. 135 and Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, are much relied on to support emergency legislation. They were civil proceedings; the first to recover a leased building in the District of [291 U.S. 552] Columbia; the second to gain possession of an apartment house in New York. The unusual conditions grew out of the World War. The questioned statutes made careful provision for protection of owners. These cases were analyzed, and their inapplicability to circumstances like the ones before us was pointed out, in Tyson & Bro. v. Banton, 273 U.S. 418. They involved peculiar facts, and must be strictly limited. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, said of them—

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The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law, but fell far short of the present act.

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Is the milk business so affected with public interest that the Legislature may prescribe prices for sales by stores? This Court has approved the contrary view; has emphatically declared that a State lacks power to fix prices in similar private businesses. United States v. Cohen Grocery Co., 255 U.S. 81; Adkins v. Children's Hospital, 261 U.S. 525; Wolff Packing Co. v. Industrial Court, 262 U.S. 522; Tyson & Bro. v. Banton, 273 U.S. 418; Fairmont Creamery Co. v. Minnesota, 274 U.S. l; Ribnik v. McBride, 277 U.S. 350; Williams v. Standard Oil Co., 278 U.S. 235; New State Ice Co. v. Liebmann, 285 U.S. 262; Sterling v. Constantin, 287 U.S. 378, 396.

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Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 537.—Here, the State's statute undertook to destroy the freedom to contract by parties engaged in so-called "essential" industries. This Court held that she had no such power.

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It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the [291 U.S. 553] mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation…. An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes.

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On a second appeal, 267 U.S. 552, 569, the same doctrine was restated:

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The system of compulsory arbitration which the Act establishes is intended to compel, and, if sustained, will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but, as shown in the prior decision, the qualifications are rather illusory, and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment.

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The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.

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Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 9.—A statute commanded buyers of cream to adhere to uniform prices fixed by a single transaction.—

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May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way, heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise [291 U.S. 554] does not ordinarily produce evil consequences, but the reverse.

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Williams v. Standard Oil Co., 278 U.S. 235, 239.—The State of Tennessee was declared without power to prescribe prices at which gasoline might be sold.

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It is settled by recent decisions of this Court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used unless the business or property involved is "affected with a public interest."

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Considered affirmatively,

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it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use, and its use thereby, in effect, granted to the public…. Negatively, it does not mean that a business is affected with a public interest merely because it is large, or because the public are warranted in having a feeling of concern in respect of its maintenance.

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New State Ice Co. v. Liebmann, 285 U.S. 262, 277.—Here, Oklahoma undertook the control of the business of manufacturing and selling ice. We denied the power so to do.

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It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor,…And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use.

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Regulation to prevent recognized evils in business has long been upheld as permissible legislative action. But fixation of the price at which "A" engaged in an ordinary business, may sell in order to enable "B," a producer, to improve his condition has not been regarded as within legislative power. This is not regulation, but management, control, dictation—it amounts to the deprivation [291 U.S. 555] of the fundamental right which one has to conduct his own affairs honestly, and along customary lines. The argument advanced here would support general prescription of prices for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some legislature finds and declares such action advisable, and for the public good. This Court has declared that a State may not, by legislative fiat, convert a private business into a public utility. Michigan Comm'n v. Duke, 266 U.S. 570, 577. Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 592. Smith v. Cahoon, 283 U.S. 553, 563. And if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution.

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Munn v. Illinois (1877), 94 U.S. 113, has been much discussed in the opinions referred to above. And always the conclusion was that nothing there sustains the notion that the ordinary business of dealing in commodities is charged with a public interest and subject to legislative control. The contrary has been distinctly announced. To undertake now to attribute a repudiated implication to that opinion is to affirm that it means what this Court has declared again and again was not intended. The painstaking effort there to point out that certain businesses like ferries, mills, &c. were subject to legislative control at common law, and then to show that warehousing at Chicago occupied like relation to the public, would have been pointless if "affected with a public interest" only means that the public has serious concern about the perpetuity and success of the undertaking. That is true of almost all ordinary business affairs. Nothing in the [291 U.S. 556] opinion lends support, directly or otherwise, to the notion that, in times of peace, a legislature may fix the price of ordinary commodities—grain, meat, milk, cotton, &c.

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Of the assailed statute, the Court of Appeals says—

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It first declares that milk has been selling too cheaply in the State of New York, and has thus created a temporary emergency; this emergency is remedied by making the sale of milk at a low price a crime; the question of what is a low price is determined by the majority vote of three officials.

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Also—"With the wisdom of the legislation we have naught to do. It may be vain to hope by laws to oppose the general course of trade." Maybe, because of this conclusion, it said nothing concerning the possibility of obtaining increase of prices to producers—the thing definitely aimed at—through the means adopted.

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But, plainly, I think, this Court must have regard to the wisdom of the enactment. At least we must inquire concerning its purpose, and decide whether the means proposed have reasonable relation to something within legislative power—whether the end is legitimate, and the means appropriate. If a statute to prevent conflagrations should require householders to pour oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood, we could hardly uphold it. Here, we find direct interference with guaranteed rights defended upon the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper, and the means adopted have reasonable relation to it, this action is unjustifiable.

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The court below has not definitely affirmed this necessary relation; it has not attempted to indicate how higher charges at stores to impoverished customers when the output [291 U.S. 557] is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm. The Legislative Committee pointed out as the obvious cause of decreased consumption, notwithstanding low prices, the consumers' reduced buying power. Higher store prices will not enlarge this power, nor will they decrease production. Low prices will bring less cows only after several years. The prime causes of the difficulties will remain. Nothing indicates early decreased output. Demand at low prices being wholly insufficient, the proposed plan is to raise and fix higher minimum prices at stores, and thereby aid the producer whose output and prices remain unrestrained! It is not true, as stated, that "the State seeks to protect the producer by fixing a minimum price for his milk." She carefully refrained from doing this, but did undertake to fix the price after the milk had passed to other owners. Assuming that the views and facts reported by the Legislative Committee are correct, it appears to me wholly unreasonable to expect this legislation to accomplish the proposed end—increase of prices at the farm. We deal only with Order No. 5, as did the court below. It is not merely unwise; it is arbitrary and unduly oppressive. Better prices may follow, but it is beyond reason to expect them as the consequent of that order. The Legislative Committee reported—

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It is recognized that the dairy industry of the State cannot be placed upon a profitable basis without a decided rise in the general level of commodity prices.

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Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to standards long accepted—complete destruction may follow; but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him [291 U.S. 558] with less than nine cents it says—You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance, but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters! And this is true although the storekeeper himself may have bought from a willing producer at half that rate, and must sell quickly or lose his stock through deterioration. The fanciful scheme is to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!

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The statement by the court below that—

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Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract…; with the natural law of supply and demand,

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is obviously correct. But another, that

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statutes aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer are to be interpreted with that degree of liberality which is essential to the attainment of the end in view

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conflicts with views of Constitutional rights accepted since the beginning. An end, although apparently desirable, cannot justify inhibited means. Moreover the challenged act was not designed to stimulate production—there was too much milk for the demand, and no prospect of less for several years; also, "standards of prices" at which the producer might sell were not prescribed. The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if, for the moment, this may seem advantageous to the public. And the adoption of any "concept of jurisprudence" which permits facile disregard of the Constitution, as long interpreted and respected, will inevitably lead to its destruction. Then, all rights will be subject [291 U.S. 559] to the caprice of the hour; government by stable laws will pass.

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The somewhat misty suggestion below, that condemnation of the challenged legislation would amount to holding "that the due process clause has left milk producers unprotected from oppression," I assume, was not intended as a material contribution to the discussion upon the merits of the cause. Grave concern for embarrassed farmers is everywhere, but this should neither obscure the rights of others nor obstruct judicial appraisement of measures proposed for relief. The ultimate welfare of the producer, like that of every other class, requires dominance of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts.

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The judgment of the court below should be reversed.

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MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER authorize me to say that they concur in this opinion.

Footnotes

ROBERTS, J., lead opinion (Footnotes)

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1. People v. Nebbia, 262 N.Y. 259, 186 N.E. 694.

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2. Chapter 158 of the Laws of 1933 added a new Article (numbered 25) to the Agriculture and Markets Law. The reasons for the enactment are set forth in the first section (§ 300). So far as material they are: that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices exist in the production, sale and distribution of milk and milk products, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled; these conditions are a menace to the public health, welfare and reasonable comfort; the production and distribution of milk is a paramount industry upon which the prosperity of the state in a great measure depends; existing economic conditions have largely destroyed the purchasing power of milk producers for industrial products, have broken down the orderly production and marketing of milk, and have seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. The danger to public health and welfare consequent upon these conditions is declared to be immediate, and to require public supervision and control of the industry to enforce proper standards of production, sanitation and marketing.

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The law then (§ 301) defines the terms used; declaring, inter alia, that "milk dealer" means any person who purchases or handles milk within the state, for sale in the state, or sells milk within the state except when consumed on the premises where sold, and includes within the definition of "store" a grocery store.

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By § 302, a state Milk Control Board is established, and, by § 303, general power is conferred upon that body to supervise and regulate the entire milk industry of the state, subject to existing provisions of the public health law, the public service law, the state sanitary code, and local health ordinances and regulations; to act as arbitrator or mediator in controversies arising between producers and dealers, or groups within those classes, and to exercise certain special powers to which reference will be made.

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The Board is authorized to promulgate orders and rules which are to have the force of law (§ 304); to make investigations (§ 305); to enter and inspect premises in which any branch of the industry is conducted, and examine the books, papers and records of any person concerned in the industry (§ 306); to license all milk dealers and suspend or revoke licenses for specified causes, its action in these respects being subject to review by certiorari (§ 308), and to require licensees to keep records (§ 309) and to make reports (§ 310).

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A violation of any provision of Article 25 or of any lawful order of the Board is made a misdemeanor (§ 307).

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By § 312, it is enacted (a):

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The board shall ascertain by such investigations and proofs as the emergency permits, what prices for milk in the several localities and markets of the state, and under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk…and be most in the public interest. The board shall take into consideration all conditions affecting the milk industry including the amount necessary to yield a reasonable return to the producer and to the milk dealer.

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(b) After such investigation, the board shall, by official order, fix minimum and maximum wholesale and retail prices to be charged by milk dealers to consumers, by milk dealers to stores for consumption on the premises or for resale to consumers, and by stores to consumers for consumption off the premises where sold. It is declared

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(c) that the intent of the law is that the benefit of any advance in price granted to dealers shall be passed on to the producer, and if the board, after due hearing, finds this has not been done, the dealer's license may be revoked, and the dealer may be subjected to the penalties mentioned in the Act. The board may (d) after investigation fix the prices to be paid by dealers to producers for the various grades and classes of milk.

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Subsection (e), on which the prosecution in the present case is founded, is quoted in the text.

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Alterations may be made in existing orders after hearing of the interested parties (f) and orders made are subject to review on certiorari. The board (§ 319) is to continue with all the powers and duties specified until March 31, 1934, at which date it is to be deemed abolished. The Act contains further provisions not material to the present controversy.

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3. Laws of 1862, Chap. 467.

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4. Laws of 1893, Chap. 338. Laws of 1909, Chap. 9; Consol.Laws, Chap. 1.

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5. Laws of 1927, Chap. 207; Cahill's Consolidated Laws of New York, 1930, Chap. 1.

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6. Many of these regulations have been unsuccessfully challenged on constitutional grounds. See People v. Cipperly, 101 N.Y. 634, 4 N.E. 107; People v. Hill, 44 Hun 472; People v. West, 106 N.Y. 293, 12 N.E. 610; People v. Kibler, 106 N.Y. 321, 12 N.E. 795; People v. Hills, 64 App.Div. 584, 72 N.Y.S. 340; People v. Bowen, 182 N.Y. 1; 74 N.E. 489; Lieberman v. Van de Carr, 199 U.S. 552; St. John v. New York, 201 U.S. 633; People v. Koster, 121 App.Div. 852, 106 N.Y.S. 793; People v. Abramson, 208 N.Y. 138, 101 N.E. 849; People v. Frudenberg, 209 N.Y. 218, 103 N.E. 166; People v. Beakes Dairy Co., 222 N.Y. 416, 119 N.E. 115; People v. Teuscher, 248 N.Y. 454, 162 N.E. 484; People v. Perretta, 253 N.Y. 305; 171 N.E. 72; People v. Ryan, 230 App.Div. 252, 243 N.Y.S. 644; Mintz v. Baldwin, 289 U.S. 346.

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7. See Cahill's Consolidated Laws of New York, 1930, and Supplements to and including 1933: Chap. 21, §§ 270-274; Chap. 41, §§ 435, 438, 1740, 1764, 2350-2357; Chap. 46, §§ 6-a, 20, 21.

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8. Munn v. Illinois, 94 U.S. 113, 124, 125; Orient Ins. Co. v. Daggs, 172 U.S. 557, 566; Northern Securities Co. v. United States, 193 U.S. 197, 351, and see the cases cited in notes 16-23, infra.

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9. Allgeyer v. Louisiana, 165 U.S. 578, 591; Atlantic Coast Line v. Riverside Mills, 219 U.S. 186, 202; Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567; Stephenson v. Binford, 287 U.S. 251, 274.

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10. Gibbons v. Ogden, 9 Wheat. 1, 203.

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11. New York v. Miln, 11 Pet. 102, 139.

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12. License Cases, 5 How. 504, 583

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13. United States v. Dewitt, 9 Wall. 41; Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 215.

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14. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228-229.

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15. Barbier v. Connolly, 113 U.S. 27, 31; Chicago, B. & Q. R. Co. v. Drainage Comm'rs, 200 U.S. 561, 592.

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16. Clark v. Nash, 198 U.S. 361; Strickley v. Highland Boy Mining Co., 200 U.S. 527.

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17. Cusack Co. v. Chicago, 242 U.S. 526; St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269.

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18. Packer Corp. v. Utah, 285 U.S. 105.

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19. Jackman v. Rosenbaum Co., 260 U.S. 22.

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20. Fischer v. St. Louis, 194 U.S. 361; Welch v. Swasey, 214 U.S. 91; Hadacheck v. Sebastian, 239 U.S. 394; Reinman v. Little Rock, 237 U.S. 171.

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21. Euclid v. Ambler Realty Co., 272 U.S. 365; Zahn v. Board of Public Works, 274 U.S. 325; Gorieb v. Fox, 274 U.S. 603.

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22. Yick Wo v. Hopkins, 118 U.S. 356, 369.

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23. Terrace v. Thompson, 263 U.S. 197; Webb v. O'Brien, 263 U.S. 313.

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24. Forbidding transmission of lottery tickets, Lottery Case, 188 U.S. 321; transportation of prize fight films, Weber v. Freed, 239 U.S. 325; the shipment of adulterated food, Hipolite Egg Co. v. United States, 220 U.S. 45; transportation of women for immoral purposes, Hoke v. United States, 227 U.S. 308; Caminetti v. United States, 242 U.S. 470; transportation of intoxicating liquor, Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311; requiring the public weighing of grain, Merchants Exchange v. Missouri, 248 U.S. 365; regulating the size and weight of loaves of bread, Schmidinger v. Chicago, 226 U.S. 578; Petersen. Baking Co. v. Bryan, 290 U.S. 570; regulating the size and character of packages in which goods are sold, Armour & Co. v. North Dakota, 240 U.S. 510; regulating sales in bulk of a stock in trade, Lemieux v. Young, 211 U.S. 489; Kidd, Dater & Price Co. v. Musselman Grocer Co., 217 U.S. 461; sales of stocks and bonds, Hall v. Geiger-Jones Co., 242 U.S. 539; Merrick v. Halsey & Co., 242 U.S. 568; requiring fluid milk offered for sale to be tuberculin tested, Adams v. Milwaukee, 228 U.S. 572; regulating sales of grain by actual weight, and abrogating exchange rules to the contrary, House v. Mayes, 219 U.S. 270; subjecting state banks to assessments for a state depositors' guarantee fund, Noble State Bank v. Haskell, 219 U.S. 104.

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25. Prescribing hours of labor in particular occupations, Holden v. Hardy, 169 U.S. 366; B. & O. R. Co. v. I.C.C., 221 U.S. 612; Bunting v. Oregon, 243 U.S. 426; prohibiting child labor, Sturges & Burn Co. v. Beauchamp, 231 US. 320; forbidding night work by women, Radice v. New York, 264 U.S. 292; reducing hours of labor for women, Muller v. Oregon, 208 U.S. 412; Riley v. Massachusetts, 232 U.S. 671; Miller v. Wilson, 236 U.S. 373; fixing the time for payment of seamen's wages, Patterson v. Bark Eudora, 190 U.S. 169; Strathearn S.S. Co. v. Dillon, 252 U.S. 348; of wages of railroad employes, St. Louis, I. M. & St.P. Ry. Co. v. Paul, 173 U.S. 404; Erie R. Co. v. Williams, 233 U.S. 685; regulating the redemption of store orders issued for wages, Knoxville Iron Co. v. Harbison, 183 US. 13; Keokee Consolidated Coke Co. v. Taylor, 234 U.S. 224; regulating the assignment of wages, Mutual Loan Co. v. Martell, 222 US. 225; requiring payment for coal mined on a fixed basis other than that usually practiced, McLean v. Arkansas, 211 U.S. 539; Rail & River Coal Co. v. Yaple, 236 U.S. 38; establishing a system of compulsory workmen's compensation, New York Central R. Co. v. White, 243 U.S. 188; Mountain Timber Co. v. Washington, 243 U.S. 219.

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26. Sales of stock or grain on margin, Booth v. Illinois, 184 U.S. 425; Brodnax v. Missouri, 219 U.S. 285; Otis v. Parker, 187 U.S. 606; the conduct of pool and billiard rooms by aliens, Clarke v. Deckebach, 274 U.S. 392; the conduct of billiard and pool rooms by anyone, Murphy v. California, 225 U.S. 623; the sale of liquor, Mugler v. Kansas, 123 U.S. 623; the business of soliciting claims by one not an attorney, McCloskey v. Tobin, 252 U.S. 107; manufacture or sale of oleomargarine, Powell v. Pennsylvania, 127 U.S. 678; hawking and peddling of drugs or medicines, Baccus v. Louisiana, 232 U.S. 334; forbidding any other than a corporation to engage in the business of receiving deposits, Dillingham v. McLaughlin, 264 U.S. 370, or any other than corporations to do a banking business, Shallenberger v. First State Bank, 219 U.S. 114.

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27. Physicians, Dent v. West Virginia, 129 U.S. 114; Watson v. Maryland, 218 U.S. 173; Crane v. Johnson, 242 U.S. 339; Hayman v. Galveston, 273 U.S. 414; dentists, Douglas v. Noble, 261 U.S. 165; Graves v. Minnesota, 272 U.S. 425; employment agencies, Brazee v. Michigan, 241 U.S. 340; public weighers of grain, Merchants Exchange v. Missouri, 248 U.S. 365; real estate brokers, Bratton v. Chandler, 260 U.S. 110; insurance agents, La Tourette v. McMaster, 248 U.S. 465; insurance companies, German Alliance Ins. Co. v. Lewis, 233 U.S. 389; the sale of cigarettes, Gundling v. Chicago, 177 U.S. 183; the sale of spectacles, Roschen v. Ward, 279 U.S. 337; private detectives, Lehon v. Atlanta, 242 U.S. 53; grain brokers, Chicago Board of Trade v. Olsen, 262 U.S. l; business of renting automobiles to be used by the renter upon the public streets, Hodge Co. v. Cincinnati, 284 U.S. 335.

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28. Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210. Compare Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 21-22.

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29. Contracts of carriage, Atlantic Coast Line v. Riverside Mills, 219 U.S. 186; agreements substituting relief or insurance payments for actions for negligence, Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549; affecting contracts of insurance, Orient Ins. Co. v. Daggs, 172 US. 557; Whitfield v. Aetna Life Ins. Co., 205 U.S. 489; National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71; Hardware Dealers Mut. F. I. Co. v. Glidden Co., 284 U.S. 151; contracts for sale of real estate, Selover, Bates & Co. v. Walsh, 226 U.S. 112; contracts for sale of farm machinery, Advance-Rumely Co. v. Jackson, 287 U.S. 283; bonds for performance of building contracts, Hartford Accident & Indemnity Co. v. Nelson Mfg. Co., 291 U.S. 352.

1934, Nebbia v. New York, 291 U.S. 559

30. Central Lumber Co. v. South Dakota, 226 U.S. 157.

1934, Nebbia v. New York, 291 U.S. 559

31. Rast v. Van Deman & Lewis Co., 240 U.S. 342.

1934, Nebbia v. New York, 291 U.S. 559

32. Van Camp & Sons Co. v. American Can Co., 278 U.S. 245.

1934, Nebbia v. New York, 291 U.S. 559

33. State statutes: Smiley v. Kansas, 196 U.S. 447; National Cotton Oil Co. v. Texas, 197 U.S. 115; Waters-Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86; Hammond Packing Co. v. Arkansas, 212 U.S. 322; Grenada Lumber Co. v. Mississippi, 217 U.S. 433; International Harvester Co. v. Missouri, 234 U.S. 199.

1934, Nebbia v. New York, 291 U.S. 559

Federal statutes: United States v. Joint Traffic Assn., 171 U.S. 505, 559, 571-573; Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228-229; Northern Securities Co. v. United States, 193 U.S. 197, 332; United Shoe Mach. Corp. v. United States, 258 U.S. 451, 462-464.

1934, Nebbia v. New York, 291 U.S. 559

34. Slaughter-House Cases, 16 Wall. 36; Conway v. Taylor's Executor, 1 Black 603; Crowley v. Christensen, 137 U.S. 86.

1934, Nebbia v. New York, 291 U.S. 559

35. Madera Water Works v. Madera, 228 U.S. 454; Jones v. Portland, 245 U.S. 217; Green v. Frazier, 253 U.S. 233; Standard Oil Co. v. Lincoln, 275 U.S. 504.

1934, Nebbia v. New York, 291 U.S. 559

36. As instances of Acts of Congress regulating private businesses consistently with the due process guarantee of the Fifth Amendment, the court cites those fixing rates to be charged at private wharves, by chimney-sweeps and hackneys, cartmen, wagoners and draymen in the District of Columbia (p. 125).

1934, Nebbia v. New York, 291 U.S. 559

37. Chicago, B. & Q. R. Co. v. Iowa, 94 U.S. 155. It will be noted that the emphasis is here reversed, and the carrier is said to be in a business affecting the public, not that the business is somehow affected by an interest of the public

1934, Nebbia v. New York, 291 U.S. 559

38. Peik v. C. & N.W. Ry. Co., 94 U.S. 164.

1934, Nebbia v. New York, 291 U.S. 559

39. See Wolff Packing Co. v. Industrial Court, supra; Tyson & Bro. v. Banton, 273 U.S. 418; Ribnik v. McBride, 277 U.S. 350; Williams v. Standard Oil Co., 278 U.S. 235.

1934, Nebbia v. New York, 291 U.S. 559

40. See McLean v. Arkansas, 211 U.S. 539, 547; Tanner v. Little, 240 U.S. 369, 385; Green v. Frazier, 253 U.S. 233, 240; O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 257-258; Gant v. Oklahoma City, 289 U.S. 98, 102.

1934, Nebbia v. New York, 291 U.S. 559

41. See note 32, supra.

1934, Nebbia v. New York, 291 U.S. 559

42. Public Service Comm'n v. Great Northern Utilities Co., 289 U.S. 130; Stephenson v. Binford, supra. See the Transportation Act, 1920, 41 Stat. 456, §§ 418, 422, amending § 15 of the Interstate Commerce Act, and compare Anchor Coal Co. v. United States, 25 F.2d 462; New England Divisions Case, 261 U.S. 184, 190, 196.

1934, Nebbia v. New York, 291 U.S. 559

43. See Public Service Comm'n v. Great Northern Utilities Co., supra.

MCREYNOLDS, J., separate opinion (Footnotes)

1934, Nebbia v. New York, 291 U.S. 559

\* Official Order No. 5, effective April 17, 1933.

1934, Nebbia v. New York, 291 U.S. 559

Ordered that, until further notice and subject to the exceptions hereinafter made, the following shall be the minimum prices to be charged for all milk and cream in any and all cities and villages of the State of New York of more than One Thousand (1,000) population, exclusive of New York City and the Counties of Westchester, Nassau and Suffolk:

1934, Nebbia v. New York, 291 U.S. 559

Milk—Quarts in bottles: By milk dealers to consumers 10 cents; by milk dealers to stores 8 cents; by stores to consumers 9 cents.

1934, Nebbia v. New York, 291 U.S. 559

 Pints in bottles: By milk dealers to consumers 6 cents; by milk dealers to stores 5 cents; by stores to consumers 6 cents….

1934, Nebbia v. New York, 291 U.S. 559

The Control Act declares:

1934, Nebbia v. New York, 291 U.S. 559

"Milk dealer" means any person who purchases or handles milk within the state, for sale in this state, or sells milk within the state except when consumed on the premises where sold. Each corporation which if a natural person would be a milk dealer within the meaning of this article, and any subsidiary of such corporation, shall be deemed a milk dealer within the meaning of this definition. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer.

1934, Nebbia v. New York, 291 U.S. 559

"Producer" means a person producing milk within the State of New York.

1934, Nebbia v. New York, 291 U.S. 559

"Store" means a grocery store, hotel, restaurant, soda fountain, dairy products store and similar mercantile establishment.

1934, Nebbia v. New York, 291 U.S. 559

"Consumer" means any person, other than a milk dealer, who purchases milk for fluid consumption.

President Roosevelt's Veto of the Bonus Bill, 1935

Title: President Roosevelt's Veto of the Bonus Bill

Author: Franklin D. Roosevelt

Date: May 22, 1935

Source: Public Papers of the Presidents, F. D. Roosevelt, 1935, Item 69

Public Papers of FDR, 1935, Item 69

Mr. Speaker, Members of the House of Representatives:

Public Papers of FDR, 1935, Item 69

Two days ago a number of gentlemen from the House of Representatives called upon me and with complete propriety presented their reasons for asking me to approve the House of Representatives bill providing for the immediate payment of adjusted service certificates. In the same spirit of courtesy I am returning this bill today to the House of Representatives.

Public Papers of FDR, 1935, Item 69

As I told the gentlemen who waited upon me, I have never doubted the good faith lying behind the reasons which have caused them and the majority of the Congress to advocate this bill. In the same spirit I come before you dispassionately and in good faith to give you, as simply as I can, the reasons which compel me to give it my disapproval.

Public Papers of FDR, 1935, Item 69

Under the Constitution, I address this message to the House of Representatives, but at the same time, I am glad that the Senate by coming here in joint session gives me opportunity to give my reasons in person to the other House of the Congress.

Public Papers of FDR, 1935, Item 69

As to the right and propriety of the President in addressing the Congress in person, I am very certain that I have never in the past disagreed, and will never in the future disagree, with the Senate or the House of Representatives as to the constitutionality of the procedure. With your permission, I should like to continue from time to time to act as my own messenger.

Public Papers of FDR, 1935, Item 69

Eighteen years ago the United States engaged in the World War. A Nation of one hundred and twenty million people was united in the purpose of victory. The millions engaged in agriculture toiled to provide the raw materials and foodstuffs for our armies and for the Nations with whom we were associated. Many other millions employed in industry labored to create the materials for the active conduct of the war on land and sea.

Public Papers of FDR, 1935, Item 69

Out of this vast army, consisting of the whole working population of the Nation, four and three-quarter million men volunteered or were drafted into the armed forces of the United States. One-half of them remained within our American continental limits. The other half served overseas; and of these, one million four hundred thousand saw service in actual combat.

Public Papers of FDR, 1935, Item 69

The people and the Government of the United States have shown a proper and generous regard for the sacrifices and patriotism of all of the four and three-quarter million men who were in uniform no matter where they served.

Public Papers of FDR, 1935, Item 69

At the outbreak of the war, the President and the Congress sought and established an entirely new policy in order to guide the granting of financial aid to soldiers and sailors. Remembering the unfortunate results that came from the lack of a veterans' policy after the Civil War, they determined that a prudent and sound principle of insurance should supplant the uncertainties and unfairness of direct bounties. At the same time, their policy encompassed the most complete care for those who had suffered disabilities in service. With respect to the grants made within the lines of this general policy, the President and the Congress have fully recognized that those who served in uniform deserved certain benefits to which other citizens of the Republic were not entitled, and in which they could not participate.

Public Papers of FDR, 1935, Item 69

In line with these sound and fair principles, many benefits have been provided for veterans.

Public Papers of FDR, 1935, Item 69

During the war itself provision was made for Government allowances for the families and other dependents of enlisted men in service. Disability and death compensation was provided for casualties in line of duty.

Public Papers of FDR, 1935, Item 69

The original provisions for these benefits have been subsequently changed and liberalized many times by the Congress. Later generous presumptions for veterans who became ill after the termination of the war were written into the statute to help veterans in their claims for disability. As a result of this liberal legislation for disability and for death compensation, one million one hundred and forty thousand men and women have been benefited.

Public Papers of FDR, 1935, Item 69

During the war the Government started a system of voluntary insurance at peace-time rates for men and women in the service.

Public Papers of FDR, 1935, Item 69

Generous provision has been made for hospitalization, vocational training and rehabilitation of veterans. You are familiar with this excellent care given to the sick and disabled.

Public Papers of FDR, 1935, Item 69

In addition to these direct benefits, the Congress has given recognition to the interest and welfare of veterans in employment matters, through veteran preference in the United States civil service and in the selection of employees under the Public Works Administration, through the establishment of a veterans' employment unit in the Department of Labor, and through provisions favoring veterans in the selection of those employed in the Civilian Conservation Corps. Many States have likewise given special bonuses in cash and veterans' preferences in State and local public employment.

Public Papers of FDR, 1935, Item 69

Furthermore, unemployed veterans as a group have benefited more largely than any other group from the expenditure of the great Public Works appropriation of three billion three hundred million dollars made by the Congress in 1933, and under which we are still operating. In like manner the new four-billion-dollar Work Relief Act seeks to give employment to practically every veteran who is receiving relief.

Public Papers of FDR, 1935, Item 69

We may measure the benefits extended from the fact that there has been expended up to the end of the last fiscal year more than $7,800,000,000 for these items in behalf of the veterans of the World War, not including sums spent for home or work relief. With our current annual expenditures of some $450,000,000 and the liquidation of outstanding obligations under term insurance and the payment of the service certificates, it seems safe to predict that by the year 1945 we will have expended $13,500,000,000. This is a sum equal to more than three-fourths of the entire cost of our participation in the World War, and ten years from now most of the veterans of that war will be barely past the half century mark.

Public Papers of FDR, 1935, Item 69

Payments have been and are being made only to veterans of the World War and their dependents, and not to civilian workers who helped to win that war.

Public Papers of FDR, 1935, Item 69

In the light Of our established principles and policies let us consider the case of adjusted compensation. Soon after the close of the war a claim was made by several veterans' organizations that they should be paid some adjusted compensation for their time in uniform. After a complete and fair presentation of the whole subject, followed by full debate in the Congress of the United States, a settlement was reached in 1924.

Public Papers of FDR, 1935, Item 69

This settlement provided for adjustment in compensation during service by an additional allowance per day for actual service rendered. Because cash payment was not to be made immediately, this basic allowance was increased by 25 percent and to this was added compound interest for 20 years, the whole to be paid in 1945. The result of this computation was that an amount two and one-half times the original grant would be paid at maturity.

Public Papers of FDR, 1935, Item 69

Taking the average case as an example, the Government acknowledged a claim of $400 to be due. This $400, under the provisions of the settlement, with the addition of the 25 percent for deferred payment and the compound interest from that time until 1945, would amount to the sum of $1,000 in 1945. The veteran was thereupon given a certificate containing an agreement by the Government to pay him this $1,000 in 1945 or to pay it to his family if he died at any time before 1945. In effect, it was a paid-up endowment policy in the average case for $1,000 payable in 1945, or sooner in the event of death. Under the provisions of this settlement the total obligation of $1,400,000,000 in 1924 produced a maturity or face value of $3,500,000,000 in 1945.

Public Papers of FDR, 1935, Item 69

Since 1924 the only major change in the original settlement was the act of 1931, under which veterans were authorized to borrow up to 50 percent of the face value of their certificates as of 1945. Three million veterans have already borrowed under this provision an amount which, with interest charges, totals $1,700,000,000.

Public Papers of FDR, 1935, Item 69

The bill before me provides for the immediate payment of the 1945 value of the certificates. It means paying $1,600,000,000 more than the present value of the certificates. It requires an expenditure of more than $2,200,000,000 in cash for this purpose. It directs payment to the veterans of a much larger sum than was contemplated in the 1924 settlement. It is nothing less than a complete abandonment of that settlement. It is a new straight gratuity or bounty to the amount of $2,600,000,000. It destroys the insurance protection for the dependents of the veterans provided in the original plan. For the remaining period of 10 years they will have lost this insurance.

Public Papers of FDR, 1935, Item 69

This proposal, I submit, violates the entire principle of veterans' benefits so carefully formulated at the time of the war and also the entire principle of the adjusted-certificate settlement of 1924.

Public Papers of FDR, 1935, Item 69

What are the reasons presented in this bill for this fundamental change in policy? They are set forth with care in a number of "whereas" clauses at the beginning of the bill.

Public Papers of FDR, 1935, Item 69

The first of these states as reasons for the cash payment of these certificates at this time: That it will increase the purchasing power of millions of the consuming public; that it will provide relief for many who are in need because of economic conditions; and that it will lighten the relief burden of cities, counties, and States. The second states that payment will not create any additional debt. The third states that payment now will be an effective method of spending money to hasten recovery.

Public Papers of FDR, 1935, Item 69

These are the enacted reasons for the passage of this bill. Let me briefly analyze them.

Public Papers of FDR, 1935, Item 69

First, the spending of this sum, it cannot be denied, would result in some expansion of retail trade. But it must be noted that retail trade has already expanded to a condition that compares favorably with conditions before the depression. However, to resort to the kind of financial practice provided in this bill would not improve the conditions necessary to expand 'those industries in which we have the greatest unemployment. The Treasury notes issued under the terms of this bill we know from past experience would return quickly to the banks. We know, too, that the banks have at this moment more than ample credit with which to expand the activities of business and industry generally. The ultimate effect of this bill will not, in the long run, justify the expectations that have been raised by those who argue for it.

Public Papers of FDR, 1935, Item 69

The next reason in the first "whereas" clause is that present payment will provide relief for many who are in need because of economic conditions. The Congress has just passed an act to provide work relief for such citizens. Some veterans are on the relief rolls, though relatively not nearly so many as is the case with nonveterans. Assume, however, that such a veteran served in the United States or overseas during the war; that he came through in fine physical shape as most of them did; that he received an honorable discharge; that he is today 38 years old and in full possession of his faculties and health; that like several million other Americans he is receiving from his Government relief and assistance in one of many forms—I hold that that able-bodied citizen should be accorded no treatment different from that accorded to other citizens who did not wear a uniform during the World War.

Public Papers of FDR, 1935, Item 69

The third reason given in the first "whereas" clause is that payment today would lighten the relief burden of municipalities. Why, I ask, should the Congress lift that burden in respect only to those who wore the uniform? Is it not better to treat every able-bodied American alike and to carry out the great relief program adopted by this Congress in a spirit of equality to all? This applies to every other unit of government through out the Nation.

Public Papers of FDR, 1935, Item 69

The second "whereas" clause, which states that the payment of certificates will not create an additional debt, raises a fundamental question of sound finance. To meet a claim of one group by this deceptively easy method of payment will raise similar demands for the payment of claims of other groups. It is easy to see the ultimate result of meeting recurring demands by the issuance of Treasury notes. It invites an ultimate reckoning in uncontrollable prices and in the destruction of the value of savings, that will strike most cruelly those like the veterans who seem to be temporarily benefited. The first person injured by sky-rocketing prices is the man on a fixed income. Every disabled veteran on pension or allowance is on fixed income. This bill favors the able-bodied veteran at the expense of the disabled veteran.

Public Papers of FDR, 1935, Item 69

Wealth is not created, nor is it more equitably distributed by this method. A government, like an individual, must ultimately meet legitimate obligations out of the production of wealth by the labor of human beings applied to the resources of nature. Every country that has attempted the form of meeting its obligations which is here provided has suffered disastrous consequences.

Public Papers of FDR, 1935, Item 69

In the majority of cases printing-press money has not been retired through taxation. Because of increased costs, caused by inflated prices, new issue has followed new issue, ending in the ultimate wiping out of the currency of the afflicted country. In a few cases, like our own in the period of the Civil War, the printing of Treasury notes to cover an emergency has fortunately not resulted in actual disaster and collapse but has nevertheless caused this Nation untold troubles, economic and political, for a whole generation.

Public Papers of FDR, 1935, Item 69

The statement in this same second "whereas" clause that payment will discharge and retire an acknowledged contract obligation of the Government is, I regret to say, not in accordance with the fact. It wholly omits and disregards the fact that this contract obligation is due in 1945 and not today.

Public Papers of FDR, 1935, Item 69

If I, as an individual, owe you, an individual member of the Congress, one thousand dollars payable in 1945, it is not a correct statement for you to tell me that I owe you one thousand dollars today. As a matter of practical fact, if I put $750 into a Government savings bond today and make that bond out in your name you will get one thousand dollars on the due date, ten years from now. My debt to you today, therefore, cannot under the remotest possibility be considered more than $750.

Public Papers of FDR, 1935, Item 69

The final "whereas" clause, stating that spending the money is the most effective means of hastening recovery, is so ill considered that little comment is necessary. Every authorization of expenditure by the 73d Congress in its session of 1933 and 1934, and every appropriation by the 74th Congress to date, for recovery purposes, has been predicated not on the mere spending of money to hasten recovery, but on the sounder principle of preventing the loss of homes and farms, of saving industry from bankruptcy, of safeguarding bank deposits, and most important of all—of giving relief and jobs through public work to individuals and families faced with starvation. These greater and broader concerns of the American people have a prior claim for our consideration at this time. They have the right of way.

Public Papers of FDR, 1935, Item 69

There is before this Congress legislation providing old-age benefits and a greater measure of security for all workers against the hazards of unemployment. We are also meeting the pressing necessities of those who are now unemployed and in need of immediate relief. In all of this every veteran shares.

Public Papers of FDR, 1935, Item 69

To argue for this bill as a relief measure is to indulge in the fallacy that the welfare of the country can be generally served by extending relief on some basis other than actual deserving need.

Public Papers of FDR, 1935, Item 69

The core of the question is that a man who is sick or under some other special disability because he was a soldier should certainly be assisted as such. But if a man is suffering from economic need because of the depression, even though he is a veteran, he must be placed on a par with all of the other victims of the depression. The veteran who is disabled owes his condition to the war. The healthy veteran who is unemployed owes his troubles to the depression. Each presents a separate and different problem. Any attempt to mingle the two problems is to confuse our efforts.

Public Papers of FDR, 1935, Item 69

Even the veteran who is on relief will benefit only temporarily by this measure, because the payment of this sum to him will remove him from the group entitled to relief if the ordinary rules of relief agencies are followed. For him this measure would give but it would also take away. In the end he would be the loser.

Public Papers of FDR, 1935, Item 69

The veteran who suffers from this depression can best be aided by the rehabilitation of the country as a whole. His country with honor and gratitude returned him at the end of the war to the citizenry from which he came. He became once more a member of the great civilian population. His interests became identified with its fortunes and also with its misfortunes.

Public Papers of FDR, 1935, Item 69

Some years ago it was well said by the distinguished senior Senator from Idaho that: "The soldier of this country cannot be aided except as the country itself is rehabilitated. The soldier cannot come back except as the people as a whole come back. The soldier cannot prosper unless the people prosper. He has now gone back and intermingled and become a part of the citizenship of the country; he is wrapped up in its welfare or in its adversity. The handing out to him of a few dollars will not benefit him under such circumstances, whereas it will greatly injure the prospects of the country and the restoration of normal conditions."

Public Papers of FDR, 1935, Item 69

It is generally conceded that the settlement by adjusted-compensation certificates made in 1924 was fair and it was accepted as fair by the overwhelming majority of World War veterans themselves.

Public Papers of FDR, 1935, Item 69

I have much sympathy for the argument that some who remained at home in civilian employ enjoyed special privilege and unwarranted remuneration. That is true—bitterly true—but a recurrence of that type of war profiteering can and must be prevented in any future war.

Public Papers of FDR, 1935, Item 69

I invite the Congress and the veterans with the great masses of the American population to join with me in progressive efforts to root a recurrence of such injustice out of American life. But we should not destroy privilege and create new privilege at the same time. Two wrongs do not make a right.

Public Papers of FDR, 1935, Item 69

The herculean task of the United States Government today is to take care that its citizens have the necessities of life. We are seeking honestly and honorably to do this, irrespective of class or group. Rightly, we give preferential treatment to those men who were wounded, disabled, or who became ill as a result of war service. Rightly, we give care to those who subsequently have become ill. The others—and they represent the great majority—are today in the prime of life, are today in full bodily vigor. They are American citizens who should be accorded equal privileges and equal rights to enjoy life, liberty, and the pursuit of happiness—no less and no more.

Public Papers of FDR, 1935, Item 69

It is important to make one more point. In accordance with the mandate of the Congress, our Budget has been set. The public has accepted it. On that basis this Congress has made and is making its appropriations. That Budget asked for appropriations in excess of receipts to the extent of four billions of dollars. The whole of that deficit was to be applied for work relief for the unemployed. That was a single-minded, definite purpose. Every unemployed veteran on the relief rolls was included in that proposed deficit; he will be taken care of out of it.

Public Papers of FDR, 1935, Item 69

I cannot in honesty assert to you that to increase that deficit this year by two billion two hundred million dollars will in itself bankrupt the United States. Today the credit of the United States is safe. But it cannot ultimately be safe if we engage in a policy of yielding to each and all of the groups that are able to enforce upon the Congress claims for special consideration. To do so is to abandon the principle of government by and for the American people and to put in its place government by and for political coercion by minorities. We can afford all that we need; but we cannot afford all that we want.

Public Papers of FDR, 1935, Item 69

I do not need to be a prophet to assert that if these certificates, due in 1945, are paid in full today, every candidate for election to the Senate or to the House of Representatives will in the near future be called upon in the name of patriotism to support general pension legislation for all veterans, regardless of need or age.

Public Papers of FDR, 1935, Item 69

Finally, I invite your attention to the fact that, solely from the point of view of the good credit of the United States, the complete failure of the Congress to provide additional taxes for an additional expenditure of this magnitude would in itself and by itself alone warrant disapproval of this measure.

Public Papers of FDR, 1935, Item 69

I well know the disappointment that the performance of my duty in this matter will occasion to many thousands of my fellow citizens. I well realize that some who favor this bill are moved by a true desire to benefit the veterans of the World War and to contribute to the welfare of the Nation. These citizens will, however, realize that I bear an obligation, as President and as Commander-in-Chief of the Army and Navy, which extends to all groups, to all citizens, to the present and to the future. I cannot be true to the office I hold if I do not weigh the claims of all in the scales of equity. I cannot swerve from this moral obligation.

Public Papers of FDR, 1935, Item 69

I am thinking of those who served their country in the Army and in the Navy during the period which convulsed the entire civilized world. I saw their service at first-hand at home and overseas. I am thinking of those millions of men and women who increased crops, who made munitions, who ran our railroads, who worked in the mines, who loaded our ships during the war period.

Public Papers of FDR, 1935, Item 69

I am thinking of those who died in the cause of America here and abroad, in uniform and out; I am thinking of the widows and orphans of all of them; I am thinking of five millions of Americans who, with their families, are today in dire need, supported in whole or in part by Federal, State, and local governments who have decreed that they shall not starve. I am thinking not only of the past, not only of today, but of the years to come. In this future of ours it is of first importance that we yield not to the sympathy which we would extend to a single group or class by special legislation for that group or class, but that we should extend assistance to all groups and all classes who in an emergency need the helping hand of their Government.

Public Papers of FDR, 1935, Item 69

I believe the welfare of the Nation, as well as the future welfare of the veterans, wholly justifies my disapproval of this measure.

Public Papers of FDR, 1935, Item 69

Therefore, Mr. Speaker, I return, without my approval, House of Representatives bill No. 3896, providing for the immediate payment to veterans of the 1945 face value of their adjusted service certificates.

Humphrey's Executor v. United States, 1935

Title: Humphrey's Executor v. United States

Author: U.S. Supreme Court

Date: May 27, 1935

Source: 295 U.S. 602

This case was argued May 1, 1935, and was decided May 27, 1935. The docket title of this case is Rathbun, Executor v. United States.

1935, Humphrey's Executor v. United States, 295 U.S. 602

CERTIFICATE FROM THE COURT OF CLAIMS

Syllabus

1935, Humphrey's Executor v. United States, 295 U.S. 602

1. The Federal Trade Commission Act fixes the terms of the Commissioners and provides that any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Held that Congress intended to restrict the power of removal to one or more of those causes. Shurtleff v. United States, 189 U.S. 311, distinguished. Pp. 621, 626.

1935, Humphrey's Executor v. United States, 295 U.S. 602

2. This construction of the Act is confirmed by a consideration of the character of the Commission—an independent, nonpartisan body of experts, charged with duties neither political nor executive, but predominantly quasi-judicial and quasi-legislative, and by the legislative history of the Act. P. 624.

1935, Humphrey's Executor v. United States, 295 U.S. 602

3. When Congress provides for the appointment of officers whose functions, like those of the Federal Trade Commissioners, are of Legislative and judicial quality, rather than executive, and limits the grounds upon which they may be removed from office, the President has no constitutional power to remove them for reasons other than those so specified. Myers v. United States, 272 U.S. 52, limited, and expressions in that opinion in part disapproved. Pp. 626, 627. [295 U.S. 603]

1935, Humphrey's Executor v. United States, 295 U.S. 603

The Myers case dealt with the removal of a postmaster, an executive officer restricted to executive functions and charged with no duty at all related to either the legislative or the judicial power. The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department, and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate he is. That decision goes no farther than to include purely executive officers. The Federal Trade Commission, in contrast, is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the Government. Pp. 627-628.

1935, Humphrey's Executor v. United States, 295 U.S. 603

4. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted, and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. P. 629.

1935, Humphrey's Executor v. United States, 295 U.S. 603

5. The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential coequality. P. 629.

1935, Humphrey's Executor v. United States, 295 U.S. 603

6. Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office. To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and the present decision that such power does not extend to an office [295 U.S. 604] such as that here involved there shall remain a field of doubt, such cases as may fall within it are left for future consideration and determination as they may arise. P. 631.

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7. While the general rule preclude the use of congressional debates to explain the meaning of the words of a statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. P. 625.

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8. Expressions in an opinion which are beyond the point involved do not come within the rule of stare decisis. P. 626.

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CERTIFICATE from the Court of Claims, propounding questions arising on a claim for the salary withheld from the plaintiff's testator, from the time when the President undertook to remove him from office to the time of his death. [295 U.S. 618]

SUTHERLAND, J., lead opinion

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MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

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Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3(a), c. 229, 43 Stat. 936, 939; 28 U.S.C. § 288) in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

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William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground

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that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,

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but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult [295 U.S. 619] his friends. After some further correspondence upon the subject, the President, on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying:

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You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.

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The commissioner declined to resign, and on October 7, 1933, the President wrote him:

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Effective as of this date, you are hereby removed from the office of Commissioner of the Federal Trade Commission.

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Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

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1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that "any commissioner may be removed by the President for inefficiency, neglect of duly, or malfeasance in office," restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

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If the foregoing question is answered in the affirmative, then—

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2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?

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The Federal Trade Commission Act, c. 311, 38 Stat. 717; 15 U.S.C. §§ 41, 42, creates a commission of five [295 U.S. 620] members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

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Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office….

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Section 5 of the act in part provides:

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That unfair methods of competition in commerce are hereby declared unlawful.

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 The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

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In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate circuit court of [295 U.S. 621] appeals for its enforcement. The party subject to the order may seek and obtain a review in the circuit court of appeals in a manner provided by the act.

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Section 6, among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

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Section 7 provides:

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That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

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First. The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act, already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in Shrutleff v. United States, 189 U.S. 311. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Section 12 of the act provided for the appointment by the President, by and with the advice and consent [295 U.S. 622] of the Senate, of nine general appraisers of merchandise, who "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court, Shurtleff relied upon the maxim expressio unius est exclusio alterius, but this court held that, while the rule expressed in the maxim was a very proper one, and founded upon justifiable reasoning in many instances, it

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should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner.

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What the court meant by this expression appears from a reading of the opinion. That opinion—after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government—points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

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"We think it quite inadmissible," the court said (pp. 316, 318),

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to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences…. We cannot bring ourselves to the belief that Congress ever [295 U.S. 623] intended this result while omitting to use language which would put that intention beyond doubt.

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These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively, and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

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The government says the phrase "continue in office" is of no legal significance, and, moreover, applies only to the first commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it nevertheless lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified, and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of [295 U.S. 624] Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act. The commission is to be nonpartisan, and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience." Illinois Central R. Co. v. Interstate Commerce Comm'n, 206 U.S. 441, 454; Standard Oil Co. v. United States, 283 U.S. 235, 238-239. The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10-11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said:

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The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience. [295 U.S. 625]

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The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and

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independent of any department of the government…a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character.

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The debates in both houses demonstrate that the prevailing view was that the commission was not to be "subject to anybody in the government, but…only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government—not subject to the orders of the President."

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More to the same effect appears in the debates, which were long and thorough, and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 650.

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Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority except in its selection, and free to exercise its judgment without the leave or hindrance [295 U.S. 626] of any other official or any department of the government. To the accomplishment of these purposes it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

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We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here, and we pass to the second question.

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Second. To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is Myers v. United States, 272 U.S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved, and, therefore do not come within the rule of stare decisis. Insofar as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was [295 U.S. 627] presented in the case of Cohens v. Virginia, 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in Marbury v. Madison, 1 Cranch. 137. Chief Justice Marshall, who delivered the opinion in the Marbury case, speaking again for the court in the Cohens case, said:

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It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

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And he added that these general expressions in the case of Marbury v. Madison were to be understood with the limitations put upon them by the opinion in the Cohens case. See also Carroll v. Lessee of Carroll, 16 How. 275, 286-287; O'Donoghue v. United States, 289 U.S. 516, 550.

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The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department, and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include [295 U.S. 628] all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department, and who exercises no part of the executive power vested by the Constitution in the President.

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The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say, in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.\* [295 U.S. 629]

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If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (Williams v. United States, 289 U.S. 553, 565-567), continue in office only at the pleasure of the President.

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We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted, and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

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The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question. So much is implied in [295 U.S. 630] the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story, in the first volume of his work on the Constitution, 4th ed., § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see O'Donoghue v. United States, supra., at pp. 530-531.

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The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

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In the light of the question now under consideration, we have reexamined the precedents referred to in the Myers case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed [295 U.S. 631] from office by the President of the United States," certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the Myers case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the Myers case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that, when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature, but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.

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In Marbury v. Madison, supra, pp. 162, 165-166, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President, and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts," and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the "decision of 1789."

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The result of what we now have said is this: whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President [295 U.S. 632] alone to make the removal, is confined to purely executive officers, and, as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed except for one or more of the causes named in the applicable statute. To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise. In accordance with the foregoing, the questions submitted are answered.

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Question No. 1, Yes. Question No. 2, Yes.

Footnotes

SUTHERLAND, J., lead opinion (Footnotes)

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\* The provision of § 6(d) of the act which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the antitrust acts is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.

United States v. Butler, 1936

Title: United States v. Butler

Author: U.S. Supreme Court

Date: January 6, 1936

Source: 297 U.S. 1

This case was argued December 9 and 10, 1935, and was decided January 6, 1936.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1936, United States v. Butler, 297 U.S. 1

FOR THE FIRST CIRCUIT

Syllabus

1936, United States v. Butler, 297 U.S. 1

1. Processors of farm products have a standing to question the constitutionality of the "processing and floor-stock taxes" sought to be laid upon them by the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31. Massachusetts v. Mellon, 262 U.S. 447, distinguished. P. 57.

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2. A tax, in the general understanding and in the strict constitutional sense, is an exaction for the support of Government; the term does not connote the expropriation of money from one group to be expended for another, as a necessary means in a plan of regulation, such as the plan for regulating agricultural production set up in the Agricultural Adjustment Act. P. 61.

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3. In testing the validity of the "processing tax," it is impossible to wrest it from its setting and treat it apart as a mere excise for raising revenue. P. 58.

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4. From the conclusion that the exaction is not a true tax it does not necessarily follow that the statute is void and the exaction uncollectible if the regulation, of which the exaction is a part, is within any of the powers granted to Congress. P. 61.

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5. The Constitution is the supreme law of the land, ordained and established by the people, and all legislation must conform to the principles it lays down. P. 62.

1936, United States v. Butler, 297 U.S. 1

6. It is a misconception to say that, in declaring an Act of Congress unconstitutional, the Court assumes a power to overrule or control the action of the people's representatives. P. 62. [297 U.S. 2]

1936, United States v. Butler, 297 U.S. 2

7. When an Act of Congress is appropriately challenged in a Court, it is the duty of the court to compare it with the article of the Constitution which is invoked and decide whether it conforms to that article. P. 62.

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8. All that the court does or can do in such cases is to announce its considered judgment upon the question; it can neither approve nor condemn any legislative policy; it can merely ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution. P. 62.

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9. The question in such cases is not what powers the Federal Government ought to have, but what powers have, in fact, been given it by the people. P. 63.

1936, United States v. Butler, 297 U.S. 2

10. Ours is a dual form of government; in every State there are two Governments—the State and the United States; each State has all governmental powers save such as the people, by the Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. P. 63.

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11. The Government of the United States is a Government of delegated powers; it has only such powers as are expressly conferred upon it by the Constitution and such as are reasonably to be implied from those expressly granted. P. 63.

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12. The Agricultural Adjustment Act does not purport to regulate transactions in interstate or foreign commerce, and the Government in this case does not attempt to sustain it under the commerce clause of the Constitution. P. 63.

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13. In Article I, § 8, cl. 1 of the Constitution, which provides that Congress shall have power

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to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States,

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the phrase "to provide for the general welfare" is not an independent provision empowering Congress generally to provide for the general welfare, but is a qualification defining and limiting the power "to lay and collect taxes," etc. P. 64.

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14. The power to appropriate money from the Treasury (Constitution, Art. I, § 9, cl. 7) is as broad as the power to tax, and the power to lay taxes to provide for the general welfare of the United States implies the power to appropriate public funds for that purpose. P. 65.

1936, United States v. Butler, 297 U.S. 2

15. The power to tax and spend is a separate and distinct power; its exercise is not confined to the fields committed to Congress by the other enumerated grants of power, but it is limited by the requirement that it shall be exercised to provide for the general welfare of the United States. P. 65. [297 U.S. 3]

1936, United States v. Butler, 297 U.S. 3

16. The Court is not required in this case to ascertain the scope of the phrase "general welfare of the United States," or to determine whether an appropriation in aid of agriculture falls within it. P. 68.

1936, United States v. Butler, 297 U.S. 3

17. The plan of the Agricultural Adjustment Act is to increase the prices of certain farm products for the farmer by decreasing the quantities produced; the decrease is to be attained by making payments of money to farmers who, under agreements with the Secretary of Agriculture, reduce their acreage and crops, and the money for this purpose is exacted, as a tax, from those who first process the commodities.

1936, United States v. Butler, 297 U.S. 3

Held:

1936, United States v. Butler, 297 U.S. 3

(1) The Act invades the reserved powers of the States. P. 68.

1936, United States v. Butler, 297 U.S. 3

(2) Regulation and control of agricultural production are beyond the powers delegated to the Federal Government. P. 68.

1936, United States v. Butler, 297 U.S. 3

(3) The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan—the means to an unconstitutional end. P. 68.

1936, United States v. Butler, 297 U.S. 3

(4) The power of taxation, which is expressly granted to Congress, may be adopted as a means to carry into operation another power also expressly granted, but not to effectuate an end which is not within the scope of the Constitution. P. 69.

1936, United States v. Butler, 297 U.S. 3

(5) The regulation of the farmer's activities under the statute, though in form subject to his own will, is, in fact, coercion through economic pressure; his right of choice is illusory. P. 70.

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(6) Even if the farmer's consent were purely voluntary, the Act would stand no better. At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the States. P. 72.

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(7) The right to appropriate and spend money under contracts or proper governmental purposes cannot justify contracts that are not within federal power. P. 72.

1936, United States v. Butler, 297 U.S. 3

(8) Congress cannot invade state jurisdiction by purchasing the action of individuals any more than by compelling it. P. 73.

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(9) There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon the assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. P. 73.

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(10) Owing to the supremacy of the United States, if the contracts with farmers contemplated by the Agricultural Adjustment Act were within the federal power to make, the States could not declare them void or prevent compliance with their terms. P. 74.

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(11) Existence of a situation of national concern resulting from similar and widespread local conditions cannot enable Congress [297 U.S. 4] to ignore the constitutional limitations upon its own powers and usurp those reserved to the States. P. 74.

1936, United States v. Butler, 297 U.S. 4

(12) If the novel view of the General Welfare Clause now advanced in support of the tax were accepted, that clause would not only enable Congress to supplant the States in the regulation of agriculture and of all other industries as well, but would furnish the means whereby all of the other provisions of the Constitution, sedulously framed to define and limit the power of the United States and preserve the powers of the States, could be broken down, the independence of the individual States obliterated, and the United States converted into a central government exercising uncontrolled police power throughout the Union superseding all local control over local concerns. P. 75.

1936, United States v. Butler, 297 U.S. 4

(13) Congress, being without power to impose the contested exaction, could not lawfully ratify the acts of an executive officer in assessing it. P. 78.

1936, United States v. Butler, 297 U.S. 4

78 F.2d 1 affirmed.

1936, United States v. Butler, 297 U.S. 4

CERTIORARI, 296 U.S. 561, to review a decree which reversed an order of the District Court (Franklin Process Co. v. Hoosac Mills Corp., 8 F.Supp. 552), directing the receivers of Hoosac Mills, a cotton milling corporation, to pay claims of the United States for processing and floor taxes on cotton, levied under §§ 9 and 16 of the Agricultural Adjustment Act of May 12, 1933. The opinion of this Court begins on p. 53, post; the dissenting opinion on p. 78. [297 U.S. 53]

ROBERTS, J., lead opinion

1936, United States v. Butler, 297 U.S. 53

MR. JUSTICE ROBERTS delivered the opinion of the Court.

1936, United States v. Butler, 297 U.S. 53

In this case, we must determine whether certain provisions of the Agricultural Adjustment Act, 1933, 1 conflict with the Federal Constitution.

1936, United States v. Butler, 297 U.S. 53

Title I of the statute is captioned "Agricultural Adjustment." Section 1 recites that an economic emergency has arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation. [297 U.S. 54]

1936, United States v. Butler, 297 U.S. 54

Section 2 declares it to be the policy of Congress:

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To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities 2 a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period.

1936, United States v. Butler, 297 U.S. 54

The base period, in the case of cotton and all other commodities except tobacco, is designated as that between August, 1909, and July, 1914.

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The further policies announced are an approach to the desired equality by gradual correction of present inequalities "at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets," and the protection of consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage returned to him in the base period.

1936, United States v. Butler, 297 U.S. 54

Section 8 provides, amongst other things, that, "In order to effectuate the declared policy," the Secretary of Agriculture shall have power

1936, United States v. Butler, 297 U.S. 54

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to [297 U.S. 55] be paid out of any moneys available for such payments….

1936, United States v. Butler, 297 U.S. 55

(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties….

1936, United States v. Butler, 297 U.S. 55

(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof.

1936, United States v. Butler, 297 U.S. 55

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable.

1936, United States v. Butler, 297 U.S. 55

Section 9(a) enacts:

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To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental on benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor….

1936, United States v. Butler, 297 U.S. 55

The Secretary may from time to time, if he finds it necessary for the effectuation of the policy of the act, readjust the amount of the exaction to meet the requirements [297 U.S. 56] of subsection (b). The tax is to terminate at the end of any marketing year if the rental or benefit payments are discontinued by the Secretary with the expiration of that year.

1936, United States v. Butler, 297 U.S. 56

Section 9(b) fixes the tax "at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value," with power in the Secretary, after investigation, notice, and hearing, to readjust the tax so as to prevent the accumulation of surplus stocks and depression of farm prices.

1936, United States v. Butler, 297 U.S. 56

Section 9(c) directs that the fair exchange value of a commodity shall be such a price as will give that commodity the same purchasing power with respect to articles farmers buy as it had during the base period and that the fair exchange value and the current average farm price of a commodity shall be ascertained by the Secretary from available statistics in his department.

1936, United States v. Butler, 297 U.S. 56

Section 12(a) appropriates $100,000,000 "to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments…", and § 12(b) appropriates the proceeds derived from all taxes imposed under the act

1936, United States v. Butler, 297 U.S. 56

to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products…administrative expenses, rental and benefit payments, and refunds on taxes.

1936, United States v. Butler, 297 U.S. 56

Section 15(d) permits the Secretary, upon certain conditions, to impose compensating taxes on commodities in competition with those subject to the processing tax.

1936, United States v. Butler, 297 U.S. 56

By § 16, a floor tax is imposed upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied in amount equivalent to that of the processing tax which would be payable with respect to the commodity from which the article is processed if the processing had occurred on the date when the processing tax becomes effective. [297 U.S. 57]

1936, United States v. Butler, 297 U.S. 57

On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933, and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

1936, United States v. Butler, 297 U.S. 57

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under § 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid, and ordered them paid. 3 Upon appeal, the Circuit Court of Appeals reversed the order. 4 The judgment under review was entered prior to the adoption of the amending act of August 24, 1935, 5 and we are therefore concerned only with the original act.

1936, United States v. Butler, 297 U.S. 57

First. At the outset, the United States contends that the respondents have no standing to question the validity of the tax. The position is that the act is merely a revenue measure levying an excise upon the activity of processing cotton—a proper subject for the imposition of such a tax—the proceeds of which go into the federal treasury, and thus become available for appropriation for any purpose. It is said that what the respondents are endeavoring to do is to challenge the intended use of the money pursuant to Congressional appropriation when, by confession, that money will have become the property of the Government and the taxpayer will no longer have any interest in it. Massachusetts v. Mellon, 262 U.S. 447, is claimed to foreclose litigation by the respondents or other taxpayers, as such, looking to restraint of the expenditure of government funds. That case might be an authority [297 U.S. 58] in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys. It was there held that a taxpayer of the United States may not question expenditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds, and thus increase the burden of future taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation is minute and indeterminable. But here, the respondents, who are called upon to pay moneys as taxes, resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the case. The Government, in substance and effect, asks us to separate the Agricultural Adjustment Act into two statutes, the one levying an excise on processors of certain commodities, the other appropriating the public moneys independently of the first. Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment.

1936, United States v. Butler, 297 U.S. 58

The tax can only be sustained by ignoring the avowed purpose and operation of the act and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil, the sole object of the legislation is to restore the purchasing power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers 6 who will reduce their acreage for [297 U.S. 59] the accomplishment of the proposed end, and, meanwhile to aid these farmers during the period required to bring the prices of their crops to the desired level.

1936, United States v. Butler, 297 U.S. 59

The tax plays an indispensable part in the plan of regulation. As stated by the Agricultural Adjustment Administrator, it is " the heart of the law "; a means of " accomplishing one or both of two things intended to help farmers attain parity prices and purchasing power." 7 A tax automatically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop reduction and price-raising. It is to equal the difference between the " current average farm price " and " fair exchange value." It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. (§ 11.) The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program embodied in Title I of the act is to become inoperative when, in the judgment of the President, the national economic emergency ends, and as to any commodity, he may terminate the provisions of the law if he finds them no longer requisite to carrying out the declared policy with respect to such commodity. (§ 13.)

1936, United States v. Butler, 297 U.S. 59

The statute not only avows an aim foreign to the procurement of revenue for the support of government, but, by its operation, shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production. [297 U.S. 60]

1936, United States v. Butler, 297 U.S. 60

In these aspects the tax, so-called, closely resembles that laid by the Act of August 3, 1882, entitled "An Act to Regulate Immigration," which came before this court in the Head Money Cases, 112 U.S. 580. The statute directed that there should be levied, collected and paid a duty of fifty cents for each alien passenger who should come by vessel from a foreign port to one in the United States. Payment was to be made to the collector of the port by the master, owner, consignee or agent of the ship; the money was to be paid into the Treasury, was to be called the immigrant fund, and to be used by the Secretary of the Treasury to defray the expense of regulating immigration, for the care of immigrants and relieving those in distress, and for the expenses of effectuating the act.

1936, United States v. Butler, 297 U.S. 60

Various objections to the act were presented. In answering them the court said (p. 595):

1936, United States v. Butler, 297 U.S. 60

But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration….

1936, United States v. Butler, 297 U.S. 60

It is true not much is said about protecting the ship owner. But he is the man who reaps the profit from the transaction,…The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government.

1936, United States v. Butler, 297 U.S. 60

While there, the exaction was sustained as an appropriate element in a plan within the power of Congress "to regulate commerce with foreign nations," no question was made of the standing of the shipowner to raise the question [297 U.S. 61] of the validity of the scheme, and consequently of the exaction which was an incident of it.

1936, United States v. Butler, 297 U.S. 61

It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue, and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. Child Labor Tax Case, 259 U.S. 20, 37.

1936, United States v. Butler, 297 U.S. 61

We conclude that the act is one regulating agricultural production, that the tax is a mere incident of such regulation, and that the respondents have standing to challenge the legality of the exaction.

1936, United States v. Butler, 297 U.S. 61

It does not follow that, as the act is not an exertion of the taxing power and the exaction not a true tax, the statute is void or the exaction uncollectible. For, to paraphrase what was said in the Head Money Cases (supra), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers,

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and the end to be attained is one falling within that power, the act is not void because, within a loose and more extended sense than was used in the Constitution,

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the exaction is called a tax. [297 U.S. 62]

1936, United States v. Butler, 297 U.S. 62

Second. The Government asserts that, even if the respondents may question the propriety of the appropriation embodied in the statute, their attack must fail because Article I, § 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case. 8 We approach its decision with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the Government.

1936, United States v. Butler, 297 U.S. 62

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. [297 U.S. 63] The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends. 9

1936, United States v. Butler, 297 U.S. 63

The question is not what power the Federal Government ought to have, but what powers, in fact, have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect, we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

1936, United States v. Butler, 297 U.S. 63

Article I, § 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

1936, United States v. Butler, 297 U.S. 63

The third clause endows the Congress with power "to regulate Commerce…among the several States." Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign 10 commerce. Its stated purpose [297 U.S. 64] is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

1936, United States v. Butler, 297 U.S. 64

The clause thought to authorize the legislation—the first—confers upon the Congress power

1936, United States v. Butler, 297 U.S. 64

to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States….

1936, United States v. Butler, 297 U.S. 64

It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that, if it were adopted,

1936, United States v. Butler, 297 U.S. 64

it is obvious that, under color of the generality of the words, to "provide for the common defence and general welfare," the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers. 11

1936, United States v. Butler, 297 U.S. 64

The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

1936, United States v. Butler, 297 U.S. 64

Nevertheless the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally [297 U.S. 65] construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination, and finally that the appropriation under attack was, in fact, for the general welfare of the United States.

1936, United States v. Butler, 297 U.S. 65

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. I, § 9, cl. 7.) They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they be construed to effectuate the intent of the instrument?

1936, United States v. Butler, 297 U.S. 65

Since the foundation of the Nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view, the phrase is mere tautology, for taxation and appropriation are, or may be, necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, [297 U.S. 66] limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. 12 We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

1936, United States v. Butler, 297 U.S. 66

But the adoption of the broader construction leaves the power to spend subject to limitations.

1936, United States v. Butler, 297 U.S. 66

As Story says:

1936, United States v. Butler, 297 U.S. 66

The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. 13

1936, United States v. Butler, 297 U.S. 66

Again, he says:

1936, United States v. Butler, 297 U.S. 66

A power to lay taxes for the common defence and general welfare of the United States is not, in common sense, a general power. It is limited to those objects. It cannot constitutionally transcend them. 14

1936, United States v. Butler, 297 U.S. 66

That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his [297 U.S. 67] well known Report on Manufactures, states that the purpose must be "general, and not local." 15 Monroe, an advocate of Hamilton's doctrine, wrote:

1936, United States v. Butler, 297 U.S. 67

Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not. 16

1936, United States v. Butler, 297 U.S. 67

Story says that, if the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. 17 And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare.

1936, United States v. Butler, 297 U.S. 67

As elsewhere throughout the Constitution, the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions. Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them. But, under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here, we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range when the subject is the promotion of the general welfare of the United States we hardly need remark. But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains. If the statute plainly violates the stated principle of the Constitution, we must so declare. [297 U.S. 68]

1936, United States v. Butler, 297 U.S. 68

We are not now required to ascertain the scope of the phrase "general welfare of the United States," or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement are but parts of the plan. They are but means to an unconstitutional end.

1936, United States v. Butler, 297 U.S. 68

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states, or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. 18 The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

1936, United States v. Butler, 297 U.S. 68

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.

1936, United States v. Butler, 297 U.S. 68

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision [297 U.S. 69] come before it, to say that such an act was not the law of the land.

1936, United States v. Butler, 297 U.S. 69

McCulloch v. Maryland, 4 Wheat. 316, 423.

1936, United States v. Butler, 297 U.S. 69

Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.

1936, United States v. Butler, 297 U.S. 69

Linder v. United States, 268 U.S. 5, 17.

1936, United States v. Butler, 297 U.S. 69

These principles are as applicable to the power to lay taxes as to any other federal power. Said the court, in McCulloch v. Maryland, supra, 421:

1936, United States v. Butler, 297 U.S. 69

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

1936, United States v. Butler, 297 U.S. 69

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.

1936, United States v. Butler, 297 U.S. 69

"Congress is not empowered to tax for those purposes which are within the exclusive province of the States." Gibbons v. Ogden, 9 Wheat. 1, 199.

1936, United States v. Butler, 297 U.S. 69

There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States or if exercised for ends [297 U.S. 70] inconsistent with the limited grants of power in the Constitution.

1936, United States v. Butler, 297 U.S. 70

Veazie Bank v. Fenno, 8 Wall. 533, 541.

1936, United States v. Butler, 297 U.S. 70

In the Child Labor Tax Case, 259 U.S. 20, and in Hill v. Wallace, 259 U.S. 44, this court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading not in interstate commerce, but in the states—matters not within any power conferred upon Congress by the Constitution—and the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse, of the power to tax. In Linder v. United States, supra, we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue. In United States v. Constantine, 296 U.S. 287, we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton, and exempt those who agree so to do, with the purpose of benefiting producers.

1936, United States v. Butler, 297 U.S. 70

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not, in fact, voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to [297 U.S. 71] agree to the proposed regulation. 19 The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a noncooperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory.

1936, United States v. Butler, 297 U.S. 71

In Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, a state act was considered which provided for supervision and regulation of transportation for hire by automobile on the public highways. Certificates of convenience and necessity were to be obtained by persons desiring to use the highways for this purpose. The regulatory [297 U.S. 72] commission required that a private contract carrier should secure such a certificate as a condition of its operation. The effect of the commission's action was to transmute the private carrier into a public carrier. In other words, the privilege of using the highways as a private carrier for compensation was conditioned upon his dedicating his property to the quasi-public use of public transportation. While holding that the private carrier was not obliged to submit himself to the condition, the commission denied him the privilege of using the highways if he did not do so. The argument was, as here, that the carrier had a free choice. This court said, in holding the act as construed unconstitutional:

1936, United States v. Butler, 297 U.S. 72

If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

1936, United States v. Butler, 297 U.S. 72

(P. 593.)

1936, United States v. Butler, 297 U.S. 72

But if the plan were one for purely voluntary cooperation, it would stand no better so far as federal power is concerned. At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

1936, United States v. Butler, 297 U.S. 72

It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper [297 U.S. 73] governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.

1936, United States v. Butler, 297 U.S. 73

We are referred to numerous types of federal appropriation which have been made in the past, and it is asserted no question has been raised as to their validity. We need not stop to examine or consider them. As was said in Massachusetts v. Mellon, supra, (p. 487):

1936, United States v. Butler, 297 U.S. 73

…as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for nonfederal purposes have been enacted and carried into effect.

1936, United States v. Butler, 297 U.S. 73

As the opinion points out, such expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts.

1936, United States v. Butler, 297 U.S. 73

We are not here concerned with a conditional appropriation of money, nor with a provision that, if certain conditions are not complied with, the appropriation shall no longer be available. By the Agricultural Adjustment Act, the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. Many examples pointing the distinction might be cited. We are referred to appropriations in aid [297 U.S. 74] of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended. But an appropriation to an educational institution which, by its terms, is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

1936, United States v. Butler, 297 U.S. 74

But it is said that there is a wide difference in another respect between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct: that, if any state objects, it may declare the contract void, and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a State. This would reverse the cardinal principle embodied in the Constitution, and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the States do not dissent.

1936, United States v. Butler, 297 U.S. 74

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern, for this [297 U.S. 75] is but to say that, whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states.

1936, United States v. Butler, 297 U.S. 75

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. A few instances will illustrate the thought.

1936, United States v. Butler, 297 U.S. 75

Let us suppose Congress should determine that the farmer, the miner, or some other producer of raw materials is receiving too much for his products, with consequent depression of the processing industry and idleness of its employes. Though, by confession, there is no power vested in Congress to compel by statute a lowering of the prices of the raw material, the same result might be accomplished, if the questioned act be valid, by taxing the producer upon his output and appropriating the proceeds to the processors, either with or without conditions imposed as the consideration for payment of the subsidy.

1936, United States v. Butler, 297 U.S. 75

We have held in Schechter Poultry Corp. v. United States, 295 U.S. 495, that Congress has no power to regulate wages and hours of labor in a local business. If the petitioner is right, this very end may be accomplished by [297 U.S. 76] appropriating money to be paid to employers from the federal treasury under contracts whereby they agree to comply with certain standards fixed by federal law or by contract.

1936, United States v. Butler, 297 U.S. 76

Should Congress ascertain that sugar refiners are not receiving a fair profit, and that this is detrimental to the entire industry, and in turn has its repercussions in trade and commerce generally, it might, in analogy to the present law, impose an excise of two cents a pound on every sale of the commodity, and pass the funds collected to such refiners, and such only, as will agree to maintain a certain price.

1936, United States v. Butler, 297 U.S. 76

Assume that too many shoes are being manufactured throughout the nation; that the market is saturated, the price depressed, the factories running half-time, the employes suffering. Upon the principle of the statute in question, Congress might authorize the Secretary of Commerce to enter into contracts with shoe manufacturers providing that each shall reduce his output, and that the United States will pay him a fixed sum proportioned to such reduction, the money to make the payments to be raised by a tax on all retail shoe dealers or their customers.

1936, United States v. Butler, 297 U.S. 76

Suppose that there are too many garment workers in the large cities; that this results in dislocation of the economic balance. Upon the principle contended for, an excise might be laid on the manufacture of all garments manufactured, and the proceeds paid to those manufacturers who agree to remove their plants to cities having not more than a hundred thousand population. Thus, through the asserted power of taxation, the federal government, against the will of individual states, might completely redistribute the industrial population.

1936, United States v. Butler, 297 U.S. 76

A possible result of sustaining the claimed federal power would be that every business group which thought itself underprivileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income. [297 U.S. 77]

1936, United States v. Butler, 297 U.S. 77

These illustrations are given not to suggest that any of the purposes mentioned are unworthy, but to demonstrate the scope of the principle for which the Government contends; to test the principle by its applications; to point out that, by the exercise of the asserted power, Congress would, in effect, under the pretext of exercising the taxing power, in reality accomplish prohibited ends. It cannot be said that they envisage improbable legislation. The supposed cases are no more improbable than would the present act have been deemed a few years ago.

1936, United States v. Butler, 297 U.S. 77

Until recently, no suggestion of the existence of any such power in the Federal Government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument, and the writings of great commentators will be searched in vain for any suggestion that there exists in the clause under discussion, or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.

1936, United States v. Butler, 297 U.S. 77

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States (which has aptly been termed " an indestructible Union, composed of indestructible States") might be served by obliterating the constituent members of the Union. But to this fatal conclusion [297 U.S. 78] the doctrine contended for would inevitably lead. And its sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless, by a single clause, gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument, when seen in its true character and in the light of its inevitable results, must be rejected.

1936, United States v. Butler, 297 U.S. 78

Since, as we have pointed out, there was no power in the Congress to impose the contested exaction, it could not lawfully ratify or confirm what an executive officer had done in that regard. Consequently the Act of 1935 does not affect the rights of the parties.

1936, United States v. Butler, 297 U.S. 78

The judgment is

1936, United States v. Butler, 297 U.S. 78

Affirmed.

STONE, J., dissenting

1936, United States v. Butler, 297 U.S. 78

MR. JUSTICE STONE, dissenting.

1936, United States v. Butler, 297 U.S. 78

I think the judgment should be reversed.

1936, United States v. Butler, 297 U.S. 78

The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the Act. They are:

1936, United States v. Butler, 297 U.S. 78

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while unconstitutional exercise of power [297 U.S. 79] by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of democratic government.

1936, United States v. Butler, 297 U.S. 79

2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.

1936, United States v. Butler, 297 U.S. 79

3. As the present depressed state of agriculture is nationwide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to " provide for the…general welfare." The opinion of the Court does not declare otherwise.

1936, United States v. Butler, 297 U.S. 79

4. No question of a variable tax fixed from time to time by fiat of the Secretary of Agriculture, or of unauthorized delegation of legislative power, is now presented. The schedule of rates imposed by the Secretary in accordance with the original command of Congress has since been specifically adopted and confirmed by Act of Congress, which has declared that it shall be the lawful tax. Act of August 24, 1935, 49 Stat. 750. That is the tax which the government now seeks to collect. Any defects there may have been in the manner of laying the tax by the Secretary have now been removed by the exercise of the power of Congress to pass a curative statute validating an intended, though defective, tax. United States v. Heinszen & Co., 206 U.S. 370; Graham & Foster v. Goodcell, 282 U.S. 409; cf. Milliken v. United States, 283 U.S. 15. The Agricultural Adjustment Act, as thus amended, declares [297 U.S. 80] that none of its provisions shall fail because others are pronounced invalid.

1936, United States v. Butler, 297 U.S. 80

It is with these preliminary and hardly controverted matters in mind that we should direct our attention to the pivot on which the decision of the Court is made to turn. It is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production, and is thus a forbidden infringement of state power. The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare, rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. While all federal taxes inevitably have some influence on the internal economy of the states, it is not contended that the levy of a processing tax upon manufacturers using agricultural products as raw material has any perceptible regulatory effect upon either their production or manufacture. The tax is unlike the penalties which were held invalid in the Child Labor Tax Case, 259 U.S. 20, in Hill v. Wallace, 259 U.S. 44, in Linder v. United States, 268 U.S. 5, 17, and in United States v. Constantine, 296 U.S. 287, because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Here regulation, if any there be, is accomplished not by the tax, but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source.

1936, United States v. Butler, 297 U.S. 80

The method may be simply stated. Out of the available fund payments are made to such farmers as are willing to curtail their productive acreage, who, in fact, do so, and who, in advance, have filed their written undertaking to do so with the Secretary of Agriculture. In saying that this method of spending public moneys is an invasion of the reserved powers of the states, the Court does not assert [297 U.S. 81] that the expenditure of public funds to promote the general welfare is not a substantive power specifically delegated to the national government, as Hamilton and Story pronounced it to be. It does not deny that the expenditure of funds for the benefit of farmers and in aid of a program of curtailment of production of agricultural products, and thus of a supposedly better ordered national economy, is within the specifically granted power. But it is declared that state power is nevertheless infringed by the expenditure of the proceeds of the tax to compensate farmers for the curtailment of their cotton acreage. Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress. In any event, it is insisted that, even though not coercive, the expenditure of public funds to induce the recipients to curtail production is itself an infringement of state power, since the federal government cannot invade the domain of the states by the "purchase" of performance of acts which it has no power to compel.

1936, United States v. Butler, 297 U.S. 81

Of the assertion that the payments to farmers are coercive it is enough to say that no such contention is pressed by the taxpayer, and no such consequences were to be anticipated or appear to have resulted from the administration of the Act. The suggestion of coercion finds no support in the record or in any data showing the actual operation of the Act. Threat of loss, not hope of gain, is the essence of economic coercion. Members of a long depressed industry have undoubtedly been tempted to curtail acreage by the hope of resulting better prices and by the proffered opportunity to obtain needed ready money. But there is nothing to indicate that those who accepted benefits were impelled by fear of lower prices if they did not accept, or that, at any stage in the operation [297 U.S. 82] of the plan a farmer could say whether, apart from the certainty of cash payments at specified times, the advantage would lie with curtailment of production plus compensation, rather than with the same or increased acreage plus the expected rise in prices which actually occurred. Although the Agricultural Adjustment Act was put into operation in June, 1933, the official reports of the Department of Agriculture show that 6,343,000 acres of productive cotton land, 14% of the total, did not participate in the plan in 1934, and 2,790,000 acres, 6% of the total, did not participate in 1935. Of the total number of farms growing cotton, estimated at 1,500,000, 33% in 1934 and 13% in 1935 did not participate.

1936, United States v. Butler, 297 U.S. 82

It is significant that, in the congressional hearings on the bill that became the Bankhead Act, 48 Stat. 598, as amended by Act of June 20, 1934, 48 Stat. 1184, which imposes a tax of 50% on all cotton produced in excess of limits prescribed by the Secretary of Agriculture, there was abundant testimony that the restriction of cotton production attempted by the Agricultural Adjustment Act could not be secured without the coercive provisions of the Bankhead Act. See Hearing before Committee on Agriculture, U.S. Senate, on S.1974, 73rd Cong., 2nd Sess.; Hearing before Committee on Agriculture, U.S. House of Representatives, on H.R. 8402, 73rd Cong., 2nd Sess. The Senate and House Committees so reported, Senate Report No. 283, 73rd Cong., 2nd Sess., p. 3; House Report No. 867, 73rd Cong., 2nd Sess., p. 3. The Report of the Department of Agriculture on the administration of the Agricultural Adjustment Act (February 15, 1934 to December 31, 1934), p. 50, points out that the Bankhead Act was passed in response to a strong sentiment in favor of mandatory production control

1936, United States v. Butler, 297 U.S. 82

that would prevent noncooperating farmers from increasing their own plantings in order to capitalize upon the price advances that had resulted from the reductions made by contract [297 U.S. 83] signers.\*

1936, United States v. Butler, 297 U.S. 83

The presumption of constitutionality of a statute is not to be overturned by an assertion of its coercive effect which rests on nothing more substantial than groundless speculation.

1936, United States v. Butler, 297 U.S. 83

It is upon the contention that state power is infringed by purchased regulation of agricultural production that chief reliance is placed. It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

1936, United States v. Butler, 297 U.S. 83

The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare. Their expenditure usually involves payment on terms which will insure use by the selected recipients within the limits of the constitutional purpose. Expenditures would fail of their purpose, and thus lose their constitutional sanction, if the terms of payment were not such that, by their influence on the action of the recipients, the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition, incorporated in the Morrill Act, 12 Stat. 503, 26 Stat. 417, that it be used for the intended purpose. Similarly, it would seem to be compliance with the Constitution, not violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no difference [297 U.S. 84] that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid, since both are in furtherance of the national purpose for which the money is appropriated.

1936, United States v. Butler, 297 U.S. 84

These effects upon individual action, which are but incidents of the authorized expenditure of government money, are pronounced to be themselves a limitation upon the granted power, and so the time-honored principle of constitutional interpretation that the granted power includes all those which are incident to it is reversed. "Let the end be legitimate," said the great Chief Justice,

1936, United States v. Butler, 297 U.S. 84

let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

1936, United States v. Butler, 297 U.S. 84

McCulloch v. Maryland, 4 Wheat. 316, 421. This cardinal guide to constitutional exposition must now be rephrased so far as the spending power of the federal government is concerned. Let the expenditure be to promote the general welfare, still, if it is needful in order to insure its use for the intended purpose to influence any action which Congress cannot command because within the sphere of state government, the expenditure is unconstitutional. And taxes otherwise lawfully levied are likewise unconstitutional if they are appropriated to the expenditure whose incident is condemned.

1936, United States v. Butler, 297 U.S. 84

Congress, through the Interstate Commerce Commission, has set aside intrastate railroad rates. It has made and destroyed intrastate industries by raising or lowering tariffs. These results are said to be permissible because they are incidents of the commerce power and the power to levy duties on imports. See Minnesota Rate Cases, 230 U.S. 352; Shreveport Case, 234 U.S. 342; Board of Trustees of the University of Illinois v. United States, 289 U.S. 48. The only conclusion to be drawn is that results [297 U.S. 85] become lawful when they are incidents of those powers, but unlawful when incident to the similarly granted power to tax and spend.

1936, United States v. Butler, 297 U.S. 85

Such a limitation is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application. The spending power of Congress is in addition to the legislative power, and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.

1936, United States v. Butler, 297 U.S. 85

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed, or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence or flood, but may not impose conditions—health precautions designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief. The government may spend its money for vocational rehabilitation, 48 Stat. 389, but it may not, with the consent of all concerned, supervise the process which it undertakes to aid. It may spend its money for the suppression of the boll weevil, but may [297 U.S. 86] not compensate the farmers for suspending the growth of cotton in the infected areas. It may aid state reforestation and forest fire prevention agencies, 43 Stat. 653, but may not be permitted to supervise their conduct. It may support rural schools, 39 Stat. 929, 45 Stat. 1151, 48 Stat. 792, but may not condition its grant by the requirement that certain standards be maintained. It may appropriate moneys to be expended by the Reconstruction Finance Corporation "to aid in financing agriculture, commerce and industry," and to facilitate "the exportation of agricultural and other products." Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer, at his own option, promises to fulfill the condition.

1936, United States v. Butler, 297 U.S. 86

That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government. Both were well understood by the framers of the Constitution when they sanctioned the grant of the spending power to the federal government, and both were recognized by Hamilton and Story, whose views of the [297 U.S. 87] spending power as standing on a parity with the other powers specifically granted have hitherto been generally accepted.

1936, United States v. Butler, 297 U.S. 87

The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. "The power to tax is the power to destroy," but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the states. See Veazie Bank v. Fenno, 8 Wall. 533; McCray v. United States, 195 U.S. 27; compare Magnano Co. v. Hamilton, 292 U.S. 40. The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive.

1936, United States v. Butler, 297 U.S. 87

It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

1936, United States v. Butler, 297 U.S. 87

Justice Holmes, in Missouri, Kansas & Texas Ry. Co. v. May, 194 U.S. 267, 270.

1936, United States v. Butler, 297 U.S. 87

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent—expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive [297 U.S. 88] concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.

1936, United States v. Butler, 297 U.S. 88

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in this opinion.

Footnotes

ROBERTS, J., lead opinion (Footnotes)

1936, United States v. Butler, 297 U.S. 88

1. May 12, 1933, c. 25, 48 Stat. 31.

1936, United States v. Butler, 297 U.S. 88

2. Section 11 denominates wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, "basic agricultural commodities," to which the act is to apply. Others have been added by later legislation.

1936, United States v. Butler, 297 U.S. 88

3. Franklin Process Co. v. Hoosac Mills Corp., 8 F.Supp. 552.

1936, United States v. Butler, 297 U.S. 88

4. Butler v. United States, 78 F . (2d) 1.

1936, United States v. Butler, 297 U.S. 88

5. 49 Stat. 750, c. 641.

1936, United States v. Butler, 297 U.S. 88

6. U.S. Department of Agriculture, Achieving A Balanced Agriculture, p. 38:

1936, United States v. Butler, 297 U.S. 88

Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every dollar collected in processing taxes goes to the farmer in benefit payments.

1936, United States v. Butler, 297 U.S. 88

U.S. Dept. of Agriculture, The Processing Tax, p. 1: " Proceeds of processing taxes are passed to farmers as benefit payments."

1936, United States v. Butler, 297 U.S. 88

7. U.S. Department of Agriculture, Agricultural Adjustment, p. 9.

1936, United States v. Butler, 297 U.S. 88

8. Other questions were presented and argued by counsel, but we do not consider or decide them. The respondents insist that the act in numerous respects delegates legislative power to the executive contrary to the principles announced in Panama Refining Co. v. Ryan, 293 U.S. 388, and Schechter Corp. v. United States, 295 U.S. 495; that this unlawful delegation is not cured by the amending act of August 24, 1935; that the exaction is in violation of the due process clause of the Fifth Amendment, since the legislation takes their property for a private use; that the floor tax is a direct tax, and therefore void for lack of apportionment amongst the states, as required by Article I, § 9, and that the processing tax is wanting in uniformity, and so violates Article I, § 8, clause one, of the Constitution.

1936, United States v. Butler, 297 U.S. 88

9. Compare Adkins v. Children's Hospital, 261 U.S. 525, 544; Massachusetts v. Mellon, 262 U.S. 447, 488.

1936, United States v. Butler, 297 U.S. 88

10. The enactment of protective tariff laws has its basis in the power to regulate foreign commerce. See Board of Trustees of the University of Illinois v. United States, 289 U.S. 48, 58.

1936, United States v. Butler, 297 U.S. 88

11. Story, Commentaries on the Constitution of the United States 5th ed., Vol. I, § 907.

1936, United States v. Butler, 297 U.S. 88

12. Loc. cit. Chapter XIV, passim.

1936, United States v. Butler, 297 U.S. 88

13. Loc. cit., § 909.

1936, United States v. Butler, 297 U.S. 88

14. Loc. cit., § 922.

1936, United States v. Butler, 297 U.S. 88

15. Works, Vol. III, p. 250.

1936, United States v. Butler, 297 U.S. 88

16. Richardson, Messages and Papers of the Presidents, Vol. II, p. 167.

1936, United States v. Butler, 297 U.S. 88

17. Loc. cit., p. 673.

1936, United States v. Butler, 297 U.S. 88

18. The Tenth Amendment declares:

1936, United States v. Butler, 297 U.S. 88

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

1936, United States v. Butler, 297 U.S. 88

19. U.S. Dept. of Agriculture, Agricultural Adjustment, p. 9.

1936, United States v. Butler, 297 U.S. 88

Experience of cooperative associations and other groups has shown that, without such Government support, the efforts of the farmers to band together to control the amount of their product sent to market are nearly always brought to nothing. Almost always, under such circumstances, there has been a noncooperating minority, which, refusing to go along with the rest, has stayed on the outside and tried to benefit from the sacrifices the majority has made…. It is to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority, that the power of the Government has been marshaled behind the adjustment programs.

STONE, J., dissenting (Footnotes)

1936, United States v. Butler, 297 U.S. 88

\* Whether coercion was the sole or the dominant purpose of the Bankhead Act, or whether the act was designed also for revenue or other legitimate ends there is no occasion to consider now.

Grosjean v. American Press Co., Inc., 1936

Title: Grosjean v. American Press Co., Inc.

Author: U.S. Supreme Court

Date: February 10, 1936

Source: 297 U.S. 233

This case was argued January 14, 1936, and was February 10, 1936.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

FOR THE EASTERN DISTRICT OF LOUISIANA

Syllabus

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

1. As respects the amount in controversy, the District Court has jurisdiction of a suit where the requisite value is involved as to each of several plaintiffs though not involved as to others. P. 241.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

2. A motion to dismiss the whole case because the amount in controversy as to some of the plaintiffs is too small should be overruled. Id.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

3. There is equitable jurisdiction to enjoin collection of an allegedly unconstitutional state tax where the taxpayer, if he pays, is afforded no clear remedy of restitution. P. 242.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

4. Liberty of the press is a fundamental right protected against state aggression by the due process clause of the Fourteenth Amendment. P. 242.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

5. The fact that, as regards the Federal Government, the protection of this right is not left to the due process clause of the Fifth Amendment, but is guaranteed in specie by the First Amendment, is not a sufficient reason for excluding it from the due process clause of the Fourteenth Amendment. P. 243.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

6. A corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. P. 244.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

7. A State license tax (La.Act No. 23, July 12, 1934) imposed on the owners of newspapers for the privilege of selling or charging for the advertising therein, and measured by a percent. of the gross receipts from such advertisements, but applicable only to newspapers enjoying a circulation of more than 20,000 copies per week, held unconstitutional. P. 244.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 233

8. From the history of the subject, it is plain that the English rule restricting freedom of the press to immunity from censorship before publication was not accepted by the American colonists, and that the First Amendment was aimed at any form of previous restraint upon printed publications or their circulation, including restraint by taxation of newspapers and their advertising, which were well known and odious methods still used in England when the First Amendment was adopted. P. 245. [297 U.S. 234]

1936, Grosjean v. American Press Co., Inc., 297 U.S. 234

9. The predominant purpose of the grant of immunity was to preserve an untrammeled press as a vital source of public information. P. 250.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 234

10. Construction of a constitutional provision phrased in terms of the common law is not determined by rules of the common law which had been rejected in this country as unsuited to local civil or political conditions. P. 248.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 234

It is not intended in this case to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of Government. The tax in question is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press. The manner of its use in this case is, in itself, suspicious; it is not measured or limited by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 234

10 F.Supp. 161, affirmed.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 234

APPEAL from a decree permanently enjoining the enforcement of a state tax on newspapers. [297 U.S. 240]

SUTHERLAND, J., lead opinion

1936, Grosjean v. American Press Co., Inc., 297 U.S. 240

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 240

This suit was brought by appellees, nine publishers of newspapers in the State of Louisiana, to enjoin the enforcement against them of the provisions of § 1 of the act of the legislature of Louisiana known as Act No. 23, passed and approved July 12, 1934, as follows:

1936, Grosjean v. American Press Co., Inc., 297 U.S. 240

That every person, firm, association, or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two percent. (2%) of the gross receipts of such business.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 240

The nine publishers who brought the suit publish thirteen newspapers, and these thirteen publications are the [297 U.S. 241] only ones within the State of Louisiana having each a circulation of more than 20,000 copies per week, although the lower court finds there are four other daily newspapers each having a circulation of "slightly less than 20,000 copies per week" which are in competition with those published by appellees both as to circulation and as to advertising. In addition, there are 120 weekly newspapers published in the state, also in competition, to a greater or less degree, with the newspapers of appellees. The revenue derived from appellees' newspapers comes almost entirely from regular subscribers or purchasers thereof and from payments received for the insertion of advertisements therein.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 241

The act requires everyone subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business described in § 1. The resulting tax must be paid when the report is filed. Failure to file the report or pay the tax as thus provided constitutes a misdemeanor and subjects the offender to a fine not exceeding $500, or imprisonment not exceeding six months, or both, for each violation. Any corporation violating the act subjects itself to the payment of $50 to be recovered by suit. All of the appellees are corporations. The lower court entered a decree for appellees and granted a permanent injunction. 10 F.Supp. 161.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 241

First. Appellant assails the federal jurisdiction of the court below on the ground that the matter in controversy does not exceed the sum or value of $3,000, as required by par. 1 of § 24 of the Judicial Code. The case arises under the Federal Constitution, and the bill alleges, and the record shows, that the requisite amount is involved in respect of each of six of the nine appellees. This is enough to sustain the jurisdiction of the district court. The motion was to dismiss the bill—that is to say, the bill in its entirety—and in that form it was properly denied. No motion to dismiss was made or considered [297 U.S. 242] by the lower court as to the three appellees in respect of whom the Jurisdictional amount was insufficient, and that question, therefore, is not before us. The Rio Grande, 19 Wall. 178, 189; Gibson v. Shufelt, 122 U.S. 27, 32.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 242

Second. The objection also is made that the bill does not make a case for equitable relief. But the objection is clearly without merit. As pointed out in Ohio Oil Co. v. Conway, 279 U.S. 813, 815, the laws of Louisiana afford no remedy whereby restitution of taxes and property exacted may be enforced, even where payment has been made under both protest and compulsion. It is true that the present act contains a provision (§ 5) to the effect that, where it is established to the satisfaction of the Supervisor of Public Accounts of the state that any payment has been made under the act which was "not due and collectible," the Supervisor is authorized to refund the amount out of any funds on hand collected by virtue of the act and not remitted to the state treasurer according to law. It seems clear that this refers only to a payment not due and collectible within the terms of the act, and does not authorize a refund on the ground that the act is invalid. Moreover, the act allows the Supervisor to make remittances immediately to the state treasurer of taxes paid under the act, and requires him to do so not later than the 30th day after the last day of the preceding quarter, in which event the right to a refund, if not sooner exercised, would be lost. Whether an aggrieved taxpayer may obtain relief under § 5 is, at best, a matter of speculation. In no view can it properly be said that there exists a plain, adequate and complete remedy at law. Davis v. Wakelee, 156 U.S. 680, 688; Union Pacific R. Co. v. Weld County, 247 U.S. 282, 285.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 242

Third. The validity of the act is assailed as violating the Federal Constitution in two particulars—(1) that it abridges the freedom of the press in contravention of the due process clause contained in § 1 of the Fourteenth [297 U.S. 243] Amendment; (2) that it denies appellees the equal protection of the laws in contravention of the same Amendment.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 243

1. The first point presents a question of the utmost gravity and importance, for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that "Congress shall make no law…abridging the freedom of speech, or of the press…. " While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 243

In the case of Hurtado v. California, 110 U.S. 516, this Court held that the term "due process of law" does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law, and it was thought that, since no part of the amendment could be regarded as superfluous, the term "due process of law" did not, ex vi termini, include presentment or indictment by a grand jury in any case, and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. But in Powell v. Alabama, 287 U.S. 45, 65, 68, we held that, in the light of subsequent decisions, the sweeping language of the Hurtado case could not be accepted without qualification. We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded [297 U.S. 244] against state action by the due process of law clause of the Fourteenth Amendment, and among them, the fundamental right of the accused to the aid of counsel in a criminal prosecution.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 244

That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this Court beginning with Gitlow v. New York, 268 U.S. 652, 666, and ending with Near v. Minnesota, 283 U.S. 697, 707. The word "liberty" contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. Allgeyer v. Louisiana, 165 U.S. 578, 589.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 244

Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a "citizen" within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall. 168. But a corporation is a "person" within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. Covington & Lexington Turnpike Co. v. Sandford, 164 U.S. 578, 592; Smyth v. Ames, 169 U.S. 466, 522.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 244

The tax imposed is designated a "license tax for the privilege of engaging in such business"—that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of two percent. on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct [297 U.S. 245] tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (Magnano Co. v. Hamilton, 292 U.S. 40, 45, and cases cited), it well might result in destroying both advertising and circulation.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 245

A determination of the question whether the tax is valid in respect of the point now under review requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (Hebert v. Louisiana, 272 U.S. 312, 316), and, as such, is embodied in the concept "due process of law" (Twining v. New Jersey, 211 U.S. 78, 99), and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment. Cf. Powell v. Alabama, supra, pp. 67-68. The history is a long one, but, for present purposes, it may be greatly abbreviated.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 245

For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an "Appeal for the Liberty of Unlicensed Printing," assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views "without previous censure", and declared the impossibility of finding any man base enough to accept [297 U.S. 246] the office of censor and at the same time good enough to be allowed to perform its duties. Collett, History of the Taxes on Knowledge, vol. I, pp. 6. The act expired by its own terms in 1695. It was never renewed, and the liberty of the press thus became, as pointed out by Wickwar (The Struggle for the Freedom of the Press, p. 15), merely "a right or liberty to publish without a license what formerly could be published only with one." But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 246

In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8-10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322-327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government, and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 246

These duties were quite commonly characterized as "taxes on knowledge," a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them. That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question, even on the part of [297 U.S. 247] those who defended the act. May (Constitutional History of England, 7th ed., vol. 2, p. 245), after discussing the control by "previous censure," says:

1936, Grosjean v. American Press Co., Inc., 297 U.S. 247

…a new restraint was devised in the form of a stamp duty on newspapers and advertisements—avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 247

Collett (vol. I, p. 14), says,

1936, Grosjean v. American Press Co., Inc., 297 U.S. 247

Any man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 247

Citations of similar import might be multiplied many times, but the foregoing is enough to demonstrate beyond peradventure that, in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern, and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as "taxes on knowledge" sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake, for, as Erskine, in his great speech in defense of Paine, has said, "The liberty of opinion keeps governments themselves in due subjection to their [297 U.S. 248] duties." Erskine's Speeches, High's ed. vol. I, p. 525. See May's Constitutional History of England, 7th ed., vol. 2, pp. 238-245.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 248

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year, an advertisement tax was imposed. Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, Freedom of the Press in Massachusetts, pp. 136-137.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 248

The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode, and while that occurrence did much to bring about the adoption of the amendment (see Pennsylvania and the Federal Constitution, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that, by the words "freedom of the press," the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship, for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that [297 U.S. 249] law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. Continental Illinois Nat. Bank v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 668-669. And, obviously, it is subject to the qualification that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. Murray's lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276-277; Waring v. Clarke, 5 How. 441, 454-457; Powell v. Alabama, supra, pp. 60-65.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 249

In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that, by the First Amendment, it was meant to preclude the national government, and, by the Fourteenth Amendment, to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well known and odious methods.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 249

This court had occasion in Near v. Minnesota, supra at pp. 713 et seq., to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication, and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 716), meant "principally, although not exclusively, immunity from previous restraints or [from] censorship."

1936, Grosjean v. American Press Co., Inc., 297 U.S. 249

Judge Cooley has laid down the test to be applied—

1936, Grosjean v. American Press Co., Inc., 297 U.S. 249

The evils to be prevented were not the censorship of the press merely, but any action of the government by [297 U.S. 250] means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 250

2 Cooley's Constitutional Limitations, 8th ed., p. 886.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 250

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 250

The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity, and, since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 250

In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our [297 U.S. 251] national existence has undertaken to impose tax like that now in question.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 251

The form in which the tax is imposed is, in itself, suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 251

2. Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned that it also constitutes a denial of the equal protection of the laws.

1936, Grosjean v. American Press Co., Inc., 297 U.S. 251

Decree affirmed.

Ashwander v. Tennessee Valley Authority, 1936

Title: Ashwander v. Tennessee Valley Authority

Author: U.S. Supreme Court

Date: February 17, 1936

Source: 297 U.S. 288

This case was argued December 19 and 20, 1935, and was decided February 17, 1936.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 288

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

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FOR THE FIFTH CIRCUIT

Syllabus

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1. Owners of a minority of the preferred shares, with voting power, in a corporation have standing to sue in its right to prevent the carrying out of a contract executed in its name by the directors with an agency of the United States, upon the grounds that the contract is unconstitutional, and that its performance will cause irreparable injury to the interests of the corporation. P. 318.

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In order to establish the stockholders' right of suit, it is not necessary to show that, in executing the contract, the directors acted with fraudulent intent or under legal duress or ultra vires of the corporation. In the absence of an adequate legal remedy, it is enough to show the breach of duty involved in the injurious, illegal action. This may consist in yielding to illegal government demands. The fact that the directors, in the exercise of their judgment, resolved to comply with such demands is not an adequate ground for denying to the stockholders an opportunity to contest their validity.

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2. The opportunity to resort to equity, in the absence of an adequate legal remedy, in order to prevent illegal transactions by those in control of corporate properties should not be curtailed because of reluctance to decide constitutional questions. P. 321.

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3. Estoppel in equity must rest on substantial grounds of prejudice or change of position—not on technicalities. P. 322.

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4. Where a contract between an electric power corporation and the Tennessee Valley Authority, a federal agency, for the sale by the former to the latter of transmission lines leading from a government dam where electricity was generated, was attacked in behalf of the corporation upon the ground that legislation by Congress purporting to empower the federal agency was unconstitutional—held that the corporation was not estopped by having bought electricity of the Government at the dam before and after the passage of the legislation, or by having applied to a state public service commission for approval of the contract, or by a delay of some months in the bringing of a stockholders' suit to set the contract aside. P. 323. [297 U.S. 289]

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The principle that one who accepts the benefit of a statute may not question its constitutionality held inapplicable.

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5. The judicial power does not extend to the determination of abstract questions. P. 324.

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6. The Act providing for declaratory judgments does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to "cases of actual controversy," meaning a controversy of a justiciable nature, thus excluding advisory decrees upon hypothetical states of fact. P. 325.

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7. The dam across the Tennessee River at Muscle Shoals, known as the Wilson Dam, was constructed pursuant to the National Defense Act of June 3, 1916, in the exercise of constitutional functions of the Federal Government, (a) as a means of assuring abundant electric energy for the manufacture of munitions in the event of war; (b) to improve the navigability of the river. P. 326.

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8. Judicial notice is taken of the international situation existing when the Act of 1916 was passed. Indisputably, the Wilson Dam and its auxiliary plants, including a hydroelectric power plant, are, and were intended to be, adapted to the purposes of national defense. P. 327.

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9. The power to regulate interstate commerce includes the power to remove obstructions to navigation from the navigable rivers of the United States. P. 328.

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10. In the execution of the Wilson Dam project for the constitutional purposes above stated, the United States acquired full title to the dam site, with all riparian rights. Water power, an inevitable incident of the construction of the dam, came into the exclusive control of the Federal Government, and was convertible into electric energy. Held:

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(1) That the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. P. 330.

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(2) That this electric energy so produced at the Wilson Dam is property of which Congress may dispose pursuant to the authority expressly granted by § 3, Art. IV, of the Constitution. P. 330.

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(3) The Ninth and Tenth Amendments do not apply to rights which are expressly granted by the Constitution to the Federal Government. P. 330.

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(4) The authority of Congress to dispose of electric energy generated at the Wilson Dam is not limited to a surplus necessarily created in the course of making munition of war or operating [297 U.S. 290] the works for navigation purposes, but extends to the remainder of the available energy, which would otherwise be lost or wasted. P. 335.

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(5) The method of disposing of government property under the constitutional provision (§ 3, Art. IV) must be appropriate to the nature of the property, and be adopted in the public interest, as distinguished from private or personal ends, and, the Court assumes, it must be consistent with the foundation principles of our dual system of Government, and must not be contrived to govern the concerns reserved to the States. P. 338.

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11. The Government, acting through its agency, the Tennessee Valley Authority, undertook to dispose of electric energy generated at the Wilson Dam by sale to a power company by interchange of energy with the company, and by purchase from the company of certain transmission lines leading from the dam and providing the means of distributing such energy to a large population within fifty miles. The power company had theretofore been buying energy from the Government at the dam, and was apparently the only customer to whom it could be sold there. The purchase of the lines was to enable the Government to seek a wider market. Held:

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(1) That there was no basis for concluding that the contract exceeded the federal power to dispose of property, and invaded rights reserved to the State or to the people. P. 338.

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(2) The power company had no constitutional right to insist that the energy should be sold to it at the dam or go to waste. P. 339.

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The decision on the constitutional question is strictly limited to the right of the Government to dispose of the energy itself—which is simply the mechanical energy, incidental to falling water at this dam, converted into electric energy, susceptible of transmission—and the right to acquire these transmission lines as a facility for disposing of that energy. The Government rightly conceded at the bar that it was without constitutional authority to acquire or dispose of electric energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. The question whether it might constitutionally use the energy generated at Wilson Dam in carrying on manufacturing or commercial enterprises not related to the purposes for which the Government was established, is not involved in this case; nor is the question whether, for disposing of the energy, the Government could acquire or operate local or urban [297 U.S. 291] distribution systems. The Court expresses no opinion as to such questions, nor as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, nor as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of that Authority, apart from the questions discussed in relation to the particular provisions of the contract above mentioned affecting the Power Company. P. 339.

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78 F.2d 578, affirmed.

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CERTIORARI, 296 U.S. 562, to review a decree reversing a decree of the District Court, by which that court, at the suit of preferred stockholders of the Alabama Power Company, set aside a contract that had been entered into by the Company and the Tennessee Valley Authority involving the sale and exchange of electric power generated at a government dam, and the acquisition by the Authority of certain transmission lines from the Power Company. [297 U.S. 315]

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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On January 4, 1934, the Tennessee Valley Authority, an agency of the Federal Government, 1 entered into a contract with the Alabama Power Company providing (1) for the purchase by the Authority from the Power Company of certain transmission lines, substations, and auxiliary properties for $1,000,000, (2) for the purchase by the Authority from the Power Company of certain real property for $150,000, (3) for an interchange of hydroelectric energy, and in addition for the sale by the Authority to the Power Company of its "surplus power," on stated terms, and (4) for mutual restrictions as to the areas to be served in the sale of power. The contract was amended and supplemented in minor particulars on February 13 and May 24, 1934. 2

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The Alabama Power Company is a corporation organized under the laws of Alabama, and is engaged in the generation of electric energy and its distribution generally throughout that State, its lines reaching 66 counties. The transmission lines to be purchased by the Authority extend from Wilson Dam, at the Muscle Shoals plant owned by the United States on the Tennessee River in [297 U.S. 316] northern Alabama, into seven counties in that State within a radius of about 50 miles. These lines serve a population of approximately 190,000, including about 10,000 individual customers, or about one-tenth of the total number served directly by the Power Company. The real property to be acquired by the Authority (apart from the transmission lines above mentioned and related properties) is adjacent to the area known as the "Joe Wheeler dam site," upon which the Authority is constructing the Wheeler Dam.

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The contract of January 4, 1934, also provided for cooperation between the Alabama Power Company and the Electric Home and Farm Authority, Inc., a subsidiary of the Tennessee Valley Authority, to promote the sale of electrical appliances, and, to that end, the Power Company, on May 21, 1934, entered into an agency contract with the Electric Home and Farm Authority, Inc. It is not necessary to detail or discuss the proceedings in relation to that transaction, as it is understood that the latter corporation has been dissolved.

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There was a further agreement on August 9, 1934, by which the Alabama Power Company gave an option to the Tennessee Valley Authority to acquire urban distribution systems which had been retained by the Power Company in municipalities within the area served by the transmission lines above mentioned. It appears that this option has not been exercised, and that the agreement has been terminated.

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Plaintiffs are holders of preferred stock of the Alabama Power Company. Conceiving the contract with the Tennessee Valley Authority to be injurious to the corporate interests and also invalid, because beyond the constitutional power of the Federal Government, they submitted their protest to the board of directors of the Power Company and demanded that steps should be taken to have the contract annulled. The board refused, and the [297 U.S. 317] Commonwealth & Southern Corporation, the holder of all the common stock of the Power Company, declined to call a meeting of the stockholders to take action. As the protest was unavailing, plaintiffs brought this suit to have the invalidity of the contract determined and its performance enjoined. Going beyond that particular challenge, and setting forth the pronouncements, policies and programs of the Authority, plaintiffs sought a decree restraining these activities as repugnant to the Constitution, and also asked a general declaratory decree with respect to the rights of the Authority in various relations.

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The defendants, including the Authority and its directors, the Power Company and its mortgage trustee, and the municipalities within the described area, filed answers, and the case was heard upon evidence. The District Court made elaborate findings and entered a final decree annulling the contract of January 4, 1934, and enjoining the transfer of the transmission lines and auxiliary properties. The court also enjoined the defendant municipalities from making or performing any contracts with the Authority for the purchase of power and from accepting or expending any funds received from the Authority or the Public Works Administration for the purpose of constructing a public distribution system to distribute power which the Authority supplied. The court gave no consideration to plaintiffs' request for a general declaratory decree.

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The Authority, its directors, and the city of Florence appealed from the decree, and the case was severed as to the other defendants. Plaintiffs took a cross-appeal.

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The Circuit Court of Appeals limited its discussion to the precise issue with respect to the effect and validity of the contract of January 4, 1934. The District Court had found that the electric energy required for the territory served by the transmission lines to be purchased [297 U.S. 318] under that contract is available at Wilson Dam without the necessity for any interconnection with any other dam or power plant. The Circuit Court of Appeals accordingly considered the constitutional authority for the construction of Wilson Dam and for the disposition of the electric energy there created. In the view that the Wilson Dam had been constructed in the exercise of the war and commerce powers of the Congress and that the electric energy there available was the property of the United States and subject to its disposition, the Circuit Court of Appeals decided that the decree of the District Court was erroneous, and should be reversed. The court also held that plaintiffs should take nothing by their cross-appeal. 78 F.2d 578. On plaintiffs' application, we granted writs of certiorari.

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First. The right of plaintiffs to bring this suit. Plaintiffs sue in the right of the Alabama Power Company. They sought unsuccessfully to have that right asserted by the Power Company itself, and, upon showing their demand and its refusal, they complied with the applicable rule. 3 While their stock holdings are small, they have a real interest, and there is no question that the suit was brought in good faith. 4 If otherwise entitled, they should not be denied the relief which would be accorded to one who owned more shares.

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Plaintiffs did not simply challenge the contract of January 4, 1934, as improvidently made—as an unwise exercise of the discretion vested in the board of directors. They challenged the contract both as injurious to the [297 U.S. 319] interests of the corporation and as an illegal transaction—violating the fundamental law. In seeking to prevent the carrying out of the contract, the suit was directed not only against the Power Company, but against the Authority and its directors upon the ground that the latter, under color of the statute, were acting beyond the powers which the Congress could validly confer. In such a case, it is not necessary for stockholders—when their corporation refuses to take suitable measures for its protection—to show that the managing board or trustees have acted with fraudulent intent or under legal duress. To entitle the complainants to equitable relief in the absence of an adequate legal remedy, it is enough for them to show the breach of trust or duty involved in the injurious and illegal action. Nor is it necessary to show that the transaction was ultra vires of the corporation. The illegality may be found in the lack of lawful authority on the part of those with whom the corporation is attempting to deal. Thus, the breach of duty may consist in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions. The right of stockholders to seek equitable relief has been recognized when the managing board or trustees of the corporation have refused to take legal measures to resist the collection of taxes or other exactions alleged to be unconstitutional (Dodge v. Woolsey, 18 How. 331, 339, 340, 345; Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 433, 553, 554; Brushaber v. Union Pacific R. Co., 240 U.S. 1, 10); or because of the failure to assert the rights and franchises of the corporation against an unwarranted interference through legislative or administrative action (Greenwood v. Freight Co., 105 U.S. 13, 15, 16; Cotting v. Kansas City Stockyards Co., 183 U.S. 79, 114). The remedy has been accorded to stockholders of public service corporations with respect to rates alleged to be confiscatory [297 U.S. 320] (Smyth v. Ames, 169 U.S. 466, 469, 517; Ex parte Young, 209 U.S. 123, 129, 130, 143). The fact that the directors, in the exercise of their judgment, either because they were disinclined to undertake a burdensome litigation or for other reasons which they regarded as substantial, resolved to comply with the legislative or administrative demands has not been deemed an adequate ground for denying to the stockholders an opportunity to contest the validity of the governmental requirements to which the directors were submitting. See Dodge v. Woolsey, supra, at pp. 340, 345; Greenwood v. Freight Co., supra, at p. 15; Pollock v. Farmers' Loan & Trust Co., supra, at pp. 433, 553, 554; Brushaber v. Union Pacific R. Co., supra, at p. 10.

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In Smith v. Kansas City Title Co., 255 U.S. 180, a shareholder of the Title Company sought to enjoin the directors from investing its funds in the bonds of Federal Land Banks and Joint Stock Land Banks upon the ground that the Act of Congress authorizing the creation of these banks and the issue of bonds was unconstitutional, and hence that the bonds were not legal securities in which the corporate funds could lawfully be invested. The proposed investment was not large—only $10,000 in each of the classes of bonds described. Id. pp. 195, 196. And it appeared that the directors of the Title Company maintained that the Federal Farm Loan Act was constitutional, and that the bonds were "valid and desirable investments." Id., p. 201. But neither the conceded fact as to the judgment of the directors nor the small amount to be invested—shown by the averments of the complaint—availed to defeat the jurisdiction of the court to decide the question as to the validity of the Act and of the bonds which it authorized. The Court held that the validity of the Act was directly drawn in question, and that the shareholder was entitled to maintain the suit. The Court said:

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The general allegations as to the interest of the [297 U.S. 321] shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by misapplication of the funds of the corporation, give jurisdiction under the principles settled in Pollock v. Farmers' Loan & Trust Co. and Brushaber v. Union Pacific R. Co., supra.

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Id., pp. 201, 202. The Court then proceeded to examine the constitutional question, and sustained the legislation under attack. A similar result was reached in Brushaber v. Union Pacific R. Co., supra. A close examination of these decisions leads inevitably to the conclusion that they should either be followed or be frankly overruled. We think that they should be followed, and that the opportunity to resort to equity, in the absence of an adequate legal remedy, in order to prevent illegal transactions by those in control of corporate properties should not be curtailed because of reluctance to decide constitutional questions.

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We find no distinctions which would justify us in refusing to entertain the present controversy. It is urged that plaintiffs hold preferred shares, and that, for the present purpose, they are virtually in the position of bondholders. The rights of bondholders, in case of injury to their interests through unconstitutional demands upon, or transactions with, their corporate debtor are not before us. Compare Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 367, 368. Plaintiffs are not creditors, but shareholders (with equal voting power share for share with the common stockholders, according to the findings), and thus they have a proprietary interest in the corporate enterprise which is subject to injury through breaches of trust or duty on the part of the directors who are not less the representatives of the plaintiffs because their shares have certain preferences. See Ball v. Rutland R. Co., 93 Fed. 513, 514, 515. It may be, as in this case, that the owner of all the common stock has participated in the transaction in question, and the owners of preferred [297 U.S. 322] stock may be the only persons having a proprietary interest in the corporation who are in a position to protect its interests against what is asserted to be an illegal disposition of its property. 5 A court of equity should not shut its door against them.

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It is said that here, instead of parting with money, as in the case of illegal or unconstitutional taxes or exactions, the Power Company is to receive a substantial consideration under the contract in suit. But the Power Company is to part with transmission lines which supply a large area, and plaintiffs allege that the consideration is inadequate, and that the transaction entails a disruption of services and a loss of business and franchises. If, as plaintiffs contend, those purporting to act as a governmental agency had no constitutional authority to make the agreement, its execution would leave the Power Company with doubtful remedy, either against the governmental agency, which might not be able, or against the Government, which might not be willing, to respond to a demand for the restoration of conditions as they now exist. In what circumstances and with what result such an effort at restoration might be made is unpredictable. If, as was decided in Smith v. Kansas City Title Co., supra, stockholders had the right to sue to test the validity of a proposed investment in the bonds of land banks, we can see no reason for denying to these plaintiffs a similar resort to equity in order to challenge, on the ground of unconstitutionality, a contract involving such a dislocation and misapplication of corporate property as are charged in the instant case.

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The Government urges that the Power Company is estopped to question the validity of the Act creating the Tennessee Valley Authority, and hence that the stockholders, suing in the right of the corporation, cannot [297 U.S. 323] maintain this suit. It is said that the Power Company, in 1925, installed its own transformers and connections at Wilson Dam, and has ever since purchased large quantities of electric energy there generated, and that the Power Company continued its purchases after the passage of the Act of 1933 constituting the Authority. The principle is invoked that one who accepts the benefit of a statute cannot be heard to question its constitutionality. Great Falls Manufacturing Co. v. Attorney General, 124 U.S. 581; Wall v. Parrot Silver & Copper Co., 244 U.S. 407; St. Louis Casting Co. v. Prendergast Construction Co., 260 U.S. 469. We think that the principle is not applicable here. The prior purchase of power in the circumstances disclosed may have a bearing upon the question before us, but it is by no means controlling. The contract in suit manifestly has a broader range, and we find nothing in the earlier transactions which preclude the contention that this contract goes beyond the constitutional power of the Authority. Reference is also made to a proceeding instituted by the Power Company to obtain the approval of the contract by the Alabama Public Service Commission and to the delay in the bringing of this suit. It was brought on October 8, 1934, following plaintiffs' demand upon the board of directors in the preceding August. Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities. We see no reason for concluding that the delay or the proceeding before the Commission caused any prejudice to either the Power Company or the Authority, so far as the subject matter of the contract between them is concerned, or that there is any basis for the claim of estoppel.

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We think that plaintiffs have made a sufficient showing to entitle them to bring suit, and that a constitutional question is properly presented and should be decided. [297 U.S. 324]

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Second. The scope of the issue. We agree with the Circuit Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934. The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions. Muskrat v. United States, 219 U.S. 346, 361; Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 74; Willing v. Chicago Auditorium Assn., 277 U.S. 274, 289; Nashville, C. & St.L. Ry. Co. v. Wallace, 288 U.S. 249, 262, 264. It was for this reason that the Court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that, in certain features, the Federal Water Power Act 6 exceeded the authority of the Congress and encroached upon that of the State. New Jersey v. Sargent, 269 U.S. 328. For the same reason, the State of New York, in her suit against the State of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. New York v. Illinois, 274 U.S. 488. At the last term, the Court held, in dismissing the bill of the United States against the State of West Virginia, that general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue "too vague and ill-defined to admit of judicial determination." United States v. West Virginia, 295 U.S. 463, 474. Claims based merely upon "assumed potential invasions" [297 U.S. 325] of rights are not enough to warrant judicial intervention. Arizona v. California, 283 U.S. 423, 462.

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The Act of June 14, 1934, 7 providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to "cases of actual controversy," a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See Nashville, C. & St.L. Ry. Co. v. Wallace, supra. While plaintiffs, as stockholders, might insist that the board of directors should take appropriate legal measures to extricate the corporation from particular transactions and agreements alleged to be invalid, plaintiffs had no right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the Tennessee Valley Authority Act in all its bearings, or a decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies.

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Examining the present record, we find no ground for a demand by plaintiffs except as it related to the contracts between the Authority and the Alabama Power Company. And as the contract of May 21, 1934, with the Electric Home and Farm Authority, Inc., and that of August 9, 1934, for an option to the Authority to acquire urban distribution systems, are understood to be inoperative (ante, p. 316), the only remaining questions that plaintiffs are entitled to raise concern the contract of January 4, 1934, providing for the purchase of transmission lines and the disposition of power.

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There is a further limitation upon our inquiry. As it appears that the transmission lines in question run from the Wilson Dam, and that the electric energy generated at that dam is more than sufficient to supply all the requirements [297 U.S. 326] of the contract, the questions that are properly before us relate to the constitutional authority for the construction of the Wilson Dam and for the disposition, as provided in the contract, of the electric energy there generated.

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Third. The constitutional authority for the construction of the Wilson Dam. The Congress may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government." Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat. 316, 423; Linder v. United States, 268 U.S. 5, 17. The Government's argument recognizes this essential limitation. The Government's contention is that the Wilson Dam was constructed, and the power plant connected with it was installed, in the exercise by the Congress of its war and commerce powers, that is, for the purposes of national defense and the improvement of navigation.

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Wilson Dam is described as a concrete monolith one hundred feet high and almost a mile long, containing two locks for navigation and eight installed generators. Construction was begun in 1917, and completed in 1926. Authority for its construction is found in § 124 of the National Defense Act of June 3, 1916. 8 It authorized the President to cause an investigation to be made in order to determine "the best, cheapest, and most available means for the production of nitrates and other products for munitions of war"; to designate for the exclusive use of the United States

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such site or sites upon any navigable or nonnavigable river or rivers or upon the public lands as in his opinion will be necessary for carrying out the purposes of this Act

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and "to construct, maintain and operate" on any such site

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dams, locks, improvements to navigation, power houses, and other plants and equipment or other [297 U.S. 327] means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.

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The President was authorized to lease, or acquire by condemnation or otherwise, such lands as might be necessary, and there was further provision that

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The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

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Id.

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We may take judicial notice of the international situation at the time the Act of 1916 was passed, and it cannot be successfully disputed that the Wilson Dam and its auxiliary plants, including the hydroelectric power plant, are and were intended to be adapted to the purposes of national defense. 9 While the District Court found that there is no intention to use the nitrate plants or the hydroelectric units installed at Wilson Dam for the production [297 U.S. 328] of war materials in time of peace,

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the maintenance of said properties in operating condition and the assurance of an abundant supply of electric energy in the event of war, constitute national defense assets.

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This finding has ample support.

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The Act of 1916 also had in view "improvements to navigation." Commerce includes navigation. "All America understands, and has uniformly understood," said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 190, "the word `commerce,' to comprehend navigation." The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation, and to remove such obstructions when they exist. "For these purposes," said the Court in Gilman v. Philadelphia, 3 Wall. 713, 725,

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Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

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See also Philadelphia Company v. Stimson, 223 U.S. 605, 634.

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The Tennessee River is a navigable stream, although there are obstructions at various points because of shoals, reefs and rapids. The improvement of navigation on this river has been a matter of national concern for over a century. Recommendation that provision be made for [297 U.S. 329] navigation around Muscle Shoals was made by the Secretary of War, John C. Calhoun, in his report transmitted to the Congress by President Monroe in 1824, 10 and, from 1852, the Congress has repeatedly authorized protects to develop navigation on that and other portions of the river, both by open channel improvements and by canalization. 11 The Wilson Dam project, adopted in 1918, gave a nine-foot slack water development, for fifteen miles above Florence, over the Muscle Shoals rapids and, as the District Court found, "flooded out the then existing canal and locks, which were inadequate." The District Court also found that a "high dam of this type was the only feasible means of eliminating this most serious obstruction to navigation." By the Act of 1930, after a protracted study by the Corps of Engineers of the United States Army, the Congress adopted a project for a permanent improvement of the main stream "for a navigable depth of nine feet." 12

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While, in its present condition, the Tennessee River is not adequately improved for commercial navigation, and traffic is small, we are not at liberty to conclude either that the river is not susceptible of development as an important waterway or that Congress has not undertaken [297 U.S. 330] that development, or that the construction of the Wilson Dam was not an appropriate mean to accomplish a legitimate end.

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The Wilson Dam and its power plant must be taken to have been constructed in the exercise of the constitutional functions of the Federal Government.

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Fourth. The constitutional authority to dispose of electric energy generated at the Wilson Dam. The Government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. See Green Bay Canal Co. v. Patten Paper Co., 172 U.S. 58, 80; United States v. Chandler-Dunbar Co., 229 U.S. 53, 72, 73; Utah, Power & Light Co. v. Pfost, 286 U.S. 165, 170.

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Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by § 3 of Article IV of the Constitution. This section provides:

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The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

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To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. And the Ninth Amendment (which petitioners also invoke) in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the [297 U.S. 331] Federal Government. The question is as to the scope of the grant, and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned.

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The occasion for the grant was the obvious necessity of making provision for the government of the vast territory acquired by the United States. The power to govern and to dispose of that territory was deemed to be indispensable to the purposes of the cessions made by the States. And yet it was a matter of grave concern because of the fear that "the sale and disposal" might become "a source of such immense revenue to the national government as to make it independent of and formidable to the people." Story on the Constitution, §§ 1325, 1326. The grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to "other property belonging to the United States," so that the power may be applied, as Story says, "to the due regulation of all other personal and real property rightfully belonging to the United States." And so, he adds, "it has been constantly understood and acted upon." Id.

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This power of disposal was early construed to embrace leases, thus enabling the Government to derive profit through royalties. The question arose with respect to a government lease of lead mines on public lands, under the Act of March 3, 1807. The contention was advanced that "disposal is not letting or leasing"; that Congress had no power "to give or authorize leases" and "to obtain profits from the working of the mines." The Court overruled the contention, saying:

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The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights, by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument.

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United States v. Gratiot, 14 Pet. 526, 533, 538. The policy, early [297 U.S. 332] adopted and steadily pursued, of segregating mineral lands from other public lands and providing for leases pointed to the recognition both of the full power of disposal and of the necessity of suitably adapting the methods of disposal to different sorts of property. The policy received particular emphasis following the discovery of gold in California in 1848. 13 For example, an Act of 1866, dealing with grants to Nevada, declared that, "in all cases, lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale." 14 And Congress, from the outset, adopted a similar practice in reserving salt springs. Morton v. Nebraska, 21 Wall. 660, 667; Montello Salt Co. v. Utah, 221 U.S. 452. It was in the light of this historic policy that the Court held that the school grant to Utah by the Enabling Act of 1894 15 was not intended to embrace land known to be valuable for coal. United States v. Sweet, 245 U.S. 563, 57. See also, as to the reservation and leases of oil lands, Pan American Petroleum Co. v. United States, 273 U.S. 456, 487.

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But when Congress thus reserved mineral lands for special disposal, can it be doubted that Congress could have provided for mining directly by its own agents, instead of giving that right to lessees on the payment of royalties? 16 Upon what ground could it be said that the Government could not mine its own gold, silver, coal, lead, or phosphates in the public domain, and dispose of them as property belonging to the United States? That it could dispose [297 U.S. 333] of its land, but not of what the land contained? It would seem to be clear that, under the same power of disposition which enabled the Government to lease and obtain profit from sales by its lessees, it could mine and obtain profit from its own sales.

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The question is whether a more limited power of disposal should be applied to the water power, convertible into electric energy, and to the electric energy thus produced at the Wilson Dam constructed by the Government in the exercise of its constitutional functions. If so, it must be by reason either of (1) the nature of the particular property, or (2) the character of the "surplus" disposed of, or (3) the manner of disposition.

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(1) That the water power and the electric energy generated at the dam are susceptible of disposition as property belonging to the United States is well established. In the case of Green Bay Canal Co. v. Patten Paper Co., supra, the question was

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whether the water power, incidentally created by the erection and maintenance of the dam and canal for the purpose of navigation in Fox River

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was

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subject to control and appropriation by the United States, owning and operating those public works, or by the State of Wisconsin, within whose limits Fox River lies.

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Id. pp. 68, 69. It appeared that, under the authority of the Congress, the United States had acquired, by purchase from a Canal Company, title to its improvement works, lands and water powers, on the Fox River, and that the United States had consented to the retention by the Canal Company of the water powers with appurtenances. We held that the

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substantial meaning of the transaction was that the United States granted to the Canal Company the right to continue in the possession and enjoyment of the water powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works,

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and that the method by which the arrangement was [297 U.S. 334] effected was

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as efficacious as if the entire property had been conveyed to the United States by one deed, and the reserved properties had been reconveyed to the Canal Company by another.

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Id., p. 80. We thought it clear that the Canal Company was "possessed of whatever rights to the use of this incidental water power that could be validly granted by the United States." Id., p. 69. And, in this view, it was decided that, so far as the "water powers and appurtenant lots are regarded as property," the title of the Canal Company could not be controverted, and that it was "equally plain that the mode and extent of the use and enjoyment of such property by the Canal Company" fell within the sole control of the United States. See Kaukauna Walter Power Co. v. Green Bay Canal Co., 142 U.S. 254; Green Bay Canal Co. v. Patten Paper Co., 173 U.S. 179.

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In United States v. Chandler-Dunbar Co., 229 U.S. 53, the United States had condemned land in Michigan, lying between the St. Marys River and the ship canal strip of the Government, in order to improve navigation. The riparian owner, under revocable permits from the Secretary of War, had placed in the rapids "the necessary dams, dykes and forebays for the purpose of controlling the current and using its power for commercial purposes." Id., p. 68. The Act of March 3, 1909, 17 authorizing the improvement, had revoked the permit. We said that the Government "had dominion over the water power of the rapids and falls," and could not be required to pay "any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use." Id., p. 76. The Act of 1909 also authorized the Secretary of War to lease

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any excess of water power which results from the conservation of the flow of the river, and the works which the Government may construct. [297 U.S. 335]

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"If the primary purpose is legitimate," said the Court,

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we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by state governments.

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Id., p. 73. Reference was made to the case of Kaukauna Water Power Co. v. Green Bay Canal Co., supra, where the Court had observed in relation to a Wisconsin statute of 1848, which had reserved to the State the water power created by the dam over the Fox River:

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As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.

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In International Paper Co. v. United States, 282 U.S. 399, the Government made a wartime requisition of electrical power, and was held bound to make compensation to a lessee who thereby had lost the use of the water to which he was entitled. The Court brushed aside attempted "distinctions between the taking of power and the taking of water rights," saying that the Government intended "to take and did take the use of all the water power," and had exercised its power of eminent domain to that end. Id. pp. 407, 408.

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(2) The argument is stressed that, assuming that electric energy generated at the dam belongs to the United States, the Congress has authority to dispose of this energy only to the extent that it is a surplus necessarily created in the course of making munitions of war or operating the works for navigation purposes; that is, that the remainder of the available energy must be lost or go to waste. We find nothing in the Constitution which imposes such a limitation. It is not to be deduced from the mere fact that the electric energy is only potentially available until the generators are operated. The Government has no less right to the energy thus available by letting the water course over its turbines than it has [297 U.S. 336] to use the appropriate processes to reduce to possession other property within its control, as, for example, oil which it may recover from a pool beneath its lands, and which is reduced to possession by boring oil wells and otherwise might escape its grasp. See Ohio Oil Co. v. Indiana, 177 U.S. 190, 208. And it would hardly be contended that, when the Government reserves coal on its lands, it can mine the coal and dispose of it only for the purpose of heating public buildings or for other governmental operations. Or, if the Government owns a silver mine, that it can obtain the silver only for the purpose of storage or coinage. Or that, when the Government extracts the oil it has reserved, it has no constitutional power to sell it. Our decisions recognize no such restriction. United States v. Gratiot, 14 Pet. 526; Kansas v. Colorado, 206 U.S. 46, 88, 89; Light v. United States, 220 U.S. 523, 536, 537; Ruddy v. Rossi, 248 U.S. 104, 106. The United States owns the coal, or the silver, or the lead, or the oil it obtains from its lands, and it lies in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose. We think that the same principle is applicable to electric energy. The argument pressed upon us leads to absurd consequences in the denial, despite the broad terms of the constitutional provision, of a power of disposal which the public interest may imperatively require. Suppose, for example, that, in the erection of a dam for the improvement of navigation, it became necessary to destroy a dam and power plant which had previously been erected by a private corporation engaged in the generation and distribution of energy which supplied the needs of neighboring communities and business enterprises. Would anyone say that, because the United States had built its own dam and plant in the exercise of its constitutional functions, and had complete ownership and dominion over both, no power could be supplied to the communities and enterprises dependent on it, not because of [297 U.S. 337] any unwillingness of the Congress to supply it, or of any overriding governmental need, but because there was no constitutional authority to furnish the supply? Or that, with abundant power available which must otherwise be wasted, the supply to the communities and enterprises whose very life may be at stake must be limited to the slender amount of surplus unavoidably involved in the operation of the navigation works because the Constitution does not permit any more energy to be generated and distributed? In the case of the Green Bay Canal Co., above cited, where the government works supplanted those of the Canal Company, the Court found no difficulty in sustaining the Government's authority to grant to the Canal Company the water powers which it had previously enjoyed, subject, of course, to the dominant control of the Government. And in the case of United States v. Chandler-Dunbar Co., supra, the statutory provision, to which the Court referred, was

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that any excess of water in the St. Marys River at Sault Sainte Marie over and above the amount now or hereafter required for the uses of navigation shall be leased for power purposes by the Secretary of War upon such terms and conditions as shall be best calculated in his judgment to insure the development thereof.

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It was to the leasing, under this provision, "of any excess of power over the needs of the Government" that the Court saw no valid objection. Id., p. 73.

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The decisions which petitioners cite give no support to their contention. Pollard v. Hagan, 3 How. 212, Shively v. Bowlby, 152 U.S. 1, and Port of Seattle v. Oregon-Washington R. Co., 255 U.S. 56, dealt with the title of the States to tidelands and the soil under navigable waters within their borders. See Borax Consolidated v. Los Angeles, 296 U.S. 10, 15. Those cases did not concern the dominant authority of the Federal Government in the interest of navigation to erect dams and avail itself of the incidental water power. We emphasized the dominant character of that authority in the case of [297 U.S. 338] the Green Bay Canal Co., supra, by this statement, at p. 80:

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At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters, there can be no divided empire.

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The case of Wisconsin v. Illinois, 278 U.S. 367, related to the diversion by the State of Illinois of water from Lake Michigan through the drainage canal at Chicago, and the questions now before us with respect to the disposition of surplus energy created at a dam erected by the Federal Government in the performance of its constitutional functions were in no way involved.

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(3) We come then to the question as to the validity of the method which has been adopted in disposing of the surplus energy generated at the Wilson Dam. The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest, as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government, and must not be contrived to govern the concerns reserved to the States. See Kansas v. Colorado, supra. In this instance, the method of disposal embraces the sale of surplus energy by the Tennessee Valley Authority to the Alabama Power Company, the interchange of energy between the Authority and the Power Company, and the purchase by the Authority from the Power Company of certain transmission lines.

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As to the mere sale of surplus energy, nothing need be added to what we have said as to the constitutional authority to dispose. The Government could lease or sell and fix the terms. Sales of surplus energy to the Power Company by the Authority continued a practice begun by the Government several years before. The contemplated [297 U.S. 339] interchange of energy is a form of disposition, and presents no questions which are essentially different from those that are pertinent to sales.

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The transmission lines which the Authority undertakes to purchase from the Power Company lead from the Wilson Dam to a large area within about fifty miles of the dam. These lines provide the means of distributing the electric energy generated at the dam to a large population. They furnish a method of reaching a market. The alternative method is to sell the surplus energy at the dam, and the market there appears to be limited to one purchaser, the Alabama Power Company, and its affiliated interests. We know of no constitutional ground upon which the Federal Government can be denied the right to seek a wider market. We suppose that, in the early days of mining in the West, if the Government had undertaken to operate a silver mine on its domain, it could have acquired the mules or horses and equipment to carry its silver to market. And the transmission lines for electric energy are but a facility for conveying to market that particular sort of property, and the acquisition of these lines raises no different constitutional question, unless in some way there is an invasion of the rights reserved to the State or to the people. We find no basis for concluding that the limited undertaking with the Alabama Power Company amounts to such an invasion. Certainly, the Alabama Power Company has no constitutional right to insist that it shall be the sole purchaser of the energy generated at the Wilson Dam—that the energy shall be sold to it or go to waste.

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We limit our decision to the case before us as we have defined it. The argument is earnestly presented that the Government, by virtue of its ownership of the dam and power plant, could not establish a steel mill and make and sell steel products, or a factory to manufacture clothing or shoes for the public, and thus attempt to make its [297 U.S. 340] ownership of energy, generated at its dam, a means of carrying on competitive commercial enterprises, and thus drawing to the Federal Government the conduct and management of business having no relation to the purposes for which the Federal Government was established. The picture is eloquently drawn, but we deem it to be irrelevant to the issue here. The Government is not using the water power at the Wilson Dam to establish any industry or business. It is not using the energy generated at the dam to manufacture commodities of any sort for the public. The Government is disposing of the energy itself, which simply is the mechanical energy, incidental to falling water at the dam, converted into the electric energy which is susceptible of transmission. The question here is simply as to the acquisition of the transmission lines as a facility for the disposal of that energy. And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. As we have said, these transmission lines lead directly from the dam, which has been lawfully constructed, and the question of the constitutional right of the Government to acquire or operate local or urban distribution systems is not involved. We express no opinion as to the validity of such an effort, as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, or as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of the Authority apart from the questions we have discussed in relation to the particular provisions of the contract of January 4, 1934, affecting the Alabama Power Company.

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The decree of the Circuit Court of Appeals is

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Affirmed. [297 U.S. 341]

BRANDEIS, J., concurring

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MR. JUSTICE BRANDEIS, concurring.

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Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

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Blair v. United States, 250 U.S. 273, 279.

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I do not disagree with the conclusion on the constitutional question announced by the Chief Justice; but, in my opinion, the judgment of the Circuit Court of Appeals should be affirmed without passing upon it. The Government has insisted throughout the litigation that the plaintiffs have no standing to challenge the validity of the legislation. This objection to the maintenance of the suit is not overcome by presenting the claim in the form of a bill in equity and complying with formal prerequisites required by Equity Rule 27. The obstacle is not procedural. It inheres in the substantive law, in well settled rules of equity, and in the practice in cases involving the constitutionality of legislation. Upon the findings made by the District Court, it should have dismissed the bill.

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From these it appears: the Alabama Power Company, a corporation of that State with transmission lines located there, has outstanding large issues of bonds, preferred stock, and common stock. Its officers agreed, with the approval of the board of directors, to sell to the Tennessee Valley Authority a part of these lines and incidental property. The management thought that the transaction was in the interest of the company. It acted in the exercise of its business judgment, with the utmost good faith. 1 [297 U.S. 342] There was no showing of fraud, oppression, or gross negligence. There was no showing of legal duress. There was no showing that the management believed that to sell to the Tennessee Valley Authority was in excess of the Company's corporate powers, or that it was illegal because entered into for a forbidden purpose.

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Nor is there any basis in law for the assertion that the contract was ultra vires of the Company. Under the law of Alabama, a public utility corporation may ordinarily sell a part of its transmission lines and incidental property to another such corporation if the approval of the Public Service Commission is obtained. The contract provided for securing such approval. Moreover, before the motion to dissolve the restraining order was denied, and before the hearing on the merits was concluded, the Legislature, by Act No. 1, approved January 24, 1935, and effective immediately, provided that a utility of the State may sell all or any of its property to the Tennessee Valley Authority without the approval of the Public Service Commission or of any other state agency.

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First. The substantive law. The plaintiffs who object own about one three hundred and fortieth of the preferred stock. They claimed at the hearing to represent about one-ninth of the preferred stock—that is, less than one forty-fifth in amount of all the securities outstanding. Their rights are not enlarged because the Tennessee Valley Authority entered into the transaction pursuant to [297 U.S. 343] an act of Congress. The fact that the bill calls for an enquiry into the legality of the transaction does not overcome the obstacle that ordinarily stockholders have no standing to interfere with the management. Mere belief that corporate action, taken or contemplated, is illegal gives the stockholder no greater right to interfere than is possessed by any other citizen. Stockholders are not guardians of the public. The function of guarding the public against acts deemed illegal rests with the public officials.

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Within recognized limits, stockholders may invoke the judicial remedy to enjoin acts of the management which threaten their property interest. But they cannot secure the aid of a court to correct what appear to them to be mistakes of judgment on the part of the officers. Courts may not interfere with the management of the corporation unless there is bad faith, disregard of the relative rights of its members, or other action seriously threatening their property rights. This rule applies whether the mistake is due to error of fact or of law or merely to bad business judgment. It applies, among other things, where the mistake alleged is the refusal to assert a seemingly clear cause of action, or the compromise of it. United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 263-264. If a stockholder could compel the officers to enforce every legal right, courts, instead of chosen officers, would be the arbiters of the corporation's fate.

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In Hawes v. Oakland, 104 U.S. 450, 462, a common stockholder sought to enjoin the Contra Costa Waterworks Company from permitting the City of Oakland to take without compensation water in excess of that to which it was legally entitled. This Court, in affirming dismissal of the bill, said:

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It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act [297 U.S. 344] understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors. If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

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In Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455, 463, a suit by a common stockholder to enjoin payment of an Alaska license tax alleged to be illegal, the Court said:

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The directors represent all the stockholders, and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder, or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to all act which their judgment does not approve, or to substitute his judgment for theirs. 2

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Second. The equity practice. Even where property rights of stockholders are alleged to be violated by the management, stockholders seeking an injunction must [297 U.S. 345] bear the burden of showing danger of irreparable injury, as do others who seek that equitable relief. In the case at bar, the burden of making such proof was a peculiarly heavy one. The plaintiffs, being preferred stockholders, have but a limited interest in the enterprise, resembling, in this respect, that of a bondholder, in contradistinction to that of a common stockholder. Acts may be innocuous to the preferred which conceivably might injure common stockholders. There was no finding that the property interests of the plaintiffs were imperiled by the transaction in question, and the record is barren of evidence on which any such finding could have been made.

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Third. The practice in constitutional cases. The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid cannot justify a departure from these settled rules of corporate law and established principles of equity practice. On the contrary, the fact that such is the nature of the enquiry proposed should deepen the reluctance of courts to entertain the stockholder's suit.

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It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.

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1 Cooley, Constitutional Limitations (8th ed.), p. 332.

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The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress, 3 and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies, and that they have no power to give advisory [297 U.S. 346] opinions. 4 On this ground, it has in recent years ordered the dismissal of several suits challenging the constitutionality of important acts of Congress. In Texas v. Interstate Commerce Comm'n, 258 U.S. 158, 162, the validity of Titles III and IV of the Transportation Act of 1920. In New Jersey v. Sargent, 269 U.S. 328, the validity of parts of the Federal Water Power Act. In Arizona v. California, 283 U.S. 423, the validity of the Boulder Canyon Project Act. Compare United States v. West Virginia, 295 U.S. 463, involving the Federal Water Power Act, and Liberty Warehouse Co. v. Grannis, 273 U.S. 70, where this Court affirmed the dismissal of a suit to test the validity of a Kentucky statute concerning the sale of tobacco; also Massachusetts State Grange v. Benton, 272 U.S. 525.

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The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

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1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions

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is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

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Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345. Compare Lord v. Veazie, 8 How. 251; Atherton Mills v. Johnston, 259 U.S. 13, 15.

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2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." [297 U.S. 347] Liverpool, N.Y. & P. S.S. Co. v. Emigration Commissioners, 113 U.S. 33, 39; 5 Abrams v. Van Schaick, 293 U.S. 188; Wilshire Oil Co. v. United States, 295 U.S. 100. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Burton v. United States, 196 U.S. 283, 295.

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3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & P. S.S. Co. v. Emigration Commissioners, supra; compare Hammond v. Schapp Bus Line, 275 U.S. 164, 169-172.

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4. The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191; Light v. United States, 220 U.S. 523, 538. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. Berea College v. Kentucky, 211 U.S. 45, 53.

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5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. 6 Tyler v. The Judges, 179 U.S. [297 U.S. 348] 405; Hendrick v. Maryland, 235 U.S. 610, 621. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. Columbus & Greenville Ry. v. Miller, 283 U.S. 96, 99-100. In Fairchild v. Hughes, 258 U.S. 126, the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In Massachusetts v. Mellon, 262 U.S. 447, the challenge of the federal Maternity Act was not entertained, although made by the Commonwealth on behalf of all its citizens.

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6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. 7 Great Falls Mfg. Co. v. Attorney General, 124 U.S. 581; Wall v. Parrot Silver & Copper Co., 244 U.S. 407, 411-412; St. Louis Malleable Casting Co. v. Prendergast Construction Co., 260 U.S. 469.

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7.

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When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

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Crowell v. Benson, 285 U.S. 22, 62. 8 [297 U.S. 349]

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Fourth. I am aware that, on several occasions, this Court passed upon important constitutional questions which were presented in stockholders' suits bearing a superficial resemblance to that now before us. But in none of those cases was the question presented under circumstances similar to those at bar. In none were the plaintiffs preferred stockholders. In some, the Court dealt largely with questions of federal jurisdiction and collusion. In most, the propriety of considering the constitutional question was not challenged by any party. In most, the statute challenged imposed a burden upon the corporation and penalties for failure to discharge it, whereas the Tennessee Valley Authority Act imposed no obligation upon the Alabama Power Company, and, under the contract, it received a valuable consideration. Among other things, the Authority agreed not to sell outside the area covered by the contract, and thus preserved the corporation against possible serious competition. The effect of this agreement was equivalent to a compromise of a doubtful cause of action. Certainly the alleged invalidity of the Tennessee Valley Authority Act was not a matter so clear as to make compromise illegitimate. These circumstances present features differentiating the case at bar from all the cases in which stockholders have been held entitled to have this Court pass upon the constitutionality of a statute which the directors had refused to challenge. The cases commonly cited are these: 9

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Dodge v. Woolsey, 18 How. 331, 341-346, was a suit brought by a common stockholder to enjoin a breach of trust by the directors which, if submitted to, would seriously injure the plaintiff. The Court drew clearly the distinction between "an error of judgment" and a breach [297 U.S. 350] of duty; declared that it could not interfere if there was only an error of judgment; held that, on the facts, the threatened action of the directors would be a breach of trust, and pointed to the serious injury necessarily resulting therefrom to the plaintiff. 10

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Grenwood v. Freight Co., 105 U.S. 13, 116, was a suit brought by a common stockholder to enjoin the enforcement of a statute alleged to be unconstitutional as repealing the corporation's charter. The Court said:

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It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence…that we think the complainant as a stockholder comes within the rule…which authorizes a shareholder to maintain a suit to prevent such a disaster where the corporation peremptorily refuses to move in the matter.

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Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 553-554, was a suit brought by a common stockholder to enjoin a breach of trust by paying voluntarily a tax which was said to be illegal. The stockholder's substantive right to object was not challenged. The question raised was that of equity jurisdiction. The allegation of threatened irreparable damage to the corporation and [297 U.S. 351] to the plaintiff was admitted. The Court said:

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The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument…. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits.

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The jurisdictional issue discussed in the dissent (157 U.S. at 608-612) was the effect of R.S. § 3224.

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Cotting v. Kansas City Stock Yards Co., 183 U.S. 79, 113, was a suit brought by a common stockholder to enjoin enforcement of a rate statute alleged to be unconstitutional against which the directors refused to protect the corporation. It was alleged and found that its enforcement would subject the company to great and irreparable loss. The serious contention concerning jurisdiction was, as stated by Mr. Justice Brewer, whether a suit lay against the Attorney General of the State. Of the jurisdiction of the suit "as one involving a controversy between the stockholders and the corporation and its officers, no serious question is made."

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Chicago v. Mills, 204 U.S. 321, was a suit brought by a common stockholder of the People's Gas, Light and Coke Company to enjoin enforcement of an ordinance alleged to be illegal. The sole question before this Court was whether the federal court had jurisdiction. That question raised an issue of fact. This Court, in affirming the judgment below, said (p. 331):

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Upon the whole record, we agree with the Circuit Court that the testimony does not disclose that the jurisdiction of the Federal court was collusively and fraudulently invoked….

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Brushaber v. Union Pacific R. Co., 240 U.S. 1, 9-10, was a suit brought by a common stockholder to restrain the corporation from voluntarily paying a tax alleged to [297 U.S. 352] be invalid. As stated by plaintiff's counsel:

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The contention—and this is the only objection that is made to the suit—that it seeks to do indirectly what the Revised Statutes [§ 3224] have said shall not be done—namely, enjoin the collection of a tax.

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The Court, assuming that the averments were identical with those in the Pollock case, declared that the right of the stockholder to sue was clear.

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Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-202, was a suit brought by a common stockholder to enjoin investment by the company in bonds issued under the Federal Farm Loan Act. Neither the parties nor the government, which filed briefs as amicus, made any objection to the jurisdiction. But, as both parties were citizens of Missouri, the Court raised, and considered fully, the question whether there was federal jurisdiction under § 24 of the Judicial Code. It was on this question that Mr. Justice Holmes and Mr. Justice McReynolds dissented. The Court held that there was federal jurisdiction, and upon averments of the bill, assumed to be adequate, sustained the right of the stockholder to invoke the equitable remedy on the authority of the Brushaber and Pollock cases.

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Hill v. Wallace, 259 U.S. 44, 60-63, was a suit by members of the Board of Trade of Chicago to restrain enforcement of the Future Trading Act, alleged to be unconstitutional. The Court held that the averments of the bill, which included allegations of irreparable injury, stated "sufficient equitable grounds to justify granting the relief" on the cases above cited.

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If, or insofar as, any of the cases discussed may be deemed authority for sustaining this bill, they should now be disapproved. This Court, while recognizing the soundness of the rule of stare decisis where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller [297 U.S. 353] consideration, to be erroneous. 11 Our present keener appreciation of the wisdom of limiting our decisions rigidly to questions essential to the disposition of the case before the court is evidenced by United States v. Hastings, 296 U.S. 188, decided at this term. There, we overruled United States v. Stevenson, 215 U.S. 190, 195, long a controlling authority on the Criminal Appeals Act.

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Fifth. If the Company ever had a right to challenge the transaction with the Tennessee Valley Authority, its right had been lost by estoppel before this suit was begun, and, as it is the Company's right which plaintiffs seek to enforce, they also are necessarily estopped. The Tennessee Valley Authority Act became a law on May 18, 1933. Between that date and January, 1934, the Company and its associates purchased approximately 230,000,000 kwh electric energy at Wilson Dam. Under the contract of January 4, 1934, which is here assailed, continued purchase of Wilson Dam power was provided for and made, and the Authority has acted in other matters in reliance on the contract. In May, 1934, the Company applied to the Alabama Public Service Commission for approval of the transfers provided for in the contract, and, on June 1, 1934, the Commission made, in general terms, its finding that the proposed sale of the properties was consistent with the public interest. Moreover, the plaintiffs, in their own right, are estopped by their long inaction. Although widespread publicity was given to the negotiations for the contract and to these later proceedings, [297 U.S. 354] the plaintiffs made no protest until August 7, 1934, and did not begin this suit until more than eight months after the execution of the contract. Others—certain ice and coal companies who thought they would suffer as competitors—appeared before the Commission in opposition to the action of the Authority, and apparently they are now contributing to the expenses of this litigation.

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Sixth. Even where by the substantive law stockholders have a standing to challenge the validity of legislation under which the management of a corporation is acting, courts should, in the exercise of their discretion, refuse an injunction unless the alleged invalidity is clear. This would seem to follow as a corollary of the long established presumption in favor of the constitutionality of a statute.

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Mr. Justice Iredell said as early as 1798, in Calder v. Bull, 3 Dall. 386, 399:

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If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void, though I admit that, as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority but in a clear and urgent case.

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Mr. Chief Justice Marshall said, in Dartmouth College v. Woodward, 4 Wheat. 518, 625:

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On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution. 12 [297 U.S. 355]

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Mr. Justice Washington said, in Ogden v. Saunders, 12 Wheat. 213, 270:

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But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until it violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this Court when that subject has called for its decision, and I know that it expresses the honest sentiments of each and every member of this bench.

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Mr. Chief Justice Waite said in the Sinking-Fund Case, 99 U.S. 700, 718:

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This declaration [that an act of Congress is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

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The challenge of the power of the Tennessee Valley Authority rests wholly upon the claim that the act of [297 U.S. 356] Congress which authorized the contract is unconstitutional. As the opinions of this Court and of the Circuit Court of Appeals show, that claim was not a matter "beyond peradventure clear." The challenge of the validity of the Act is made on an application for an injunction—a proceeding in which the court is required to exercise its judicial discretion. In proceedings for a mandamus, where, also, the remedy is granted not as a matter of right but in the exercise of a sound judicial discretion, Duncan Townsite Co. v. Lane, 245 U.S. 308, 311-312, courts decline to enter upon the enquiry when there is a serious doubt as to the existence of the right or duty sought to be enforced. As was said in United States v. Interstate Commerce Comm'n, 294 U.S. 50, 63:

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Where the matter is not beyond peradventure clear, we have invariably refused the writ [of mandamus] even though the question were one of law as to the extent of the statutory power of an administrative officer or body.

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A fortiori, this rule should have been applied here, where the power challenged is that of Congress under the Constitution.

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MR. JUSTICE STONE, MR. JUSTICE ROBERTS, and MR. JUSTICE CARDOZO join in this opinion.

MCREYNOLDS, J., separate opinion

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Separate opinion of MR. JUSTICE McREYNOLDS.

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Considering the consistent rulings of this court through many years, it is not difficult for me to conclude that petitioners have presented a justiciable controversy which we must decide. In Smith v. Kansas City Title Co., 255 U.S. 180, the grounds for jurisdiction were far less substantial than those here disclosed. We may not with propriety avoid disagreeable duties by lightly forsaking long respected precedents and established practice.

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Nor do I find serious difficulty with the notion that the United States, by proper means and for legitimate ends, [297 U.S. 357] may dispose of water power or electricity honestly developed in connection with permissible improvement of navigable waters. But the means employed to that end must be reasonably appropriate in the circumstances. Under pretense of exercising granted power, they may not, in fact, undertake something not intrusted to them. Their mere ownership, e.g., of an iron mine, would hardly permit the construction of smelting works followed by entry into the business of manufacturing and selling hardware, albeit the ore could thus be disposed of, private dealers discomfited, and artificial prices publicized. Here, therefore, we should consider the truth of petitioners' charge that, while pretending to act within their powers to improve navigation, the United States, through corporate agencies, are really seeking to accomplish what they have no right to undertake the business of developing, distributing and selling electric power. If the record sustains this charge, we ought so to declare and decree accordingly.

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The Circuit Court of Appeals took too narrow a view of the purpose and effect of the contract of January 4, 1934. That went far beyond the mere acquisition of transmission lines for proper use in disposing of power legitimately developed. Like all contracts, it must be considered as a whole, illumined by surrounding circumstances. Especial attention should be given to the deliberately announced purpose of Directors, clothed with extraordinary discretion and supplied with enormous sums of money. With $50,000,000 at their command, they started out to gain control of the electrical business in large areas, and to dictate sale prices. The power at Wilson Dam was the instrumentality seized upon for carrying the plan into effect.

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While our primary concern is with this contract, it cannot be regarded as a mere isolated effort to dispose of property. And certainly to consider only those provisions [297 U.S. 358] which directly relate to Alabama Power Company is not permissible. We must give attention to the whole transaction—its antecedents, purpose and effect—as well as the terms employed.

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No abstract question is before us; on the contrary, the matter is of enormous practical importance to petitioners—their whole investment is at stake. Properly understood, the pronouncements, policies and program of the Authority illuminate the action taken. They help to reveal the serious interference with the petitioners' rights. Their property was in danger of complete destruction under a considered program commenced by an agency of the National Government with vast resources subject to its discretion and backed by other agencies likewise intrusted with discretionary use of huge sums. The threat of competition by such an opponent was appalling. The will to prevail was evident. No private concern could reasonably hope to withstand such force.

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The Tennessee River, with headwaters in West Virginia and North Carolina, crosses Tennessee on a southwesterly course, enters Alabama near Chattanooga, and flows westerly across the northern part of that State to the northeast corner of Mississippi. There it turns northward, passes through Tennessee and Kentucky, and empties into the Ohio forty miles above Cairo. The total length is nine hundred miles; the drainage basin approximates forty thousand square miles. The volume of water is extremely variable; commercial navigation is of moderate importance.

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At Muscle Shoals, near Florence, Alabama (twenty miles east of the Mississippi line and fifteen south of Tennessee), a succession of falls constitutes serious interference with navigation, also presents possibilities for development of power on a large scale. During and immediately after the World War, a great dam was constructed there by the United States, intended primarily for generation [297 U.S. 359] of power. Production of electricity soon commenced. Some of this was devoted to governmental purposes; much was sold, delivery being made at or near the dam.

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During the last thirty years, several corporations have been engaged in the growing business of developing electric energy and distributing this to customers over a network of interconnected lines extending throughout Tennessee, Georgia, Alabama and Mississippi. At great expense, they gradually built up extensive businesses and acquired properties of very large value. All operated under state supervision. Through stock ownership or otherwise, they came under general control of the Commonwealth & Southern Corporation. Among the associates were the Alabama Power Company, which serviced Alabama, the Mississippi Company, which serviced Mississippi, and the Tennessee Company, which operated in eastern Tennessee. Huge sums were invested in these enterprises by thousands of persons in many states. Apparently, the companies were diligently developing their several systems and responding to the demands of the territories which they covered.

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In 1933, operations began under an imposing program for somewhat improving Tennessee River navigation, and especially for developing the water power along its whole course at public expense. This plan involved conversion of water power into electricity for wide distribution throughout the valley and adjacent territory. Its development was intrusted to the Tennessee Valley Authority, a federal corporation wholly controlled by the United States. This promptly took over the Wilson Dam and began work upon the Wheeler Dam, twenty miles up the River, and the Pickwick Dam, some forty miles lower down. Also it commenced construction of Norris Dam across Clinch River, a branch of the Tennessee, two hundred miles above the Wilson Dam. All these, with probable additions, were to be connected by transmission wires, [297 U.S. 360] and electric energy distributed from them to millions of people in many states. Public service corporations were to be brought to terms or put out of business. At least $75,000,000 of public funds was early appropriated for expenditure by the Directors, and other governmental agencies in control of vast sums were ready to lend aid.

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Readily to understand the issues now before us, one must be mindful of these circumstances.

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The trial court made findings of fact which fill more than sixty printed pages. They are not controverted, and, for present purposes, are accepted; upon them the cause stands for decision. They are much quoted below. Plainly they indicate, and that court, in effect, declared, the contract of January 4th was a deliberate step into a forbidden field, taken with definite purpose to continue the trespass.

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Nothing suggests either necessity or desirability of entering into this agreement solely to obtain solvent customers willing to pay full value for all surplus power generated at Wilson Dam. Apparently there was ample opportunity for such sales, deliveries to be made at or near the dam. No attempt was made to show otherwise. The definite end in view was something other than orderly disposition.

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The Authority's Answer to the Complaint is little more than a series of denials. It does not even allege that the contract of January 4th was necessary for ready disposal of power; or that thereby better prices could be obtained; or that no buyer was ready, able and willing to take at the dam for full value; or that the Board expected to derive adequate return from the business to be acquired. No sort of explanation of the contract is presented—why it was entered into, or whether profitable use probably could be made of the property. And I find in the Authority's brief no serious attempt to justify the purchases because necessary. or, in fact, an advantageous method, for disposing [297 U.S. 361] of property. Nothing in the findings lends support to any such view.

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The record leaves no room for reasonable doubt that the primary purpose was to put the Federal Government into the business of distributing and selling electric power throughout certain large districts, to expel the power companies which had long serviced them, and to control the market therein. A government instrumentality had entered upon a pretentious scheme to provide a "yardstick" of the fairness of rates charged by private owners, and to attain "no less a goal than the electrification of America."

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When we carry this program into every town and city and village, and every farm throughout the country, we will have written the greatest chapter in the economic, industrial and social development of America.

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Any reasonable doubt concerning the purpose and result of the contract of January 4th or of the design of the Authority should be dispelled by examination of its Reports for 1934 and 1935.\* [297 U.S. 362]

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The conception was to establish an independent network comparable in all respects with the electric utility system serving the area, with which TVA sought to establish interchange arrangements, both as outlets for its [297 U.S. 363] own power and to use existing systems as a standby or backup service.

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The TVA plan as conceived and in process of execution contemplates complete and exclusive control and jurisdiction over all power sites on the Tennessee River [297 U.S. 364] and tributaries.

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The TVA policy contemplates full corporate discretion by TVA in developing, executing and extending its electric system and service within transmission limits.

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This policy contemplated service utility in type and covered not only generation, but transmission and distribution (preferably through public or nonprofit agencies, if available), both wholesale and retail. That is, [297 U.S. 365] moreover, implicit in both the January 4 contract and the now terminated August 9th contract.

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The challenged contract is defended upon the theory that the

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Federal Government may dispose of the surplus water power necessarily created by Wilson Dam, and may authorize generation of electric energy and acquisition of transmission lines as means of facilitating this disposal.

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But to facilitate disposal was not the real purpose; obviously the thing to be facilitated was carrying on business by use of the purchased property. Under the guise of disposition, something wholly different was to be accomplished—devotion of electric power to purposes beyond the sphere of proper federal action, an unlawful goal. There is no plausible claim that such a contract was either necessary or desirable merely to bring about the sale of property. This Court has often affirmed that facts, not artifice, control its conclusions. The Agency has stated quite clearly the end in view: "This public operation is to serve as a yardstick by which to measure the fairness of electric rates." "The TVA power policy was not designed or limited with a view to the marketing of the power produced and available at Muscle Shoals."

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In formulating and going forward with the power policy, the Board was considering that policy as a permanent and independent commercial function.

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For present purposes, a complete survey of relevant circumstances preceding the contract of January 4th and all its consequences is not essential. The pleadings and findings fairly outline the situation. What follows is mainly quoted or derived from them.

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The Act of May 18, 1933, created the Tennessee Valley Authority as a body corporate

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for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural [297 U.S. 366] and industrial development, and to improve navigation in the Tennessee River and to control the destructive floodwaters in the Tennessee River and Mississippi River Basins.

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It provided, a board of three directors "shall direct the exercise of all the powers of the Corporation," and "is authorized to make alterations, modifications or improvements in existing plants and facilities, and to construct new plants", and to "produce, distribute, and sell electric power as herein particularly specified." The Corporation

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shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation;

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to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries.

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Also, the Board is

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hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth, and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years.

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In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines, the board, in its discretion, shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable.

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One of the first corporate acts of TVA after its organization was to formulate and announce a power policy to govern the commercial distribution of electric power by TVA. The evidence establishes the fact that the Board, [297 U.S. 367] from the outset, has considered that it has general corporate discretion as to the establishment and extension of its electric power policy. In establishing a power policy, the Board was not primarily considering merely the question of disposal of power produced at Muscle Shoals no longer required for governmental purposes as a result of overbuilding, obsolescence of plants, or termination of war purpose. Nor was it considering disposal of prospective increases in electric power to be unavoidably created in excess of some governmental requirement. It was considering the matter from the standpoint of the successful establishment and permanent operation of an independent and well rounded government-owned electric distribution system and the general civic, social, and industrial planning and development of the Tennessee Valley region as a whole.

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Under date of August 25, 1933, TVA announced its power policy, indicating both the initial stage of its development and certain later steps originally determined upon…. This power policy had not been rescinded or abandoned or modified at the time of submission of this cause.

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In September, 1933, the Authority announced its wholesale and retail rate schedules, which are shown by the evidence to be materially lower than corresponding schedules of the existing utilities in the area. Following this action, numerous municipalities in the area began to make efforts to construct municipal systems with which to distribute TVA current, and Public Works Administration (called PWA) gave assurances of favorable consideration of applications for loans to that end.

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Under such circumstances, Commonwealth & Southern Corporation negotiated the January 4th contract for its operating subsidiaries—Alabama Power Company, Georgia Power Company, Mississippi Power Company, and Tennessee Electric Power Company. [297 U.S. 368]

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This recited that the Alabama Company, the Mississippi Company, and the Tennessee Company desired to sell, and the Authority desired to purchase, certain land, buildings and physical properties devoted to the generation, transmission and distribution of electricity, together with certain franchises, contracts and going business.

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The Alabama Company agreed to sell for $1,000,000 all of its low tension (44 KV or lower) transmission lines, substations (including the high tension station at Decatur and the Sheffield Steam Plant Station) and all rural lines and rural distribution systems in five Alabama counties and parts of two others. [These counties are northwestern Alabama, and lie on both sides of the Tennessee River for eighty miles or more.]

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The Mississippi Company, in consideration of $850,000, agreed to transfer all of its transmission and distribution lines, substations, generating plants and other property in Pontotoc, Lee, Itawamba, Union, Benton, Tippah, Prentiss, Tishomingo and Alcorn counties (except one dam site in Tishomingo County) State of Mississippi, used in connection with the generation, transmission, distribution or sale of electrical energy. [These counties are the northeastern section of the state, a territory sixty miles square.]

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For $900,000, the Tennessee Company agreed to convey its transmission and distribution lines, substations, distribution systems and other properties used in connection with the transmission, distribution and sale of electrical energy in Anderson, Campbell, Morgan and Scott counties, East Tennessee, and "all of the 66 KV transmission line from Cove Creek to Knoxville." [These counties are in the mountains northward from Knoxville within a radius of about sixty miles. They lie northeast of Muscle Shoals, and some points therein are much more than a hundred miles from Wilson Dam. They have a population of 86,000.] [297 U.S. 369]

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

The power companies agreed, that

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

any conveyance of property shall include not only the physical property, easements and rights-of-way, but shall also include all machinery, equipment, tools and working supplies set forth in the respective exhibits, and all franchises, contracts and going business relating to the use of any of said properties.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

Also,

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

to transfer or secure the transfer of said franchises, contracts and going business, and to transfer said properties with all present customers attached, so far as they are able.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

Also,

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

that, during the period of this contract, none of said companies will sell electric energy to any municipality, corporation, partnership, association or individual in any portion of the above-described counties or parts thereof in Alabama, Tennessee and Mississippi,

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

etc. The Authority agreed not to sell electric energy outside of the specified counties to the customers of non-utilities supplied by the power companies.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

Other covenants provided for interchange of electric energy between the contracting parties and for cooperation in the sale of electric appliances throughout the entire territory served by the power companies.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

Power Companies covenant and agree that, after the expiration of this agreement, the interchange arrangement then in effect will be maintained by Power Companies for an additional period (not exceeding eighteen months) sufficient to permit Authority to construct its own transmission facilities for serving all of the territory which it is then serving in whole or in part with power obtained at such interchange points.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 369

Power Companies agree to have available at all times for exchange, at each point of exchange, energy and capacity to supply the entire demands of the customers served by Authority from such points of exchange, subject to the limitations as to transmission capacity set forth in Section 10(h) hereof; Provided, that the maximum [297 U.S. 370] amount which Authority shall be entitled to demand at all points of exchange shall be 70,000 k.v.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 370

Prior to the agreement for sale, The Alabama Company had derived $750,000 gross annual revenue from its properties located within the "ceded area." This district had a population of 190,000, and the Company had therein 10,000 individual customers—approximately 1/10 of all those directly served by it. The lines transferred by the Mississippi Power Company served directly 4,000 customers in 9 counties, having total population of 184,000. When this cause began, the Mississippi properties were being operated by TVA, and rural lines were in process of extension by it in both Mississippi and Alabama.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 370

All of the electric properties and facilities covered by the contract of January 4, 1934,…were contracted for by TVA for the purpose of continuing and enlarging the utility service for which they were used by the respective power companies.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 370

The operation of a commercial utility service by TVA and the wholesaling and retailing by TVA of electricity in the area served by the Alabama Power Company is not and will not be in aid of the regulation of navigation or national defense or other governmental function insofar as any plan, purpose or activity of the TVA or of the United States disclosed on this record would indicate.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 370

Answering the Petitioners' Complaint, Alabama Company admitted

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 370

that the public statements of TVA indicated the program therein alleged, and the directors of respondent company considered that to vest such an agency as therein alleged with unlimited power and access to public funds in a program of business competition and public ownership promotion in the area served by respondent company would in effect destroy this respondent's property, and such conclusion on its part was the [297 U.S. 371] principal inducement for it to enter into the contracts of January 4 and August 9, 1934, and respondent company thereby was and will be enabled to salvage a larger amount of its property than it could have done by competition.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 371

Also,

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 371

that, under the circumstances of threatened competition, directed or controlled by TVA as averred therein, this respondent agreed to the sale of certain of its transmission lines and property, and entered into the contract dated January 4, 1934…. Respondent company admits that, at and before the execution of the contract, the threat was made to use federal funds to duplicate the facilities of respondent, which would result in competition with rates not attainable by or permissible to this respondent, and such rates would be stipulated, controlled and regulated by TVA.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 371

As matter of law, the trial court found—

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The function intended by TVA under the evidence in relation to service, utility in type, in the area ceded by the contract of January 4, 1934, transcends the function of conservation or disposition of government property, involves continuing service and commercial functions by the government to fill contracts not governmental in origin or character.

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Performance of the contract of January 4th, 1934, would involve substantial loss and injury to the Alabama Power Company, including, inter alia, the loss or abandonment of franchises, licenses, going business and service area supporting its general system and power facilities, and, unless resisted, would tend to invite a progressive encroachment on its service area by the Tennessee Valley Authority.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 371

Congress has no constitutional authority to authorize Tennessee Valley Authority or any other federal agency to undertake the operation, essentially permanent in character, of a utility system, for profit, involving the [297 U.S. 372] generation, transmission and commercial distribution of electricity within State domain, having no reasonable relation to a lawful governmental use.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 372

The contract of January 4, 1934, expressly provided for the transfer of all or substantially all of the lines and properties of the Alabama Power Company for the service of the ceded area, included transmission lines, rural distribution systems and certain urban distribution systems, and contemplated the eventual transfer of fourteen urban distribution systems. This contract, expressly contemplating service of the ceded area by the Tennessee Valley Authority with electricity to be generated or purchased by the Tennessee Valley Authority for that purpose, was in furtherance of illegal proprietary operations by the Tennessee Valley Authority in violation of the Federal Constitution, and void. The contract was accordingly ultra vires and void as to the Alabama Power Company.

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Having made exhaustive findings of fact and law, the trial court entered a decree annulling the January 4th contract and enjoining the Alabama Power Company from performing it. The Circuit Court of Appeals reversed, upon the theory that the Authority was making proper arrangements for sale of surplus power from the Wilson dam. The injunction was continued.

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I think the trial court reached the correct conclusion, and that its decree should be approved. If, under the thin mask of disposing of property, the United States can enter the business of generating, transmitting and selling power as, when, and wherever some board may specify, with the definite design to accomplish ends wholly beyond the sphere marked out for them by the Constitution, an easy way has been found for breaking down the limitations heretofore supposed to guarantee protection against aggression.

Footnotes

HUGHES, J., lead opinion (Footnotes)

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 372

1. The Tennessee Valley Authority is a body corporate created by the Act of Congress of May 18, 1933, amended by the Act of Congress of August 31, 1935. 48 Stat. 58; 49 Stat. 1075.

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2. The Commonwealth & Southern Corporation, organized under the laws of Delaware, and the owner of the common stock of the Alabama Power Company, was a party to the contract, which also contained agreements with other subsidiaries of the Commonwealth & Southern Corporation, viz: Tennessee Electric Power Company, Georgia Power Company, and Mississippi Power Company. The agreements with these companies are not involved in this suit.

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3. Equity Rule 27.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 372

4. The District Court found that

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Approximately 1900 preferred stockholders of the Alabama Company, holding over 40,000 shares of the preferred stock thereof, have associated themselves with a preferred stockholders' protective committee and authorized their names to be joined with the plaintiffs of record in this case as parties plaintiff.

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5. See note 2.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 372

6. 41 Stat. 1063.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 372

7. 48 Stat. 955.

1936, Ashwander v. Tennessee Valley Authority, 297 U.S. 372

8. 39 Stat. 166, 215.

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9. Among the findings of the District Court on this point are the following:

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38. The Muscle Shoals plants, including the Sheffield steam plant and the 8 hydroelectric units installed at Wilson Dam, were authorized for war purposes by Section 124 of the National Defense Act of 1916 in anticipation of participation in the great war. The original conception was for the use of Nitrate Plant No. 1, employing the Haber process, and Plant No. 2, employing the cyanamide process, for the fixation or manufacture of nitrogen and its subsequent conversion into ammonium nitrate for explosives. Plant No. 1 was completed, but was never practicable, due to the lack of knowledge of the Haber process. Plant No. 2 successfully developed calcium cyanamide from a manufacturing standpoint, but, due to the availability of ammonium nitrate as a result of commercial development of byproduct or synthetic processes, the commercial or peacetime manufacture of calcium cyanamide at Nitrate Plant No. 2 is considered uneconomical and undesirable, and is not proposed or suggested by either the War Department or the TVA. The Court further finds, however, that the plant, with the aid of electric power furnished by Wilson Dam and the Sheffield steam plant, can be operated to produce annually 110,000 tons of ammonium nitrate by the cyanamide process, and that the present plans of the War Department count upon that plant to supply that amount annually in the event of a major war….

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40. The existence of these facilities, which make available large quantities of nitrogenous war materials by use of either the nitrogen fixing process or the oxidation of synthetic ammonia, is a valuable national defense asset.

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10. Sen.Doc. No. 1, 18th Cong., 2d sess.; H.R.Doc. No. 119, 69th Cong., 1st sess., 11, 12.

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11. See Rivers and Harbors Acts of August 30, 1852, c. 104, 10 Stat. 56, 60; July 25, 1868, c. 233, 15 Stat. 171, 174; March 3, 1871, c. 118, 16 Stat. 538, 542; June 10, 1872, c. 416, 17 Stat. 370, 372; September 19, 1890, c. 907, 26 Stat. 426, 445, 446; August 18, 1894, c. 299, 28 Stat. 338, 354; April 26, 1904, c. 1605, 33 Stat. 309; March 2, 1907, c. 2509, 34 Stat. 1073, 1093; June 25, 1910, c. 382, 36 Stat. 630, 652; July 25, 1912, c. 253, 37 Stat. 201, 215; July 27, 1916, c. 260, 39 Stat. 391, 399; March 3, 1925, c. 467, 43 Stat. 1186, 1188; July 3, 1930, c. 847, 46 Stat. 918, 927, 928. See also H.R.Docs. No. 319, 67th Cong., 2d sess.; No. 43, 69th Cong., 1st sess.; No. 185, 70th Cong., 1st sess.; No. 328, 71st Cong., 2d sess.

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12. Act of July 3, 1930, c. 847, 46 Stat. 918, 927, 928.

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13. See citations of numerous statutes in United States v. Sweet, 245 U.S. 563, 568, 569.

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14. Act of July 4, 1866, c. 16, § 5, 14 Stat. 85, 86.

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15. Act of July 16, 1894, c. 138, 28 Stat. 107.

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16. See, as to royalties under leases "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," the Act of February 25, 1920, c. 85, 41 Stat. 437. Also, as to leases of public lands containing potassium deposits, the Act of October 2, 1917, c. 62, 40 Stat. 297.

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17. 35 Stat. c. 264, 815, 820, 821.

BRANDEIS, J., concurring (Footnotes)

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1. The management explained that it was in the best interest of the Company to accept the offer of the Authority for the purchase of the transmission lines in a limited area, coupled with an agreement on the part of the Authority not to sell outside of that area during the life of the contract. It protected the Company against possible entrance of the Authority into the territory in which were located nine-tenths of the Company's customers, including the largest, and it assured the Company that, so long as the latter retained its urban distribution systems within the territory served by the transmission lines, those systems would be serviced by power from Wilson Dam. Upon delivery of the transmission lines, the Authority agreed to pay the Company $1,150,000.

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2. See also Samuel v. Holladay, 21 Fed.Cas. No. 12,288, pp. 306, 311-312.

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3. E.g., Miller, J., in Ex parte Garland, 4 Wall. 333, 382; Hepburn v. Griswold, 8 Wall. 603, 610; Adkins v. Children's Hospital, 261 U.S. 525, 544; Holmes, J., in Blodgett v. Holden, 275 U.S. 142, 147-148.

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4. E.g., Hayburn's Case, 2 Dall. 409; United States v. Ferreira, 13 How. 40; Gordon v. United States, 2 Wall. 561, 117 U.S. 697; Muskrat v. United States, 219 U.S. 346; Willing v. Chicago Auditorium Assn., 277 U.S. 274.

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5. E.g., Ex parte Randolph, 20 Fed.Cas. No. 11,558, pp. 242, 254; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 553; Trade-Mark Cases, 100 U.S. 82, 96; Arizona v. California, 283 U.S. 423, 462-464.

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6. E.g., Hatch v. Reardon, 204 U.S. 152, 160-161; Corporation Commission v. Lowe, 281 U.S. 431, 438; Heald v. District of Columbia, 259 U.S. 114, 123; Sprout v. South Bend, 277 U.S. 163, 167; Concordia Fire Insurance Co. v. Illinois, 292 U.S. 535, 547.

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7. Compare Electric Co. v. Dow, 166 U.S. 489; Pierce v. Somerset Ry., 171 U.S. 641, 648; Leonard v. Vicksburg, S. & P. R. Co., 198 U.S. 416, 422.

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8. E.g., United States v. Delaware & Hudson Co., 213 U.S. 366, 407-408; United States v. Jin Fuey Moy, 241 U.S. 394, 401; Baender v. Barnett, 255 U.S. 224; Texas v. Eastern Texas R. Co., 258 U.S. 204, 217; Panama R. Co. v. Johnson, 264 U.S. 375, 390; Linder v. United States, 268 U.S. 5, 17-18; Missouri Pacific R. Co. v. Boone, 270 U.S. 466, 471-472; Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346; Blodgett v. Holden, 275 U.S. 142, 148; Lucas v. Alexander, 279 U.S. 573, 577; Interstate Commerce Comm'n v. Oregon-Washington R. & N. Co., 288 U.S. 14, 40.

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9. Others are Memphis v. Dean, 8 Wall. 64, 73; Smyth v. Ames, 169 U.S. 466, 515-518; Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455; Ex parte Young, 209 U.S. 123, 143; Delaware & Hudson Co. v. Albany & Susquehanna R. Co., 213 U.S. 435; Wathen v. Jackson Oil & Refining Co., 235 U.S. 635.

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10. The resolution of the directors (p. 340) was this:

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Resolved, that we fully concur in the views expressed in said letter as to the illegality of the tax therein named, and believe it to be in no way binding upon the bank; but, in consideration of the many obstacles in the way of testing the law in the courts of the State, we cannot consent to take the action which we are called upon to take, but must leave the said Kleman to pursue such measures as he may deem best in the premises.

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Referring to Dodge v. Woolsey, the Court pointed out, in Hawes v. Oakland, 104 U.S. 450, 459:

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As the law then stood, there was no means by which the bank, being a citizen of the same State with Dodge, the tax collector, could bring into a court of the United States the right which it asserted under the Constitution to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States.

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11. A notable recent example is Humphrey's Executor v. United States, 295 U.S. 602, which limited (p. 626 et seq.) Myers v. United States, 272 U.S. 52, disapproving important statements in the opinion. For lists of decisions of this Court later overruled, see Burnet v. Cormado Oil & Gas Co., 285 U.S. 393, 406-409; Malcolm Sharp, Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions, 46 Harv.L.Rev. 361, 593, 795.

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12. In 1811, Chief Justice Tilghman of the Supreme Court of Pennsylvania, while asserting the power of the court to hold laws unconstitutional but declining to exercise it in a particular case, stated the practice as follows:

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For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.

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James B. Thayer, after quoting the passage in The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv.Law Review 129, 140, called attention (p. 144) to

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a remark of Judge Cooley to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional, and, being subsequently placed on the bench, when this measure having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.

MCREYNOLDS, J., separate opinion (Footnotes)

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\* From the Annual Report, TVA Board, for 1934, pp. 23, 24, 25, 26, 27, and 28.

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To provide a workable and economic basis of operations, the Authority plans initially to serve certain definite regions, and to develop its program in those areas before going outside.

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The initial areas selected by the Authority may be roughly described as (a) the region immediately proximate to the route of the transmission line soon to be constructed by the Authority between Muscle Shoals and the site of Norris Dam; (b) the region in proximity to Muscle Shoals, including northern Alabama and northeastern Mississippi, and (c) the region in the proximity of Norris Dam (the new source of power to be constructed by the Authority on the Clinch River in northeast Tennessee).

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At a later stage in the development, it is contemplated to include, roughly, the drainage area of the Tennessee River in Kentucky, Alabama, Georgia, and North Carolina, and that part of Tennessee which lies east of the west margin of the Tennessee drainage area.

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To make the area a workable one and a fair measure of public ownership, it should include several cities of substantial size (such as Chattanooga and Knoxville) and, ultimately, at least one city of more than a quarter million, within transmission distance, such as Birmingham, Memphis, Atlanta, or Louisville.

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While it is the Authority's present intention to develop its power program in the above-described territory before considering going outside, the Authority may go outside the area if there are substantial changes in general conditions, facts, or governmental policy which would necessarily require a change in this policy of regional development, or if the privately owned utilities in the area do not cooperate in the working out of the program.

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The Authority entered into a 5-year contract on January 4, 1934, with the Commonwealth & Southern Corporation and its Alabama, Tennessee, Georgia, and Mississippi subsidiaries. The contract covered options to purchase electric properties in certain counties of Alabama, Mississippi, and Tennessee, the sale of distribution systems to municipalities in these counties, restrictions on territorial expansion by the contracting parties, the interchange of power, and other matters.

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Alabama properties.—All of the low-tension (44,000 volts or lower) transmission lines, substations, rural lines, and rural distribution systems of the Alabama Power Co., in the counties of Lauderdale, Colbert, Lawrence, Limestone, and Morgan (except the Hulaco area) were included in the contract; also those in the north half of Franklin County, including the town of Red Bay, and the territory in the northern part of Cullman County served by a line of the Alabama Power Co. extending south from Decatur. The price of these properties was set at $1,101,256. The purchase had not been completed at the end of the fiscal year.

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The power company agreed to attempt to sell the local distribution systems in the above counties to the respective municipalities, the Authority reserving the right to serve them if sales were not consummated within 3 months of bona fide negotiation and effort. Because of the failure of any [many] of the municipalities in northern Alabama to consummate negotiations for the purchase of the distribution systems serving them, the Authority entered into negotiations for the direct purchase of these distribution systems, but a purchase contract had not been completed on June 30.

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Mississippi properties.—The contract covered all of the properties of the Mississippi Power Co. in the counties of Pontotoc, Lee, Itawamba, Union, Benton, Tippah, Prentiss, Tishomingo, and Alcorn, except a dam site on the Tennessee River in Tishomingo County. The purchase price was $850,000. The purchase was completed, and delivery was accepted on June 1, 1934.

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The transmission and generation facilities acquired in Mississippi and to be retained as part of the Authority's system include the following:

44,000-volt transmission lines 63 miles

44,000-volt substations 6

22,000-volt transmission lines 45 miles

22,000-volt substations 4

Tupelo steam stand-by generating plant 4,374 Kilovolt-amperes

Corinth steam stand-by generating plant 2,225 Kilovolt-amperes

Blue Mountain Diesel generating plant 150 Kilovolt-amperes

Myrtle Diesel generating plant 75 Kilovolt-amperes

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Part of the local distribution facilities acquired in Mississippi were sold prior to the end of the fiscal year, and it is expected that all will be sold eventually, as noted hereafter.

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Tennessee properties.—The contract covered all of the properties of the Tennessee Electric Power Co. in the counties of Anderson, Campbell, Morgan (except the lines extending into Morgan County from Harriman), and Scott; also those in the west portion of Claiborne County, and the 66,000-volt transmission line from Anderson County to Knoxville. The price of these properties was set at $900,000. The purchase had not been completed at the end of the fiscal year.

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Negotiations were carried on diligently for several months with the National Power & Light Co., an affiliate of the Electric Bond & Share Co., in an endeavor to acquire the eastern Tennessee electric properties of the Tennessee Public Service Co., a subsidiary of the National Power & Light Co. The electric distribution system in the city of Knoxville is included in these properties. The negotiations resulted in a contract after the end of the fiscal year.

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Construction of rural electric lines in northern Alabama and northeastern Mississippi was commenced in the latter part of 1933 with relief labor, the Authority furnishing supervision and materials. Relief labor was withdrawn on February 15, 1934, after which date the work was continued by the Authority with its own forces. Approximately 93.5 miles of rural electric lines were under construction in Lauderdale and Colbert Counties, Ala. on June 30, and approximately 127 miles in Lee, Pontotoc, Alcorn, Itawamba, Prentiss, Monroe, and Tishomingo Counties, Miss.

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A standard form of 20-year contract was devised to govern the sale of power at wholesale to municipal distribution systems, and was first used in a contract with the city of Tupelo, Miss. The Tupelo contract has been published by the Authority, and is available for distribution.

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Annual Report, TVA 1935, pp. 29, 30—

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The Authority has devoted special attention during the year to the problems of rural electrification, as required by section 10 of the act. By the close of the fiscal year, 200 miles of rural electric line had been built, and 181 additional miles were in process of construction. These lines are divided among the various counties as follows:

 Miles

completed Miles in

progress

Alabama:

Colbert 19 15

Lauderdale 72 —

Mississippi:

Alcorn 41 29

Lee and Itawamba 41 26

Pontotoc 27

Prentiss — 7

Tennessee:

Lincoln — 104

Total 200 181

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In addition to the above, a number of the rural lines purchased from the Mississippi Power Co. were rehabilitated in order to improve operating and safety conditions, and to provide for increases in load. Also, additional customers were connected to all existing rural lines.

Republican Platform of 1936

Title: Republican Platform of 1936

Author: Republican Party

Date: 1936

Source: National Party Platforms, pp.365-370

Republican Platform of 1936, p.365

America is in peril. The welfare of American

Republican Platform of 1936, p.365

men and women and the future of our youth are at stake. We dedicate ourselves to the preservation of their political liberty, their individual opportunity and their character as free citizens, which today for the first time are threatened by Government itself.

Republican Platform of 1936, p.365

For three long years the New Deal Administration has dishonored American traditions and flagrantly betrayed the pledges upon which the Democratic Party sought and received public support.

Republican Platform of 1936, p.365

The powers of Congress have been usurped by the President.

Republican Platform of 1936, p.365

The integrity and authority of the Supreme Court have been flouted.

Republican Platform of 1936, p.365

The rights and liberties of American citizens have been violated.

Republican Platform of 1936, p.365

Regulated monopoly has displaced free enterprise.

Republican Platform of 1936, p.365

The New Deal Administration constantly seeks to usurp the rights reserved to the States and to the people.

Republican Platform of 1936, p.365

It has insisted on the passage of laws contrary to the Constitution.

Republican Platform of 1936, p.365

It has intimidated witnesses and interfered with the right of petition.

Republican Platform of 1936, p.365

It has dishonored our country by repudiating its most sacred obligations.

Republican Platform of 1936, p.365

It has been guilty of frightful waste and extravagance, using public funds for partisan political purposes.

Republican Platform of 1936, p.365

It has promoted investigations to harass and intimidate American citizens, at the same time denying investigations into its own improper expenditures.

Republican Platform of 1936, p.365

It has created a vast multitude of new offices, filled them with its favorites, set up a centralized bureaucracy, and sent out swarms of inspectors to harass our people.

Republican Platform of 1936, p.365

It has bred fear and hesitation in commerce and industry, thus discouraging new enterprises, preventing employment and prolonging the depression.

Republican Platform of 1936, p.365

It secretly has made tariff agreements with our foreign competitors, flooding our markets with foreign commodities.

Republican Platform of 1936, p.365

It has coerced and intimidated voters by withholding relief to those opposing its tyrannical policies.

Republican Platform of 1936, p.365

It has destroyed the morale of our people and made them dependent upon government.

Republican Platform of 1936, p.366

[p.366] Appeals to passion and class prejudice have replaced reason and tolerance.

Republican Platform of 1936, p.366

To a free people, these actions are insufferable. This campaign cannot be waged on the traditional differences between the Republican and Democratic parties. The responsibility of this election transcends all previous political divisions. We invite all Americans, irrespective of party, to join us in defense of American institutions.

Constitutional Government and Free Enterprise

Republican Platform of 1936, p.366

We pledge ourselves:

Republican Platform of 1936, p.366

1. To maintain the American system of Constitutional and local self government, and to resist all attempts to impair the authority of the Supreme Court of the United States, the final protector of the rights of our citizens against the arbitrary encroachments of the legislative and executive branches of government. There can be no individual liberty without an independent judiciary.

Republican Platform of 1936, p.366

2. To preserve the American system of free enterprise, private competition, and equality of opportunity, and to seek its constant betterment in the interests of all.

Reemployment

Republican Platform of 1936, p.366

The only permanent solution of the unemployment problem is the absorption of the unemployed by industry and agriculture. To that end, we advocate:

Republican Platform of 1936, p.366

Removal of restrictions on production. Abandonment of all New Deal policies that raise production costs, increase the cost of living, and thereby restrict buying, reduce volume and prevent reemployment.

Republican Platform of 1936, p.366

Encouragement instead of hindrance to legitimate business.

Republican Platform of 1936, p.366

Withdrawal of government from competition with private payrolls.

Republican Platform of 1936, p.366

Elimination of unnecessary and hampering regulations.

Republican Platform of 1936, p.366

Adoption of such other policies as will furnish a chance for individual enterprise, industrial expansion, and the restoration of jobs.

Relief

Republican Platform of 1936, p.366

The necessities of life must be provided for the needy, and hope must be restored pending recovery. The administration of relief is a major failing of the New Deal. It has been faithless to those who must deserve our sympathy. To end confusion, partisanship, waste and incompetence, we pledge:

Republican Platform of 1936, p.366

1. The return of responsibility for relief administration to non-political local agencies familiar with community problems.

Republican Platform of 1936, p.366

2. Federal grants-in-aid to the States and territories while the need exists, upon compliance with these conditions: (a) a fair proportion of the total relief burden to be provided from the revenues of States and local governments; (b) all engaged in relief administration to be selected on the basis of merit and fitness; (c) adequate provision to be made for the encouragement of those persons who are trying to become self-supporting.

Republican Platform of 1936, p.366

3. Undertaking of Federal public works only on their merits and separate from the administration of relief.

Republican Platform of 1936, p.366

4. A prompt determination of the facts concerning relief and unemployment.

Security

Republican Platform of 1936, p.366

Real security will be possible only when our productive capacity is sufficient to furnish a decent standard of living for all American families and to provide a surplus for future needs and contingencies. For the attainment of that ultimate objective, we look to the energy, self-reliance and character of our people, and to our system of free enterprise.

Republican Platform of 1936, p.366

Society has an obligation to promote the security of the people, by affording some measure of protection against involuntary unemployment and dependency in old age. The New Deal policies, while purporting to provide social security, have, in fact, endangered it.

Republican Platform of 1936, p.366

We propose a system of old age security, based upon the following principles:

Republican Platform of 1936, p.366

1. We approve a pay-as-you-go policy, which requires of each generation the support of the aged and the determination of what is just and adequate.

Republican Platform of 1936, p.366

2. Every American citizen over sixty-five should receive the supplementary payment necessary to provide a minimum income sufficient to protect him or her from want.

Republican Platform of 1936, p.366

3. Each state and territory, upon complying with simple and general minimum standards, should receive from the federal government a [p.367] graduated contribution in proportion to its own, up to a fixed maximum.

Republican Platform of 1936, p.367

4. To make this program consistent with sound fiscal policy the Federal revenues for this purpose must be provided from the proceeds of a direct tax widely distributed. All will be benefited and all should contribute.

Republican Platform of 1936, p.367

We propose to encourage adoption by the states and territories of honest and practical measures for meeting the problems of unemployment insurance.

Republican Platform of 1936, p.367

The unemployment insurance and old age annuity sections of the present Social Security Act are unworkable and deny benefits to about two-thirds of our adult population, including professional men and women and all those engaged in agriculture and domestic service, and the self employed while imposing heavy tax burdens upon all. The so-called reserve fund estimated at forty-seven billion dollars for old age insurance is no reserve at all, because the fund will contain nothing but the Government's promise to pay, while the taxes collected in the guise of premiums will be wasted by the Government in reckless and extravagant political schemes.

Labor

Republican Platform of 1936, p.367

The welfare of labor rests upon increased production and the prevention of exploitation. We pledge ourselves to:

Republican Platform of 1936, p.367

Protect the right of labor to organize and to bargain collectively through representatives of its own choosing without interference from any source.

Republican Platform of 1936, p.367

Prevent governmental job holders from exercising autocratic powers over labor.

Republican Platform of 1936, p.367

Support the adoption of state laws and interstate compacts to abolish sweatshops and child labor, and to protect women and children with respect to maximum hours, minimum wages and working conditions. We believe that this can be done within the Constitution as it now stands.

Agriculture

Republican Platform of 1936, p.367

The farm problem is an economic and social, not a partisan problem, and we propose to treat it accordingly. Following the wreck of the restrictive and coercive A.A.A.., the New Deal Administration has taken to itself the principles of the Republican Policy of soil conservation and land retirement. This action opens the way for a non-political and permanent solution. Such a solution cannot be had under a New Deal Administration which misuses the program to serve partisan ends, to promote scarcity and to limit by coercive methods the farmer's control over his own farm.

Republican Platform of 1936, p.367

Our paramount object is to protect and foster the family type of farm, traditional in American life, and to promote policies which will bring about an adjustment of agriculture to meet the needs of domestic and foreign markets. As an emergency measure, during the agricultural depression, federal benefits payments or grants-in-aid when administered within the means of the Federal government are consistent with a balanced budget.

Republican Platform of 1936, p.367

We propose:

Republican Platform of 1936, p.367

1. To facilitate economical production and increased consumption on a basis of abundance instead of scarcity.

Republican Platform of 1936, p.367

2. A national land-use program, including the acquisition of abandoned and non-productive farm lands by voluntary sale or lease, subject to approval of the legislative and executive branches of the States concerned, and the devotion of such land to appropriate public use, such as watershed protection and flood prevention, reforestation, recreation, and conservation of wild life.

Republican Platform of 1936, p.367

3. That an agricultural policy be pursued for the protection and restoration of the land resources, designed to bring about such a balance between soil-building and soil-depleting crops as will permanently insure productivity, with reasonable benefits to cooperating farmer's on family-type farms, but so regulated as to eliminate the New Deal's destructive policy towards the dairy and live-stock industries.

Republican Platform of 1936, p.367

4. To extend experimental aid to farmers developing new crops suited to our soil and climate.

Republican Platform of 1936, p.367

5. To promote the industrial use of farm products by applied science.

Republican Platform of 1936, p.367

6. To protect the American farmer against the importation of all live stock, dairy, and agricultural products, substitutes thereof, and derivatives therefrom, which will depress American farm prices.

Republican Platform of 1936, p.367

7. To provide effective quarantine against imported live-stock, dairy and other farm products from countries which do not impose health and sanitary regulations fully equal to those required of our own producers.

Republican Platform of 1936, p.368

[p.368] 8. To provide for ample farm credit at rates as low as those enjoyed by other industries, including commodity and live-stock loans, and preference in land loans to the farmer acquiring or refinancing a farm as a home.

Republican Platform of 1936, p.368

9. To provide for decentralized, non-partisan control of the Farm Credit Administration and the election by National Farm Loan Associations of at least one-half of each Board of Directors of the Federal Land Banks, and thereby remove these institutions from politics.

Republican Platform of 1936, p.368

10. To provide in the case of agricultural products of which there are exportable surpluses, the payment of reasonable benefits upon the domestically consumed portion of such crops in order to make the tariff effective. These payments are to be limited to the production level of the family type farm.

Republican Platform of 1936, p.368

11. To encourage and further develop co-operative marketing.

Republican Platform of 1936, p.368

12. To furnish Government assistance in disposing of surpluses in foreign trade by bargaining for foreign markets selectively by countries both as to exports and imports. We strenuously oppose so called reciprocal treaties which trade off the American farmer.

Republican Platform of 1936, p.368

13. To give every reasonable assistance to producers in areas suffering from temporary disaster, so that they may regain and maintain a self-supporting status.

Tariff

Republican Platform of 1936, p.368

Nearly sixty percent of all imports into the United States are now free of duty. The other forty percent of imports compete directly with the product of our industry. We would keep on the free list all products not grown or produced in the United States in commercial quantities. As to all commodities that commercially compete with our farms, our forests, our mines, our fisheries, our oil wells, our labor and our industries, sufficient protection should be maintained at all times to defend the American farmer and the American wage earner from the destructive competition emanating from the subsidies of foreign governments and the imports from low-wage and depreciated-currency countries.

Republican Platform of 1936, p.368

We will repeal the present Reciprocal Trade Agreement Law. It is futile and dangerous. Its effect on agriculture and industry has been destructive. Its continuation would work to the detriment of the wage earner and the farmer.

Republican Platform of 1936, p.368

We will restore the principle of the flexible tariff in order to meet changing economic conditions here and abroad and broaden by careful definition the powers of the Tariff Commission in order to extend this policy along non-partisan lines.

Republican Platform of 1936, p.368

We will adjust tariffs with a view to promoting international trade, the stabilization of currencies, and the attainment of a proper balance between agriculture and industry.

Republican Platform of 1936, p.368

We condemn the secret negotiations of reciprocal trade treaties without public hearing or legislative approval.

Monopolies

Republican Platform of 1936, p.368

A private monopoly is indefensible and intolerable. It menaces and, if continued, will utterly destroy constitutional government and the liberty of the citizen.

Republican Platform of 1936, p.368

We favor the vigorous enforcement of the criminal laws, as well as the civil laws, against monopolies and trusts and their officials, and we demand the enactment of such additional legislation as is necessary to make it impressible for private monopoly to exist in the United States.

Republican Platform of 1936, p.368

We will employ the full powers of the government to the end that monopoly shall be eliminated and that free enterprise shall be fully restored and maintained.

Regulation of Business

Republican Platform of 1936, p.368

We recognize the existence of a field within which governmental regulation is desirable and salutary. The authority to regulate should be vested in an independent tribunal acting under clear and specific laws establishing definite standards. Their determinations on law and facts should be subject to review by the Courts. We favor Federal regulation, within the Constitution, of the marketing of securities to protect investors. We favor also Federal regulation of the interstate activities of public utilities.

Civil Service

Republican Platform of 1936, p.368

Under the New Deal, official authority has been given to inexperienced and incompetent persons. The Civil Service has been sacrificed to create a national political machine. As a result the Federal [p.369] Government has never presented such a picture of confusion and inefficiency.

Republican Platform of 1936, p.369

We pledge ourselves to the merit system, virtually destroyed by New Deal spoilsmen. It should be restored, improved and extended.

Republican Platform of 1936, p.369

We will provide such conditions as offer an attractive permanent career in government service to young men and women of ability, irrespective of party affiliations.

Government Finance

Republican Platform of 1936, p.369

The New Deal Administration has been characterized by shameful waste, and general financial irresponsibility. It has piled deficit upon deficit. It threatens national bankruptcy and the destruction through inflation of insurance policies and savings bank deposits. We pledge ourselves to:

Republican Platform of 1936, p.369

Stop the folly of uncontrolled spending. Balance the budget—not by increasing taxes but by cutting expenditures, drastically and immediately.

Republican Platform of 1936, p.369

Revise the federal tax system and coordinate it with state and local tax systems.

Republican Platform of 1936, p.369

Use the taxing power for raising revenue and not for punitive or political purposes.

Money and Banking

Republican Platform of 1936, p.369

We advocate a sound currency to be preserved at all hazards.

Republican Platform of 1936, p.369

The first requisite to a sound and stable currency is a balanced budget.

Republican Platform of 1936, p.369

We oppose further devaluation of the dollar. We will restore to the Congress the authority lodged with it by the Constitution to coin money and regulate the value thereof by repealing all the laws delegating this authority to the Executive.

Republican Platform of 1936, p.369

We will cooperate with other countries toward stabilization of currencies as soon as we can do so with due regard for our National interests and as soon as other nations have sufficient stability to justify such action.

Foreign Affairs

Republican Platform of 1936, p.369

We pledge ourselves to promote and maintain peace by all honorable means not leading to foreign alliances or political commitments.

Republican Platform of 1936, p.369

Obedient to the traditional foreign policy of America and to the repeatedly expressed will of the American people, we pledge that America shall not become a member of the League of Nations nor of the World Court nor shall America take on any entangling alliances in foreign affairs.

Republican Platform of 1936, p.369

We shall promote, as the best means of securing and maintaining peace by the pacific settlement of disputes, the great cause of international arbitration through the establishment of free, independent tribunals, which shall determine such disputes in accordance with law, equity and justice.

National Defense

Republican Platform of 1936, p.369

We favor an army and navy, including air forces, adequate for our National Defense.

Republican Platform of 1936, p.369

We will cooperate with other nations in the limitation of armaments and control of tragic in arms.

Bill of Rights

Republican Platform of 1936, p.369

We pledge ourselves to preserve, protect and defend, against all intimidation and threat, freedom of religion, speech, press and radio; and the right of assembly and petition and immunity from unreasonable searches and seizures.

Republican Platform of 1936, p.369

We offer the abiding security of a government of laws as against the autocratic perils of a government of men.

Furthermore

Republican Platform of 1936, p.369

1. We favor the construction by the Federal Government of head-water storage basins to prevent floods, subject to the approval of the legislative and executive branches of the government of the States whose lands are concerned.

Republican Platform of 1936, p.369

2. We favor equal opportunity for our colored citizens. We pledge our protection of their economic status and personal safety. We will do our best to further their employment in the gainfully occupied life of America, particularly in private industry, agriculture, emergency agencies and the Civil Service.

Republican Platform of 1936, p.369

We condemn the present New Deal policies which would regiment and ultimately eliminate the colored citizen from the country's productive life, and make him solely a ward of the federal government.

Republican Platform of 1936, p.369

3. To our Indian population we pledge every effort on the part of the national government to ameliorate living conditions for them.

Republican Platform of 1936, p.370

4. We pledge continuation of the Republican [p.370] policy of adequate compensation and care for veterans disabled in the service of our country and for their widows, orphans and dependents.

Republican Platform of 1936, p.370

5. We shall use every effort to collect the war debt due us from foreign countries, amounting to $12,000,000—one-third of our national debt. No effort has been made by the present administration even to reopen negotiations.

Republican Platform of 1936, p.370

6. We are opposed to legislation which discriminates against women in Federal and State employment.

Conclusion

Republican Platform of 1936, p.370

We assume the obligations and duties imposed upon Government by modern conditions. We affirm our unalterable conviction that, in the future as in the past, the fate of the nation will depend, not so much on the wisdom and power of government, as on the character and virtue, self-reliance, industry and thrift of the people and on their willingness to meet the responsibilities essential to the preservation of a free society.

Republican Platform of 1936, p.370

Finally, as our party affirmed in its first Platform in 1856: "Believing that the spirit of our institutions as well as the Constitution of our country guarantees liberty of conscience and equality of rights among our citizens we oppose all legislation tending to impair them," and "we invite the affiliation and cooperation of the men of all parties, however differing from us in other respects, in support of the principles herein declared."

Republican Platform of 1936, p.370

The acceptance of the nomination tendered by the Convention carries with it, as a matter of private honor and public faith, an undertaking by each candidate to be true to the principles and program herein set forth.

Democratic Platform of 1936

Title: Democratic Platform of 1936

Author: Democratic Party

Date: 1936

Source: National Party Platforms, pp.360-363

Democratic Platform of 1936, p.360

We hold this truth to be self-evident—that the test of a representative government is its ability to promote the safety and happiness of the people.

Democratic Platform of 1936, p.360

We hold this truth to be self-evident—that 12 years of Republican leadership left our Nation sorely stricken in body, mind, and spirit; and that three years of Democratic leadership have put it back on the road to restored health and prosperity.

Democratic Platform of 1936, p.360

We hold this truth to be self-evident—that 12 years of Republican surrender to the dictatorship of a privileged few have been supplanted by a Democratic leadership which has returned the people themselves to the places of authority, and has revived in them new faith and restored the hope which they had almost lost.

Democratic Platform of 1936, p.360

We hold this truth to be self-evident—that this three-year recovery in all the basic values of life and the reestablishment of the American way of living has been brought about by humanizing the policies of the Federal Government as they affect the personal, financial, industrial, and agricultural well-being of the American people.

Democratic Platform of 1936, p.360

We hold this truth to be self-evident—that government in a modern civilization has certain inescapable obligations to its citizens, among which are:

Democratic Platform of 1936, p.360

(1) Protection of the family and the home.

Democratic Platform of 1936, p.360

(2) Establishment of a democracy of opportunity for all the people.

Democratic Platform of 1936, p.360

(3) Aid to those overtaken by disaster. These obligations, neglected through 12 years of the old leadership, have once more been recognized by American Government. Under the new leadership they will never be neglected.

For the Protection of the Family and the Home

Democratic Platform of 1936, p.360

(1) We have begun and shall continue the successful drive to rid our land of kidnappers and bandits. We shall continue to use the powers of government to end the activities of the malefactors of great wealth who defraud and exploit the people.

Savings and Investment

Democratic Platform of 1936, p.360

(2) We have safeguarded the thrift of our citizens by restraining those who would gamble with other peoples savings, by requiring truth in the sale of securities; by putting the brakes upon the use of credit for speculation; by outlawing the manipulation of prices in stock and commodity markets; by curbing the overweening power and unholy practices of utility holding companies; by insuring fifty million bank accounts.

Old Age and Social Security

Democratic Platform of 1936, p.360

(3) We have built foundations for the security of those who are faced with the hazards of unemployment and old age; for the orphaned, the crippled, and the blind. On the foundation of the Social Security Act we are determined to erect a structure of economic security for all our people, making sure that this benefit shall keep step with the ever-increasing capacity of America to provide a high standard of living for all its citizens.[p.361]

Consumer

Democratic Platform of 1936, p.361

(4) We will act to secure to the consumer fair value, honest sales and a decreased spread between the price he pays and the price the producer receives.

Rural Electrification

Democratic Platform of 1936, p.361

(5) This administration has fostered power rate yardsticks in the Tennessee Valley and in several other parts of the Nation. As a result, electricity has been made available to the people at a lower rate. We will continue to promote plans for rural electrification and for cheap power by means of the yardstick method.

Housing

Democratic Platform of 1936, p.361

(6) We maintain that our people are entitled to decent, adequate housing at a price which they can afford. In the last three years, the Federal Government, having saved more than two million homes from foreclosure, has taken the first steps in our history to provide decent housing for people of meagre incomes. We believe every encouragement should be given to the building of new homes by private enterprise; and that the Government should steadily extend its housing program toward the goal of adequate housing for those forced through economic necessities to live in unhealthy and slum conditions.

Veterans

Democratic Platform of 1936, p.361

(7) We shall continue just treatment of our war veterans and their dependents.

For the Establishment of a Democracy of Opportunity

Agriculture

Democratic Platform of 1936, p.361

We have taken the farmers off the road to ruin. We have kept our pledge to agriculture to use all available means to raise farm income toward its pre-war purchasing power. The farmer is no longer suffering from 15-cent corn, 3-cent hogs, 2 1/2-cent beef at the farm, 5-cent wool, 30-cent wheat, 5-cent cotton, and 8-cent sugar.

Democratic Platform of 1936, p.361

By Federal legislation, we have reduced the farmer's indebtedness and doubled his net income. In cooperation with the States and through the varmers' own committees, we are restoring the fertility of his land and checking the erosion of his soil. We are bringing electricity and good roads to his home.

Democratic Platform of 1936, p.361

We will continue to improve the soil conservation and domestic allotment program with payments to farmers.

Democratic Platform of 1936, p.361

We will continue a fair-minded administration of agricultural laws, quick to recognize and meet new problems and conditions. We recognize the gravity of the evils of farm tenancy, and we pledge the full cooperation of the Government in the refinancing of farm indebtedness at the lowest possible rates of interest and over a long term of years.

Democratic Platform of 1936, p.361

We favor the production of all the market will absorb, both at home and abroad, plus a reserve supply sufficient to insure fair prices to consumers; we favor judicious commodity loans on seasonal surpluses; and we favor assistance within Federal authority to enable farmers to adjust and balance production with demand, at a fair profit to the farmers.

Democratic Platform of 1936, p.361

We favor encouragement of sound, practical farm co-operatives.

Democratic Platform of 1936, p.361

By the purchase and retirement of ten million acres of sub-marginal land, and assistance to those attempting to eke out an existence upon it, we have made a good beginning toward proper land use and rural rehabilitation.

Democratic Platform of 1936, p.361

The farmer has been returned to the road to freedom and prosperity. We will keep him on that road.

Labor

Democratic Platform of 1936, p.361

We have given the army of America's industrial workers something more substantial than the Republicans' dinner pail full of promises. We have increased the worker's pay and shortened his hours; we have undertaken to put an end to the sweated labor of his wife and children; we have written into the law of the land his right to collective bargaining and self-organization free from the interference of employers; we have provided Federal machinery for the peaceful settlement of labor disputes.

Democratic Platform of 1936, p.361

We will continue to protect the worker and we will guard his rights, both as wage-earner and consumer, in the production and consumption of all commodities, including coal and water power and other natural resource products.

Democratic Platform of 1936, p.362

The worker has been returned to the road to [p.362] freedom and prosperity. We will keep him on that road.

Business

Democratic Platform of 1936, p.362

We have taken the American business man out of the red. We have saved his bank and given it a sounder foundation; we have extended credit; we have lowered interest rates; we have undertaken to free him from the ravages of cutthroat competition.

Democratic Platform of 1936, p.362

The American business man has been returned to the road to freedom and prosperity. We will keep him on that road.

Youth

Democratic Platform of 1936, p.362

We have aided youth to stay in school; given them constructive occupation; opened the door to opportunity which 12 years of Republican neglect had closed.

Democratic Platform of 1936, p.362

Our youth have been returned to the road to freedom and prosperity. We will keep them on that road.

Monopoly and Concentration of Economic Power

Democratic Platform of 1936, p.362

Monopolies and the concentration of economic power, the creation of Republican rule and privilege, continue to be the master of the producer, the exploiter of the consumer, and the enemy of the independent operator. This is a problem challenging the unceasing effort of untrammeled public officials in every branch of the Government. We pledge vigorously and fearlessly to enforce the criminal and civil provisions of the existing anti-trust laws, and to the extent that their effectiveness has been weakened by new corporate devices or judicial construction, we propose by law to restore their efficacy in stamping out monopolistic practices and the concentration of economic power.

Aid to Those Overtaken By Disaster

Democratic Platform of 1936, p.362

We have aided and will continue to aid those who have been visited by widespread drought and floods, and have adopted a Nation-wide flood-control policy.

Unemployment

Democratic Platform of 1936, p.362

We believe that unemployment is a national problem, and that it is an inescapable obligation of our Government to meet it in a national way.

Democratic Platform of 1936, p.362

Due to our stimulation of private business, more than five million people have been reemployed; and we shall continue to maintain that the first objective of a program of economic security is maximum employment in private industry at adequate wages. Where business fails to supply such employment, we believe that work at prevailing wages should be provided in cooperation with State and local governments on useful public projects, to the end that the national wealth may be increased, the skill and energy of the worker may be utilized, his morale maintained, and the unemployed assured the opportunity to earn the necessities of life.

The Constitution

Democratic Platform of 1936, p.362

The Republican platform proposes to meet many pressing national problems solely by action of the separate States. We know that drought, dust storms, floods, minimum wages, maximum hours, child labor, and working conditions in industry, monopolistic and unfair business practices cannot be adequately handled exclusively by 48 separate State legislatures, 48 separate State administrations, and 48 separate State courts. Transactions and activities which inevitably overflow State boundaries call for both State and Federal treatment.

Democratic Platform of 1936, p.362

We have sought and will continue to seek to meet these problems through legislation within the Constitution.

Democratic Platform of 1936, p.362

If these problems cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendment as will assure to the legislatures of the several States and to the Congress of the United States, each within its proper jurisdiction, the power to enact those laws which the State and Federal legislatures, within their respective spheres, shall find necessary, in order adequately to regulate commerce, protect public health and safety and safeguard economic security. Thus we propose to maintain the letter and spirit of the Constitution.

The Merit System in Government

Democratic Platform of 1936, p.362

For the protection of government itself and promotion of its efficiency, we pledge the immediate extension of the merit system through the classified civil service—which was first established and fostered under Democratic auspices—to all non-policy-making positions in the Federal service.

Democratic Platform of 1936, p.363

[p.363] We shall subject to the civil service law all continuing positions which, because of the emergency, have been exempt from its operation.

Civil Liberties

Democratic Platform of 1936, p.363

We shall continue to guard the freedom of speech, press, radio, religion and assembly which our Constitution guarantees; with equal rights to all and special privileges to none.

Government Finance

Democratic Platform of 1936, p.363

The Administration has stopped deflation, restored values and enabled business to go ahead with confidence.

Democratic Platform of 1936, p.363

When national income shrinks, government income is imperilled. In reviving national income, we have fortified government finance. We have raised the public credit to a position of unsurpassed security. The interest rate on Government bonds has been reduced to the lowest point in twenty eight years. The same Government bonds which in 1932 sold under 83 are now selling over 104.

Democratic Platform of 1936, p.363

We approve the objective of a permanently sound currency so stabilized as to prevent the former wide fluctuations in value which injured in turn producers, debtors, and property owners on the one hand, and wage-earners and creditors on the other, a currency which will permit full utilization of the country's resources. We assert that today we have the soundest currency in the world.

Democratic Platform of 1936, p.363

We are determined to reduce the expenses of government. We are being aided therein by the recession in unemployment. As the requirements of relief decline and national income advances, an increasing percentage of Federal expenditures can and will be met from current revenues, secured from taxes levied in accordance with ability to pay. Our retrenchment, tax and recovery programs thus reflect our firm determination to achieve a balanced budget and the reduction of the national debt at the earliest possible moment.

Foreign Policy

Democratic Platform of 1936, p.363

In our relationship with other nations, this Government will continue to extend the policy of the Good Neighbor. We reaffirm our opposition to war as an instrument of national policy, and declare that disputes between nations should be settled by peaceful means. We shall continue to observe a true neutrality in the disputes of others; to be prepared, resolutely to resist aggression against ourselves; to work for peace and to take the profits out of war; to guard against being drawn, by political commitments, international banking or private trading, into any war which may develop anywhere.

Democratic Platform of 1936, p.363

We shall continue to foster the increase in our foreign trade which has been achieved by this administration; to seek by mutual agreement the lowering of those tariff barriers, quotas and embargoes which have been raised against our exports of agricultural and industrial products; but continue as in the past to give adequate protection to our farmers and manufacturers against unfair competition or the dumping on our shores of commodities and goods produced abroad by cheap labor or subsidized by foreign governments.

The Issue

Democratic Platform of 1936, p.363

The issue in this election is plain. The American people are called upon to choose between a Republican administration that has and would again regiment them in the service of privileged groups and a Democratic administration dedicated to the establishment of equal economic opportunity for all our people.

Democratic Platform of 1936, p.363

We have faith in the destiny of our nation. We are sufficiently endowed with natural resources and with productive capacity to provide for all a quality of life that meets the standards of real Americanism.

Democratic Platform of 1936, p.363

Dedicated to a government of liberal American principles, we are determined to oppose equally, the despotism of Communism and the menace of concealed Fascism.

Democratic Platform of 1936, p.363

We hold this final truth to be self-evident—that the interests, the security and the happiness of the people of the United States of America can be perpetuated only under democratic government as conceived by the founders of our nation.

Carter v. Carter Coal Co., 1936

Title: Carter v. Carter Coal Co.

Author: U.S. Supreme Court

Date: May 18, 1936

Source: 298 U.S. 238

This case was argued March 11 and 12, 1936, and was decided May 18, 1936.

1936, Carter v. Carter Coal Co., 298 U.S. 238

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1936, Carter v. Carter Coal Co., 298 U.S. 238

FOR THE SIXTH CIRCUIT

Syllabus

1936, Carter v. Carter Coal Co., 298 U.S. 238

1. A stockholder may maintain a bill to enjoin the corporation and its directors from submitting to legislative exactions and regulations which are unconstitutional and would seriously injure the business of the corporation. P. 286.

1936, Carter v. Carter Coal Co., 298 U.S. 238

2. Where irreparable injury from unconstitutional legislation is certain and imminent, suit for an injunction need not be deferred until injury has been actually inflicted. P. 287.

1936, Carter v. Carter Coal Co., 298 U.S. 238

3. The "Bituminous Coal Conservation Act of 1935" declares, with specifications, that the mining and distribution of such coal are so affected with a national public interest and so related to the general welfare that the industry should be regulated. It recites further, with details, that such regulation is necessary because interstate commerce is directly and detrimentally affected by the state of the industry and its practices, and that the right of the miners to organize and collectively bargain for wages, hours of labor and working conditions should be guaranteed in order to prevent constant wage-cutting and disparate labor costs, detrimental to fair interstate commerce, and in order to prevent the obstructions to that commerce that arise from disputes over labor relations at the mines. The Act thereupon provides an elaborate scheme for the creation of a national commission, the organization of numerous coal districts, the setting up of numerous boards in the districts, and the fixing of all prices for bituminous coal, and of the wages, hours and working conditions of the miners, throughout the country.

1936, Carter v. Carter Coal Co., 298 U.S. 238

Held: [298 U.S. 239]

1936, Carter v. Carter Coal Co., 298 U.S. 239

(1) That a so-called excise tax, imposed by the Act, of 15% of the sale price or market value at the mine of all bituminous coal produced in the country, subject to a draw-back of 13 1/2% allowed to those producers who submit to the price-fixing and labor, provisions of the Act, is not a tax, but a penalty to coerce submission, and cannot be upheld as an expression of the taxing power. P. 288.

1936, Carter v. Carter Coal Co., 298 U.S. 239

(2) The provisions of the Act looking to the control of the wages, hours, and working conditions of the miners engaged in the production of coal, and seeking to guarantee their right of collective bargaining in these matters, are beyond the powers of Congress, because—

1936, Carter v. Carter Coal Co., 298 U.S. 239

(a) The Constitution grants to Congress no general power to regulate for the promotion of the general welfare. P. 289.

1936, Carter v. Carter Coal Co., 298 U.S. 239

(b) The power expressly granted Congress to regulate interstate commerce does not include the power to control the conditions in which coal is produced before it becomes an article of commerce. P. 297.

1936, Carter v. Carter Coal Co., 298 U.S. 239

(c) The effect on interstate commerce in the coal of labor conditions involved in its production, including disputes and strikes over wages, etc., is an indirect effect. P. 307.

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(3) Since a mine owner, by refusing to accept the regulatory provisions, would incur a prohibitive tax and be deprived, by other provisions of the Act, of the right to sell coal to the United States or to any of its contractors for use in performing their contracts, the regulations are, in fact, compulsory. In view of this compulsion, provisions of the Act seeking to authorize part of the producers and miners to fix hours for the entire industry, and part of the producers and miners in the districts to fix minimum wages in their districts, are legislative delegation in its most obnoxious form, and clearly violate the Fifth Amendment. P. 310.

1936, Carter v. Carter Coal Co., 298 U.S. 239

(4) The price-fixing provisions are not separable from the provisions concerning labor, and therefore cannot stand independently. They are so related to and dependent upon the labor provisions, as conditions, considerations or compensations, as to make it clearly probable that, the latter being held bad, the former would not have been passed. P. 312.

1936, Carter v. Carter Coal Co., 298 U.S. 239

(5) The constitutionality of the price-fixing provisions is not considered. P. 316.

1936, Carter v. Carter Coal Co., 298 U.S. 239

4. Whether the end sought to be attained by an Act of Congress is legitimate is wholly a matter of constitutional power, and not [298 U.S. 240] at all of legislative discretion. Beneficent aims, however great or well directed, can never serve in lieu of power. P. 290.

1936, Carter v. Carter Coal Co., 298 U.S. 240

5. To a constitutional end, many ways are open; but to an end not within the terms of the Constitution, all ways are closed. P. 291.

1936, Carter v. Carter Coal Co., 298 U.S. 240

6. The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to all purposes affecting the Nation as a whole with which the States severally cannot deal, or deal adequately, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have always been definitely rejected by this Court. P. 291.

1936, Carter v. Carter Coal Co., 298 U.S. 240

7. Those who framed and those who adopted the Constitution meant to carve from the general mass of legislative powers then possessed by the States only such portions as it was thought wise to confer upon the federal government, and, in order that there should be no uncertainty as to what was taken and what was left, the national powers of legislation were not aggregated, but enumerated—with the result that what was not embraced by the enumeration remained vested in the States without change or impairment. P. 294.

1936, Carter v. Carter Coal Co., 298 U.S. 240

8. The States, in respect of all powers reserved to them, are supreme. And since every addition to the national legislative power to some extent detracts from or invades the power of the States, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. P. 294.

1936, Carter v. Carter Coal Co., 298 U.S. 240

9. The general government possesses no inherent power over the internal affairs of the States, and emphatically not with regard to legislation. P. 295.

1936, Carter v. Carter Coal Co., 298 U.S. 240

10. The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the national government is one of the plainest facts in the history of their deliberations. Adherence to that determination is incumbent equally upon the federal government and the States. State powers can neither be appropriated, on the one hand, nor abdicated, on the other. P. 295.

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11. If the federal government once begins taking over the powers of the States, the States may be so despoiled of their powers, or—what may amount to the same thing—be so relieved of the responsibilities [298 U.S. 241] which the possession of the powers necessarily enjoins, as to reduce them to little more than geographical divisions of the national domain. P. 295.

1936, Carter v. Carter Coal Co., 298 U.S. 241

12. The Constitution is a law—the supreme law of the land. Judicial tribunals are required to apply the law to the facts in every case properly brought before them, and, in so doing, they are bound to give effect to this supreme law as against any mere statute conflicting with it. P. 296.

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13. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. P. 297.

1936, Carter v. Carter Coal Co., 298 U.S. 241

14. As used in the commerce clause of the Constitution, the term "commerce" is the equivalent of intercourse for the purposes of trade, and includes transportation, purchase, sale and exchange of commodities between citizens of the different States. The power to regulate commerce embraces the instruments by which commerce is carried on. P. 297.

1936, Carter v. Carter Coal Co., 298 U.S. 241

15. Production and manufacture of commodities are not commerce, even when done with intent to sell or transport the commodities out of the State. P. 299.

1936, Carter v. Carter Coal Co., 298 U.S. 241

16. The possibility or even certainty of the exportation of a product or an article from a State does not put it in interstate commerce before it has begun to move from the State. To hold otherwise would be to nationalize all industries. P. 301.

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17. One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures it, his business is purely local. So far as he sells or ships it, or contracts to do so, to customers in another State, he engages in interstate commerce. In respect of the former, he is subject to regulation by the State; in respect of the latter, to regulation only by the federal government. Production is not commerce, but a step in preparation for commerce. P. 303.

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18. The incidents leading up to and culminating in the mining of coal—the employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—each and all constitute intercourse for the purposes of production, not of trade. Commerce in the coal is not brought into [298 U.S. 242] being by force of these purely local activities, but by negotiations, agreements and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence; commerce disposes of it. P. 303.

1936, Carter v. Carter Coal Co., 298 U.S. 242

19. To say that an activity or condition has a "direct" effect upon commerce implies that it operates proximately—not mediately, remotely, or collaterally—to produce the effect, without the presence of any efficient intervening agency or condition. P. 307.

1936, Carter v. Carter Coal Co., 298 U.S. 242

20. The distinction between a direct and an indirect effect upon interstate commerce is independent of the magnitude of the effect or of its cause. P. 308.

1936, Carter v. Carter Coal Co., 298 U.S. 242

21. The evils which come to interstate commerce from struggles between employer and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices, however extensive such evils may be, affect interstate commerce in a secondary and indirect way; they are local evils over which the federal government has no legislative control. P. 308.

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22. The want of power in the federal government is the same whether the wages, hours of service, and working conditions and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended. Schechter Poultry Corp. v. United States, 295 U.S. 495. P. 309.

1936, Carter v. Carter Coal Co., 298 U.S. 242

23. A declaration in a statute that invalidity of any of its provisions shall not affect the others reverses the presumption of inseparability, but it does not alter the rule that, if one of two mutually dependent parts be unconstitutional, the other cannot be upheld. P. 312.

1936, Carter v. Carter Coal Co., 298 U.S. 242

63 Washington Law Rep. 986 affirmed in part and reversed in part. 12 F.Supp. 570 reversed.

1936, Carter v. Carter Coal Co., 298 U.S. 242

NUMBERS 636 and 651 were cross-writs of certiorari, 296 U.S. 571, removing a case from the United States Court of Appeals for the District of Columbia, which had reached that court by appeal from the Supreme Court of the District, but which the upper court had not heard. It was a suit by Carter, stockholder and president of the Carter Coal Company, to enjoin the corporation, its officers and directors, from filing an acceptance of a code formulated under the Bituminous Coal Conservation Act [298 U.S. 243] of 1935, and from paying the tax imposed by the Act. The Commissioner of Internal Revenue; a Collector of Internal Revenue, the Attorney General, and the United States Attorney for the District of Columbia, were joined as defendants, the bill praying that they be restrained from attempting to enforce the tax. The trial court found that the labor provisions of the Act and Code were unconstitutional, but that the price-fixing provisions were valid, and were separable from the labor provisions. It therefore denied relief, except for granting a permanent injunction against collection of taxes accrued during the suit.

1936, Carter v. Carter Coal Co., 298 U.S. 243

The other two cases (Nos. 649 and 650) were removed to this Court by certiorari, 296 U.S. 571, 572, from the Circuit Court of Appeals, where they were pending on appeal from decrees of a District Court in Kentucky. One was a suit by several coal companies against a Collector to enjoin him from collecting the taxes sought to be imposed by the Act mentioned above. The other was a suit brought by a stockholder against his corporation and some of its officers, to compel acceptance of the Act and Code, by mandatory injunction. In these cases, the District Court found the Act valid in its entirety, and decreed accordingly. [298 U.S. 278]

SUTHERLAND, J., lead opinion

1936, Carter v. Carter Coal Co., 298 U.S. 278

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

1936, Carter v. Carter Coal Co., 298 U.S. 278

The purposes of the "Bituminous Coal Conservation Act of 1935," involved in these suits, as declared by the title, are to stabilize the bituminous coal mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on such coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of such coal to be affected with a national public interest; to conserve the national resources of such coal; to provide for the general welfare, and for other purposes. C. 824, 49 Stat. 991. The constitutional validity of the act is challenged in each of the suits.

1936, Carter v. Carter Coal Co., 298 U.S. 278

Nos. 636 and 651 are cross-writs of certiorari in a stockholder's suit, brought in the Supreme Court of the District of Columbia by Carter against the Carter Coal Company and some of its officers, Guy T. Helvering (Commissioner of Internal Revenue of the United [298 U.S. 279] States), and certain other officers of the United States, to enjoin the coal company and its officers named from filing an acceptance of the code provided for in said act, from paying any tax imposed upon the coal company under the authority of the act, and from complying with its provisions or the provisions of the code. The bill sought to enjoin the Commissioner of Internal Revenue and the other federal officials named from proceeding under the act in particulars specified, the details of which it is unnecessary to state.

1936, Carter v. Carter Coal Co., 298 U.S. 279

No. 649 is a suit brought in a federal district court in Kentucky by petitioners against respondent collector of internal revenue for the district of Kentucky, to enjoin him from collecting or attempting to collect the taxes sought to be imposed upon them by the act, on the ground of its unconstitutionality.

1936, Carter v. Carter Coal Co., 298 U.S. 279

No. 650 is a stockholder's suit brought in the same court against the coal company and some of its officers, to secure a mandatory injunction against their refusal to accept and operate under the provisions of the Bituminous Coal Code prepared in pursuance of the act.

1936, Carter v. Carter Coal Co., 298 U.S. 279

By the terms of the act, every producer of bituminous coal within the United States is brought within its provisions.

1936, Carter v. Carter Coal Co., 298 U.S. 279

Section 1 is a detailed assertion of circumstances thought to justify he act. It declares that the mining and distribution of bituminous coal throughout the United States by the producer are affected with a national public interest, and that the service of such coal in relation to industrial activities, transportation facilities, health and comfort of the people, conservation by controlled production and economical mining and marketing, maintenance of just and rational relations between the public, owners, producers and employees, the right of the public to constant and adequate supplies of coal at reasonable prices, and the general welfare of the nation, [298 U.S. 280] require that the bituminous coal industry should be regulated as the act provides.

1936, Carter v. Carter Coal Co., 298 U.S. 280

Section 1, among other things, further declares that the production and distribution by producers of such coal bear upon and directly affect interstate commerce, and render regulation of production and distribution imperative for the protection of such commerce; that certain features connected with the production, distribution, and marketing have led to waste of the national coal resources, disorganization of interstate commerce in such coal, and burdening and obstructing interstate commerce therein; that practices prevailing in the production of such coal directly affect interstate commerce and require regulation for the protection of that commerce, and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and disparate labor costs detrimental to fair interstate competition and in order to avoid obstructions to interstate commerce that recur in industrial disputes over labor relations at the mines. These declarations constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows.

1936, Carter v. Carter Coal Co., 298 U.S. 280

The substantive legislation begins with § 2, which establishes in the Department of the Interior a National Bituminous Coal Commission, to be appointed and constituted as the section then specifically provides. Upon this commission is conferred the power to hear evidence and find facts upon which its orders and actions may be predicated.

1936, Carter v. Carter Coal Co., 298 U.S. 280

Section 3 provides:

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There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 percentum on the sale price at the mine, or, in the case of captive coal, the fair market [298 U.S. 281] value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: Provided, That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: Provided further, That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 percentum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.

1936, Carter v. Carter Coal Co., 298 U.S. 281

Section 4 provides that the commission shall formulate the elaborate provisions contained therein into a working agreement to be known as the Bituminous Coal Code. These provisions require the organization of twenty-three [298 U.S. 282] coal districts, each with a district board the membership of which is to be determined in a manner pointed out by the act. Minimum prices for coal are to be established by each of these boards, which is authorized to make such classification of coals and price variation as to mines and consuming market areas as it may deem proper.

1936, Carter v. Carter Coal Co., 298 U.S. 282

In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "Minimum-price area table," equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

1936, Carter v. Carter Coal Co., 298 U.S. 282

The district board must determine and adjust the total cost of the ascertainable tonnage produced in the district so as to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, which may have been established since January 1st, 1934.

1936, Carter v. Carter Coal Co., 298 U.S. 282

Without repeating the long and involved provisions with regard to the fixing of minimum prices, it is enough to say that the act confers the power to fix the minimum price of coal at each and every coal mine in the United States, with such price variations as the board may deem necessary and proper. There is also a provision authorizing the commission, when deemed necessary in the public [298 U.S. 283] interest, to establish maximum prices in order to protect the consumer against unreasonably high prices.

1936, Carter v. Carter Coal Co., 298 U.S. 283

All sales and contracts for the sale of coal are subject to the code prices provided for and in effect when such sales and contracts are made. Various unfair methods of competition are defined and forbidden.

1936, Carter v. Carter Coal Co., 298 U.S. 283

The labor provisions of the code, found in Part III of the same section, require that, in order to effectuate the purposes of the act, the district boards and code members shall accept specified conditions contained in the code, among which are the following:

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Employees to be given the right to organize and bargain collectively, through representatives of their own choosing, free from interference, restraint, or coercion of employers or their agents in respect of their concerted activities.

1936, Carter v. Carter Coal Co., 298 U.S. 283

Such employees to have the right of peaceable assemblage for the discussion of the principles of collective bargaining, and to select their own check-weighman to inspect the weighing or measuring of coal.

1936, Carter v. Carter Coal Co., 298 U.S. 283

A labor board is created, consisting of three members, to be appointed by the President and assigned to the Department of Labor. Upon this board is conferred authority to adjudicate disputes arising under the provisions just stated, and to determine whether or not an organization of employees had been promoted, or is controlled or dominated by, an employer in its organization, management, policy, or election of representatives. The board "may order a code member to meet the representatives of its employees for the purpose of collective bargaining."

1936, Carter v. Carter Coal Co., 298 U.S. 283

Subdivision (g) of Part III provides:

1936, Carter v. Carter Coal Co., 298 U.S. 283

Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the [298 U.S. 284] preceding calendar year and the representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts.

1936, Carter v. Carter Coal Co., 298 U.S. 284

The bill of complaint in Nos. 636 and 651 was filed in the Supreme Court of the District of Columbia on August 31, 1935, the day after the Coal Conservation Act came into effect. That court, among other things, found that the suit was brought in good faith; that, if Carter Coal Company should join the code, it would be compelled to cancel existing contracts and pay its proportionate share of administering the code; that the production of bituminous coal is a local activity carried on within state borders; that coal is the nation's greatest and primary source of energy, vital to the public welfare, of the utmost importance to the industrial and economic life of the nation and the health and comfort of its inhabitants, and that its distribution in interstate commerce should be regular, continuous, and free of interruptions, obstructions, burdens, and restraints.

1936, Carter v. Carter Coal Co., 298 U.S. 284

Other findings are to the effect that such coal is generally sold f.o.b. mine, and the predominant portion of it shipped outside the state in which it is produced; that the distribution and marketing is predominantly interstate in character, and that the intrastate distribution [298 U.S. 285] and sale are so connected that interstate regulation cannot be accomplished effectively unless transactions of intrastate distribution and sale be regulated.

1936, Carter v. Carter Coal Co., 298 U.S. 285

The court further found the existence of a condition of unrestrained and destructive competition in the system of distribution and marketing such coal, and of destructive price-cutting, burdening and restraining interstate commerce and dislocating and diverting its normal flow.

1936, Carter v. Carter Coal Co., 298 U.S. 285

The court concluded as a matter of law that the bringing of the suit was not premature; that the plaintiff was without legal remedy, and rightly invoked relief in equity; that the labor provisions of the act and code were unconstitutional for reasons stated, but the price-fixing provisions were valid and constitutional; that the labor provisions are separable; and, since the provisions with respect to price-fixing and unfair competition are valid, the taxing provisions of the act could stand. Therefore, except for granting a permanent injunction against collection of the "taxes" accrued during the suit (Ex parte Young, 209 U.S. 123, 147-148), the court denied the relief sought, and dismissed the bill.

1936, Carter v. Carter Coal Co., 298 U.S. 285

Appeals were taken to the United States Court of Appeals for the District of Columbia by the parties, but, pending hearing and submission in that court, petitions for writs of certiorari were presented asking us to review the decree of the Supreme Court of the District without awaiting such hearing and submission. Because of the importance of the question and the advantage of a speedy final determination thereof, the writs were granted.

1936, Carter v. Carter Coal Co., 298 U.S. 285

The remaining two suits (Nos. 649 and 650), involving the same questions, were brought in the federal District Court for the Western District of Kentucky. That court held the act valid and constitutional in its entirety, and entered a decree accordingly. 12 F.Supp. 570. Appeals were taken to the Circuit Court of Appeals for the Sixth [298 U.S. 286] Circuit; but, as in the Carter case and for the same reasons, this court granted writs of certiorari in advance of hearing and submission.

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The questions involved will be considered under the following heads:

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1. The right of stockholders to maintain suits of this character.

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2. Whether the suits were prematurely brought.

1936, Carter v. Carter Coal Co., 298 U.S. 286

3. Whether the exaction of 15 percentum on the sale price of coal at the mine is a tax or a penalty.

1936, Carter v. Carter Coal Co., 298 U.S. 286

4. The purposes of the act as set forth in § 1, and the authority vested in Congress by the Constitution to effectuate them.

1936, Carter v. Carter Coal Co., 298 U.S. 286

5. Whether the labor provisions of the act can be upheld as an exercise of the power to regulate interstate commerce.

1936, Carter v. Carter Coal Co., 298 U.S. 286

6. Whether subdivision (g) of Part III of the Code, is an unlawful delegation of power.

1936, Carter v. Carter Coal Co., 298 U.S. 286

7. The constitutionality of the price-fixing provisions, and the question of severability—that is to say, whether, if either the group of labor provisions or the group of price-fixing provisions be found constitutionally invalid, the other can stand as separable.

1936, Carter v. Carter Coal Co., 298 U.S. 286

First. In the Carter case (Nos. 636 and 651), the stockholder who brought the suit had formally demanded of the board of directors that the company should not join the code, should refuse to pay the tax fixed by the act, and should bring appropriate Judicial proceedings to prevent an unconstitutional and improper diversion of the assets of the company and to have determined the liability of the company under the act. The board considered the demand, determined that, while it believed the act to be unconstitutional and economically unsound, and that it would adversely affect the business of the company if accepted, nevertheless, it should accept the code provided for by the act because the penalty in the form [298 U.S. 287] of a 15% tax on its gross sales would be seriously injurious, and might result in bankruptcy. This action of the board was approved by a majority of the shareholders at a special meeting called for the purpose of considering it.

1936, Carter v. Carter Coal Co., 298 U.S. 287

In the Tway Company cases, the company itself brought suit to enjoin the enforcement of the act (No. 649), and a stockholder brought suit to compel the company to accept the code and operate under its provisions (No. 650).

1936, Carter v. Carter Coal Co., 298 U.S. 287

Without repeating the long averments of the several bills, we are of opinion that the suits were properly brought and were maintainable in a court of equity. The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 and requires no further discussion.

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Second. That the suits were not prematurely brought also is clear. Section 2 of the act is mandatory in its requirement that the commission be appointed by the President. The provisions of § 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15% is definitely imposed, and its exaction certain to ensue.

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In Pennsylvania v. West Virginia, 262 U.S. 553, 592-595, suits were brought by Pennsylvania and Ohio against West Virginia to enjoin the defendant state from enforcing an act of her legislature upon the ground that it would injuriously affect or cut off the supply of natural gas produced in her territory and carried by pipelines into the territory of the plaintiff states, and there sold and used. These suits were brought a few days after the West Virginia act became effective. No order had yet been made under it by the Public Service Commission, nor had it been tested in actual practice. But it appeared that the act was certain to operate as the complainant [298 U.S. 288] states apprehended it would. This court held that the suit was not premature.

1936, Carter v. Carter Coal Co., 298 U.S. 288

One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.

1936, Carter v. Carter Coal Co., 298 U.S. 288

Pierce v. Society of Sisters, 268 U.S. 510, 535-536, involved the constitutional validity of the Oregon Compulsory Education Act, which required every parent or other person having control of a child between the ages of eight and sixteen years to send him to the public school of the district where he resides. Suit was brought to enjoin the operation of the act by corporations owning and conducting private schools, on the ground that their business and property were threatened with destruction through the unconstitutional compulsion exercised by the act upon parents and guardians. The suits were held to be not premature, although the effective date of the act had not yet arrived. We said—

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The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity.

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See also Terrace v. Thompson, 263 U.S. 197, 215-216; Swift & Co. v. United States, 276 U.S. 311, 326; Euclid v. Ambler Realty Co., 272 U.S. 365, 386; City Bank Co. v. Schnader, 291 U.S. 24, 34.

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Third. The so-called excise tax of 15 percentum on the sale price of coal at the mine, or, in the case of captive coal the fair market value, with its drawback allowance of 13 1/2%, is clearly not a tax, but a penalty. The exaction applies to all bituminous coal produced, whether it be sold, transported or consumed in interstate commerce, or transactions in respect of it be confined wholly [298 U.S. 289] to the limits of the state. It also applies to "captive coal"—that is to say, coal produced for the sole use of the producer.

1936, Carter v. Carter Coal Co., 298 U.S. 289

It is very clear that the "excise tax" is not imposed for revenue, but exacted as a penalty to compel compliance with the regulatory provisions of the act. The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail.

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The exaction here is a penalty, and not a tax, within the test laid down by this court in numerous cases. Child Labor Tax Case, 259 U.S. 20, 37-39; United States v. La Franca, 282 U.S. 568, 572; United States v. Constantine, 296 U.S. 287, 293 et seq.; United States v. Butler, 297 U.S. 1, 70. While the lawmaker is entirely free to ignore the ordinary meanings of words and make definitions of his own, Karnuth v. United States, 279 U.S. 231, 242; Tyler v. United States, 281 U.S. 497, 502, that device may not be employed so as to change the nature of the acts or things to which the words are applied. But it is not necessary to pursue the matter further. That the "tax" is, in fact, a penalty is not seriously in dispute. The position of the Government, as we understand it, is that the validity of the exaction does not rest upon the taxing power, but upon the power of Congress to regulate interstate commerce, and that, if the act in respect of the labor and price-fixing provisions be not upheld, the "tax" must fall with them. With that position we agree, and confine our consideration accordingly.

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Fourth. Certain recitals contained in the act plainly suggest that its makers were of opinion that its constitutionality could be sustained under some general federal [298 U.S. 290] power thought to exist apart from the specific grants of the Constitution. The fallacy of that view will be apparent when we recall fundamental principles which, although hitherto often expressed in varying forms of words, will bear repetition whenever their accuracy seems to be challenged. The recitals to which we refer are contained in § 1 (which is simply a preamble to the act), and, among others, are to the effect that the distribution of bituminous coal is of national interest, affecting the health and comfort of the people and the general welfare of the nation; that this circumstance, together with the necessity of maintaining just and rational relations between the public, owners, producers, and employees, and the right of the public to constant and adequate supplies at reasonable prices, require regulation of the industry as the act provides. These affirmations—and the further ones that the production and distribution of such coal "directly affect interstate commerce," because of which and of the waste of the national coal resources and other circumstances, the regulation is necessary for the protection of such commerce—do not constitute an exertion of the will of Congress, which is legislation, but a recital of considerations which in the opinion of that body existed and justified the expression of its will in the present act. Nevertheless, this preamble may not be disregarded. On the contrary, it is important because it makes clear, except for the pure assumption that the conditions described "directly" affect interstate commerce, that the powers which Congress undertook to exercise are not specific, but of the most general character—namely, to protect the general public interest and the health and comfort of the people, to conserve privately owned coal, maintain just relations between producers and employees and others, and promote the general welfare, by controlling nationwide production and distribution of coal. These, it may be conceded, are objects of great worth; [298 U.S. 291] but are they ends the attainment of which has been committed by the Constitution to the federal government? This is a vital question, for nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.

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The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power, and not at all of legislative discretion. Legislative congressional discretion begins with the choice of means, and ends with the adoption of methods and details to carry the delegated powers into effect. The distinction between these two things—power and discretion—is not only very plain, but very important. For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers into effect are not restricted, save that they must be appropriate, plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution. McCulloch v. Maryland, 4 Wheat. 316, 421. Thus, it may be said that, to a constitutional end, many ways are open, but to an end not within the terms of the Constitution, all ways are closed.

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The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted, but always definitely rejected, by this court. Mr. Justice Story, as early as 1816, [298 U.S. 292] laid down the cardinal rule, which has ever since been followed—that the general government

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can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.

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Martin v. Hunter's Lessee, 1 Wheat. 304, 326. In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, the sixth of which, among other things, declared that the National Legislature ought to enjoy the legislative rights vested in Congress by the Confederation, and,

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moreover, to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.

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The convention, however, declined to confer upon Congress power in such general terms, instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to legislate substantively for the general welfare, United States v. Butler, supra, p. 64, and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted. Compare Jacobson v. Massachusetts, 197 U.S. 11, 22.

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There are many subjects in respect of which the several states have not legislated in harmony with one another, and in which their varying laws and the failure of some of them to act at all have resulted in injurious confusion and embarrassment. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 232-233. The state laws with respect to marriage and divorce present a case in point, and the great necessity of national legislation on that subject has been from time to time vigorously urged. Other pertinent examples are laws with respect to negotiable [298 U.S. 293] instruments, desertion and nonsupport, certain phases of state taxation, and others which we do not pause to mention. In many of these fields of legislation, the necessity of bringing the applicable rules of law into general harmonious relation has been so great that a Commission on Uniform State Laws, composed of commissioners from every state in the Union, has for many years been industriously and successfully working to that end by preparing and securing the passage by the several states of uniform laws. If there be an easier and constitutional way to these desirable results through congressional action it thus far has escaped discovery.

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Replying directly to the suggestion advanced by counsel in Kansas v. Colorado, 206 U.S. 46, 89-90, to the effect that necessary powers national in their scope must be found vested in Congress, though not expressly granted or essentially implied, this court said:

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But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination, the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary they should [298 U.S. 294] be granted by the people in the manner they had provided for amending that act.

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The general rule with regard to the respective powers of the national and the state governments under the Constitution is not in doubt. The states were before the Constitution, and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers then possessed by the states only such portions as it was thought wise to confer upon the federal government, and, in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated, but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. Thus, "when it was found necessary to establish a national government for national purposes," this court said in Munn v. Illinois, 94 U.S. 113, 124,

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a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England except such as have been delegated to the United States or reserved by the people.

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While the states are not sovereign in the true sense of that term, but only quasi-sovereign, yet, in respect of all powers reserved to them, they are supreme—"as independent of the general government as that government, within its sphere, is independent of the States." Collector v. Day, 11 Wall. 113, 124. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government [298 U.S. 295] be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. It is no longer open to question that the general government, unlike the states, Hammer v. Dagenhart, 247 U.S. 251, 275, possesses no inherent power in respect of the internal affairs of the states, and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter, which it is not necessary now to consider. See, however, Jones v. United States, 137 U.S. 202, 212; Nishimura Ekiu v. United States, 142 U.S. 651, 659; Fong Yue Ting v. United States, 149 U.S. 698, 705 et seq.; Burnet v. Brooks, 288 U.S. 378, 396.

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The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated, on the one hand, nor abdicated, on the other. As this court said in Texas v. White, 7 Wall. 700, 725—

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the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

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Every journey to a forbidden end begins with the first step, and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so [298 U.S. 296] relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that, if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.

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And the Constitution itself is, in every real sense, a law—the lawmakers being the people themselves, in whom, under our system, all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. "We the people of the United States," it says, "do ordain and establish this Constitution…" Ordain and establish! These are definite words of enactment, and, without more, would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly—

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This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;…shall be the supreme Law of the Land;…

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The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute, but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute [298 U.S. 297] whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, Adkins v. Children's Hospital, 261 U.S. 525, 544; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. Schechter v. United States, 295 U.S. 495, 549-550.

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We have set forth, perhaps at unnecessary length, the foregoing principles, because it seemed necessary to do so in order to demonstrate that the general purposes which the act recites, and which, therefore, unless the recitals be disregarded, Congress undertook to achieve, are beyond the power of Congress except so far, and only so far, as they may be realized by an exercise of some specific power granted by the Constitution. Proceeding by a process of elimination which it is not necessary to follow in detail, we shall find no grant of power which authorizes Congress to legislate in respect of these general purposes unless it be found in the commerce clause—and this we now consider.

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Fifth. Since the validity of the act depends upon whether it is a regulation of interstate commerce, the nature and extent of the power conferred upon Congress by the commerce clause becomes the determinative question in this branch of the case. The commerce clause vests in Congress the power—"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The function to be exercised is that of regulation. The thing to be regulated is the commerce described. In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation. We first inquire, then—What is commerce? The term, as this court many times has said, is [298 U.S. 298] one of extensive import. No all-embracing definition has ever been formulated. The question is to be approached both affirmatively and negatively—that is to say, from the points of view as to what it includes and what it excludes.

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In Gibbons v. Ogden, 9 Wheat. 1, 189-190, Chief Justice Marshall said:

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Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse….

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As used in the Constitution, the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade," and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states. And the power to regulate commerce embraces the instruments by which commerce is carried on. Welton v. Missouri, 91 U.S. 275, 280; Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241; Hopkins v. United States, 171 U.S. 578, 597. In Adair v. United States, 208 U.S. 161, 177, the phrase "Commerce among the several States" was defined as comprehending

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traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States.

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In Veazie v. Moor, 14 How. 568, 573-574, this court, after saying that the phrase could never be applied to transactions wholly internal, significantly added:

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Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures or in the arts may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce, or fairly implied [298 U.S. 299] in any investiture of the power to regulate such commerce. A pretension as far-reaching as this would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads from point to point within the several States towards an ultimate destination like the one above mentioned….

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The distinction between manufacture and commerce was discussed in Kidd v. Pearson, 128 U.S. 1, 20, 21, 22, and it was said:

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No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different…. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest and the cotton planter of the South plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and [298 U.S. 300] denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which, in their nature, are and must be local in all the details of their successful management.

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And then, as though foreseeing the present controversy, the opinion proceeds:

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Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market…. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended it would be difficult to imagine.

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Chief Justice Fuller, speaking for this court in United States v. E. C. Knight Co., 156 U.S. 1, 12, 13, said:

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Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary, and not the primary, sense, and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it…. [298 U.S. 301]

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It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States, as required by our dual form of government, and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

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…The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not, of itself, make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce….

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That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause. As this court said in Coe v. Errol, 116 U.S. 517, 526,

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Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind, and until actually put in motion for some place out of the State or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of [298 U.S. 302] property in the State?

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It is true that this was said in respect of a challenged power of the state to impose a tax, but the query is equally pertinent where the question, as here, is with regard to the power of regulation. The case was relied upon in Kidd v. Pearson, supra, p. 26. "The application of the principles above announced," it was there said,

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to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a State is as broad and plenary as its taxing power, and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter.

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In Heisler v. Thomas Colliery Co., 260 U.S. 245, 259-260, we held that the possibility, or even certainty, of exportation of a product or article from a state did not determine it to be in interstate commerce before the commencement of its movement from the state. To hold otherwise

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would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.

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In Oliver Iron Co. v. Lord, 262 U.S. 172, 178, we said on the authority of numerous cited cases:

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Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation…. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even [298 U.S. 303] though the business be conducted in close connection with interstate commerce.

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The same rule applies to the production of oil.

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Such production is essentially a mining operation, and therefore is not a part of interstate commerce even though the product obtained is intended to be and, in fact, is immediately shipped in such commerce.

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Champlin Rfg. Co. v. Corporation Commission, 286 U.S. 210, 235. One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships or contracts to sell and ship the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. Utah Power & L. Co. v. Pfost, 286 U.S. 165, 182. Production is not commerce, but a step in preparation for commerce. Chassaniol v. Greenwood, 291 U.S. 584, 587.

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We have seen that the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade." Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which, in all producing occupations, is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by [298 U.S. 304] force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

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A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production, and not upon commerce, and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in, or forms any part of, interstate commerce. Schechter Corp. v. United States, supra, p. 542 et seq. Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products.

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Certain decisions of this court, superficially considered, seem to lend support to the defense of the act now under review. But, upon examination, they will be seen to be inapposite. Thus, Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310, and kindred cases, involved conspiracies to restrain interstate commerce in violation of the anti-trust laws. The acts of the persons involved were local in character, but the intent was to restrain interstate commerce, and the means employed were calculated to carry that intent into effect. Interstate commerce was the direct object of attack, and the restraint of such commerce was the necessary consequence of the acts and the immediate end in view. Bedford Stone Co. [298 U.S. 305] v. Stone Cutters Assn., 274 U.S. 37, 46. The applicable law was concerned not with the character of the acts or of the means employed, which might be in and of themselves purely local, but with the intent and direct operation of those acts and means upon interstate commerce. " The mere reduction in the supply of an article," this court said in the Coronado Co. case, supra, p. 310,

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to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.

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Another group of cases, of which Swift & Co. v. United States, 196 U.S. 375, is an example, rest upon the circumstance that the acts in question constituted direct interferences with the "flow" of commerce among the states. In the Swift case, livestock was consigned and delivered to stockyards—not as a place of final destination, but, as the court said in Stafford v. Wallace, 258 U.S. 495, 516, "a throat through which the current flows." The sales which ensued merely changed the private interest in the subject of the current, without interfering with its continuity. Industrial Assn. v. United States, 268 U.S. 64, 79. It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow. If the court had held that the raising of the cattle, which were involved in the Swift case, including the wages paid to and working conditions of the herders and others employed in the business, could be regulated by Congress, that decision and decisions holding similarly would be in [298 U.S. 306] point, for it is that situation, and not the one with which the court actually dealt, which here concerns us.

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The distinction suggested is illustrated by the decision in Arkadelphia Milling Co. v. St. Lois S.W. Ry. Co., 249 U.S. 134, 150-152. That case dealt with orders of a state commission fixing railroad rates. One of the questions considered was whether certain shipments of rough material from the forest to mills in the same state for manufacture, followed by the forwarding of the finished product to points outside the state, was a continuous movement in interstate commerce. It appeared that, when the rough material reached the mills, it was manufactured into various articles which were stacked or placed in kilns to dry, the processes occupying several months. Markets for the manufactured articles were almost entirely in other states or in foreign countries. About 95% of the finished articles was made for outbound shipment. When the rough material was shipped to the mills, it was expected by the mills that this percentage of the finished articles would be so sold and shipped outside the state. And all of them knew and intended that this 95% of the finished product would be so sold and shipped. This court held that the state order did not interfere with interstate commerce, and that the Swift case was not in point, as it is not in point here.

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The restricted field covered by the Swift and kindred cases is illustrated by the Schechter case, supra, p. 543. There, the commodity in question, although shipped from another state, had come to rest in the state of its destination, and, as the court pointed out, was no longer in a current or flow of interstate commerce. The Swift doctrine was rejected as inapposite. In the Schechter case, the flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same. [298 U.S. 307]

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But § 1 (the preamble) of the act now under review declares that all production and distribution of bituminous coal "bear upon and directly affect its interstate commerce", and that regulation thereof is imperative for the protection of such commerce. The contention of the government is that the labor provisions of the act may be sustained in that view.

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That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted, and we are brought to the final and decisive inquiry, whether here that effect is direct, as the "preamble" recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the Schechter case, supra, p. 546, et seq. "If the commerce clause were construed," we there said,

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to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control.

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It was also pointed out, p. 548, that

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the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.

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Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency [298 U.S. 308] or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not what is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce?, but what is the relation between the activity or condition and the effect?

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Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices, and it is insisted that interstate commerce is greatly affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. T he employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils which it is the object of the [298 U.S. 309] act to regulate and minimize are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.

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The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the Schechter case, supra. The only perceptible difference between that case and this is that, in the Schechter case, the federal power was asserted with respect to commodities which had come to rest after their interstate transportation, while here the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the Schechter case. On the contrary, the situations were recognized as akin. In the opinion, at page 546, after calling attention to the fact that, if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: "Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control." And again, after pointing out that hours and wages have no direct relation to interstate commerce and that, if the federal government had power to determine the wages and hours of employees in the internal commerce of a state because of their relation to cost and prices and their [298 U.S. 310] indirect effect upon interstate commerce, we said, p. 549:

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All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion, and not of power.

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A reading of the entire opinion makes clear what we now declare, that the want of power on the part of the federal government is the same whether the wages hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun or to sale and distribution after it has ended.

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Sixth. That the act, whatever it may be in form, in fact, is compulsory clearly appears. We have already discussed § 3, which imposes the excise tax as a penalty to compel "acceptance" of the code. Section 14 provides that the United States shall purchase no bituminous coal produced at any mine where the producer has not complied with the provisions of the code, and that each contract made by the United States shall contain a provision that the contractor will buy no bituminous coal to use on, or in the carrying out of, such contract unless the producer be a member of the code, as certified by the coal commission. In the light of these provisions, we come to a consideration of subdivision (g) of Part III of § 4, dealing with "Labor Relations."

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That subdivision delegates the power to fix maximum hours of labor to a part of the producers and the miners—namely, "the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year" and "more than one-half of the mine workers employed", and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district [298 U.S. 311] or group of districts. The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To "accept," in these circumstances, is not to exercise a choice, but to surrender to force.

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The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the Code; others oppose it, and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Schechter Corp. v. United States, [298 U.S. 312] 295 U.S. at p. 537; Eubank v. Richmond, 226 U.S. 137, 143; Seattle Trust Co. v. Roberge, 278 U.S. 116, 121-122.

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Seventh. Finally, we are brought to the price-fixing provisions of the code. The necessity of considering the question of their constitutionality will depend upon whether they are separable from the labor provisions, so that they can stand independently. Section 15 of the act provides:

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If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

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In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute, and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability and create the opposite one of separability. Under the nonstatutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But, under either rule, the determination, in the end, is reached by applying the same test—namely, what was the intent of the lawmakers?

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Under the statutory rule, the presumption must be overcome by considerations which establish "the clear probability that the invalid part being eliminated, the legislature would not have been satisfied with what remains," Williams v. Standard Oil Co., 278 U.S. 235, 241 et seq.; or, as stated in Utah Power & L. Co. v. Pfost, 286 U.S. 165, 184-185, "the clear probability that the legislature would not have been satisfied with the statute unless [298 U.S. 313] it had included the invalid part." Whether the provisions of a statute are so interwoven that, one being held invalid, the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. "But it is an aid merely; not an inexorable command." Dorchy v. Kansas, 264 U.S. 286, 290. The presumption in favor of separability does not authorize the court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 362.

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The statutory aid to construction in no way alters the rule that, in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another. Perhaps a fair approach to a solution of the problem is to suppose that, while the bill was pending in Congress, a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code.

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Section 3 of the act, which provides that no producer shall, by accepting the code or the drawback of taxes, be estopped from contesting the constitutionality of any provision of the code, is thought to aid the separability clause. But the effect of that provision is simply to permit the producer to challenge any provision of the code despite his acceptance of the code or the drawback. It seems not to have anything to do with the question of separability.

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With the foregoing principles in mind, let us examine the act itself. The title of the act and the preamble demonstrate, as we have already seen, that Congress desired to accomplish certain general purposes therein recited. To that end, it created a commission, with mandatory [298 U.S. 314] directions to formulate into a working agreement the provisions set forth in § 4 of the act. That being done, the result is a code. Producers accepting and operating under the code are to be known as code members, and § 4 specifically requires that, in order to carry out the policy of the act, "the code shall contain the following conditions, provisions, and obligations…," which are then set forth. No power is vested in the commission, in formulating the code, to omit any of these conditions, provisions, or obligations. The mandate to include them embraces all of them. Following the requirement just quoted, and, significantly, in the same section (International Textbook Co. v. Pigg, 217 U.S. 91, 112-113) under appropriate headings, the price-fixing and labor-regulating provisions are set out in great detail. These provisions, plainly meant to operate together and not separately, constitute the means designated to bring about the stabilization of bituminous coal production, and thereby to regulate or affect interstate commerce in such coal. The first clause of the title is: "To stabilize the bituminous coal mining industry and promote its interstate commerce."

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Thus, the primary contemplation of the act is stabilization of the industry through the regulation of labor and the regulation of prices; for, since both were adopted, we must conclude that both were thought essential. The regulations of labor, on the one hand, and prices, on the other, furnish mutual aid and support, and their associated force—not one or the other, but both combined—was deemed by Congress to be necessary to achieve the end sought. The statutory mandate for a code upheld by two legs at once suggests the improbability that Congress would have assented to a code supported by only one.

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This seems plain enough, for Congress must have been conscious of the fact that elimination of the labor provisions [298 U.S. 315] from the act would seriously impair, if not destroy, the force and usefulness of the price provisions. The interdependence of wages and prices is manifest. Approximately two-thirds of the cost of producing a ton of coal is represented by wages. Fair prices necessarily depend upon the cost of production, and since wages constitute so large a proportion of the cost, prices cannot be fixed with any proper relation to cost without taking into consideration this major element. If one of them becomes uncertain, uncertainty with respect to the other necessarily ensues.

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So much is recognized by the code itself. The introductory clause of Part III declares that the conditions respecting labor relations are "To effectuate the purposes of this Act." And subdivision (a) of Part II, quoted in the forepart of this opinion, reads in part:

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In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area…equal as nearly as may be to the weighted average of the total costs, per net ton….

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Thus, wages, hours of labor, and working conditions are to be so adjusted as to effectuate the purposes of the act, and prices are to be so regulated as to stabilize wages, working conditions, and hours of labor which have been or are to be fixed under the labor provisions. The two are so woven together as to render the probability plain enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated without also regulating these elements of labor which enter so largely into the cost of production.

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These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one [298 U.S. 316] set of which cannot be removed without fatal consequences to the whole. Paraphrasing the words of this court in Butts v. Merchants Transportation Co., 230 U.S. 126, 133, we inquire: what authority has this court, by construction, to convert the manifest purpose of Congress to regulate production by the mutual operation and interaction of fixed wages and fixed prices into a purpose to regulate the subject by the operation of the latter alone? Are we at liberty to say from the fact that Congress has adopted an entire integrated system that it probably would have enacted a doubtfully effective fraction of the system? The words of the concurring opinion in the Schechter case, 295 U.S. at pages 554-555, are pertinent in reply.

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To take from this code the provisions as to wages and the hours of labor is to destroy it altogether…. Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder.

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The conclusion is unavoidable that the price-fixing provisions of the code are so related to and dependent upon the labor provisions as conditions, considerations or compensations as to make it clearly probable that, the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former. International Textbook Co. v. Pigg, supra, p. 113; Warren v. Charlestown, 2 Gray [Mass.] 84, 98-99.

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The price-fixing provisions of the code are thus disposed of without coming to the question of their constitutionality; but neither this disposition of the matter nor anything we have said is to be taken as indicating that the court is of opinion that these provisions, if separately enacted, could be sustained.

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If there be in the act provisions, other than those we have considered, that may stand independently, the [298 U.S. 317] question of their validity is left for future determination when, if ever, that question shall be presented for consideration.

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The decrees in Nos. 636, 649, and 650 must be reversed and the causes remanded for further consideration in conformity with this opinion. The decree in No. 651 will be affirmed.

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It is so ordered.

HUGHES, J., separate opinion

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Separate opinion of MR. CHIEF JUSTICE HUGHES.

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I agree that the stockholders were entitled to bring their suits; that, in view of the question whether any part of the Act could be sustained, the suits were not premature; that the so-called tax is not a real tax, but a penalty; that the constitutional power of the Federal Government to impose this penalty must rest upon the commerce clause, as the Government concedes; that production—in this case, mining—which precedes commerce is not itself commerce, and that the power to regulate commerce among the several States is not a power to regulate industry within the State.

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The power to regulate interstate commerce embraces the power to protect that commerce from injury, whatever may be the source of the dangers which threaten it, and to adopt any appropriate means to that end. Second Employers' Liability Cases, 223 U.S. 1, 51. Congress thus has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it. Texas & N.O. R. Co. v. Railway Clerks, 281 U.S. 548, 570. But Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effect, Congress, in its discretion, [298 U.S. 318] could assume control of virtually all the activities of the people, to the subversion of the fundamental principle of the Constitution. If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

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I also agree that subdivision (g) of Part III of the prescribed Code is invalid upon three counts: (1) It attempts a broad delegation of legislative power to fix hours and wages without standards or limitation. The Government invokes the analogy of legislation which becomes effective on the happening of a specified event, and says that, in this case, the event is the agreement of a certain proportion of producers and employees, whereupon the other producers and employees become subject to legal obligations accordingly. I think that the argument is unsound, and is pressed to the point where the principle would be entirely destroyed. It would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated officials or private persons whose orders or agreements would be treated as "events," with the result that they would be invested with the force of law having penal sanctions. (2) The provision permits a group of producers and employees, according to their own views of expediency, to make rules as to hours and wages for other producers and employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose. (3) The provision goes beyond any proper measure of protection of interstate [298 U.S. 319] commerce, and attempts a broad regulation of industry within the State.

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But that is not the whole case. The Act also provides for the regulation of the prices of bituminous coal sold in interstate commerce, and prohibits unfair methods of competition in interstate commerce. Undoubtedly, transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce, and the control of charges and the protection of fair competition in that commerce are familiar illustrations of the exercise of the power, as the Interstate Commerce Act, the Packers and Stockyards Act, and the Anti-Trust Acts abundantly show. The Court has repeatedly stated that the power to regulate interstate commerce among the several States is supreme and plenary. Minnesota Rate Cases, 230 U.S. 352, 398. It is

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complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

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Gibbons v. Ogden, 9 Wheat. 1, 196. We are not at liberty to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce. See Nebbia v. New York, 291 U.S. 502.

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Whether the policy of fixing prices of commodities sold in interstate commerce is a sound policy is not for our consideration. The question of that policy, and of its particular applications, is for Congress. The exercise of the power of regulation is subject to the constitutional restriction of the due process clause, and if, in fixing rates, prices or conditions of competition, that requirement is transgressed, the judicial power may be invoked to the end that the constitutional limitation may be maintained. Interstate Commerce Comm'n v. Union Pacific R. Co., 222 U.S. 541, 547; St. Joseph Stock Yards Co. v. United States, ante, p. 38. [298 U.S. 320]

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In the legislation before us, Congress has set up elaborate machinery for the fixing of prices of bituminous coal sold in interstate commerce. That provision is attacked in limine. Prices have not yet been fixed. If fixed, they may not be contested. If contested, the Act provides for review of the administrative ruling. If, in fixing prices, due process is violated by arbitrary, capricious or confiscatory action, judicial remedy is available. If an attempt is made to fix prices for sales in intrastate commerce, that attempt will also be subject to attack by appropriate action. In that relation, it should be noted that, in the Carter cases, the court below found that substantially all the coal mined by the Carter Coal Company is sold f.o.b. mines, and is transported into States other than those in which it is produced for the purpose of filling orders obtained from purchasers in such States. Such transactions are in interstate commerce. Savage v. Jones, 225 U.S. 501, 520. The court below also found that "the interstate distribution and sale and the intrastate distribution and sale" of the coal are so "intimately and inextricably connected" that

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the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce unless transactions of intrastate distribution and sale be regulated.

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Substantially the same situation is disclosed in the Kentucky cases. In that relation, the Government invokes the analogy of transportation rates. Shreveport Case, 234 U.S. 342; Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co., 257 U.S. 563. The question will be the subject of consideration when it arises in any particular application of the Act.

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Upon what ground, then, can it be said that this plan for the regulation of transactions in interstate commerce in coal is beyond the constitutional power of Congress? The Court reaches that conclusion in the view that the [298 U.S. 321] invalidity of the labor provisions requires us to condemn the Act in its entirety. I am unable to concur in that opinion. I think that the express provisions of the Act preclude such a finding of inseparability.

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This is admittedly a question of statutory construction, and hence we must search for the intent of Congress. And, in seeking that intent, we should not fail to give full weight to what Congress itself has said upon the very point. The Act provides (§ 15):

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If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

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That is a flat declaration against treating the provisions of the Act as inseparable. It is a declaration which Congress was competent to make. It is a declaration which reverses the presumption of indivisibility and creates an opposite presumption. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184.

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The above-quoted provision does not stand alone. Congress was at pains to make a declaration of similar import with respect to the provisions of the Code (§ 3):

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No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer.

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This provision evidently contemplates, when read with the one first quoted, that a stipulation of the Code may be found to be unconstitutional, and yet that its invalidity shall not be regarded as affecting the obligations attaching to the remainder.

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I do not think that the question of separability should be determined by trying to imagine what Congress would [298 U.S. 322] have done if certain provisions found to be invalid were excised. That, if taken broadly, would lead us into a realm of pure speculation. Who can tell, amid the host of divisive influences playing upon the legislative body, what its reaction would have been to a particular excision required by a finding of invalidity? The question does not call for speculation of that sort, but rather for an inquiry whether the provisions are inseparable by virtue of inherent character. That is, when Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

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All that is said in the preamble of the Act, in the directions to the Commission which the Act creates, and in the stipulations of the Code, is subject to the explicit direction of Congress that the provisions of the statute shall not be treated as forming an indivisible unit. The fact that the various requirements furnish to each other mutual aid and support does not establish indivisibility. The purpose of Congress, plainly expressed, was that, if a part of that aid were lost, the whole should not be lost. Congress desired that the Act and Code should be operative so far as they met the constitutional test. Thus, we are brought, as I have said, to the question whether, despite this purpose of Congress, we must treat the marketing provisions and the labor provisions as inextricably tied together because of their nature. I find no such tie. The labor provisions are themselves separated and placed in a separate part (Part III) of the Code. It seems quite clear that the validity of the entire Act cannot depend upon the provisions as to hours and wages in paragraph (g) of Part III. For what was contemplated by that paragraph is manifestly independent of [298 U.S. 323] the other machinery of the Act, as it cannot become effective unless the specified proportion of producers and employees reach an agreement as to particular wages and hours. And the provision for collective bargaining in paragraphs (a) and (b) of Part III is apparently made separable from the Code itself by § 9 of the Act, providing, in substance, that the employees of all producers shall have the right of collective bargaining even when producers do not accept or maintain the Code.

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The marketing provisions (Part II) of the Code naturally form a separate category. The interdependence of wages and prices is no clearer in the coal business than in transportation. But the broad regulation of rates in order to stabilize transportation conditions has not carried with it the necessity of fixing wages. Again, the requirement, in paragraph (a) of Part II, that district boards shall establish prices so as to yield a prescribed "return per net ton" for each district in a minimum price area in order "to sustain the stabilization of wages, working conditions and maximum hours of labor" does not link the marketing provisions to the labor provisions by an unbreakable bond. Congress evidently desired stabilization through both the provisions relating to marketing and those relating to labor, but the setting up of the two sorts of requirements did not make the one dependent upon the validity of the other. It is apparent that they are not so interwoven that they cannot have separate operation and effect. The marketing provisions in relation to interstate commerce can be carried out as provided in Part II without regard to the labor provisions contained in Part III. That fact, in the light of the congressional declaration of separability, should be considered of controlling importance.

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In this view, the Act, and the Code for which it provides, may be sustained in relation to the provisions for [298 U.S. 324] marketing in interstate commerce, and the decisions of the courts below, so far as they accomplish that result, should be affirmed.

CARDOZO, J., concurring and dissenting

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MR. JUSTICE CARDOZO (dissenting in Nos. 636, 649 and 650, and in No. 651 concurring in the result).

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My conclusions, compendiously stated, are these:

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(a) Part II of the statute sets up a valid system of price-fixing as applied to transactions in interstate commerce and to those in intrastate commerce where interstate commerce is directly or intimately affected. The prevailing opinion holds nothing to the contrary.

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(b) Part II, with its system of price-fixing, is separable from Part III, which contains the provisions as to labor considered and condemned in the opinion of the court.

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(c) Part II being valid, the complainants are under a duty to come in under the code, and are subject to a penalty if they persist in a refusal.

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(d) The suits are premature insofar as they seek a judicial declaration as to the validity or invalidity of the regulations in respect of labor embodied in Part III. No opinion is expressed, either directly or by implication, as to those aspects of the case. It will be time enough to consider them when there is the threat, or even the possibility, of imminent enforcement. If that time shall arrive, protection will be given by clear provisions of the statute (§ 3) against any adverse inference flowing from delay or acquiescence.

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(e) The suits are not premature to the extent that they are intended to avert a present wrong, though the wrong upon analysis will be found to be unreal.

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The complainants are asking for a decree to restrain the enforcement of the statute in all or any of its provisions on the ground that it is a void enactment, and void in all its parts. If some of its parts are valid and are separable from others that are or may be void, and if the parts upheld and separated are sufficient to sustain a [298 U.S. 325] regulatory penalty, the injunction may not issue, and hence the suits must fail. There is no need when that conclusion has been reached to stir a step beyond. Of the provisions not considered, some may never take effect, at least in the absence of future happenings which are still uncertain and contingent. Some may operate in one way as to one group and in another way as to others, according to particular conditions as yet unknown and unknowable. A decision in advance as to the operation and validity of separable provisions in varying contingencies is premature, and hence unwise.

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The court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." Steamship Co. v. Emigration Commissioners, 113 U.S. 33, 39; Abrams v. Van Schaick, 293 U.S. 188; Wilshire Oil Co. v. United States, 295 U.S. 100. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Burton v. United States, 196 U.S. 283, 295.

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Per Brandeis, J., in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346. The moment we perceive that there are valid and separable portions, broad enough to lay the basis for a regulatory penalty, inquiry should halt. The complainants must conform to whatever is upheld, and, as to parts excluded from the decision, especially if the parts are not presently effective, must make their protest in the future when the occasion or the need arises.

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First: I am satisfied that the Act is within the power of the central government insofar as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or intimately affected. Whether it is valid also in other provisions that have been considered and condemned in the opinion of the court I do not find it necessary to determine at this time. Silence must not be taken as importing acquiescence. Much would have [298 U.S. 326] to be written if the subject, even as thus restricted, were to be explored through all its implications, historical and economic as well as strictly legal. The fact that the prevailing opinion leaves the price provisions open for consideration in the future makes it appropriate to forego a fullness of elaboration that might otherwise be necessary. As a system of price-fixing, the Act is challenged upon three grounds: (1) because the governance of prices is not within the commerce clause; (2) because it is a denial of due process forbidden by the Fifth Amendment, and (3) because the standards for administrative action are indefinite, with the result that there has been an unlawful delegation of legislative power.

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(1) With reference to the first objection, the obvious and sufficient answer is, so far as the Act is directed to interstate transactions, that sales made in such conditions constitute interstate commerce, and do not merely "affect" it. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290; Flanagan v. Federal Coal Co., 267 U.S. 222, 225; Lemke v. Farmers Crain Co., 258 U.S. 50, 60; Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83, 90; Federal Trade Comm'n v. Pacific States Paper Trade Assn., 273 U.S. 52, 64. To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences. The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. Baldwin v. Seelig, 294 U.S. 511. They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. Cf. Head Money Cases, 112 U.S. 580, 593; Story, Commentaries on the Constitution, § 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy. This does not mean, of course, that prices may be fixed for arbitrary reasons or in an arbitrary way. The commerce power of the nation is [298 U.S. 327] subject to the requirement of due process like the police power of the states. Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156; cf. Brooks v. United States, 267 U.S. 432, 436, 437; Nebbia v. New York, 291 U.S. 502, 524. Heed must be given to similar considerations of social benefit or detriment in marking the division between reason and oppression. The evidence is overwhelming that Congress did not ignore those considerations in the adoption of this Act. What is to be said in that regard may conveniently be postponed to the part of the opinion dealing with the Fifth Amendment.

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Regulation of prices being an exercise of the commerce power in respect of interstate transactions, the question remains whether it comes within that power as applied to intrastate sales where interstate prices are directly or intimately affected. Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that, for the protection of the one, there is need to regulate the other. Schechter Poultry Corp. v. United States, 295 U.S. 495, 544, 545, 546. Sometimes it is said that the relation must be "direct" to bring that power into play. In many circumstances, such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this—that "the law is not indifferent to considerations of degree." Schechter Poultry Corp. v. United States, supra, concurring opinion, p. 554. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances, [298 U.S. 328] the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous, or the opposite, according to the facts. Always, the setting of the facts is to be viewed if one would know the closeness of the tie. Perhaps, if one group of adjectives is to be chosen in preference to another, "intimate" and "remote" will be found to be as good as any. At all events, "direct" and "indirect," even if accepted as sufficient, must not be read too narrowly. Cf. Stone, J., in Di Santo v. Pennsylvania., 273 U.S. 34, 44. A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.

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One of the most common and typical instances of a relation characterized as direct has been that between interstate and intrastate rates for carriers by rail where the local rates are so low as to divert business unreasonably from interstate competitors. In such circumstances, Congress has the power to protect the business of its carriers against disintegrating encroachments. Shreveport Case, 234 U.S. 342, 351, 352; Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co., 257 U.S. 563, 588; United States v. Louisiana, 290 U.S. 70, 75; Florida v. United States, 292 U.S. 1. To be sure, the relation even then may be characterized as indirect if one is nice or over-literal in the choice of words. Strictly speaking, the intrastate rates have a primary effect upon the intrastate traffic, and not upon any other, though the repercussions of the competitive system may lead to secondary consequences affecting interstate traffic also. Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301, 306. What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain. There is a like immediacy [298 U.S. 329] here. Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. The argument is strongly pressed by intervening counsel that this may not be true in all communities or in exceptional conditions. If so, the operators unlawfully affected may show that the Act, to that extent, is invalid as to them. Such partial invalidity is plainly an insufficient basis for a declaration that the Act is invalid as a whole. Dahnke-Walker Co. v. Bondurant, supra, p. 289; DuPont v. Commissioner, 289 U.S. 685, 688.

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What has been said in this regard is said with added certitude when complainants' business is considered in the light of the statistics exhibited in the several records. In No. 636, the Carter case, the complainant has admitted that "substantially all" (over 97 1/2%) of the sales of the Carter Company are made in interstate commerce. In No. 649 the percentages of intrastate sales are, for one of the complaining companies, twenty-five percent, for another, one percent, and for most of the others, two percent or four. The Carter Company has its mines in West Virginia; the mines of the other companies are located in Kentucky. In each of those states, moreover, coal from other regions is purchased in large quantities, and is thus brought into competition with the coal locally produced. Plainly, it is impossible to say, either from the statute itself or from any figures laid before us, that interstate sales will not be prejudicially affected in West Virginia and Kentucky if intrastate prices are maintained on a lower level. If it be assumed for present purposes that there are other states or regions where the effect may be different, the complainants are not the champions of any rights except their own. Hatch v. [298 U.S. 330] Reardon, 204 U.S. 152, 160, 161; Premier-Pabst Sales Co. v. Grosscup, ante, p. 226.

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(2) The commerce clause being accepted as a sufficient source of power, the next inquiry must be whether the power has been exercised consistently with the Fifth Amendment. In the pursuit of that inquiry, Nebbia v. New York, 291 U.S. 502, lays down the applicable principle. There, a statute of New York prescribing a minimum price for milk was upheld against the objection that price-fixing was forbidden by the Fourteenth Amendment. 1 We found it a sufficient reason to uphold the challenged system that

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the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself.

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291 U.S. at p. 538.

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All this may be said, and with equal, if not greater force, of the conditions and practices in the bituminous coal industry, not only at the enactment of this statute in August, 1935, but for many years before. Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky [298 U.S. 331] handful. Wages came down along with prices and with profits. There were strikes, at times nationwide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines. 2 The hope of betterment was faint unless the industry could be subjected to the compulsion of a code. In the weeks immediately preceding the passage of this Act, the country was threatened once more with a strike of ominous proportions. The plight of the industry was not merely a menace to owners and to mine workers; it was and had long been a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy.

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Congress was not condemned to inaction in the face of price wars and wage wars so pregnant with disaster. Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and for labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot.

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When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.

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Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372. The free competition so often figured as a social good imports order and moderation and a decent regard for the welfare of the group. Cf. Sugar Institute, Inc. v. [298 U.S. 332] United States, 297 U.S. 553. There is testimony in these records, testimony even by the assailants of the statute, that only through a system of regulated prices can the industry be stabilized and set upon the road of orderly and peaceful progress. 3 If further facts are looked for, they are narrated in the findings, as well as in congressional reports and a mass of public records. 4 After making every allowance for difference of opinion as to the most efficient cure, the student of the subject is confronted with the indisputable truth that there were ills to be corrected, and ills that had a direct relation to the maintenance of commerce among the states without friction or diversion. An evil existing, and also the power to correct it, the lawmakers were at liberty to use their own discretion in the selection of the means. 5

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(3) Finally, and in answer to the third objection to the statute in its price-fixing provisions, there has been no excessive delegation of legislative power. The prices [298 U.S. 333] to be fixed by the District Boards and the Commission must conform to the following standards: they must be just and equitable; they must take account of the weighted average cost of production for each minimum price area; they must not be unduly prejudicial or preferential as between districts or as between producers within a district, and they must reflect as nearly as possible the relative market value of the various kinds, qualities and sizes of coal, at points of delivery in each common consuming market area; to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals on a competitive basis as has heretofore existed. The minimum for any district shall yield a return, per net ton, not less than the weighted average of the total costs per net ton of the tonnage of the minimum price area; the maximum for any mine, if a maximum is fixed, shall yield a return not less than cost plus a reasonable profit. Reasonable prices can as easily be ascertained for coal as for the carriage of passengers or property under the Interstate Commerce Act, or for the services of brokers in the stockyards (Tagg Bros. & Moorhead v. United States, 280 U.S. 420), or for the use of dwellings under the Emergency Rent Laws (Block v. Hirsh, 256 U.S. 135, 157; Marcus Brown Co. v. Feldman, 256 U.S. 170; Levy Leasing Co. v. Siegel, 258 U.S. 242), adopted at a time of excessive scarcity, when the laws of supply and demand no longer gave a measure for the ascertainment of the reasonable. The standards established by this Act are quite as definite as others that have had the approval of this court. New York Central Securities Corp. v. United States, 287 U.S. 12, 24; Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 286; Tagg Bros. & Moorhead v. United States, supra; Mabler v. Eby, 264 U.S. 32. Certainly a bench of judges, not experts in the coal business, cannot [298 U.S. 334] say with assurance that members of a commission will be unable, when advised and informed by others experienced in the industry, to make the standards workable, or to overcome, through the development of an administrative technique, many obstacles and difficulties that might be baffling or confusing to inexperience or ignorance.

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The price provisions of the Act are contained in a chapter known as Part II. The final subdivisions of that part enumerate certain forms of conduct which are denounced as "unfair methods of competition." For the most part, the prohibitions are ancillary to the fixing of a minimum price. The power to fix a price carries with it the subsidiary power to forbid and prevent evasion. Cf. United States v. Ferger, 250 U.S. 199. The few prohibitions that may be viewed as separate are directed to situations that may never be realized in practice. None of the complainants threatens or expresses the desire to do these forbidden acts. As to those phases of the statute, the suits are premature.

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Second: the next inquiry must be whether Part I of the statute, which creates the administrative agencies, and Part II, which has to do in the main with the price-fixing machinery as well as preliminary sections levying a tax or penalty, are separable from Part III, which deals with labor relations in the industry, with the result that what is earlier would stand if what is later were to fall.

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The statute prescribes the rule by which construction shall be governed.

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If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

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§ 15. The rule is not read as an inexorable mandate. Dorchy v. Kansas, 264 U.S. 286, 290; Utah Power & Light Co. v. Pfost, 286 [298 U.S. 335] U.S. 165, 184; Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 362. It creates a "presumption of divisibility," which is not applied mechanically or in a manner to frustrate the intention of the lawmakers. Even so, the burden is on the litigant who would escape its operation. Here, the probabilities of intention are far from overcoming the force of the presumption. They fortify and confirm it. A confirmatory token is the formal division of the statute into "Parts" separately numbered. Part III which deals with labor, is physically separate from everything that goes before it. But, more convincing than the evidences of form and structure, the division into chapters and sections and paragraphs, each with its proper subject matter, are the evidences of plan and function. Part II, which deals with prices, is to take effect at once, or as soon as the administrative agencies have finished their administrative work. Part III, in some of its most significant provisions, the section or subdivision in respect of wages and the hours of labor, may never take effect at all. This is clear beyond the need for argument from the mere reading of the statute. The maximum hours of labor may be fixed by agreement between the producers of more than two thirds of the annual national tonnage production for the preceding calendar year and the representatives of more than one half the mine workers. Wages may be fixed by agreement or agreements negotiated by collective bargaining in any district or group of two or more districts between representatives of producers of more than two thirds of the annual tonnage production of such districts or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein. It is possible that none of these agreements as to hours and wages will ever be made. If made, they may not be completed for months, or even years. In the meantime, however, the provisions [298 U.S. 336] of Part II will be continuously operative, and will determine prices in the industry. Plainly, then, there was no intention on the part of the framers of the statute that prices should not be fixed if the provisions for wages or hours of labor were found to be invalid.

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Undoubtedly the rules as to labor relations are important provisions of the statute. Undoubtedly the lawmakers were anxious that provisions so important should have the force of law. But they announced with all the directness possible for words that they would keep what they could have if they could not have the whole. Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage. 6 To hold otherwise is to ignore the whole history of mining. All in vain have official committees [298 U.S. 337] inquired and reported in thousands of printed pages if this lesson has been lost. In the face of that history, the court is now holding that Congress would have been unwilling to give the force of law to the provisions of Part II, which were to take effect at once, if it could not have Part III, which, in the absence of agreement between the employers and the miners, would never take effect at all. Indeed, the prevailing opinion goes so far, it seems, as to insist that if the least provision of the statute in any of the three chapters is to be set aside as void, the whole statute must go down for the reason that everything, from end to end, or everything, at all events, beginning with § 4, is part of the Bituminous Coal Code, to be swallowed at a single draught, without power in the commission, or even in the court, to abate a jot or tittle. One can only wonder what is left of the "presumption of divisibility" which the lawmakers were at pains to establish later on. Codes under the National Recovery Act are not a genuine analogy. The Recovery Act made it mandatory (§ 7a) that every code should contain provisions as to labor, including wages and hours, and left everything else to the discretion of the codifiers. Wages and hours in such circumstances were properly described as "essential features of the plan, its very bone and sinew" (Schechter Poultry Corp. v. United States, supra, concurring opinion, p. 555), which, taken from the body of a code, would cause it to collapse. Here, on the face of the statute, the price provisions of one Part and the labor provisions of the other (the two to be administered by separate agencies) are made of equal rank.

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What is true of the sections and subdivisions that deal with wages and the hours of labor is true also of the other provisions of the same chapter of the Act. Employees are to have the right to organize and bargain collectively through representatives of their own choosing, [298 U.S. 338] and shall be free from interference, restraint or coercion of employers, 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, and no employee and no one seeking employment shall be required as a condition of employment to join any company union. No threat has been made by anyone to do violence to the enjoyment of these immunities and privileges. No attempt to violate them may be made by the complainants, or indeed by anyone else in the term of four years during which the Act is to remain in force. By another subdivision, employees are to have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own checkweighman to inspect the weighing or measuring of coal, and shall not be required, as a condition of employment, to live in company houses or to trade at the store of the employer. None of these privileges or immunities has been threatened with impairment. No attempt to impair them may ever be made by anyone.

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Analysis of the statute thus leads to the conclusion that the provisions of Part III, so far as summarized, are separable from Parts I and II, and that any declaration in respect of their validity or invalidity under the commerce clause of the Constitution or under any other section will anticipate a controversy that may never become real. This being so, the proper course is to withhold an expression of opinion until expression becomes necessary. A different situation would be here if a portion of the statute, and a portion sufficient to uphold the regulatory penalty, did not appear to be valid. If the whole statute were a nullity, the complainants would be at liberty to stay the hand of the tax gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act. Child Labor [298 U.S. 339] Tax Case, 259 U.S. 20; Hill v. Wallace, 259 U.S. 44, 62; Terrace v. Thompson, 263 U.S. 197, 215; Pierce v. Society of Sisters, 268 U.S. 510, 536. It would be no answer to say that the complainants might avert the penalty by declaring themselves code members ( § 3) and fighting the statute afterwards. In the circumstances supposed, there would be no power in the national government to put that constraint upon them. The Act by hypothesis, being void in all its parts as a regulatory measure, the complainants might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser. But the case, as it comes to us, assumes a different posture, a posture inconsistent with the commission of a trespass, either present or prospective. The hypothesis of complete invalidity has been shown to be unreal. The price provisions being valid, the complainants were under a duty to come in under the code whether the provisions as to labor are valid or invalid, and their failure to come in has exposed them to a penalty lawfully imposed. They are thus in no position to restrain the acts of the collector, or to procure a judgment defeating the operation of the statute, whatever may be the fate hereafter of particular provisions not presently enforceable. The right to an injunction failing, the suits must be dismissed. Nothing more is needful—no pronouncement more elaborate—for a disposition of the controversy.

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A last assault upon the statute is still to be repulsed. The complainants take the ground that the Act may not coerce them through the imposition of a penalty into a seeming recognition or acceptance of the code, if any of the code provisions are invalid, however separable from others. I cannot yield assent to a position so extreme. It is one thing to impose a penalty for refusing to come in under a code that is void altogether. It is a very different thing if a penalty is imposed for [298 U.S. 340] refusing to come in under a code invalid at the utmost in separable provisions, not immediated operative, the right to contest them being explicitly reserved. The penalty in those circumstances is adopted as a lawful sanction to compel submission to a statute having the quality of law. A sanction of that type is the one in controversy here. So far as the provisions for collective bargaining and freedom from coercion are concerned, the same duties are imposed upon employers by § 9 of the statute whether they come in under the code or not. So far as code members are subject to regulation as to wages and hours of labor, the force of the complainants' argument is destroyed when reference is made to those provisions of the statute in which the effect of recognition and acceptance is explained and limited. By § 3 of the Act,

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No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided for in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to said producer.

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These provisions are reinforced and made more definite by §§ 5(c) and 6(b), which, so far as presently material, are quoted in the margin. 7 For the subscriber to the code who is [298 U.S. 341] doubtful as to the validity of some of its requirements, there is thus complete protection. If this might otherwise be uncertain, it would be made clear by our decision in Ex parte Young, 209 U.S. 123, which was applied in the court below at the instance and for the benefit of one of these complainants to give relief against penalties accruing during suit. Helvering v. Carter, No. 651. Finally, the adequacy of the remedial devices is made even more apparent when one remembers that the attack upon the statute in its labor regulations assumes the existence of a controversy that may never become actual. The failure to agree upon a wage scale or upon maximum hours of daily or weekly labor may make the statutory scheme abortive in the very phases and aspects that the court has chosen to condemn. What the code will provide as to wages and hours of labor, or whether it will provide anything, is still in the domain of prophecy. The opinion of the court begins at the wrong end. To adopt a homely form of words, the complainants have been crying before they are really hurt.

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My vote is for affirmance.

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I am authorized to state that MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion.

Footnotes

CARDOZO, J., concurring and dissenting (Footnotes)

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1. Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156:

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The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations (Ex parte Milligan, 4 Wall. 2, 121-127; Monongahela Navigation Co. v. United States, 148 U.S. 312, 336; United States v. Joint Traffic Assn., 171 U.S. 505, 571; McCray v. United States, 195 U.S. 27, 61; United States v. Cress, 243 U.S. 316, 326); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. In re Kemmler, 136 U.S. 436, 448; Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410.

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Cf. Brooks v. United States, 267 U.S. 432, 436, 437; Nebbia v. New York, 291 U.S. 502, 524.

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2. The dates and titles are given in the brief for the Government in No. 636, at pp. 118.

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3. See also the Report of the Fifteenth Annual Meeting of the National Coal Association, October 26-27, 1934, and the statement of the resolutions adopted at the Sixteenth Annual Meeting as reported at hearings preliminary to the passage of this Act. Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, 1st Session, on H.R. 8479, pp. 20, 152.

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4. There is significance in the many bills proposed to the Congress after painstaking reports during successive national administrations with a view to the regulation of the coal industry by Congressional action. S. 2557, October 4, 1921, 67th Cong., 1st Sess.; S. 3147, February 13, 1922, 67th Cong., 2nd Sess.; H.R. 9222, February 11, 1926, 69th Cong., 1st Sess.; H.R. 11898, May 4, 1926 (S. 4177), 69th Cong., 1st Sess.; S. 2935, January 7, 1932 (H.R. 7536), 72nd Cong., 1st Sess.; also, same session, H.R. 12916 and 9924.

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5.

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Price control, like any other form of discrimination, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

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Nebbia v. New York, supra, at p. 538.

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6. At a hearing before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, on H.R. 8479, counsel for the United Mine Workers of America, who had cooperated in the drafting of the Act, said (p. 35):

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We have, as can be well understood, a provision of this code dealing with labor relations at the mines. We think that is justified; we think it is impossible to conceive of any regulation of this industry that does not provide for regulation of labor relations at the mines. I realize that, while it may be contested, yet I feel that it is going to be sustained.

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Also, there is a provision in this act that if this act, or any part of it, is declared to be invalid as affecting any person or persons, the rest of it will be valid, and if the other provisions of this act still stand and the labor provisions are struck down, we still want the act, because it stabilizes the industry and enables us to negotiate with them on a basis which will at least be different from what we have been confronted with since April, and that is a disinclination to even negotiate a labor wage scale because they claim they are losing money.

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If the labor provisions go down, we still want the industry stabilized, so that our union may negotiate with them on the basis of a living American wage standard.

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7. § 5(c).

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Any producer whose membership in the code and whose right to a drawback on the taxes as provided under this Act has been canceled shall have the right to have his membership restored upon payment by him of all taxes in full for the time during which it shall be found by the Commission that his violation of the code or of any regulation thereunder, the observance of which is required by its terms, shall have continued. In making its findings under this subsection the Commission shall state specifically (1) the period of time during which such violation continued, and (2) the amount of taxes required to be paid to bring about reinstatement as a code member.

1936, Carter v. Carter Coal Co., 298 U.S. 341

§ 6(b).

1936, Carter v. Carter Coal Co., 298 U.S. 341

Any person aggrieved by an order issued by the Commission or Labor Board in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission or Labor Board be modified or set aside in whole or in part…. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission or Labor Board, as the case may be, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C. title 28, §§ 346 and 347.)

United States v. Curtiss-Wright Export Corp., 1936

Title: United States v. Curtiss-Wright Export Corp.

Author: U.S. Supreme Court

Date: December 21, 1936

Source: 299 U.S. 304

This case was argued November 19 and 20, 1936, and was decided December 21, 1936.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

1936, United States v. Curtiss-Wright Export Corp., 299 U.S. 304

FOR THE SOUTHERN DISTRICT OF NEW YORK

Syllabus

1936, United States v. Curtiss-Wright Export Corp., 299 U.S. 304

1. A Joint Resolution of May 28, 1934, provided:

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That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if, after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

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Violation was made punishable as a [310 U.S. 305] crime. The President issued two proclamations, one on the date of the Resolution, putting it into operation, the other on November 14, 1935, revoking the first proclamation.

1936, United States v. Curtiss-Wright Export Corp., 310 U.S. 305

Held:

1936, United States v. Curtiss-Wright Export Corp., 310 U.S. 305

(1) The Joint Resolution is not an unconstitutional delegation of legislative power to the Executive. Pp. 314, 329.

1936, United States v. Curtiss-Wright Export Corp., 310 U.S. 305

(2) The powers of the Federal Government over foreign or external affairs differ in nature and origin from those over domestic or internal affairs. P. 315.

1936, United States v. Curtiss-Wright Export Corp., 310 U.S. 305

(3) The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the States such portions as it was thought desirable to vest in the Federal Government, leaving those not included in the enumeration still in the States. Id.

1936, United States v. Curtiss-Wright Export Corp., 310 U.S. 305

(4) The States severally never possessed international powers. P. 316.

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(5) As a result of the separation from Great Britain by the Colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the Colonies severally, but to the Colonies in their collective and corporate capacity as the United States of America. Id.

1936, United States v. Curtiss-Wright Export Corp., 310 U.S. 305

(6) The Constitution was ordained and established, among other things, to form "a more perfect Union." Prior to that event, the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save insofar as the Constitution, in express terms, qualified its exercise. Though the States were several, their people, in respect of foreign affairs, were one. P. 317.

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(7) The investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. P. 318.

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(8) In the international field, the sovereignty of the United States is complete. Id.

1936, United States v. Curtiss-Wright Export Corp., 310 U.S. 305

(9) In international relations, the President is the sole organ of the Federal Government. P. 319.

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(10) In view of the delicacy of foreign relations and of the power peculiar to the President in this regard, Congressional legislation which is to be made effective in the international field must [299 U.S. 306] often accord to him a degree of discretion and freedom which would not be admissible were domestic affairs alone involved. P. 319.

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(11) The marked difference between foreign and domestic affairs in this respect is recognized in the dealings of the houses of Congress with executive departments. P. 321.

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(12) Unbroken legislative practice from the inception almost of the national government supports the conclusion that the Joint Resolution, supra, is not an unconstitutional delegation of power. P. 322.

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(13) Findings of jurisdictional facts in the first proclamation, following the language of the Joint Resolution, were sufficient. P. 330.

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(14) The revocation of the first proclamation by the second did not have the effect of abrogating the Resolution or of precluding its enforcement by prosecution and punishment of offenses committed during the life of the first proclamation. P. 331.

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2. Upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad on demurrer, this Court has jurisdiction of questions involving the validity of the statute on which the indictment was founded which were decided by the District Court in favor of the United States. P. 329.

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14 F.Supp. 230, reversed.

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APPEAL, under the Criminal Appeals Act, from a judgment quashing an indictment for conspiracy. [299 U.S. 311]

SUTHERLAND, J., lead opinion

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MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

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On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by § 1 of the resolution. In pursuance of the conspiracy, the commission of certain overt acts was alleged, details of which need not be stated. The Joint Resolution (c. 365, 48 Stat. 811) follows: [299 U.S. 312]

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Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

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Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

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The President's proclamation (48 Stat. 1744), after reciting the terms of the Joint Resolution, declares:

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Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution, and I do hereby admonish all citizens of the [299 U.S. 313] United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

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And I do hereby enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

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And I do hereby delegate to the Secretary of State the power of prescribing exceptions and limitations to the application of the said joint resolution of May 28, 1934, as made effective by this my proclamation issued thereunder.

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On November 14, 1935, this proclamation was revoked (49 Stat. 3480), in the following terms:

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Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to Bolivia or Paraguay will no longer be necessary as a contribution to the reestablishment of peace between those countries, and the above-mentioned Proclamation of May 28, 1934, is hereby revoked as to the sale of arms and munitions of war to Bolivia or Paraguay from and after November 29, 1935, provided, however, that this action shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under the aforesaid Proclamation of May 28, 1934, or the Joint Resolution of Congress approved by the President on the same date, and that the said Proclamation and Joint Resolution shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. [299 U.S. 314]

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Appellees severally demurred to the first count of the indictment on the grounds (1) that it did not charge facts sufficient to show the commission by appellees of any offense against any law of the United States; (2) that this count of the indictment charges a conspiracy to violate the joint resolution and the Presidential proclamation, both of which had expired according to the terms of the joint resolution by reason of the revocation contained in the Presidential proclamation of November 14, 1935, and were not in force at the time when the indictment was found. The points urged in support of the demurrers were, first, that the joint resolution effects an invalid delegation of legislative power to the executive; second, that the joint resolution never became effective, because of the failure of the President to find essential jurisdictional facts, and third, that the second proclamation operated to put an end to the alleged liability under the joint resolution.

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The court below sustained the demurrers upon the first point, but overruled them on the second and third points. 14 F.Supp. 230. The government appealed to this court under the provisions of the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, as amended, U.S.C. Title 18, § 682. That act authorizes the United States to appeal from a district court direct to this court in criminal cases where, among other things, the decision sustaining a demurrer to the indictment or any count thereof is based upon the invalidity or construction of the statute upon which the indictment is founded.

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First. It is contended that, by the Joint Resolution, the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the reestablishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, [299 U.S. 315] which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion, and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

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Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

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It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

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The two classes of powers are different both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except [299 U.S. 316] those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. Carter v. Carter Coal Co., 298 U.S. 238, 294. That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers, but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by, and were entirely under the control of, the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and, as such, to have

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full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

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As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end, and forms of government change; but sovereignty survives. A political society cannot endure [299 U.S. 317] without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See Penhallow v. Doane, 3 Dall. 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his Brittanic Majesty and the "United States of America." 8 Stat.—European Treaties—80.

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The Union existed before the Constitution, which was ordained and established, among other things, to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save insofar as the Constitution, in express terms, qualified its exercise. The Framers' Convention was called, and exerted its powers upon the irrefutable postulate that, though the states were several, their people, in respect of foreign affairs, were one. Compare The Chinese Exclusion Case, 130 U.S. 581, 604, 606. In that convention, the entire absence of state power to deal with those affairs was thus forcefully stated by Rufus King:

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The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not ,of themselves, raise troops, or equip vessels, for war.

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5 Elliott's Debates 212. 1 [299 U.S. 318]

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It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see American Banana Co. v. United Fruit Co., 213 U.S. 347, 356), and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (Jones v. United States, 137 U.S. 202, 212), the power to expel undesirable aliens (Fong Yue Ting v. United States, 149 U.S. 698, 705 et seq.), the power to make such international agreements as do not constitute treaties in the constitutional sense (Altman & Co. v. United States, 224 U.S. 583, 600-601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and, in each of the cases cited, found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

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In Burnet v. Brooks, 288 U.S. 378, 396, we said,

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As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.

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Cf. Carter v. Carter Coal Co., supra, p. 295. [299 U.S. 319]

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Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations, at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

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The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct, he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility, and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.

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U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p 24.

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It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an [299 U.S. 320] exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself, and has never since been doubted. In his reply to the request, President Washington said:

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The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely [299 U.S. 321] impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

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1 Messages and Papers of the Presidents, p. 194.

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The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

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When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field [299 U.S. 322] of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in Mackenzie v. Hare, 239 U.S. 299, 311,

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As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality, it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.

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(Italics supplied.)

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In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.

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Let us examine, in chronological order, the acts of legislation which warrant this conclusion:

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The Act of June 4, 1794, authorized the President to lay, regulate and revoke embargoes. He was "authorized," "whenever, in his opinion, the public safety shall so require," to lay the embargo upon all ships and vessels in the ports of the United States, including those of foreign nations "under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper." C. 41, 1 Stat. 372. A prior joint resolution of May 7, 1794 (1 Stat. 401), had conferred unqualified power on the President to grant clearances, notwithstanding an existing embargo, to ships or vessels belonging to citizens of the United States bound to any port beyond the Cape of Good Hope.

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The Act of March 3, 1795 (c. 53, 1 Stat. 444), gave the President authority to permit the exportation of arms, cannon and military stores, the law prohibiting such exports [299 U.S. 323] to the contrary notwithstanding, the only prescribed guide for his action being that such exports should be in "cases connected with the security of the commercial interest of the United States, and for public purposes only."

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By the Act of June 13, 1798 (c. 53, § 5, 1 Stat. 566), it was provided that, if the government of France "shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities" theretofore maintained against vessels and property of the citizens of the United States

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in violation of the faith of treaties, and the laws of nations, and shall thereby acknowledge the just claims of the United States to be considered as in all respects neutral,…it shall be lawful for the President of the United States, being well ascertained of the premises, to remit and discontinue the prohibitions and restraints hereby enacted and declared, and he shall be, and is hereby, authorized to make proclamation thereof accordingly.

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By § 4 of the Act of February 9, 1799 (c. 2, 1 Stat. 615), it was made "lawful" for the President, "if he shall deem it expedient and consistent with the interest of the United States," by order to remit certain restraints and prohibitions imposed by the act with respect to the French Republic, and also to revoke any such order "whenever, in his opinion, the interest of the United States shall require."

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Similar authority, qualified in the same way, was conferred by § 6 of the Act of February 7, 1800, c. 10, 2 Stat. 9.

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Section 5 of the Act of March 3, 1805 (c. 41, 2 Stat. 341), made it lawful for the President, whenever an armed vessel entering the harbors or waters within the jurisdiction of the United States and required to depart therefrom should fail to do so, not only to employ the land and naval forces to compel obedience, but,

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if he [299 U.S. 324] shall think it proper, it shall be lawful for him to forbid, by proclamation, all intercourse with such vessel, and with every armed vessel of the same nation, and the officers and crew thereof; to prohibit all supplies and aid from being furnished them

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and to do various other things connected therewith. Violation of the President's proclamation was penalized.

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On February 28, 1806, an act was passed (c. 9, 2 Stat. 351) to suspend commercial intercourse between the United States and certain parts of the Island of St. Domingo. A penalty was prescribed for its violation. Notwithstanding the positive provisions of the act, it was, by § 5, made "lawful" for the President to remit and discontinue the restraints and prohibitions imposed by the act at any time "if he shall deem it expedient and consistent with the interests of the United States" to do so. Likewise in respect of the Non-intercourse Act of March 1, 1809, (c. 24, 2 Stat. 528), the President was "authorized" (§ 11, p. 530), in case either of the countries affected should so revoke or modify her edicts "as that they shall cease to violate the neutral commerce of the United States," to proclaim the fact, after which the suspended trade might be renewed with the nation so doing.

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Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs. Many, though not all, of these acts are designated in the footnote. 2 [299 U.S. 325]

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It well may be assumed that these legislative precedents were in mind when Congress passed the joint resolutions of April 22, 1898, 30 Stat. 739; March 14, 1912, 37 Stat. 630, and January 31, 1922, 42 Stat. 361, to prohibit the export of coal or other war material. The resolution of 1898 authorized the President "in his discretion, and with such limitations and exceptions as shall seem to him expedient" to prohibit such exportations. The striking identity of language found in the second resolution mentioned above and in the one now under review will be [299 U.S. 326] seen upon comparison. The resolution of March 14, 1912, provides:

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That whenever the President shall find that, in any American country, conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President [299 U.S. 327] shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.

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SEC. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both.

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The third resolution is in substantially the same terms, but extends to any country in which the United States exercises extraterritorial jurisdiction, and provides for the President's action not only when conditions of domestic violence exist which are promoted, but also when such conditions may be promoted by the use of such arms or munitions of war.

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We had occasion to review these embargo and kindred acts in connection with an exhaustive discussion of the general subject of delegation of legislative power in a recent case, Panama Refining Co. v. Ryan, 293 U.S. 388, 421-422, and, in justifying such acts, pointed out that they confided to the President "an authority which was cognate to the conduct by him of the foreign relations of the government."

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The result of holding that the joint resolution here under attack is void and unenforceable as constituting an unlawful delegation of legislative power would be to stamp this multitude of comparable acts and resolutions as likewise invalid. And while this court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so, an impressive array of legislation such as we have just set forth, enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances [299 U.S. 328] but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.

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In The Laura, 114 U.S. 411, 416, this court answered a challenge to the constitutionality of a statute authorizing the Secretary of the Treasury to remit or mitigate fines and penalties in certain cases, by repeating the language of a very early case (Stuart v. Laird, 1 Cranch 299, 309) that the long practice and acquiescence under the statute was a

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practical exposition…too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

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In Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57, the constitutionality of R.S. § 4952, conferring upon the author, inventor, designer or proprietor of a photograph certain rights, was involved. Mr. Justice Miller, speaking for the court, disposed of the point by saying:

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The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

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In Field v. Clark, 143 U.S. 649, 691, this court declared that

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…the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land.

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The rule is one which has been stated and applied many times by this court. As examples, see [299 U.S. 329] Ames v. Kansas, 111 U.S. 449, 469; McCulloch v. Maryland, 4 Wheat. 316, 401; Downes v. Bidwell, 182 U.S. 244, 286.

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The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.

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We deem it unnecessary to consider seriatim the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly, and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.

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Second. The second point raised by the demurrer was that the Joint Resolution never became effective because the President failed to find essential jurisdictional facts, and the third point was that the second proclamation of the President operated to put an end to the alleged liability of appellees under the Joint Resolution. In respect of both points, the court below overruled the demurrer, and thus far sustained the government.

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The government contends that, upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed [299 U.S. 330] in the usual way, after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion. The demurrer in the present case challenges the validity of the statute upon three separate and distinct grounds. If the court below had sustained the demurrer without more, an appeal by the government necessarily would have brought here for our determination all of these grounds, since, in that case, the record would not have disclosed whether the court considered the statute invalid upon one particular ground or upon all of the grounds alleged. The judgment of the lower court is that the statute is invalid. Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute, and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act. United States v. Hastings, 296 U.S. 188, 192.

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In Langnes v. Green, 282 U.S. 531, where the decree of a district court had been assailed upon two grounds and the circuit court of appeals had sustained the attack upon one of such grounds only, we held that a respondent in certiorari might nevertheless urge in this court in support of the decree the ground which the intermediate appellate court had rejected. That principle is applicable here.

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We proceed, then, to a consideration of the second and third grounds of the demurrers which, as we have said, the court below rejected.

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1. The Executive proclamation recites,

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I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, [299 U.S. 331] and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution.

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This finding satisfies every requirement of the Joint Resolution. There is no suggestion that the resolution is fatally uncertain or indefinite, and a finding which follows its language, as this finding does, cannot well be challenged as insufficient.

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But appellees, referring to the words which we have italicized above, contend that the finding is insufficient because the President does not declare that the cooperation of such governments as he deemed necessary included any American republic, and, therefore, the recital contains no affirmative showing of compliance in this respect with the Joint Resolution. The criticism seems to us wholly wanting in substance. The President recites that he has consulted with the governments of other American republics, and that he has been assured of the cooperation of such governments as he deemed necessary as contemplated by the joint resolution. These recitals, construed together, fairly include within their meaning American republics.

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2. The second proclamation of the President, revoking the first proclamation, it is urged, had the effect of putting an end to the Joint Resolution, and, in accordance with a well settled rule, no penalty could be enforced or punishment inflicted thereafter for an offense committed during the life of the Joint Resolution in the absence of a provision in the resolution to that effect. There is no doubt as to the general rule or as to the absence of a saving clause in the Joint Resolution. But is the case presented one which makes the rule applicable?

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It was not within the power of the President to repeal the Joint Resolution, and his second proclamation did not [299 U.S. 332] purport to do so. It "revoked" the first proclamation, and the question is, did the revocation of the proclamation have the effect of abrogating the resolution, or of precluding its enforcement insofar as that involved the prosecution and punishment of offenses committed during the life of the first proclamation? We are of opinion that it did not.

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Prior to the first proclamation, the Joint Resolution was an existing law, but dormant, awaiting the creation of a particular situation to render it active. No action or lack of action on the part of the President could destroy its potentiality. Congress alone could do that. The happening of the designated events—namely, the finding of certain conditions and the proclamation by the President—did not call the law into being. It created the occasion for it to function. The second proclamation did not put an end to the law, or affect what had been done in violation of the law. The effect of the proclamation was simply to remove, for the future, a condition of affairs which admitted of its exercise.

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We should have had a different case if the Joint Resolution had expired by its own terms upon the issue of the second proclamation. Its operative force, it is true, was limited to the period of time covered by the first proclamation. And, when the second proclamation was issued, the resolution ceased to be a rule for the future. It did not cease to be the law for the antecedent period of time. The distinction is clearly pointed out by the Superior Court of Judicature of New Hampshire in Stevens v. Dimond, 6 N.H. 330, 332, 333. There, a town by law provided that, if certain animals should be found going at large between the first day of April and the last day of October, etc., the owner would incur a prescribed penalty. The trial court directed the jury that the bylaw, being in force for a year only, had expired, so that the defendant could not be called upon to answer for a violation which [299 U.S. 333] occurred during the designated period. The state appellate court reversed, saying that, when laws

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expire by their own limitation, or are repealed, they cease to be the law in relation to the past, as well as the future, and can no longer be enforced in any case. No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves or were repealed. It has never been decided that they cease to be law merely because the time they were intended to regulate had expired…. A very little consideration of the subject will convince anyone that a limitation of the time to which a statute is to apply is a very different thing from the limitation of the time a statute is to continue in force.

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The first proclamation of the President was in force from the 28th day of May, 1934, to the 14th day of November, 1935. If the Joint Resolution had in no way depended upon Presidential action, but had provided explicitly that, at any time between May 28, 1934, and November 14, 1935, it should be unlawful to sell arms or munitions of war to the countries engaged in armed conflict in the Chaco, it certainly could not be successfully contended that the law would expire with the passing of the time fixed in respect of offenses committed during the period.

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The judgment of the court below must be reversed, and the cause remanded for further proceedings in accordance with the foregoing opinion.

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Reversed.

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MR. JUSTICE McREYNOLDS does not agree. He is of opinion that the court below reached the right conclusion, and its judgment ought to be affirmed.

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MR. JUSTICE STONE took no part in the consideration or decision of this case.

Footnotes

SUTHERLAND, J., lead opinion (Footnotes)

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1. In general confirmation of the foregoing views, see 1 Story on the Constitution, 4th ed., §§ 198-217, and especially §§ 210, 211, 213, 214, 215 (p. 153), 216.

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2. Thus, the President has been broadly "authorized" to suspend embargo acts passed by Congress, "if in his judgment the public interest should require it" (Act of December 19, 1806, c. 1, § 3, 2 Stat. 411) or if, "in the judgment of the President," there has been such suspension of hostilities abroad as may render commerce of the United States sufficiently safe. Act of April 22, 1808, c. 52, 2 Stat. 490. See also Act of March 3, 1817, c. 39, § 2, 3 Stat. 361. Compare, but as to reviving an embargo act, the Act of May 1, 1810, c. 39, § 4, 2 Stat. 605.

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Likewise, Congress has passed numerous acts laying tonnage and other duties on foreign ships in retaliation for duties enforced on United States vessels, but providing that if the President should be satisfied that the countervailing duties were repealed or abolished, then he might, by proclamation, suspend the duties as to vessels of the nation so acting. Thus, the President has been "authorized" to proclaim the suspension. Act of January 7, 1824, c. 4, § 4, 4 Stat. 3; Act of May 24, 1828, c. 111, 4 Stat. 308; Act of July 24, 1897, c. 13, 30 Stat. 214. Or it has been provided that the suspension should take effect whenever the President "shall be satisfied" that the discriminating duties have been abolished. Act of March 3, 1815, c. 77, 3 Stat. 224; Act of May 31, 1830, c. 219, § 2, 4 Stat. 425. Or that the President "may direct" that the tonnage duty shall cease to be levied in such circumstances. Act of July 13, 1832, c. 207, § 3, 4 Stat. 578. And compare Act of June 26, 1884, c. 121, § 14, 23 Stat. 53, 57.

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Other acts, for retaliation against discriminations as to United States commerce, have placed broad powers in the hands of the President, "authorizing" even the total exclusion of vessels of any foreign country so offending (Act of June 19, 1886, c. 421, § 17, 24 Stat. 79, 83), or the increase of duties on its goods or their total exclusion from the United States (Act of June 17, 1930, c. 497, § 388, 46 Stat. 590, 704), or the exclusion of its goods or the detention, in certain circumstances, of its vessels, or the exclusion of its vessels or nationals from privileges similar to those which it has denied to citizens of the United States (Act of September 8, 1916, c. 463, §§ 804-806, 39 Stat. 756, 799-800). As to discriminations by particular countries, it has been made lawful for the President, by proclamation, which he "may in his discretion, apply…to any part or all" of the subjects named, to exclude certain goods of the offending country, or its vessels. Act of March 3, 1887, c. 339, 24 Stat. 475. And compare Act of July 26, 1892, c. 248, 27 Stat. 267. Compare also authority given the Postmaster General to reduce or enlarge rates of foreign postage, among other things, for the purpose of counteracting any adverse measures affecting our postal intercourse with foreign countries. Act of March 3, 1851, c. 20, § 2, 9 Stat. 587, 589.

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The President has been "authorized" to suspend an act providing for the exercise of judicial functions by ministers, consuls and other officers of the United States in the Ottoman dominions and Egypt whenever he "shall receive satisfactory information" that the governments concerned have organized tribunals likely to secure to United States citizens the same impartial justice enjoyed under the judicial functions exercised by the United States officials. Act of March 23, 1874, c. 62, 18 Stat. 23.

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Congress has also passed acts for the enforcement of treaties or conventions, to be effective only upon proclamation of the President. Some of them may be noted which "authorize" the President to make proclamation when he shall be "satisfied" or shall receive "satisfactory evidence" that the other nation has complied: Act of August 5, 1854, c. 269, §§ 1, 2, 10 Stat. 587; Act of March 1, 1873, c. 213, §§ 1, 2, 17 Stat. 482; Act of August 15, 1876, c. 290, 19 Stat. 200; Act of December 17, 1903, c. 1, § 1, 33 Stat. 3. Cf. Act of June 11, 1864, c. 116, § 1, 13 Stat. 121; Act of February 21, 1893, c. 150, 27 Stat. 472.

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Where appropriate, Congress has provided that violation of the President's proclamations authorized by the foregoing acts shall be penalized. See, e.g., Act of June 19, 1886; Act of March 3, 1887; Act of September 8, 1916; Act of June 17, 1930—all supra.

NLRB v. Jones & Laughlin Steel Corp., 1937

Title: National Labor Relations Board v. Jones & Laughlin Steel Corp.

Author: U.S. Supreme Court

Date: April 12, 1937

Source: 301 U.S. 1 (No. 419)

This case was argued February 10 and 11, 1937, and was decided April 12, 1937. Note: No. 419, National Labor Relations Board v. Jones & Laughlin Steel Corp.; Nos. 420 and 421, National Labor Relations Board v. Fruehauf Trailer Co., post, p. 49; Nos. 422 and 423, National Labor Relations Board v. Friedman-Harry Marks Clothing Co., post, p. 58; No. 365, Associated Press v. National Labor Relations Board, post, p. 103, and No. 469, Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, post, p. 142, which are known as the "Labor Board Cases," were disposed of in five separate opinions. The dissenting opinion, post, p. 76, applies to Nos. 419, 420 and 421, and 422 and 423. The dissenting opinion, post, p. 133, applies to No. 365. The opinion in No. 469 was unanimous.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

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FOR THE FIFTH CIRCUIT

Syllabus

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1. The distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal form of government. P.29.

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2. The validity of provisions which, considered by themselves, are constitutional, held not affected by general and ambiguous declarations in the same statute. P. 30.

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3. An interpretation which conforms a statute to the Constitution must be preferred to another which would render it unconstitutional or of doubtful validity. P. 30.

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4. Acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional [301 U.S. 2] power, and this includes acts, having that effect, which grow out of labor disputes. P. 31.

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5. Employees in industry have a fundamental right to organize and select representatives of their own choosing for collective bar gaining, and discrimination or coercion upon the part of their employer to prevent the free exercise of this right is a proper subject for condemnation by competent legislative authority. P. 33.

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6. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of such commerce. Pp. 34-36.

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7. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control. P. 37.

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8. This power must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would, in view of our complex society, effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. P. 37.

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9. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. P. 37.

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10. The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry, although the industry when separately viewed is local. P. 38.

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11. The relation to interstate commerce of the manufacturing enterprise involved in this case was such that a stoppage of its operations by industrial strife would have an immediate, direct and paralyzing effect upon interstate commerce. Therefore, Congress had constitutional authority, for the protection of interstate commerce, to safeguard the right of the employees in the manufacturing plant to self-organization and free choice of their representatives for collective bargaining. P. 41. [301 U.S. 3]

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Judicial notice is taken of the facts that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace, and that refusal to confer and negotiate has been one of the most prolific causes of strife.

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12. The National Labor Relations Act of July 5, 1935, empowers the National Labor Relations Board to prevent any person from engaging in unfair labor practices "affecting commerce"; its definition of "commerce" (aside from commerce within a territory or the District of Columbia) is such as to include only interstate and foreign commerce, and the term "affecting commerce" it defines as meaning

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in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

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The "unfair labor practices," as defined by the Act and involved in this case, are restraint or coercion of employees in their rights to self-organization and to bargain collectively through representatives of their own choosing, and discrimination against them in regard to hire or tenure of employment for the purpose of encouraging or discouraging membership in any labor organization. §§ 7 and 8. The Act (§ 9a) declares that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit; but that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. Held:

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(1) That in safeguarding rights of employees and empowering the Board, the statute, insofar as involved in the present case, confines itself to such control of the industrial relationship as may be constitutionally exercised by Congress to prevent burden or obstruction to interstate or foreign commerce arising from industrial disputes. P. 43.

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(2) The Act imposes upon the employer the duty of conferring and negotiating with the authorized representatives of the employees for the purpose of settling a labor dispute, but it does not preclude such individual contracts as the employer may elect to make directly with individual employees. P. 44.

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(3) The Act does not compel agreements between employers and employees. Its theory is that free opportunity for negotiation [301 U.S. 4] with accredited representatives of employees is likely to promote industrial peace, and may bring about the adjustments and agreements which the Act, in itself, does not attempt to compel. P. 45.

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(4) The Act does not interfere with the normal right of the employer to hire, or with the right of discharge when exercised for other reasons than intimidation and coercion, and what is the true reason in this regard is left the subject of investigation in each case, with full opportunity to show the facts. P. 45.

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13. A corporation which manufactured iron and steel products in its factories in Pennsylvania from raw materials, most of which it brought in from other States, and which shipped 75% of the manufactured products out of Pennsylvania and disposed of them throughout this country and in Canada, was required by orders of the National Labor Relations Board to tender reinstatement to men who had been employed in one of the factories but were discharged because of their union activities and for the purpose of discouraging union membership. The orders further required that the company make good the pay the men had lost through their discharge, and that it desist from discriminating against members of the union, with regard to hire and tenure of employment, and from interfering by coercion with the self-organization of its employees in the plant. Held that the orders were authorized by the National Labor Relations Act, and that the Act is constitutional as thus applied to the company. Pp. 30, 32, 34, 41.

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14. The right of employers to conduct their own business is not arbitrarily restrained by regulations that merely protect the correlative rights of their employees to organize for the purpose of securing the redress of grievances and of promoting agreements with employers relating to rates of pay and conditions of work. P. 43.

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15. The fact that the National Labor Relations Act subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible, and fails to provide a more comprehensive plan, with better assurance of fairness to both sides and with increased chances of success in bringing about equitable solutions of industrial disputes affecting interstate commerce, does not affect its validity. The question is as to the power of Congress, not as to its policy, and legislative authority, exerted within its proper field, need not embrace all the evils within its reach. P. 46. [301 U.S. 5]

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16. The National Labor Relations Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. These findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. These procedural provisions afford adequate opportunity to secure judicial protection against arbitrary action, in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. P. 47.

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17. The provision of the National Labor Relations Act, § 10(c), authorizing the Board to require the reinstatement of employees found to have been discharged because of their union activity or for the purpose of discouraging membership in the union, is valid. P. 47.

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18. The provision of the Act, § 10(c), that the Board, in requiring reinstatement, may direct the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period, does not contravene the provisions of the Seventh Amendment with respect to jury trial in suits at common law. P. 48.

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83 F.2d 998, reversed.

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CERTIORARI, 299 U.S. 534, to review a decree of the Circuit Court of Appeals declining to enforce an order of the National Labor Relations Board. [301 U.S. 22]

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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In a proceeding under the National Labor Relations Act of 1935, 1 the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

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The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. 83 F.2d 998. We granted certiorari.

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The scheme of the National Labor Relations Act—which is too long to be quoted in full—may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective [301 U.S. 23] bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce. 2 The Act [301 U.S. 24] then defines the terms it uses, including the terms "commerce" and "affecting commerce." § 2. It creates the National Labor Relations Board, and prescribes its organization. §§ 6. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. § 7. It defines "unfair labor practices." § 8. It lays down rules as to the representation of employees for the purpose of collective bargaining. § 9. The Board is empowered to prevent the described unfair labor practices affecting commerce and the Act prescribes the procedure to that end. The Board is authorized to petition designated courts to secure the enforcement of its orders. The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party, on application to the court, shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of its order. § 10. The Board has broad powers of investigation. § 11. Interference with members of the Board or its agents in the performance of their duties is punishable by fine and imprisonment. § 12. Nothing in the Act is to be construed, to interfere with the right to strike. § 13. There is a separability clause to the effect that, if any provision of the Act or its application to any person or circumstances shall be held invalid, the remainder of the Act or its application to other persons or circumstances shall not be affected. § 15. The particular provisions which are involved in the instant case will be considered more in detail in the course of the discussion. The procedure in the instant case followed the statute. The labor union filed with the Board its verified charge. [301 U.S. 25] The Board thereupon issued its complaint against the respondent alleging that its action in discharging the employees in question constituted unfair labor practices affecting commerce within the meaning of § 8, subdivisions (1) and (3), and § 2, subdivisions (6) and (7) of the Act. Respondent, appearing specially for the purpose of objecting to the jurisdiction of the Board, filed its answer. Respondent admitted the discharges, but alleged that they were made because of inefficiency or violation of rule or for other good reasons, and were not ascribable to union membership or activities. As an affirmative defense, respondent challenged the constitutional validity of the statute and its applicability in the instant case. Notice of hearing was given, and respondent appeared by counsel. The Board first took up the issue of jurisdiction, and evidence was presented by both the Board and the respondent. Respondent then moved to dismiss the complaint for lack of jurisdiction, and, on denial of that motion, respondent, in accordance with its special appearance, withdrew from further participation in the hearing. The Board received evidence upon the merits, and, at its close, made its findings and order.

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Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations, and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees, because they are not subject to regulation by the federal government, and (3) that the provisions of the Act violate § 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States.

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The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board, and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: the corporation is [301 U.S. 26] organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities, and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central, and Baltimore and Ohio Railroad systems. It owns the Aliquippa and Southern Railroad Company, which connects the Aliquippa works with the Pittsburgh and Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans, it operates structural steel fabricating shops in connection with the warehousing of semi-finished materials sent from its works. Through one of its wholly owned subsidiaries, it owns, leases and operates stores, warehouses and yards for the distribution of equipment and supplies for drilling and operating oil and gas wells and for pipelines, refineries, and pumping stations. It has sales offices in [301 U.S. 27] twenty cities in the United States and a wholly owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 percent. of its product is shipped out of Pennsylvania.

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Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa

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might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania, in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated.

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To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.

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Respondent points to evidence that the Aliquippa plant, in which the discharged men were employed, contains complete facilities for the production of finished and semi-finished iron and steel products from raw materials; that its works consist primarily of a byproduct coke plant for the production of coke; blast furnaces for the production of pig iron; open hearth furnaces and Bessemer converters for the production of steel; blooming mills for the reduction of steel ingots into smaller shapes, and a number of finishing mills such as structural mills, rod mills, wire mills, and the like. In addition, there are other buildings, structures and equipment, storage yards, docks and an intra-plant storage system. Respondent's operations at these works are carried on in two distinct stages, the first being the conversion of raw materials into pig [301 U.S. 28] iron and the second being the manufacture of semi-finished and finished iron and steel products, and, in both cases, the operations result in substantially changing the character, utility and value of the materials wrought upon, which is apparent from the nature and extent of the processes to which they are subjected and which respondent fully describes. Respondent also directs attention to the fact that the iron ore which is procured from mines in Minnesota and Michigan and transported to respondent's plant is stored in stockpiles for future use, the amount of ore in storage varying with the season, but usually being enough to maintain operations from nine to ten months; that the coal which is procured from the mines of a subsidiary located in Pennsylvania and taken to the plant at Aliquippa is there, like ore, stored for future use, approximately two to three months' supply of coal being always on hand, and that the limestone which is obtained in Pennsylvania and West Virginia is also stored in amounts usually adequate to run the blast furnaces for a few weeks. Various details of operation, transportation, and distribution are also mentioned which, for the present purpose, it is not necessary to detail.

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Practically all the factual evidence in the case, except that which dealt with the nature of respondent's business, concerned its relations with the employees in the Aliquippa plant whose discharge was the subject of the complaint. These employees were active leaders in the labor union. Several were officers, and others were leaders of particular groups. Two of the employees were motor inspectors; one was a tractor driver; three were crane operators; one was a washer in the coke plant, and three were laborers. Three other employees were mentioned in the complaint, but it was withdrawn as to one of them and no evidence was heard on the action taken with respect to the other two. [301 U.S. 29]

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While respondent criticizes the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point, it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union." We turn to the questions of law which respondent urges in contesting the validity and application of the Act.

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First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable, at best; that the Act is not a true regulation of such commerce or of matters which directly affect it, but, on the contrary, has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble (section one 3) and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

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If this conception of terms, intent, and consequent inseparability were sound, the Act would necessarily fall [301 U.S. 30] by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. Schechter Corp. v. United States, 295 U.S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. Id.

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But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save, and not to destroy. We have repeatedly held that, as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt, the rule is the same. Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298 307; Panama R. Co. v. Johnson, 264 U.S. 375, 390; Missouri Pacific R. Co. v. Boone, 270 U.S. 466, 472; Blodgett v. Holden, 275 U.S. 142, 148; Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346.

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We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10(a), which provides:

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SEC. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. [301 U.S. 31]

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The critical words of this provision, prescribing the limits of the Board's authority in dealing with he labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers (§ 2(6)):

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The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

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There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" (§ 2(7)):

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The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

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This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not [301 U.S. 32] rendered immune because they grow out of labor disputes. See Texas & N.O. R . Co. v. Railway Clerks, 281 U.S. 548, 570; Schechter Corp. v. United States, supra, pp. 544, 545; Virginian Railway v. System Federation, No. 40, 300 U.S. 515. It is the effect upon commerce, not the source of the injury, which is the criterion. Second Employers' Liability Cases, 223 U.S. 1, 51. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether, in the instant case, the constitutional boundary has been passed.

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Second. The fair labor practices in question.—The unfair labor practices found by the Board are those defined in § 8, subdivisions (1) and (3). These provide:

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Sec. 8. It shall be an unfair labor practice for an employer—

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(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

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(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…. 4 [301 U.S. 33]

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Section 8, subdivision (1), refers to § 7, which is as follows:

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Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

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Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

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That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in [301 U.S. 34] order to safeguard their proper interests, we said that Congress was not required to ignore this right, but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace, rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence, the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." Texas & N.O. R. Co. v. Railway Clerks, supra. We have reasserted the same principle in sustaining the application of the Railway Labor Act as amended in 1934. Virginian Railway Co. v. System Federation, No. 40, supra.

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Third. The application of the Act to employees engaged in production.—The principle involved.— Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing, in itself, is not commerce. Kidd v. Pearson, 128 U.S. 1, 20, 21; United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 407, 408; Oliver Iron Co. v. Lord, 262 U.S. 172, 178; United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457, 465; Industrial Association v. United States, 268 U.S. 64, 82; Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310; Schechter Corp. v. United States, supra, p. 547; Carter v. Carter Coal Co., 298 U.S. 238, 304, 317, 327.

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The Government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of [301 U.S. 35] iron ore, coal and limestone along well defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well understood course of business." It is urged that these activities constitute a "stream" or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. 5 Stafford v. Wallace, 258 U.S. 495. The Court found that the stockyards were but a "throat" through which the current of Commerce flowed and the transactions which there occurred could not be separated from that movement. Hence, the sales at the stockyards were not regarded as merely local transactions, for, while they created "a local change of title," they did not "stop the flow," but merely changed the private interests in the subject of the current. Distinguishing the cases which upheld the power of the State to impose a nondiscriminatory tax upon property which the owner intended to transport to another State, but which was not in actual transit and was held within the State subject to the disposition of the owner, the Court remarked:

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The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.

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Id., p. 526. See Minnesota v. Blasius, 290 U.S. 1, 8. Applying the doctrine of Stafford v. Wallace, supra, the Court sustained the Grain Futures Act of 1922 6 with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce." Congress had found [301 U.S. 36] that they had become "a constantly recurring burden and obstruction to that commerce." Chicago Board of Trade v. Olsen, 262 U.S. 1, 32; compare Hill v. Wallace, 259 U.S. 44, 69. See also Tagg Bros. & Moorhead v. United States, 280 U.S. 420.

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Respondent contends that the instant case presents material distinctions. Respondent says that the Aliquippa plant is extensive in size and represents a large investment in buildings, machinery and equipment. The raw materials which are brought to the plant are delayed for long periods and, after being subjected to manufacturing processes, "are changed substantially as to character, utility and value." The finished products which emerge

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are to a large extent manufactured without reference to preexisting orders and contracts, and are entirely different from the raw materials which enter at the other end.

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Hence, respondent argues that,

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If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of congressional regulation, it should follow that their combination would not alter the local situation.

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Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 151; Oliver Iron Co. v. Lord, supra.

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We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is [301 U.S. 37] the power to enact "all appropriate legislation" for "its protection and advancement" (The Daniel Ball, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (Mobile County v. Kimball, 102 U.S. 691, 696, 697); "to foster, protect, control and restrain." Second Employers' Liability Cases, supra, p. 47. See Texas & N.O. R. Co. v. Railway Clerks, supra. That power is plenary, and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Second Employers' Liability Cases, p. 51; Schechter Corp. v. United States, supra. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Schechter Corp. v. United States, supra. Undoubtedly the scope of this power must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. The question is necessarily one of degree. As the Court said in Chicago Board of Trade v. Olsen, supra, p. 37, repeating what had been said in Stafford v. Wallace, supra:

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Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it.

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That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who [301 U.S. 38] are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. Shreveport Case, 234 U.S. 342, 351, 352; Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co., 257 U.S. 563, 588. It is manifest that intrastate rates deal primarily with a local activity. But, in ratemaking, they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. Id. Under the Transportation Act, 1920, 7 Congress went so far as to authorize the Interstate Commerce Commission to establish a statewide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co., supra; Florida v. United States, 282 U.S. 194, 210, 211. Other illustrations are found in the broad requirements of the Safety Appliance Act and the Hours of Service Act. Southern Railway Co. v. United States, 222 U.S. 20; Baltimore & Ohio R. Co. v. Interstate Commerce Comm'n, 221 U.S. 612. It is said that this exercise of federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter.

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The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry, when separately viewed, is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. In the Standard Oil and American Tobacco cases, 221 U.S. 1, 106, that statute was applied to combinations of employers engaged in productive industry. [301 U.S. 39] Counsel for the offending corporations strongly urged that the Sherman Act had no application because the acts complained of were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, but primarily affected manufacturing and not commerce. 221 U.S. pp. 5, 125 [argument of counsel omitted in electronic version]. Counsel relied upon the decision in United States v. Knight Co., 156 U.S. 1. The Court stated their contention as follows:

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That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects dehors the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States.

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And the Court summarily dismissed the contention in these words:

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But all the structure upon which this argument proceeds is based upon the decision in United States v. E. C. Knight Co., 156 U.S. 1. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice

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(citing cases). 221 U.S. pp. 68, 69.

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Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. Loewe v.Lawlor, 208 U.S. 274; Coronado Coal Co. v. United Mine Workers, supra; Bedford Cut Stone Co. v. Stone Cutters' Assn., 274 U.S. 37. See also Local 16 v. United States, 291 U.S. 293, 397; Schechter Corp. v. United States, supra. The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the first Coronado case, the Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such, [301 U.S. 40] and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in United Leather Workers v. Herkert & Meisel Trunk Co., supra, Industrial Association v. United States, supra, and Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 107. But, in the first Coronado case, the Court also said that

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if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.

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259 U.S. p. 408. And, in the second Coronado case, the Court ruled that, while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the

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intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.

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268 U.S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct. Industrial Association v. United States, 268 U.S. p. 81. What was absent from the evidence in the first Coronado case appeared in the second, and the Act was accordingly applied to the mining employees.

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It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the Schechter case, supra, we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost [301 U.S. 41] everywhere," a result inconsistent with the maintenance of our federal system. In the Carter case, supra, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce, but were also inconsistent with due process. These cases are not controlling here.

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Fourth. Effects of the unfair labor practice in respondent's enterprise.— Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate, and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life, and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical [301 U.S. 42] conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

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Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice, and requires no citation of instances. The opinion in the case of Virginian Railway Co. v. System Federation, No. 40, supra, points out that, in the case of carriers, experience has shown that, before the amendment of 1934 of the Railway Labor Act,

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when there was no dispute as to the organizations authorized to represent the employees and when there was a willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed, and strikes had been avoided.

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That, on the other hand,

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a prolific source of dispute had been the maintenance by the railroad of company unions and the denial by railway management of the authority of representatives chosen by their employees.

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The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But, with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation if interstate commerce is throttled with respect to the commodities to be transported! [301 U.S. 43]

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These questions have frequently engaged the attention of Congress, and have been the subject of many inquiries. 8 The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920, with its far-reaching consequences. 9 The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce, and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

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Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.— Respondent asserts its right to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative [301 U.S. 44] right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. Texas & N.O. R. Co. v. Railway Clerks, supra; Virginian Railway Co. v. System Federation, No. 40. Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious. The provision of § 9(a) 10 that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in § 2, Ninth, of the Railway Labor Act, which was under consideration in Virginian Railway Co. v. System Federation, No. 40, supra. The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive, and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, 11 the injunction [301 U.S. 45] against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the Company might "elect to make directly with individual employees." We think this construction also applies to § 9(a) of the National Labor Relations Act.

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The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." 12 The Act expressly provides in § 9(a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace, and may bring about the adjustments and agreements which the Act, in itself, does not attempt to compel. As we said in Texas & N.O. R. Co. v. Railway Clerks, supra, and repeated in Virginian Railway Co. v. System Federation, No. 40, supra, the cases of Adair v. United States, 208 U.S. 161, and Coppage v. Kansas, 236 U.S. 1, are inapplicable to legislation of this character. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their [301 U.S. 46] self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that, when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation, there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.

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The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. Carroll v. Greenwich Insurance Co., 199 U.S. 401, 411; Keokee Coke Co. v. Taylor, 234 U.S. 224, 227; Miller v. Wilson, 236 U.S. 373, 384; Sproles v. Binford, 286 U.S. 374, 396. The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits.

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The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the [301 U.S. 47] creation and action of administrative bodies. See Interstate Commerce Comm'n v. Louisville & Nashville R. Co., 227 U.S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have frequently been declared. None of them appears to have been transgressed in the instant case. Respondent was notified and heard. It had opportunity to meet the charge of unfair labor practices upon the merits, and, by withdrawing from the hearing, it declined to avail itself of that opportunity. The facts found by the Board support its order, and the evidence supports the findings. Respondent has no just ground for complaint on this score.

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The order of the Board required the reinstatement of the employees who were found to have been discharged because of their "union activity" and for the purpose of "discouraging membership in the union." That requirement was authorized by the Act. § 10(c). In Texas & N.O. R. Co. v. Railway Clerks, supra, a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with [301 U.S. 48] the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service of employees discharged in violation of the provisions of that Act was thus a sanction imposed in the enforcement of a judicial decree. We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that, in the one case, it was a judicial sanction, and, in the other, a legislative one, is not an essential difference in determining its propriety.

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Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the Act. § 10(c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. Shields v. Thomas, 18 How. 253, 262; In re Wood, 210 U.S. 246, 258; Dimick v. Schiedt, 293 U.S. 474, 476; Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657. Thus, it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325; Pease v. Rathbun-Jones Engineering Co., 243 U.S. 273, 279. It does not apply where the proceeding is not in the nature of a suit at common law. Guthrie National Bank v. Guthrie, 173 U.S. 528, 537.

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The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are [301 U.S. 49] requirements imposed for violation of the statute, and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

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Our conclusion is that the order of the Board was within its competency, and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

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Reversed.

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For dissenting opinion, see p. 76.

Footnotes

HUGHES, J., lead opinion (Footnotes)

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1. Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. 151.

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2. This section is as follows:

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Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

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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.

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Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

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It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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3. See Note 2, supra, p. 23.

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4. What is quoted above is followed by this proviso—not here involved—

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Provided, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C. Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

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5. 42 Stat. 159.

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6. 42 Stat. 998.

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7. §§ 416, 422, 41 Stat. 484, 488; Interstate Commerce Act, § 13(4).

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8. See, for example, Final Report of the Industrial Commission (1902), vol.19, p. 844; Report of the Anthracite Coal Strike Commission (1902), Sen.Doc. No. 6, 58th Cong., spec. sess.; Final Report of Commission on Industrial Relations (1916), Sen.Doc. No. 415, 64th Cong., 1st sess., vol. I; National War Labor Board, Principles and Rules of Procedure (1919), p. 4; Bureau of Labor Statistics, Bulletin No. 287 (1921), pp. 52-64; History of the Shipbuilding Labor Adjustment Board, U.S. Bureau of Labor Statistics, Bulletin No. 283.

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9. See Investigating Strike in Steel Industries, Sen.Rep. No. 289, 66th Cong., 1st sess.

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10. The provision is as follows:

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SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

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11. See Virginian Railway Co. v. System Federation, No. 40, 300 U.S. 515.

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12. See Note 11.

Steward Mach. Co. v. Collector, 1937

Title: Steward Machine Co. v. Collector of Internal Revenue

Author: U.S. Supreme Court

Date: May 24, 1937

Source: 301 U.S. 548

This case was argued April 8 and 9, 1937, and was decided May 24, 1937.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 548

FOR THE FIFTH CIRCUIT

Syllabus

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 548

1. The tax imposed by Title IX of the Social Security Act of August 14, 1935, upon the employer of labor, described as "an excise tax with respect to having individuals in his employ," and which is measured by prescribed percentages of the total wages payable by the employer during the calendar year, is either an "excise," a "duty," or an "impost," within the intent of Art. I, Sec. 8, of the Constitution, and complies with the requirement of uniformity throughout the United States. Pp. 578, 583.

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2. The enjoyment of common rights, such as the right to employ labor, may constitutionally be taxed. P. 578.

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Such taxation was practiced in England and among the Colonies before the adoption of the Constitution. P. 579.

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3. The fact that the Social Security Act, Title IX, supra, exempts from the tax employers of less than eight, and does not apply in respect of agricultural labor, domestic service in private homes, and some other classes of employment does not render it obnoxious to the Fifth Amendment. P. 584.

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A classification supported by considerations of public policy and practical convenience, which would be valid under the equal protection clause of the Fourteenth Amendment if adopted by a State, is lawful, a fortiori, in the legislation of Congress, since the Fifth Amendment contains no equal protection clause.

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4. The proceeds of the tax imposed on employers by Title IX of the Social Security Act, supra, go into the Treasury of the United States without earmark, like internal revenue collections generally. The taxpayer is entitled to credit against the federal tax (up to 90% thereof) what he has contributed during the tax year under a state unemployment law, provided that the state law shall have been certified by the Federal Social Security Board to the Secretary of the Treasury as satisfying certain conditions designed to assure that the state law is genuinely an unemployment compensation law and that contributions will [301 U.S. 549] be used solely in the payment of compensation and be protected against loss after the payment to the State. To these ends, Title IX provides, among other things, that, to be approved by the federal Commission, the state law shall direct that all money received in the state unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of an "Unemployment Trust Fund," and that all money withdrawn from the Unemployment Trust Fund by the state agency shall be used solely in the payment of compensation, exclusive of expenses of administration. The Secretary is empowered to invest in Government securities any portion of this fund which, in his judgment, is not required to meet current withdrawals, and out of it he is directed to pay to any competent state agency such sums as it may duly requisition from the amount standing to its credit. The taxpayer's credit against the federal tax depends on compliance with these statutory conditions; the State, however, is under no contractual obligation to comply, but, at its pleasure, may repeal its unemployment law, and withdraw its deposit from the federal Treasury.

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Held:

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(1) Assuming that the federal tax cannot be treated as a revenue provision standing apart, but must be tested in combination with the 90% credit provision, the tax is not void as involving an unconstitutional attempt to coerce the States to adopt unemployment compensation legislation approved by the Federal Government. P. 585.

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(2) The problem of unemployment is national as well as local, and in promotion of the general welfare moneys of the Nation may be used to relieve the unemployed and their dependents in economic depressions and to guard against such disasters. P. 586.

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(3) Title IX may be sustained as a cooperative plan whereby States may be set free to provide unemployment compensation without subjecting themselves to economic disadvantages resulting from the absence of such provision in other States, and whereby, through the assumption of such burdens by the States generally, the financial burden of tho Nation due to unemployment may be correspondingly decreased. P. 587.

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Duplicated taxes, or burdens that approach them, are hardships that government, state or national, may properly avoid. P. 589.

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(4) Every rebate from a tax, when conditioned upon conduct, is in some measure a temptation; but motive or temptation is not equivalent to coercion. P. 589. [301 U.S. 550]

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(5) If it be true to say that a power akin to undue influence may be exerted by the national Government on the States, the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree—at times, perhaps, of fact. The point had not been reached when Alabama, by passing her unemployment compensation law, evinced her choice to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers. P. 589.

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It is one thing to impose a federal tax dependent upon the conduct of the taxpayers, or of the State in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. P. 591.

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5. No surrender of powers essential to the quasi-sovereign existence of States is required by § 903 of Title IX of the Social Security Act, which defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the Social Security Board as the basis for credits against the taxes laid on employers by that Title; nor by § 904, which deals with the deposit, investment and withdrawal of the moneys credited. P. 593.

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6. Semble that the States may constitutionally make with Congress such agreements as do not impair the essence of their statehood. P. 597.

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7. Title III of the Social Security Act, which appropriates no money but authorizes the making of future appropriations for the purpose of assisting the States in the administration of their unemployment compensation laws, is severable from Title IX, and its validity is not in issue. P. 598.

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89 F.2d 207, affirmed.

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This was a review, on certiorari, 300 U.S. 652, of a judgment of the court below affirming the dismissal of the complaint in an action for the recovery of money paid by the plaintiff as a tax under Title IX of the Social Security Act. [301 U.S. 573]

CARDOZO, J., lead opinion

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MR. JUSTICE CARDOZO delivered the opinion of the Court.

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The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined.

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Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment ($46.14), asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant dismissing the complaint, and the Circuit Court of Appeals for the Fifth Circuit affirmed. 89 F.2d 207. The decision is in accord with judgments of the Supreme Judicial Court of Massachusetts (Howes Brothers Co. v. Massachusetts Unemployment Compensation Comm'n, December 30, 1936, 5 N.E.2d 720), the Supreme Court of California (Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037), and the Supreme Court of Alabama (Beeland Wholesale Co. v. Kaufman, 174 So. 516). It is in conflict with a judgment of the Circuit Court of Appeals for the First Circuit, from which one judge dissented. Davis v. Boston & Maine R. Co., 89 F.2d 368. An important question of constitutional law being involved, we granted certiorari. [301 U.S. 574]

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The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C. c. 7 (Supp.)) Is divided into eleven separate titles, of which only Titles IX and III are so related to this case as to stand in need of summary. The caption of Title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. § 901. One is not, however, an "employer" within the meaning of the act unless he employs eight persons or more. § 907(a). There are also other limitations of minor importance. The term "employment" too has its special definition, excluding agricultural labor, domestic service in a private home and some other smaller classes. § 907(c). The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936, the rate is to be one percent, during 1937 two percent, and three percent thereafter. The proceeds, when collected, go into the Treasury of the United States like internal revenue collections generally. § 905(a). They are not earmarked in any way. In certain circumstances, however, credits are allowable. § 902. If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90 percentum of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria. § 902. The provisions of § 903 defining those criteria are stated in the [301 U.S. 575] margin. 1 Some of the conditions thus attached to the allowance of a credit are designed to give assurance that the state unemployment compensation law shall be one in substance as well as name. Others are designed to give assurance that the contributions shall be protected against loss after payment to the state. To this last end, there [301 U.S. 576] are provisions that, before a state law shall have the approval of the Board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." Section 904 establishing this fund is quoted below. 2 For the moment, it is enough to say that the Fund is to be held by the Secretary of the Treasury, who is to invest in government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay out of the Fund to any competent state agency such sums as it may duly requisition from the amount standing to its credit. § 904(f). [301 U.S. 577]

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Title III, which is also challenged as invalid, has the caption "Grants to States for Unemployment Compensation Administration." Under this title, certain sums of money are "authorized to be appropriated" for the purpose of assisting the states in the administration of their unemployment compensation laws, the maximum for the fiscal year ending June 30, 1936, to be $4,000,000, and $49,000,000 for each fiscal year thereafter. § 301. No present appropriation is made to the extent of a single dollar. All that the title does is to authorize future appropriations. Actually only $2,250,000 of the $4,000,000 authorized was appropriated for 1936 (Act of Feb. 11, [301 U.S. 578] 1936, c. 49, 49 Stat. 1109, 1113) and only $29,000,000 of the $49,000,000 authorized for the following year. Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605. The appropriations, when made, were not specifically out of the proceeds of the employment tax, but out of any moneys in the Treasury. Other sections of the title prescribe the method by which the payments are to be made to the state (§ 302) and also certain conditions to be established to the satisfaction of the Social Security Board before certifying the propriety of a payment to the Secretary of the Treasury. § 303. They are designed to give assurance to the Federal Government that the moneys granted by it will not be expended for purposes alien to the grant, and will be used in the administration of genuine unemployment compensation laws.

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The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States, as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states, and that the states, in submitting to it, have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

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The objections will be considered seriatim, with such further explanation as may be necessary to make their meaning clear.

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First. The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

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1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days, we are supplied with [301 U.S. 579] illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

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As to the argument from history: doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. Cf. Pensacola Telegraph Co. v. Western Union, 96 U.S. 1, 9; In re Debs, 158 U.S. 564, 591; South Carolina v. United States, 199 U.S. 437, 448, 449. But, in truth, other excises were known, and known since early times. Thus, in 1695 (6 & 7 Wm. III, c. 6), Parliament passed an act which granted "to His Majesty certain Rates and Duties upon Marriage, Births and Burials," all for the purpose of "carrying on the War against France with Vigour." See Opinion of the Justices, 196 Mass. 603, 609, 85 N.E. 545. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, Parliament laid upon employers an annual "duty" of 21 shillings for "every male Servant" employed in stated forms of work. 3 [301 U.S. 580] Revenue Act of 1777, 17 George III, c. 39. 4 The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. Davis v. Boston & Maine R. Co., supra. It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever may be thought of its validity, is inapplicable to a statute of Virginia passed in 1780. There, a tax of three pounds, six shillings and eight pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for "every white servant whatsoever, except apprentices under the age of twenty one years." 10 Hening's Statutes of Virginia, p. 244. Our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede. 5

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The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. 6 An excise is not limited to vocations or activities [301 U.S. 581] that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. "Business is as legitimate an object of the taxing powers as property." Newton v. Atchison, 31 Kan. 151, 154 (per Brewer, J.), 1 Pac. 288. Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. Henneford v. Silas Mason Co., 300 U.S. 577. "A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." Ibid. Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts. Nashville, C. & St.L. Ry. Co. v. Wallace, 288 U.S. 249, 267, 268.

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The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have power to lay and collect taxes, duties, imposts and excises." Art. 1, § 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. Cf. Burnet v. Brooks, 288 U.S. 378, 403, 405; Brushaber v. Union Pacific R. Co., 240 U.S. 1, 12. Whether the tax is to be [301 U.S. 582] classified as an "excise" is in truth not of critical importance. If not that, it is an "impost" (Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 622, 625; Pacific Insurance Co. v. Soble, 7 Wall. 433, 445), or a "duty" (Veazie Bank v. Fenno, 8 Wall. 533, 546, 547; Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 570; Knowlton v. Moore, 178 U.S. 41, 46). A capitation or other "direct" tax it certainly is not.

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Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts and excises," such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of powers.

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Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 557. There is no departure from that thought in later cases, but rather a new emphasis of it. Thus, in Thomas v. United States, 192 U.S. 363, 370, it was said of the words "duties, imposts and excises" that

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they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.

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At times taxpayers have contended that the Congress is without power to lay an excise on the enjoyment of a privilege created by state law. The contention has been put aside as baseless. Congress may tax the transmission of property by inheritance or will, though the states and not Congress have created the privilege of succession. Knowlton v. Moore, supra, p. 58. Congress may tax the enjoyment of a corporate franchise, though a state and not Congress has brought the franchise into being. Flint v. Stone Tracy Co., 220 U.S. 107, 155. The statute books of the states are strewn with illustrations of taxes laid on [301 U.S. 583] occupations pursued of common right. 7 We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

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2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. Knowlton v. Moore, supra, p. 83; Flint v. Stone Tracy Co., supra, p. 158; Billings v. United States, 232 U.S. 261, 282; Stellwagen v. Clum, 245 U.S. 605, 613; LaBelle Iron Works v. United States, 256 U.S. 377, 392; Poe v. Seaborn, 282 U.S. 101, 117; Wright v. Vinton Branch Mountain Trust Bank, 300 U.S. 440. "The rule of liability shall be the same in all parts of the United States." Florida v. Mellon, 273 U.S. 12, 17.

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Second. The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions. [301 U.S. 584]

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The statute does not apply, as we have seen, to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

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The Fifth Amendment, unlike the Fourteenth, has no equal protection clause. LaBelle Iron Works v. United States, supra; Brushaber v. Union Pacific R. Co., supra, p. 24. But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. Swiss Oil Corp. v. Shanks, 273 U.S. 407, 413. They may tax some kinds of property at one rate, and others at another, and exempt others altogether. Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232; Stebbins v. Riley, 268 U.S. 137, 142; Ohio Oil Co. v. Conway, 281 U.S. 146, 150. They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. Quong Wing v. Kirkendall, 223 U.S. 59, 62; American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 94; Armour Packing Co. v. Lacy, 200 U.S. 226, 235; Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573; Heisler v. Thomas Colliery Co., 260 U.S. 245, 255; State Board of Tax Comm'rs v. Jackson, 283 U.S. 527, 537, 538. If this latitude of judgment is lawful for the states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining. Quong Wing v. Kirkendall, supra.

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The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemption would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. This is held in two cases [301 U.S. 585] passed upon today in which precisely the same provisions were the subject of attack, the provisions being contained in the Unemployment Compensation Law of the State of Alabama. Carmichael v. Southern Coal & Coke Co., and Carmichael v. Gulf States Paper Corp., ante, p. 495. The opinion rendered in those cases covers the ground fully. It would be useless to repeat the argument. The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation, and subject under the Fifth Amendment to challenge and annulment.

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Third. The excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

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The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. Cincinnati Soap Co. v. United States, ante, p. 308. No presumption can be indulged that they will be misapplied or wasted. 8 Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that, without more, would not make the act invalid. Sonzinsky v. United States, 300 U.S. 506. This indeed is hardly questioned. The case for the petitioner is built on the contention that, here, an ulterior aim is wrought into the very structure of the act, and what is [301 U.S. 586] even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 percent credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. Cincinnati Soap Co. v. United States, supra. There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

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To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. West Coast Hotel Co. v. Parrish, 300 U.S. 379. The relevant statistics are gathered in the brief of counsel for the Government. Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly, the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that, in a crisis so extreme, the use of the moneys of the nation to relieve the unemployed [301 U.S. 587] and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. United States v. Butler, 297 U.S. 1, 65, 66, Helvering v. Davis, decided herewith, post, p. 619. The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936, the states (according to statistics submitted by the Government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period, the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936 the stupendous total of $8,681,000,000. The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train.

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In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil. Before Congress acted, unemployment compensation insurance was still, for the most part, a project, and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times, bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unemployment [301 U.S. 588] laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. See House Report No. 615, 74th Congress, 1st session, p. 8; Senate Report No. 628, 74th Congress, 1st session, p. 11. 9 Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that, insofar as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

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The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the [301 U.S. 589] nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand, fulfillment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. Henneford v. Silas Mason Co., supra; Kidd v. Alabama, 188 U.S. 730, 732; Watson v. State Comptroller, 254 U.S. 122, 125. If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the cooperating localities ought not, in all fairness, to pay a second time.

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Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now, she does not offer a suggestion that, in passing the unemployment law, she was affected by duress. See Carmichael v. Southern Coal & Coke Co., and Carmichael v. Gulf States Paper Corp., supra. For all that appears, she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion.

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Every tax is in some measure regulatory. To some extent, it interposes an economic impediment to the activity taxed as compared with others not taxed.

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Sonzinsky v. United States, supra. In like manner, every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive [301 U.S. 590] or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now, the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption, the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony indeed if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. Beeland Wholesale Co. v. Kaufman, supra. We think the choice must stand.

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In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress, does not intrude upon fields foreign to its function. The purpose [301 U.S. 591] of its intervention, as we have shown, is to safeguard its own treasury and, as an incident to that protection, to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. The Child Labor Tax Case, 259 U.S. 20, and Hill v. Wallace, 259 U.S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. United States v. Constantine, 296 U.S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that, wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.

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Florida v. Mellon, 273 U.S. 12, supplies us with a precedent, if precedent be needed. What was in controversy there was § 301 of the Revenue Act of 1926, which imposes a tax upon the transfer of a decedent's estate while at the same time permitting a credit, not exceeding 80 percent, for "the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory." Florida challenged that provision as unlawful. Florida had no inheritance taxes, and alleged that, under its constitution, it could not levy any. 273 U.S. 12, 15. Indeed, by abolishing inheritance taxes, it had hoped to induce wealthy persons to become its citizens. See 67 Cong.Rec. Part 1, pp. 735, 752. It argued at our bar that "the Estate Tax provision was not passed for the purpose [301 U.S. 592] of raising federal revenue" (273 U.S. 12, 14), but rather "to coerce States into adopting estate or inheritance tax laws." 273 U.S. 12, 13. In fact, as a result of the 80 percent credit, material changes of such laws were made in 36 states. 10 In the face of that attack, we upheld the act as valid. Cf. Massachusetts v. Mellon, 262 U.S. 447, 482; also Act of August 5, 1861, c. 45, 12 Stat. 292; Act of May 13, 1862, c. 66, 12 Stat. 384.

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United States v. Butler, supra, is cited by petitioner as a decision to the contrary. There, a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage and crops under agreements with the Secretary of Agriculture, the plan of the act being to increase the prices of certain farm products by decreasing the quantities produced. The court held (1) that the so-called tax was not a true one (pp. 297 U.S. 56, 61), the proceeds being earmarked for the benefit of farmers complying with the prescribed conditions, (2) that there was an attempt to regulate production without the consent of the state in which production was affected, and (3) that the payments to farmers were coupled with coercive contracts (p. 73), unlawful in their aim and oppressive in their consequences. The decision was by a divided court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.

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(a) The proceeds of the tax in controversy are not earmarked for a special group.

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(b) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.

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(c) The condition is not linked to an irrevocable agreement, for the state, at its pleasure, may repeal its unemployment law, § 903(a)(6), terminate the credit, [301 U.S. 593] and place itself where it was before the credit was accepted.

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(d) The condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully cooperate.

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Fourth. The statute does not call for a surrender by the states of powers essential to their quasi-sovereign existence.

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Argument to the contrary has its source in two sections of the act. One section (903 11) defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the Board as the basis for a credit. The other section (904 12) rounds out the requirement with complementary rights and duties. Not all the criteria or their incidents are challenged as unlawful. We will speak of them first generally, and then more specifically insofar as they are questioned.

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A credit to taxpayers for payments made to a State under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is, in truth, what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name, and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of Judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York, and elsewhere. They may establish a system of merit ratings applicable at [301 U.S. 594] once or to go into effect later on the basis of subsequent experience. Cf. §§ 909, 910. They may provide for employee contributions, as in Alabama and California, or put the entire burden upon the employer, as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted, after his reserve has accumulated, to contribute at a reduced rate, or even not at all. This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which, in the judgment of Congress, are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute. In determining essentials, Congress must have the benefit of a fair margin of discretion. One cannot say with reason that this margin has been exceeded, or that the basic standards have been determined in any arbitrary fashion. In the event that some particular condition shall be found to be too uncertain to be capable of enforcement, it may be severed from the others, and what is left will still be valid.

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 594

We are to keep in mind steadily that the conditions to be approved by the Board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. § 903(a)(6). The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely, or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is [301 U.S. 595] that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. § 903(b)(c).

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 595

These basic considerations are, in truth, a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal.

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 595

Thus, the argument is made that, by force of an agreement, the moneys, when withdrawn, must be "paid through public employment offices in the State or through such other agencies as the Board may approve." § 903(a)(1). But, in truth, there is no agreement as to the method of disbursement. There is only a condition which the state is free at pleasure to disregard or to fulfill. Moreover, approval is not requisite if public employment offices are made the disbursing instruments. Approval is to be a check upon resort to "other agencies" that may, perchance, be irresponsible. A state looking for a credit must give assurance that her system has been organized upon a base of rationality.

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 595

There is argument again that the moneys, when withdrawn, are to be devoted to specific uses, the relief of unemployment, and that, by agreement for such payment, the quasi-sovereign position of the state has been impaired, if not abandoned. But, again, there is confusion between promise and condition. Alabama is still free, without breach of an agreement, to change her system overnight. No officer or agency of the national Government can force a compensation law upon her or keep it in existence. No officer or agency of that Government, either by suit or other means, can supervise or control the application of the payments.

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Finally and chiefly, abdication is supposed to follow from § 904 of the statute and the parts of § 903 that are complementary thereto. § 903(a)(3). By these, the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all [301 U.S. 596] moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. We are told that Alabama, in consenting to that deposit, has renounced the plenitude of power inherent in her statehood.

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The same pervasive misconception is in evidence again. All that the state has done is to say, in effect, through the enactment of a statute, that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. Alabama Unemployment Act of September 14, 1935, § 10(i). The statute may be repealed. § 903(a)(6). The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depositary that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason, one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank.

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There are very good reasons of fiscal and governmental policy why a State should be willing to make the Secretary of the Treasury the custodian of the fund. His possession of the moneys and his control of investments will be an assurance of stability and safety in times of stress and strain. A report of the Ways and Means Committee of the House of Representatives, quoted in the margin, develops the situation clearly. 13 Nor is there risk of loss [301 U.S. 597] or waste. The credit of the Treasury is at all times back of the deposit, with the result that the right of withdrawal will be unaffected by the fate of any intermediate investments, just as if a checking account in the usual form had been opened in a bank.

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The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. Perry v. United States, 294 U.S. 330, 353; 1 Oppenheim, International Law, 4th ed., §§ 493, 494; Hall, International Law, 8th ed., § 107; 2 Hyde, International Law, § 489. The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. Constitution, Art. I, § 10, par. 3. Poole v. Fleeger, 11 Pet. 185, 209; Rhode Island v. Massachusetts, 12 Pet. 657, 725. We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. 14 Alabama [301 U.S. 598] is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.

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Fifth. Title III of the act is separable from Title IX, and its validity is not at issue.

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The essential provisions of that title have been stated in the opinion. As already pointed out, the title does not appropriate a dollar of the public moneys. It does no more than authorize appropriations to be made in the future for the purpose of assisting states in the administration of their laws, if Congress shall decide that appropriations are desirable. The title might be expunged, and Title IX would stand intact. Without a severability clause, we should still be led to that conclusion. The presence of such a clause (§ 1103) makes the conclusion even clearer. Williams v. Standard Oil Co., 278 U.S. 235, 242; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184; Carter v. Carter Coal Co., 298 U.S. 238, 312.

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The judgment is

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 598

Affirmed.

MCREYNOLDS, J., separate opinion

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Separate opinion of MR. JUSTICE McREYNOLDS.

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That portion of the Social Security legislation here under consideration, I think, exceeds the power granted to Congress. It unduly interferes with the orderly government of the State by her own people and otherwise offends the Federal Constitution.

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In Texas v. White, 7 Wall. 700, 725 (1869), a cause of momentous importance, this Court, through Chief Justice Chase, declared—[301 U.S. 599]

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But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term that

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the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence,

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and that, "without the States in union, there could be no such political body as the United States." [Lane County v. Oregon, 7 Wall. 71, 76.] Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

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The doctrine thus announced and often repeated, I had supposed was firmly established. Apparently the States remained really free to exercise governmental powers, not delegated or prohibited, without interference by the Federal Government through threats of punitive measures or offers of seductive favors. Unfortunately, the decision just announced opens the way for practical annihilation of this theory, and no cloud of words or ostentatious parade of irrelevant statistics should be permitted to obscure that fact. [301 U.S. 600]

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 600

The invalidity, also the destructive tendency, of legislation like the Act before us were forcefully pointed out by President Franklin Pierce in a veto message sent to the Senate May 3, 1854.\* He was a scholarly lawyer of distinction, and enjoyed the advice and counsel of a rarely able Attorney General—Caleb Cushing of Massachusetts. This message considers with unusual lucidity points here specially important. I venture to set out pertinent portions of it which must appeal to all who continue to respect both the letter and spirit of our great charter.

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To the Senate of the United States:

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The bill entitled "An Act making a grant of public lands to the several States for the benefit of indigent insane persons," which was presented to me on the 27th ultimo, has been maturely considered, and is returned to the Senate, the House in which it originated, with a statement of the objections which have required me to withhold from it my approval.

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If, in presenting my objections to this bill, I should say more than strictly belongs to the measure or is required for the discharge of my official obligation, let it be attributed to a sincere desire to justify my act before those whose good opinion I so highly value and to that earnestness which springs from my deliberate conviction that a strict adherence to the terms and purposes of the federal compact offers the best, if not the only, security for the preservation of our blessed inheritance of representative liberty.

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The bill provides in substance:

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First. That 10,000,000 acres of land be granted to the several States, to be apportioned among them in the compound ratio of the geographical area and representation of said States in the House of Representatives. [301 U.S. 601]

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Second. That wherever there are public lands in a State subject to sale at the regular price of private entry, the proportion of said 10,000,000 acres falling to such State shall be selected from such lands within it, and that, to the States in which there are no such public lands land scrip shall be issued to the amount of their distributive shares, respectively, said scrip not to be entered by said States, but to be sold by them and subject to entry by their assignees: Provided, That none of it shall be sold at less than $1 per acre, under penalty of forfeiture of the same to the United States.

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Third. That the expenses of the management and superintendence of said lands and of the moneys received therefrom shall be paid by the States to which they may belong out of the treasury of said States.

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Fourth. That the gross proceeds of the sales of such lands or land scrip so granted shall be invested by the several States in safe stocks, to constitute a perpetual fund, the principal of which shall remain forever undiminished, and the interest to be appropriated to the maintenance of the indigent insane within the several States.

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Fifth. That annual returns of lands or scrip sold shall be made by the States to the Secretary of the Interior, and the whole grant be subject to certain conditions and limitations prescribed in the bill, to be assented to by legislative acts of said States.

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This bill therefore proposes that the Federal Government shall make provision to the amount of the value of 10,000,000 acres of land for an eleemosynary object within the several States, to be administered by the political authority of the same, and it presents at the threshold the question whether any such act on the part of the Federal Government is warranted and sanctioned by the Constitution, the provisions and principles of which are to be protected and sustained as a first and paramount duty. [301 U.S. 602]

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It cannot be questioned that, if Congress has power to make provision for the indigent insane without the limits of this District, it has the same power to provide for the indigent who are not insane, and thus to transfer to the Federal Government the charge of all the poor in all the States. It has the same power to provide hospitals and other local establishments for the care and cure of every species of human infirmity, and thus to assume all that duty of either public philanthropy or public necessity to the dependent, the orphan, the sick, or the needy which is now discharged by the States themselves or by corporate institutions or private endowments existing under the legislation of the States. The whole field of public beneficence is thrown open to the care and culture of the Federal Government. Generous impulses no longer encounter the limitations and control of our imperious fundamental law; for however worthy may be the present object in itself, it is only one of a class. It is not exclusively worthy of benevolent regard. Whatever considerations dictate sympathy for this particular object apply in like manner, if not in the same degree, to idiocy, to physical disease, to extreme destitution. If Congress may and ought to provide for any one of these objects, it may and ought to provide for them all. And if it be done in this case, what answer shall be given when Congress shall be called upon, as it doubtless will be, to pursue a similar course of legislation in the others? It will obviously be vain to reply that the object is worthy, but that the application has taken a wrong direction. The power will have been deliberately assumed, the general obligation will by this act have been acknowledged, and the question of means and expediency will alone be left for consideration. The decision upon the principle in any one case determines it for the whole class. The question presented, therefore, clearly is upon the constitutionality and propriety of the Federal Government's [301 U.S. 603] assuming to enter into a novel and vast field of legislation, namely that of providing for the care and support of all those among the people of the United States who, by any form of calamity, become fit objects of public philanthropy.

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I readily and, I trust, feelingly acknowledge the duty incumbent on us all as men and citizens, and as among the highest and holiest of our duties, to provide for those who, in the mysterious order of Providence, are subject to want and to disease of body or mind; but I cannot find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution, and subversive of the whole theory upon which the Union of these States is founded. And if it were admissible to contemplate the exercise of this power for any object whatever, I cannot avoid the belief that it would, in the end, be prejudicial, rather than beneficial, in the noble offices of charity to have the charge of them transferred from the States to the Federal Government. Are we not too prone to forget that the Federal Union is the creature of the States, not they of the Federal Union? We were the inhabitants of colonies distinct in local government one from the other before the revolution. By that Revolution, the colonies each became an independent State. They achieved that independence and secured its recognition by the agency of a consulting body which, from being an assembly of the ministers of distinct sovereignties instructed to agree to no form of government which did not leave the domestic concerns of each State to itself, was appropriately denominated a Congress. When, having tried the experiment of the Confederation, they resolved to change that, for the present Federal Union, and thus to confer on the Federal Government more ample authority, they scrupulously measured such of the [301 U.S. 604] functions of their cherished sovereignty as they chose to delegate to the General Government. With this aim and to this end, the fathers of the Republic framed the Constitution, in and by which the independent and sovereign States united themselves for certain specified objects and purposes, and for those only, leaving all powers not therein set forth as conferred on one or another of the three great departments—the legislative, the executive, and the judicial—indubitably with the States. And when the people of the several States had in their State conventions, and thus alone, given effect and force to the Constitution, not content that any doubt should in future arise as to the scope and character of this act, they ingrafted thereon the explicit declaration that

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the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.

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Can it be controverted that the great mass of the business of Government—that involved in the social relations, the internal arrangements of the body politic, the mental and moral culture of men, the development of local resources of wealth, the punishment of crimes in general, the preservation of order, the relief of the needy or otherwise unfortunate members of society—did in practice remain with the States; that none of these objects of local concern are by the Constitution expressly or impliedly prohibited to the States, and that none of them are by any express language of the Constitution transferred to the United States? Can it be claimed that any of these functions of local administration and legislation are vested in the Federal Government by any implication? I have never found anything in the Constitution which is susceptible of such a construction. No one of the enumerated powers touches the subject, or has even a remote analogy to it. The powers conferred upon the United States have reference to federal relations, or to the means of accomplishing [301 U.S. 605] or executing things of federal relation. So also of the same character are the powers taken away from the States by enumeration. In either case, the powers granted and the powers restricted were so granted or so restricted only where it was requisite for the maintenance of peace and harmony between the States or for the purpose of protecting their common interests and defending their common sovereignty against aggression from abroad or insurrection at home.

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I shall not discuss at length the question of power sometimes claimed for the General Government under the clause of the eighth section of the Constitution, which gives Congress the power

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to lay and collect taxes, duties, imposts, and excises, to pay debts and provide for the common defense and general welfare of the United States,

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because if it has not already been settled upon sound reason and authority, it never will be. I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises in order to pay the debts and in order to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive. It would be impossible in that view to escape from the conclusion that these were inserted only to mislead for the present, and, instead of enlightening and defining the pathway of the future, to involve its action in the mazes of doubtful construction. Such a conclusion the character of the men who framed that sacred instrument will never permit us to form. Indeed, to suppose it susceptible of any other construction would be to consign all the rights of the States and of the people of the States to the mere discretion [301 U.S. 606] of Congress, and thus to clothe the federal Government with authority to control the sovereign States, by which they would have been dwarfed into provinces or departments and all sovereignty vested in an absolute consolidated central power, against which the spirit of liberty has so often and in so many countries struggled in vain.

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In my judgment, you cannot by tributes to humanity make any adequate compensation for the wrong you would inflict by removing the sources of power and political action from those who are to be thereby affected. If the time shall ever arrive when, for an object appealing, however strongly, to our sympathies, the dignity of the States shall bow to the dictation of Congress by conforming their legislation thereto, when the power and majesty and honor of those who created shall become subordinate to the thing of their creation, I but feebly utter my apprehensions when I express my firm conviction that we shall see "the beginning of the end."

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Fortunately, we are not left in doubt as to the purpose of the Constitution any more than as to its express language, for although the history of its formation, as recorded in the Madison Papers, shows that the Federal Government in its present form emerged from the conflict of opposing influences which have continued to divide statesmen from that day to this, yet the rule of clearly defined powers and of strict construction presided over the actual conclusion and subsequent adoption of the Constitution. President Madison, in the Federalist, says:

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The powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite…. Its [the General Government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. [301 U.S. 607]

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In the same spirit, President Jefferson invokes

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the support of the State governments in all their rights as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies,

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and President Jackson said that our true strength and wisdom are not promoted by invasions of the rights and powers of the several States, but that, on the contrary, they consist "not in binding the States more closely to the center, but in leaving each more unobstructed in its proper orbit."

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The framers of the Constitution, in refusing to confer on the Federal Government any jurisdiction over these purely local objects, in my judgment, manifested a wise forecast and broad comprehension of the true interests of these objects themselves. It is clear that public charities within the States can be efficiently administered only by their authority. The bill before me concedes this, for it does not commit the funds it provides to the administration of any other authority.

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I cannot but repeat what I have before expressed, that, if the several States, many of which have already laid the foundation of munificent establishments of local beneficence, and nearly all of which are proceeding to establish them, shall be led to suppose, as, should this bill become a law, they will be, that Congress is to make provision for such objects, the fountains of charity will be dried up at home, and the several States, instead of bestowing their own means on the social wants of their own people, may themselves, through the strong temptation which appeals to states as to individuals, become humble suppliants for the bounty of the Federal Government, reversing their true relations to this Union.

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I have been unable to discover any distinction on constitutional grounds or grounds of expediency between an appropriation of $10,000,000 directly from the money in [301 U.S. 608] the Treasury for the object contemplated and the appropriation of lands presented for my sanction, and yet I cannot doubt that, if the bill proposed $10,000,000 from the Treasury of the United States for the support of the indigent insane in the several States, that the constitutional question involved in the act would have attracted forcibly the attention of Congress.

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I respectfully submit that, in a constitutional point of view, it is wholly immaterial whether the appropriation be in money or in land.

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To assume that the public lands are applicable to ordinary State objects, whether of public structures, police, charity, or expenses of State administration, would be to disregard to the amount of the value of the public lands all the limitations of the Constitution and confound to that extent all distinctions between the rights and powers of the States and those of the United States; for if the public lands may be applied to the support of the poor, whether sane or insane, if the disposal of them and their proceeds be not subject to the ordinary limitations of the Constitution, then Congress possesses unqualified power to provide for expenditures in the States by means of the public lands, even to the degree of defraying the salaries of governors, judges, and all other expenses of the government and internal administration within the several States.

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The conclusion from the general survey of the whole subject is to my mind irresistible, and closes the question both of right and of expediency so far as regards the principle of the appropriation proposed in this bill. Would not the admission of such power in Congress to dispose of the public domain work the practical abrogation of some of the most important provisions of the Constitution?

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\* \* \* \* [301 U.S. 609]

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The general result at which I have arrived is the necessary consequence of those views of the relative rights, powers, and duties of the States and of the Federal Government which I have long entertained and often expressed and in reference to which my convictions do but increase in force with time and experience.

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No defense is offered for the legislation under review upon the basis of emergency. The hypothesis is that hereafter it will continuously benefit unemployed members of a class. Forever, so far as we can see, the States are expected to function under federal direction concerning an internal matter. By the sanction of this adventure, the door is open for progressive inauguration of others of like kind under which it can hardly be expected that the States will retain genuine independence of action. And without independent States a Federal Union as contemplated by the Constitution becomes impossible.

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At the bar, counsel asserted that, under the present Act, the tax upon residents of Alabama during the first year will total $9,000,000. All would remain in the Federal Treasury but for the adoption by the State of measures agreeable to the National Board. If continued, these will bring relief from the payment of $8,000,000 to the United States.

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Ordinarily, I must think, a denial that the challenged action of Congress and what has been done under it amount to coercion and impair freedom of government by the people of the State would be regarded as contrary to practical experience. Unquestionably our federate plan of government confronts an enlarged peril.

SUTHERLAND, J., separate opinion

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Separate opinion of MR. JUSTICE SUTHERLAND.

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With most of what is said in the opinion just handed down, I concur. I agree that the payroll tax levied is an excise within the power of Congress; that the devotion of [301 U.S. 610] not more than 90% of it to the credit of employers in states which require the payment of a similar tax under so-called unemployment tax laws is not an unconstitutional use of the proceeds of the federal tax; that the provision making the adoption by the state of an unemployment law of a specified character a condition precedent to the credit of the tax does not render the law invalid. I agree that the states are not coerced by the federal legislation into adopting unemployment legislation. The provisions of the federal law may operate to induce the state to pass an employment law if it regards such action to be in its interest. But that is not coercion. If the act stopped here, I should accept the conclusion of the court that the legislation is not unconstitutional.

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But the question with which I have difficulty is whether the administrative provisions of the act invade the governmental administrative powers of the several states reserved by the Tenth Amendment. A state may enter into contracts; but a state cannot, by contract or statute, surrender the execution, or a share in the execution, of any of its governmental powers either to a sister state or to the federal government, any more than the federal government can surrender the control of any of its governmental powers to a foreign nation. The power to tax is vital and fundamental, and, in the highest degree, governmental in character. Without it, the state could not exist. Fundamental also, and no less important, is the governmental power to expend the moneys realized from taxation, and exclusively to administer the laws in respect of the character of the tax and the methods of laying and collecting it and expending the proceeds.

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The people of the United States, by their Constitution, have affirmed a division of internal governmental powers between the federal government and the governments of the several states—committing to the first its powers by express grant and necessary implication; to the latter, or [301 U.S. 611] to the people, by reservation, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States." The Constitution thus affirms the complete supremacy and independence of the state within the field of its powers. Carter v. Carter Coal Co., 298 U.S. 238, 295. The federal government has no more authority to invade that field than the state has to invade the exclusive field of national governmental powers; for, in the oft-repeated words of this court in Texas v. White, 7 Wall. 700, 725,

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the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government.

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The necessity of preserving each from every form of illegitimate intrusion or interference on the part of the other is so imperative as to require this court, when its judicial power is properly invoked, to view with a careful and discriminating eye any legislation challenged as constituting such an intrusion or interference. See South Carolina v. United States, 199 U.S. 437, 448.

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The precise question, therefore, which we are required to answer by an application of these principles is whether the congressional act contemplates a surrender by the state to the federal government, in whole or in part, of any state governmental power to administer its own unemployment law or the state payroll tax funds which it has collected for the purposes of that law. An affirmative answer to this question, I think, must be made.

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I do not, of course, doubt the power of the state to select and utilize a depository for the safekeeping of its funds; but it is quite another thing to agree with the selected depository that the funds shall be withdrawn for certain stipulated purposes, and for no other. Nor do I doubt the authority of the federal government and a state government to cooperate to a common end, provided [301 U.S. 612] each of them is authorized to reach it. But such cooperation must be effectuated by an exercise of the powers which they severally possess, and not by an exercise, through invasion or surrender, by one of them of the governmental power of the other.

1937, Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 612

An illustration of what I regard as permissible cooperation is to be found in Title I of the act now under consideration. By that title, federal appropriations for old-age assistance are authorized to be made to any state which shall have adopted a plan for old-age assistance conforming to designated requirements. But the state is not obliged, as a condition of having the federal bounty, to deposit in the federal treasury funds raised by the state. The state keeps its own funds and administers its own law in respect of them, without let or hindrance of any kind on the part of the federal government; so that we have simply the familiar case of federal aid upon conditions which the state, without surrendering any of its powers, may accept or not as it chooses. Massachusetts v. Mellon, 262 U.S. 447, 480, 482-483.

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But this is not the situation with which we are called upon to deal in the present case. For here, the state must deposit the proceeds of its taxation in the federal treasury, upon terms which make the deposit suspiciously like a forced loan to be repaid only in accordance with restrictions imposed by federal law. Title IX, §§ 903(a)(3), 904(a), (b), (e). All moneys withdrawn from this fund must be used exclusively for the payment of compensation. § 903(a)(4). And this compensation is to be paid through public employment offices in the state or such other agencies as a federal board may approve. § 903(a)(1). The act, it is true, recognizes [§ 903(a)(6)] the power of the legislature to amend or repeal its compensation law at any time. But there is nothing in the act, as I read it, which justifies the conclusion that the state may, in that event, unconditionally withdraw its [301 U.S. 613] funds from the federal treasury. Section 903(b) provides that the board shall certify in each taxable year to the Secretary of the Treasury each state whose law has been approved. But the board is forbidden to certify any state which the board finds has so changed its law that it no longer contains the provisions specified in subsection (a), "or has with respect to such taxable year failed to comply substantially with any such provision." The federal government, therefore, in the person of its agent, the board, sits not only as a perpetual overseer, interpreter and censor of state legislation on the subject, but, as lord paramount, to determine whether the state is faithfully executing its own law—as though the state were a dependency under pupilage \* and not to be trusted. The foregoing, taken in connection with the provisions that money withdrawn can be used only in payment of compensation and that it must be paid through an agency approved by the federal board, leaves it, to say the least, highly uncertain whether the right of the state to withdraw any part of its own funds exists, under the act otherwise than upon these various statutory conditions. It is true also that subsection (f) of § 904 authorizes the Secretary of the Treasury to pay to any state agency "such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment." But it is to be observed that the payment is to be made to the state agency, and only such amount as that agency may duly requisition. It is hard to find in this provision any extension of the right of the state to withdraw its funds except in the manner and for the specific purpose prescribed by the act.

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By these various provisions of the act, the federal agencies are authorized to supervise and hamper the administrative powers of the state to a degree which not only does not comport with the dignity of a quasi-sovereign [301 U.S. 614] state a matter with which we are not judicially concerned—but which denies to it that supremacy and freedom from external interference in respect of its affairs which the Constitution contemplates—a matter of very definite judicial concern. I refer to some, though by no means all, of the cases in point.

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In the License Cases, 5 How. 504, 588, Mr. Justice McLean said that the federal government was supreme within the scope of its delegated powers, and the state governments equally supreme in the exercise of the powers not delegated by nor inhibited to them; that the states exercise their powers over everything connected with their social and internal condition, and that, over these subjects, the federal government had no power. "They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government."

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In Tarble's Case, 13 Wall. 397, Mr. Justice Field, after pointing out that the general government and the state are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres, said that, except in one particular, they stood in the same independent relation to each other as they would if their authority embraced distinct territories. The one particular referred to is that of the supremacy of the authority of the United States in case of conflict between the two.

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In Farrington v. Tennessee, 95 U.S. 679, 685, this court said,

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Yet every State has a sphere of action where the authority of the national government may not intrude. Within that domain, the State is as if the union were not. Such are the checks and balances in our complicated but wise system of State and national polity.

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"The powers exclusively given to the federal government," it was said in Worcester v. Georgia, 6 Pet. 515, 570,

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are limitations upon the state authorities. But, [301 U.S. 615] with the exception of these limitations, the states are supreme, and their sovereignty can be no more invaded by the action of the general government than the action of the state governments can arrest or obstruct the course of the national power.

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The force of what has been said is not broken by an acceptance of the view that the state is not coerced by the federal law. The effect of the dual distribution of powers is completely to deny to the states whatever is granted exclusively to the nation, and, conversely, to deny to the nation whatever is reserved exclusively to the states.

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The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated, on the one hand, nor abdicated, on the other.

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Carter v. Carter Coal Co., supra, p. 295. The purpose of the Constitution in that regard does not admit of doubt or qualification, and it can be thwarted no more by voluntary surrender from within than by invasion from without.

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Nor may the constitutional objection suggested be overcome by the expectation of public benefit resulting from the federal participation authorized by the act. Such expectation, if voiced in support of a proposed constitutional enactment, would be quite proper for the consideration of the legislative body. But, as we said in the Carter case, supra, p. 291—"nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power." Moreover, everything which the act seeks to do for the relief of unemployment might have been accomplished, as is done by this same act for the relief of the misfortunes of old age, without [301 U.S. 616] obliging the state to surrender, or share with another government, any of its powers.

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If we are to survive as the United States, the balance between the powers of the nation and those of the states must be maintained. There is grave danger in permitting it to dip in either direction, danger—if there were no other—in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment upon the administrative functions of the states is that greater encroachments, and encroachments upon other functions, will follow.

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For the foregoing reasons, I think the judgment below should be reversed.

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MR. JUSTICE VAN DEVANTER joins in this opinion.

BUTLER, J., dissenting

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MR. JUSTICE BUTLER, dissenting.

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I think that the objections to the challenged enactment expressed in the separate opinions of MR. JUSTICE McREYNOLDS and MR. JUSTICE SUTHERLAND are well taken. I am also of opinion that, in principle and as applied to bring about and to gain control over state unemployment compensation, the statutory scheme is repugnant to the Tenth Amendment:

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The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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The Constitution grants to the United States no power to pay unemployed persons or to require the States to enact laws or to raise or disburse money for that purpose. The provisions in question, if not amounting to coercion in a legal sense, are manifestly designed and intended directly to affect state action in the respects specified. And, if valid as so employed, this "tax and credit" device may be made effective to enable federal authorities to induce, if not indeed to compel, state enactments for any purpose within the realm of [301 U.S. 617] state power, and generally to control state administration of state laws.

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The Act creates a Social Security Board and imposes upon it the duty of studying and making recommendations as to legislation and as to administrative policies concerning unemployment compensation and related subjects. § 702. It authorizes grants of money by the United States to States for old age assistance, for administration of unemployment compensation, for aid to dependent children, for maternal and child welfare and for public health. Each grant depends upon state compliance with conditions prescribed by federal authority. The amounts given being within the discretion of the Congress, it may at any time make available federal money sufficient effectively to influence state policy, standards and details of administration.

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The excise laid by § 901 is limited to specified employers. It is not imposed to raise money to pay unemployment compensation. But it is imposed having regard to that subject; for, upon enactment of state laws for that purpose in conformity with federal requirements specified in the Act, each of the employers subject to the federal tax becomes entitled to credit for the amount he pays into an unemployment fund under a state law up to 90 percent. of the federal tax. The amounts yielded by the remaining 10 percent., not assigned to any specific purpose, may be applied to pay the federal contributions and expenses in respect of state unemployment compensation. It is not yet possible to determine more closely the sums that will be needed for these purposes.

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When the federal Act was passed, Wisconsin was the only State paying unemployment compensation. Though her plan then in force is by students of the subject generally deemed the best yet devised, she found it necessary to change her law in order to secure federal approval. In the absence of that, Wisconsin employers subject to the [301 U.S. 618] federal tax would not have been allowed any deduction on account of their contribution to the state fund. Any State would be moved to conform to federal requirements, not utterly objectionable, in order to save its taxpayers from the federal tax imposed in addition to the contributions under state laws.

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Federal agencies prepared and took draft bills to state legislatures to enable and induce them to pass laws providing for unemployment compensation in accordance with federal requirements, and thus to obtain relief for the employers from the impending federal exaction. Obviously the Act creates the peril of federal tax not to raise revenue, but to persuade. Of course, each State was free to reject any measure so proposed. But, if it failed to adopt a plan acceptable to federal authority, the full burden of the federal tax would be exacted. And, as federal demands similarly conditioned may be increased from time to time as Congress shall determine, possible federal pressure in that field is without limit. Already at least 43 States, yielding to the inducement resulting immediately from the application of the federal tax and credit device, have provided for unemployment compensation in form to merit approval of the Social Security Board. Presumably the remaining States will comply whenever convenient for their legislatures to pass the necessary laws.

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The terms of the measure make it clear that the tax and credit device was intended to enable federal officers virtually to control the exertion of powers of the States in a field in which they alone have jurisdiction and from which the United States is by the Constitution excluded.

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I am of opinion that the judgment of the Circuit Court of Appeals should be reversed.

Footnotes

CARDOZO, J., lead opinion (Footnotes)

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1.

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Sec. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that—

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(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve:

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(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

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(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by Section 904;

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(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

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(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

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(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

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The Board shall, upon approving such law, notify the Governor of the State of its approval.

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(b) On December 31 in each taxable year the Board shall certify to the Secretary of the Treasury each State whose law it has previously approved, except that it shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Board finds has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provision.

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(c) If, at any time during the taxable year, the Board has reason to believe that a State whose law it has previously approved, may not be certified under subsection (b), it shall promptly so notify the Governor of such State.

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2.

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Sec. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund," hereinafter in this title called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

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(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that, where such average rate is not a multiple of one-eighth of 1 percentum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 percentum next lower than such average rate. Obligations other than such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition.

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(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

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(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

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(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

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(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment.

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3. The list of services is comprehensive. It included:

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Maitre d'Hotel, House-steward, Master of the Horse, Groom of the Chamber, Valet de Chambre, Butler, Under-butler, Clerk of the Kitchen, Confectioner, Cook, House-porter, Footman, Running-footman, Coachman, Groom, Postillion, Stable-boy, and the respective Helpers in the Stables of such Coachman, Groom, or Postillion, or in the Capacity of Gardener (not being a Day-labourer), Park-keeper, Gamekeeper, Huntsman, Whipper-in….

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4. The statute, amended from time to time, but with its basic structure unaffected, is on the statute books today. Act of 1803, 43 George III, c. 161; Act of 1812, 52 George III, c. 93; Act of 1853, 16 & 17 Vict., c. 90; Act of 1869, 32 & 33 Vict., c. 14. 24 Halsbury's Laws of England, 1st ed., pp. 692 et seq.

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5. See also the following laws imposing occupation taxes: 12 Hening's Statutes of Virginia, p. 285, Act of 1786; Chandler, The Colonial Records of Georgia, vol.19, Part 2, p. 88, Act of 1778; 1 Potter, Taylor and Yancey, North Carolina Revised Laws, p. 501, Act of 1784.

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6. The cases are brought together by Professor John MacArthur Maguire in an essay, "Taxing the Exercise of Natural Rights" (Harvard Legal Essays, 1934, pp. 273, 322).

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The Massachusetts decisions must be read in the light of the particular definitions and restrictions of the Massachusetts Constitution. Opinion of the Justices, 282 Mass. 619, 622, 186 N.E. 490, 266 Mass. 590, 593, 165 N.E. 904. And see Howes Brothers Co. v. Massachusetts Unemployment Compensation Comm'n, supra, pp. 730, 731.

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7. Alabama General Acts, 1935, c.194, Art. XIII (flat license tax on occupations); Arizona Revised Code, Supplement (1936) § 3138a et seq. (general gross receipts tax); Connecticut General Statutes, Supplement (1935) §§ 457c, 458c (gross receipts tax on unincorporated businesses); Revised Code of Delaware (1935) §§ 192-197 (flat license tax on occupations); Compiled Laws of Florida, Permanent Supplement (1936) Vol. I, § 1279 (flat license tax on occupations); Georgia Laws, 1935, p. 11 (flat license tax on occupations); Indiana Statutes Ann. (1933) § 64 2601 et seq. (general gross receipts tax); Louisiana Laws, 3rd Extra Session, 1934, Act No. 15, 1st Extra Session, 1935, Acts Nos. 5, 6 (general gross receipts tax); Mississippi Laws, 1934, c. 119 (general gross receipts tax); New Mexico Laws, 1935, c. 73 (general gross receipts tax); South Dakota Laws, 1933, c. 184 (general gross receipts tax, expired June 30, 1935); Washington Laws, 1935, c. 180, Title II (general gross receipts tax); West Virginia Code, Supplement (1935) § 960 (general gross receipts tax).

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8. The total estimated receipts without taking into account the 90 percent deduction, range from $225,000,000 in the first year to over $900,000,000 seven years later. Even if the maximum credits are available to taxpayers in all states, the maximum estimated receipts from Title IX will range between $22,000,000, at one extreme, to $90,000,000 at the other. If some of the states hold out in their unwillingness to pass statutes of their own, the receipts will be still larger.

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9. The attitude of Massachusetts is significant. Her act became a law August 12, 1935, two days before the federal act. Even so, she prescribed that its provisions should not become operative unless the federal bill became a law, or unless eleven of the following states (Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Vermont) should impose on their employers burdens substantially equivalent. Acts of 1935, c. 479, p. 655. Her fear of competition is thus forcefully attested. See also California Laws, 1935, c. 352, Art. I, § 2; Idaho Laws, 1936 (Third Extra Session) c. 12, § 26; Mississippi Laws, 1936, c. 176, § 2-a.

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10. Perkins, State action under the Federal Estate Tax Credit Clause, 13 North Carolina L.Rev. 271, 280.

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11. See note 1, supra.

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12. See note 2, supra.

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13.

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This last provision will not only afford maximum safety for these funds, but is very essential to insure that they will operate to promote the stability of business, rather than the reverse. Unemployment reserve funds have the peculiarity that the demands upon them fluctuate considerably, being heaviest when business slackens. If, in such times, the securities in which these funds are invested are thrown upon the market for liquidation, the net effect is likely to be increased deflation. Such a result is avoided in this bill through the provision that all reserve funds are to be held by the United States Treasury, to be invested and liquidated by the Secretary of the Treasury in a manner calculated to promote business stability. When business conditions are such that investment in securities purchased on the open market is unwise, the Secretary of the Treasury may issue special nonnegotiable obligations exclusively to the unemployment trust fund. When a reverse situation exists and heavy drains are made upon the fund for payment of unemployment benefits, the Treasury does not have to dispose of the securities belonging to the fund in open market, but may assume them itself. With such a method of handling the reserve funds, it is believed that this bill will solve the problem often raised in discussions of unemployment compensation, regarding the possibility of transferring purchasing power from boom periods to depression periods. It will, in fact, operate to sustain purchasing power at the onset of a depression without having any counteracting deflationary tendencies.

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House Report No. 615, 74th Congress, 1st session, p. 9.

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14. Cf. 12 Stat. 503; 26 Stat. 417.

MCREYNOLDS, J., separate opinion (Footnotes)

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\* "Messages and Papers of the President" by James D. Richardson, Vol. V, pp. 247-256.

SUTHERLAND, J., separate opinion (Footnotes)

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\* Compare Snow v. United States, 18 Wall. 317, 319-320.

DeJonge v. Oregon, 1937

Title: DeJonge v. Oregon

Author: U.S. Supreme Court

Date: January 4, 1937

Source: 299 U.S. 353

This case was argued December 9, 1936, and decided January 4, 1937.

1937, DeJonge v. Oregon, 299 U.S. 353

APPEAL FROM THE SUPREME COURT OF OREGON

Syllabus

1937, DeJonge v. Oregon, 299 U.S. 353

1. The practice of substituting for the evidence a stipulation of facts not shown to have received the approval of the court below is disapproved. P. 358.

1937, DeJonge v. Oregon, 299 U.S. 353

2. Upon appeal from a judgment of a state supreme court sustaining a conviction, this Court in this case takes the indictment as construed by the court below. P. 360.

1937, DeJonge v. Oregon, 299 U.S. 353

3. Criminal punishment under a state statute for participation in the conduct of a public meeting, otherwise lawful, merely because the meeting was held under the auspices of an organization which teaches or advocates the use of violence, or other unlawful acts [299 U.S. 354] or methods to effect industrial or political change or revolution, though no such teaching or advocacy attended the meeting in question, violates the constitutional principles of free speech and assembly. P. 362.

1937, DeJonge v. Oregon, 299 U.S. 354

The Criminal Syndicalism Law of Oregon, as applied in this case, is invalid.

1937, DeJonge v. Oregon, 299 U.S. 354

4. The rights of free speech and peaceable assembly are fundamental rights which are safeguarded against state interference by the due process clause of the Fourteenth Amendment. P. 364.

1937, DeJonge v. Oregon, 299 U.S. 354

5. The fact that these rights are guaranteed specifically by the First Amendment against abridgment by Congress does not argue their exclusion from the due process clause of the Fourteenth Amendment. Id.

1937, DeJonge v. Oregon, 299 U.S. 354

6. The legislature may protect against abuses of the rights of free speech and assembly by dealing with the abuses; the rights themselves must not be curtailed. Id.

1937, DeJonge v. Oregon, 299 U.S. 354

152 Ore. 315; 51 P. (2d) 674, reversed.

1937, DeJonge v. Oregon, 299 U.S. 354

APPEAL from the affirmance of a conviction under the Criminal Syndicalism Law of Oregon. [299 U.S. 356]

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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Appellant, Dirk De Jonge, was indicted in Multnomah County, Oregon, for violation of the Criminal Syndicalism Law of that State.\* The Act, which we set forth in [299 U.S. 357] the margin, defines "criminal syndicalism" as

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the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

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With this preliminary definition, the Act proceeds to describe a number of offenses, embracing the teaching of criminal syndicalism, the printing or distribution of books, pamphlets, etc., advocating that doctrine, the organization of a society or assemblage which advocates it, and presiding at or assisting in conducting a meeting of such an organization, society or group. The prohibited acts are made felonies, punishable by imprisonment for not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both.

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We are concerned with but one of the described offenses, and with the validity of the statute in this particular application. The charge is that appellant assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The defense was that the meeting was public and orderly, and was held for a lawful purpose; that, while it was held under the auspices of the Communist Party, neither criminal syndicalism nor any unlawful conduct was taught or advocated at the meeting, either by appellant or by others. Appellant moved for a direction of acquittal, contending that the statute, as applied to him for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated, violated the due process clause of the [299 U.S. 358] Fourteenth Amendment of the Constitution of the United States.

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This contention was overruled. Appellant was found guilty as charged, and was sentenced to imprisonment for seven years. The Judgment was affirmed by the Supreme Court of the State, which considered the constitutional question and sustained the statute as thus applied. 152 Ore. 315; 51 P.2d 674. The case comes here on appeal.

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The record does not present the evidence adduced at the trial. The parties have substituted a stipulation of facts, which was made and filed after the decision of the Supreme Court of the State and after the Chief Justice of that court had allowed the appeal and had directed transmission here of a certified transcript of the record. We do not approve of that practice, where it does not appear that the stipulation has received the approval of the court, as we think that adherence to our rule as to the preparation of records is important for the protection of the court whose decision is under review as well as of this Court. See Rule 10. But as the question presented in this instance does not turn upon an appreciation of the facts on any disputed point, we turn to the merits.

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The stipulation, after setting forth the charging part of the indictment, recites in substance the following: that, on July 27, 1934, there was held in Portland a meeting which had been advertised by handbills issued by the Portland section of the Communist Party; that the number of persons in attendance was variously estimated at from 150 to 300; that some of those present, who were members of the Communist Party, estimated that not to exceed ten to fifteen percent of those in attendance were such members; that the meeting was open to the public without charge, and no questions were asked of those entering with respect to their relation to the Communist Party; that the notice of the meeting advertised it as a [299 U.S. 359] protest against illegal raids on workers' halls and homes and against the shooting of striking longshoremen by Portland police; that the chairman stated that it was a meeting held by the Communist Party; that the first speaker dwelt on the activities of the Young Communist League; that the defendant De Jonge, the second speaker, was a member of the Communist Party and went to the meeting to speak in its name; that, in his talk, he protested against conditions in the county jail, the action of city police in relation to the maritime strike then in progress in Portland and numerous other matters; that he discussed the reason for the raids on the Communist headquarters and workers' halls and offices; that he told the workers that these attacks were due to efforts on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike; that they hoped to break the strike by pitting the longshoremen and seamen against the Communist movement; that there was also testimony to the effect that defendant asked those present to do more work in obtaining members for the Communist Party and requested all to be at the meeting of the party to be held in Portland on the following evening, and to bring their friends to show their defiance to local police authority and to assist them in their revolutionary tactics; that there was also testimony that defendant urged the purchase of certain communist literature which was sold at the meeting; that, while the meeting was still in progress, it was raided by the police; that the meeting was conducted in an orderly manner; that defendant and several others who were actively conducting the meeting were arrested by the police, and that, on searching the hall, the police found a quantity of communist literature.

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The stipulation then set forth various extracts from the literature of the Communist Party to show its advocacy of criminal syndicalism. The stipulation does not disclose [299 U.S. 360] any activity by the defendant as a basis for his prosecution other than his participation in the meeting in question. Nor does the stipulation show that the communist literature distributed at the meeting contained any advocacy of criminal syndicalism or of any unlawful conduct. It was admitted by the Attorney General of the State in his argument at the bar of this Court that the literature distributed in the meeting was not of that sort, and that the extracts contained in the stipulation were taken from communist literature found elsewhere. Its introduction in evidence was for the purpose of showing that the Communist Party, as such, did advocate the doctrine of criminal syndicalism, a fact which is not disputed on this appeal.

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While the stipulation of facts is but a condensed statement, still much of it is irrelevant in the light of the particular charge of the indictment as construed by the Supreme Court. The indictment charged as follows:

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The said Dirk De Jonge, Don Cluster, Edward R. Denny and Earl Stewart, on the 27th day of July, A.D., 1934, in the county of Multnomah and State of Oregon, then and there being, did then and there unlawfully and feloniously preside at, conduct, and assist in conducting an assemblage of persons, organization, society and group, to-wit: The Communist Party, a more particular description of which said assemblage of persons, organization, society and group is to this grand jury unknown, which said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

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On the theory that this was a charge that criminal syndicalism and sabotage were advocated at the meeting in question, defendant moved for acquittal, insisting that the evidence was insufficient to warrant his conviction. [299 U.S. 361] The trial court denied his motion, and error in this respect was assigned on appeal. The Supreme Court of the State put aside that contention by ruling that the indictment did not charge that criminal syndicalism or sabotage was advocated at the meeting described in the evidence, either by defendant or by anyone else. The words of the indictment that

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said assemblage of persons, organization, society and group did then and there unlawfully and feloniously teach and advocate the doctrine of criminal syndicalism and sabotage

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referred not to the meeting in question, or to anything then and there said or done by defendant or others, but to the advocacy of criminal syndicalism and sabotage by the Communist Party in Multnomah County. The ruling of the state court upon this point was precise. The court said (152 Ore. p. 330):

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Turning now to the grounds for a directed verdict set forth in defendant's motion therefor, we note that he asserts and argues that the indictment charges the assemblage at which he spoke with unlawfully and feloniously teaching and advocating the doctrine of criminal syndicalism and sabotage, and, elsewhere in the same motion, he contends that the indictment charges the defendant with unlawfully and feloniously teaching and advocating said doctrine at said meeting. The indictment does not, however, charge the defendant, nor the assemblage at which he spoke, with teaching or advocating at said meeting at 68 Southwest Alder street, in the city of Portland, the doctrine of criminal syndicalism or sabotage. What the indictment does charge, in plain and concise language, is that the defendant presided at, conducted and assisted in conducting an assemblage of persons, organization, society and group, to-wit, the Communist party, which said assemblage of persons, organization, society and group was unlawfully teaching and advocating in Multnomah county the doctrine of criminal syndicalism and sabotage.

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In this view, lack of sufficient evidence as to illegal advocacy or action at the meeting became immaterial. [299 U.S. 362] Having limited the charge to defendant's participation in a meeting called by the Communist Party, the state court sustained the conviction upon that basis regardless of what was said or done at the meeting.

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We must take the indictment as thus construed. Conviction upon a charge not made would be sheer denial of due process. It thus appears that, while defendant was a member of the Communist Party, he was not indicted for participating in its organization, or for joining it, or for soliciting members or for distributing its literature. He was not charged with teaching or advocating criminal syndicalism or sabotage or any unlawful acts, either at the meeting or elsewhere. He was accordingly deprived of the benefit of evidence as to the orderly and lawful conduct of the meeting and that it was not called or used for the advocacy of criminal syndicalism or sabotage or any unlawful action. His sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party.

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The broad reach of the statute as thus applied is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker, although not a member, who "assisted in the conduct" of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. This manifest result was brought out sharply at this bar by the concessions which the Attorney General made, and could not avoid, in the light of the decision of the state court. [299 U.S. 363] Thus, if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the Government, or taxation, or relief, or candidacies for the offices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. The list of illustrations might be indefinitely extended to every variety of meetings under the auspices of the Communist Party, although held for the discussion of political issues or to adopt protests and pass resolutions of an entirely innocent and proper character.

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While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions goes to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. In Gitlow v. New York, 268 U.S. 652, under the New York statute defining criminal anarchy, the defendant was found to be responsible for a "manifesto" advocating the overthrow of the government by violence and unlawful means. Id. pp. 656, 662, 663. In Whitney v. California, 274 U.S. 357, under the California statute relating to criminal syndicalism, the defendant was found guilty of willfully and deliberately assisting in the forming of an organization for the purpose of carrying on a revolutionary class struggle by criminal methods. The defendant was convicted of participation in what amounted to a conspiracy to commit serious crimes. Id. pp. 363, 364, 367, 379. The case of Burns v. United States, 274 U.S. 328, involved a similar ruling under the California statute as [299 U.S. 364] extended to the Yosemite National Park. Id. pp. 330, 331. On the other hand, in Fiske v. Kansas, 274 U.S. 380, the criminal syndicalism act of that State was held to have been applied unconstitutionally, and the judgment of conviction was reversed, where it was not shown that unlawful methods had been advocated. Id., p. 387. See also Stromberg v. California, 283 U.S. 359.

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Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. Gitlow v. New York, supra, p. 666; Stromberg v. California, supra, p. 368; Near v. Minnesota, 283 U.S. 697, 707; Grosjean v. American Press Co., 297 U.S. 233, 243, 244. The right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental. As this Court said in United States v. Cruikshank, 92 U.S. 542, 552:

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The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

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The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. Hebert v. Louisiana, 272 U.S. 312, 316; Powell v. Alabama, 287 U.S. 45, 67; Grosjean v. American Press Co., supra.

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These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people, through their legislatures may protect themselves against that abuse. But the legislative intervention, can find constitutional justification only by dealing with the [299 U.S. 365] abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government

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It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

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We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although [299 U.S. 366] called by that Party. The defendant was nonetheless entitled to discuss the public issues of the day, and thus, in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty.

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We hold that the Oregon statute, as applied to the particular charge as defined by the state court, is repugnant to the due process clause of the Fourteenth Amendment. The judgment of conviction is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

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Reversed.

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MR. JUSTICE STONE took no part in the consideration or decision of this case.

Footnotes

HUGHES, J., lead opinion (Footnotes)

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\* Oregon Code, 1930, §§ 14-3110-3112—as amended by chapter 459, Oregon Laws, 1933:

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Section 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

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Section 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

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Section 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, hand-bill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine.

Aetna Life Ins. Co. v. Haworth, 1937

Title: Aetna Life Insurance Co. v. Haworth

Author: U.S. Supreme Court

Date: March 1, 1937

Source: 300 U.S. 227

This case was argued February 4, 1937, and was decided March 1, 1937.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

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FOR THE EIGHTH CIRCUIT

Syllabus

1937, Aetna Life Insurance Co. v. Haworth, 300 U.S. 227

1. The Federal Declaratory Judgment Act deals with "controversies" in the constitutional sense, and is procedural only. P. 239.

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2. In the exercise of its control over practice and procedure of the lower federal courts, Congress is not limited to traditional forms or remedies, but may create and improve, as well as abolish or restrict. P. 240.

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3. A controversy, in the constitutional sense and in the sense of the Declaratory Judgment Act, must be justiciable—it must be definite and concrete, touching the legal relation of parties having adverse legal interests—it must be a real and substantial controversy admitting of specific relief through a conclusive decree, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts. P. 240.

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4. There may be adjudication of the rights of parties without award of process or payment of damages and where no allegation of irreparable injury is made. P. 241.

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5. Where the holder of life insurance policies claims, under disability benefit clauses, that, notwithstanding nonpayment of premiums, the policies, by reason of his total and permanent disability, [300 U.S. 228] remain in force and entitle him to cash benefits, and makes repeated and persistent demands upon the insurer accordingly, whereas the insurer denies that such disability existed and insists that the policies have lapsed because the premiums were not paid, there is an "actual controversy" on which suit may be maintained by the insurer against the insured under the Federal Declaratory Judgment Act. P. 242.

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8 F.2d 695, reversed.

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CERTIORARI, 299 U.S. 536.

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This suit by the Insurance Company, under the Federal Declaratory Judgment Act, was dismissed by the District Court upon the ground that there was no justiciable controversy. 11 F.Supp. 1016. The decree was affirmed by the court below. [300 U.S. 236]

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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The question presented is whether the District Court had jurisdiction of this suit under the Federal Declaratory Judgment Act. Act of June 14, 1934, 48 Stat. 955; Jud.Code, § 274D; 28 U.S.C. 400.\*

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The question arises upon the plaintiff's complaint, which was dismissed by the District Court upon the ground that it did not set forth a "controversy" in the constitutional sense, and hence did not come within the legitimate scope of the statute. 11 F.Supp. 1016. The decree of dismissal was affirmed by the Circuit Court of Appeals. 84 F.2d 695. We granted certiorari. November 16, 1936. [300 U.S. 237]

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From the complaint it appears that plaintiff is an insurance company which had issued to the defendant, Edwin P. Haworth, five policies of insurance upon his life, the defendant Cora M. Haworth being named as beneficiary. The complaint set forth the terms of the policies. They contained various provisions which, for the present purpose, it is unnecessary fully to particularize. It is sufficient to observe that they all provided for certain benefits in the event that the insured became totally and permanently disabled. In one policy, for $10,000, issued in 1911, the company agreed, upon receiving the requisite proof of such disability and without further payment of premiums, to pay the sum insured, and dividend additions, in twenty annual instalments, or a life annuity as specified, in full settlement. In four other policies issued in 1921, 1928 and 1929, respectively, for amounts aggregating $30,000, plaintiff agreed upon proof of such disability to waive further payment of premiums, promising in one of the policies to pay a specified amount monthly and in the other three to continue the life insurance in force. By these four policies, the benefits to be payable at death, and the cash and loan values to be available, were to be the same whether the premiums were paid or were waived by reason of the described disability.

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The complaint alleges that, in 1930 and 1931, the insured ceased to pay premiums on the four policies last mentioned and claimed the disability benefits as stipulated. He continued to pay premiums on the first mentioned policy until 1934, and then claimed disability benefits. These claims, which were repeatedly renewed, were presented in the form of affidavits accompanied by certificates of physicians. A typical written claim on the four policies is annexed to the complaint. It states that, while these policies were in force, the insured became [300 U.S. 238] totally and permanently disabled by disease, and was "prevented from performing any work or conducting any business for compensation or profit"; that, on October 7, 1930, he had made and delivered to the company a sworn statement

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for the purpose of asserting and claiming his right to have these policies continued under the permanent and total disability provision contained in each of them;

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that, more than six months before that date, he had become totally and permanently disabled, and had furnished evidence of his disability within the stated time; that the annual premiums payable in the year 1930 or in subsequent years were waived by reason of the disability, and that he was entitled to have the policies continued in force without the payment of premiums so long as the disability should continue.

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With respect to the policy first mentioned, it appears that the insured claimed that, prior to June 1, 1934, when he ceased to pay premiums, he had become totally and permanently disabled; that he was without obligation to pay further premiums, and was entitled to the stipulated disability benefits including the continued life of the policy.

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Plaintiff alleges that consistently and at all times it has refused to recognize these claims of the insured, and has insisted that all the policies had lapsed according to their terms by reason of the nonpayment of premiums, the insured not being totally and permanently disabled at any of the times to which his claims referred. Plaintiff further states that, taking loans into consideration, four of the policies have no value, and the remaining policy (the one first mentioned) has a value of only $45 as extended insurance. If, however, the insured has been totally and permanently disabled as he claims, the five policies are in full force, the plaintiff is now obliged to pay the accrued instalments of cash disability benefits for which two of the policies provide, and the insured [300 U.S. 239] has the right to claim at any time cash surrender values accumulating by reason of the provisions for waiver of premiums, or at his death, Cora M. Haworth, as beneficiary, will be entitled to receive the face of the policies less the loans thereon.

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Plaintiff thus contends that there is an actual controversy with defendants as to the existence of the total and permanent disability of the insured and as to the continuance of the obligations asserted despite the nonpayment of premiums. Defendants have not instituted any action wherein the plaintiff would have an opportunity to prove the absence of the alleged disability, and plaintiff points to the danger that it may lose the benefit of evidence through disappearance, illness or death of witnesses, and meanwhile, in the absence of a judicial decision with respect to the alleged disability, the plaintiff in relation to these policies will be compelled to maintain reserves in excess of $20,000.

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The complaint asks for a decree that the four policies be declared to be null and void by reason of lapse for nonpayment of premiums and that the obligation upon the remaining policy be held to consist solely in the duty to pay the sum of $45 upon the death of the insured, and for such further relief as the exigencies of the case may require.

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First. The Constitution limits the exercise of the judicial power to "cases" and "controversies."

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The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.

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Per Mr. Justice Field in In re Pacific Railway Comm'n, 32 Fed. 241, 255, citing Chisholm v. Georgia, 2 Dall. 419, 431, 432. See Muskrat v. United States, 219 U.S. 346, 356, 357; Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 723, 724. The Declaratory Judgment Act of 1934, in its limitation to "cases of actual controversy," manifestly [300 U.S. 240] has regard to the constitutional provision, and is operative only in respect to controversies which are such in the constitutional sense. The word "actual" is one of emphasis, rather than of definition. Thus, the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense, the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. Turner v. Bank of North America, 4 Dall. 8, 10; Stevenson v. Fain, 195 U.S. 165, 167; Kline v. Burke Construction Co., 260 U.S. 226, 234. Exercising this control of practice and procedure, the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution

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did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.

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Nashville, C. & St.L. Ry. Co. v. Wallace, 288 U.S. 249, 264. In dealing with methods within its sphere of remedial action, the Congress may create and improve, as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which, under the Constitution, the judicial power extends.

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A "controversy" in this sense must be one that is appropriate for judicial determination. Osborn v. United States Bank, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. United States v. Alaska S.S. Co., 253 U.S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having [300 U.S. 241] adverse legal interests. South Spring Gold Co. v. Amador Gold Co., 145 U.S. 300, 301; Fairchild v. Hughes, 258 U.S. 126, 129; Massachusetts v. Mellon, 262 U.S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See Muskrat v. United States, supra; Texas v. Interstate Commerce Comm'n, 258 U.S. 158, 162; New Jersey v. Sargent, 269 U.S. 328, 339, 340; Liberty Warehouse Co. v. Grannis, 273 U.S. 70; New York v. Illinois, 274 U.S. 488, 490; Willing v. Chicago Auditorium Assn., 277 U.S. 274, 289, 290; Arizona v. California, 283 U.S. 423, 463, 464; Alabama v. Arizona, 291 U.S. 286, 291; United States v. West Virginia, 295 U.S. 463, 474, 475; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 324. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised, although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Nashville, C. & St.L. Ry. Co. v. Wallace, supra, p. 263; Tutun v. United States, 270 U.S. 568, 576, 577; Fidelity National Bank v. Swope, 274 U.S. 123, 132; Old Colony Trust Co. v. Commissioner, supra, p. 725. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. Nashville, C. & St.L. Ry. Co. v. Wallace, supra, p. 264.

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With these principles governing the application of the Declaratory Judgment Act, we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the instant case. [300 U.S. 242]

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Second. There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled, and hence was relieved of the obligation to continue the payment of premiums, and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that, in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.

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That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts, and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is everyday practice. Equally unavailing is respondent's contention that the dispute relates to the existence of a "mutable fact" and a "changeable condition—the state of the insured's health." The insured [300 U.S. 243] asserted a total and permanent disability occurring prior to October, 1930, and continuing thereafter. Upon that ground, he ceased to pay premiums. His condition at the time he stopped payment, whether he was then totally and permanently disabled so that the policies did not lapse, is not a "mutable," but a definite, fact. It is a controlling fact which can be finally determined, and which fixes rights and obligations under the policies. If it were found that the insured was not totally and permanently disabled when he ceased to pay premiums, and hence was in default, the effect of that default and the consequent right of the company to treat the policies as lapsed could be definitely and finally adjudicated. If it were found that he was totally and permanently disabled, as he claimed, the duty of the company to pay the promised disability benefits and to maintain the policies in force could likewise be adjudicated. There would be no difficulty, in either event, in passing a conclusive decree applicable to the facts found and to the obligations of the parties corresponding to those facts. If the insured made good his claim, the decree establishing his right to the disability benefits, and to the continuance of the policies in force during the period of the proved disability, would be nonetheless final and conclusive as to the matters thus determined, even though a different situation might later arise in the event of his recovery from that disability and his failure after that recovery to comply with the requirements of the policies. Such a contention would present a distinct subject matter.

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If the insured had brought suit to recover the disability benefits currently payable under two of the policies, there would have been no question that the controversy was of a justiciable nature, whether or not the amount involved would have permitted its determination in a federal court. Again, on repudiation by [300 U.S. 244] the insurer of liability in such a case and insistence by the insured that the repudiation was unjustified because of his disability, the insured would have "such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being." Burnet v. Wells, 289 U.S. 670, 680; Cohen v. N.Y. Mutual Life Ins. Co., 50 N.Y. 610, 624; Fidelity National Bank v. Swope, supra. But the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer. Whether the District Court may entertain such a suit by the insurer, when the controversy as here is between citizens of different States or otherwise is within the range of the federal judicial power, is for the Congress to determine. It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative. See Gully v. Interstate Natural Gas Co., 82 F.2d 145, 149; Travelers Insurance Co. v. Helmer, 15 F.Supp. 355, 356; New York Life Insurance Co. v. London, 15 F.Supp. 586, 589.

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We have no occasion to deal with questions that may arise in the progress of the cause, as the complaint has been dismissed in limine. Questions of burden of proof or mode of trial have not been considered by the courts below, and are not before us.

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Our conclusion is that the complaint presented a controversy to which the judicial power extends, and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act. The decree is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

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Reversed.

Footnotes

HUGHES, J., lead opinion (Footnotes)

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\* The Act provides:

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(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

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(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

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(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

West Coast Hotel Co. v. Parrish, 1937

Title: West Coast Hotel Co. v. Parrish

Author: U.S. Supreme Court

Date: March 29, 1937

Source: 300 U.S. 379

This case was argued December 16 and 17, 1936, and was decided March 29, 1937.

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APPEAL FROM THE SUPREME COURT OF WASHINGTON

Syllabus

1937, West Coast Hotel Co. v. Parrish, 300 U.S. 379

1. Deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process. P. 391.

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2. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. P. 393.

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3. The State has a special interest in protecting women against employment contracts which through poor working conditions, long hours or scant wages may leave them inadequately supported and undermine their health; because:

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(1) The health of women is peculiarly related to the vigor of the race;

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(2) Women are especially liable to be overreached and exploited by unscrupulous employers; and

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(3) This exploitation and denial of a living wage is not only detrimental to the health and wellbeing of the women affected, but casts a direct burden for their support upon the community. Pp. 394, 398, et seq.

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4. Judicial notice is taken of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. P. 399.

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5. A state law for the setting of minimum wages for women is not an arbitrary discrimination because it does not extend to men. P. 400.

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6. A statute of the State of Washington (Laws, 1913, c. 174; Remington's Rev.Stats., 1932, § 7623 et seq.) providing for the establishment of minimum wages for women, held valid. Adkins v. Children's Hospital, 261 U.S. 525, is overruled; Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, distinguished. P. 400.

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185 Wash. 581; 55 P.2d 1083, affirmed. [300 U.S. 380]

1937, West Coast Hotel Co. v. Parrish, 300 U.S. 380

This was an appeal from a judgment for money directed by the Supreme Court of Washington, reversing the trial court, in an action by a chambermaid against a hotel company to recover the difference between the amount of wages paid or tendered to her as per contract and a larger amount computed on the minimum wage fixed by a state board or commission. [300 U.S. 386]

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

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The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. Laws of 1913 (Washington) chap. 174; Remington's Rev.Stat. (1932), § 7623 et seq. It provides:

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SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

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SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals, and it shall be unlawful to employ [300 U.S. 387] women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

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SEC. 3. There is hereby created a commission to be known as the "Industrial Welfare Commission" for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women.

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Further provisions required the Commission to ascertain the wages and conditions of labor of women and minors within the State. Public hearings were to be held. If, after investigation, the Commission found that, in any occupation, trade or industry, the wages paid to women were "inadequate to supply them necessary cost of living and to maintain the workers in health," the Commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the Commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and, on the approval of such a recommendation, it became the duty of the Commission to issue an obligatory order fixing minimum wages. Any such order might be reopened, and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were "physically defective or crippled by age or otherwise," and also for apprentices, at less than the prescribed minimum wage.

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By a later Act, the Industrial Welfare Commission was abolished, and its duties were assigned to the Industrial Welfare Committee, consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, [300 U.S. 388] the Supervisor of Industrial Relations, the Industrial Statistician, and the Supervisor of Women in Industry. Laws of 1921 (Washington) c. 7; Remington's Rev.Stat. (1932), §§ 10840, 10893.

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The appellant conducts a hotel. The appellee, Elsie Parrish, was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. Parrish v. West Coast Hotel Co., 185 Wash. 581, 55 P.2d 1083. The case is here on appeal.

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The appellant relies upon the decision of this Court in Adkins v. Children's Hospital, 261 U.S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the Adkins case upon the ground that the appellee was employed in a hotel, and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that, in one of the cases ruled by the Adkins opinion, the employee was a woman employed as an elevator operator in a hotel. Adkins v. Lyons, 261 U.S. 525, at p. 542.

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The recent case of Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, came here on certiorari to the New York court, which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the Adkins case, and, that for that and other reasons, the New [300 U.S. 389] York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes, and this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." Id., p. 609. That view led the affirmance by this Court of the judgment in the Morehead case, as the Court considered that the only question before it was whether the Adkins case was distinguishable, and that reconsideration of that decision had not been sought. Upon that point, the Court said:

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The petition for the writ sought review upon the ground that this case [Morehead] is distinguishable from that one [Adkins]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted…. Here, the review granted was no broader than that sought by the petitioner…. He is not entitled, and does not ask, to be heard upon the question whether the Adkins case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.

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Id. pp. 604, 605.

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We think that the question which was not deemed to be open in the Morehead case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion, the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins case as determinative, and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of [300 U.S. 390] the state court demands on our part a reexamination of the Adkins case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the Adkins case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that, in deciding the present case, the subject should receive fresh consideration.

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The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case, it had twice been held valid by the Supreme Court of the State. Larsen v. Rice, 100 Wash. 642, 171 Pac. 1037; Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws of 1913 (Oregon) chap. 62. The validity of the latter act was sustained by the Supreme Court of Oregon in Stettler v. O'Hara, 69 Ore. 519, 139 Pac. 743, and Simpson v. O'Hara, 70 Ore. 261, 141 Pac. 158. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U.S. 629. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the Adkins case. Upon appeal, the Court of Appeals of the District first affirmed that ruling, but, on rehearing, reversed it, and the case came before this Court in 1923. The judgment of the Court of Appeals holding the Act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the [300 U.S. 391] principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the Adkins case. The Justices who had dissented in that case bowed to the ruling, and Mr. Justice Brandeis dissented. Murphy v. Sardell, 269 U.S. 530; Donham v. West-Nelson Co., 273 U.S. 657. The question did not come before us again until the last term in the Morehead case, as already noted. In that case, briefs supporting the New York statute were submitted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. 298 U.S. p. 604, note. Throughout this entire period, the Washington statute now under consideration has been in force.

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The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment, governing the States, as the due process clause invoked in the Adkins case governed Congress. In each case, the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. [300 U.S. 392]

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This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago, we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described: 1

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But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

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Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567.

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This power under the Constitution to restrict freedom of contract has had many illustrations. 2 That it may be exercised in the public interest with respect to contracts [300 U.S. 393] between employer and employee is undeniable. Thus, statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (Holden v. Hardy, 169 U.S. 366); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (Knoxville Iron Co. v. Harbison, 183 U.S. 13); in forbidding the payment of seamen's wages in advance (Patterson v. Bark Eudora, 190 U.S. 169); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U.S. 539); in prohibiting contracts limiting liability for injuries to employees (Chicago, B. & Q. R. Co. v. McGuire, supra); in limiting hours of work of employees in manufacturing establishments (Bunting v. Oregon, 243 U.S. 426), and in maintaining workmen's compensation laws (New York Central R. Co. v. White, 243 U.S. 188; Mountain Timber Co. v. Washington, 243 U.S. 219). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. Chicago, B. & Q. R. Co. v. McGuire, supra, p. 570.

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The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in Holden v. Hardy, supra, where we pointed out the inequality in the footing of the parties. We said (Id. 397):

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The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that [300 U.S. 394] their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

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And we added that the fact

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that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.

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The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.

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It is manifest that this established principle is peculiarly applicable in relation to the employment of women, in whose protection the State has a special interest. That phase of the subject received elaborate consideration in Muller v. Oregon (1908), 208 U.S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," and that her physical wellbeing "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that,

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though limitations upon personal and contractual rights may be removed by legislation, there is that in her [300 U.S. 395] disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.

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Hence, she was

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properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained.

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We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor," were "not imposed solely for her benefit, but also largely for the benefit of all." Again, in Quong Wing v. Kirkendall, 223 U.S. 59, 63, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings, this Court sustained the regulation of hours of work of women employees in Riley v. Massachusetts, 232 U.S. 671 (factories), Miller v. Wilson, 236 U.S. 373 (hotels), and Bosley v. McLaughlin, 236 U.S. 385 (hospitals).

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This array of precedents and the principles they applied were thought by the dissenting Justices in the Adkins case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U.S. p. 564. That challenge persists, and is without any satisfactory answer. As Chief Justice Taft observed:

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In absolute freedom of contract, the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to [300 U.S. 396] the one is not greater, in essence, than the other, and is of the same kind. One is the multiplier, and the other the multiplicand.

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And Mr. Justice Holmes, while recognizing that "the distinctions of the law are distinctions of degree," could

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perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate.

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Id., p. 569.

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One of the points which was pressed by the Court in supporting its ruling in the Adkins case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the Morehead case, the minority thought that the New York statute had met that point in its definition of a "fair wage," and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the Morehead petition for certiorari was deemed to present. The Court, however, did not take that view, and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that, in its minimum wage requirement, the State has passed beyond the boundary of its broad protective power.

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The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the Adkins case is pertinent:

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This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as [300 U.S. 397] the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law, in its character and operation, is like hundreds of so-called police laws that have been upheld.

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261 U.S. p. 570. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character:

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Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that, when sweating employers are prevented from paying unduly low wages by positive law, they will continue their business, abating that part of their profits which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that, while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.

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Id., p. 563.

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We think that the views thus expressed are sound, and that the decision in the Adkins case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus, in Radice v. New York, 264 U.S. 292, we sustained the New York statute which restricted the employment of women in restaurants at night. In O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In Nebbia v. New York, 291 U.S. 502, dealing [300 U.S. 398] with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination, and we again declared that, if such laws

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have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied;

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that

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with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal;

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that

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times without number, we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that, though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

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Id. pp. 537, 538.

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With full recognition of the earnestness and vigor which characterize the prevailing opinion in the Adkins case, we find it impossible to reconcile that ruling with these well considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," [300 U.S. 399] the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

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There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power, and are thus relatively defenceless against the denial of a living wage, is not only detrimental to their health and wellbeing, but casts a direct burden for their support upon the community. What these workers lose in wages, the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While, in the instant case, no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is, in effect, a subsidy for unconscionable employers. The [300 U.S. 400] community may direct its lawmaking power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If

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the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.

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There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. Carroll v. Greenwich Insurance Co., 199 U.S. 401, 411; Patsone v. Pennsylvania, 232 U.S. 138, 144; Keokee Coke Co. v. Taylor, 234 U.S. 224, 227; Sproles v. Binford, 286 U.S. 374, 396; Semler v. Oregon Board, 294 U.S. 608, 610, 611. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. Miller v. Wilson, supra, p. 384; Bosley v. McLaughlin, supra, pp. 394, 395; Radice v. New York, supra, pp. 295-298. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

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Our conclusion is that the case of Adkins v. Children's Hospital, supra, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is

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Affirmed.

SUTHERLAND, J., dissenting

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MR. JUSTICE SUTHERLAND, dissenting:

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MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I think the judgment of the court below should be reversed. [300 U.S. 401]

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The principles and authorities relied upon to sustain the judgment were considered in Adkins v. Children's Hospital, 261 U.S. 525, and Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

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Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction, and, so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.

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It has been pointed out many times, as in the Adkins case, that this judicial duty is one of gravity and delicacy, and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but, in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And, in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so [300 U.S. 402] important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

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The suggestion that the only check upon the exercise of the judicial power, when properly invoked to declare a constitutional right superior to an unconstitutional statute, is the judge's own faculty of self-restraint is both ill-considered and mischievous. Self-restraint belongs in the domain of will, and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions, and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This court acts as a unit. It cannot act in any other way, and the majority (whether a bare majority or a majority of all but one of its members) therefore establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands—always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise.

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It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of [300 U.S. 403] living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

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The words of Judge Campbell in Twitchell v. Blodgett, 13 Mich. 127, 139-140, apply with peculiar force. "But it may easily happen," he said,

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that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill-adapted to a new state of things.

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…Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances…But, where evils arise from the application of such regulations, their force cannot be denied or evaded, and the remedy consists in repeal or amendment, and not in false construction.

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The principle is reflected in many decisions of this court. See South Carolina v. United States, 199 U.S. 437, 448-449; Lake County v. Rollins, 130 U.S. 662, 670; Knowlton v. Moore, 178 U.S. 41, 95; Rhode Island v. Massachusetts, 12 Pet. 657, 723; Craig v. Missouri, 4 Pet. 410, 431-432; Ex parte Bain, 121 U.S. 1, 12; Maxwell v. Dow, 176 U.S. 581, 602; Jarrolt v. Moberly, 103 U.S. 580, 586. [300 U.S. 404]

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The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for, and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

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If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. Judge Cooley, in the first volume of his Constitutional Limitations (8th ed.), p. 124, very clearly pointed out that much of the benefit expected from written constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a constitution, was subject to modification by public sentiment and action which the courts might recognize, but that

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a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders would be justly chargeable with reckless disregard of official oath and public duty, and if its course could become a precedent, these instruments would be of little avail…. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

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The Adkins case dealt with an act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that [300 U.S. 405] thereby these departments had affirmed the validity of the statute, and properly declared that their determination must be given great weight, but we then concluded, after thorough consideration, that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

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The people, by their Constitution, created three separate, distinct, independent and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat what so often has been said, that the powers of these departments are different, and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator, and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

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Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the Adkins case. Such vices as existed in the latter are present in the former. And if the Adkins case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

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In support of minimum wage legislation it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum, and thus bring down the [300 U.S. 406] earnings of the more efficient toward the level of the less efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

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That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. Adair v. United States, 208 U.S. 161, 174-175; Coppage v. Kansas, 236 U.S. 1, 10, 14. In the first of these cases, Mr. Justice Harlan, speaking for the court, said,

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The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell…. In all such particulars, the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

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In the Adkins case, we referred to this language, and said that, while there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule, and restraint the exception, and that the power to abridge that freedom could only be justified by the existence of exceptional circumstances. This statement of the rule has been many times affirmed, and we do not understand that it is questioned by the present decision.

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We further pointed out four distinct classes of cases in which this court from time to time had upheld statutory interferences with the liberty of contract. They were, in brief, (1) statutes fixing rates and charges to be [300 U.S. 407] exacted by businesses impressed with a public interest; (2) statutes relating to contracts for the performance of public work; (3) statutes prescribing the character, methods and time for payment of wages, and (4) statutes fixing hours of labor. It is the last class that has been most relied upon as affording support for minimum wage legislation, and much of the opinion in the Adkins case (261 U.S. 547-553) is devoted to pointing out the essential distinction between fixing hours of labor and fixing wages. What is there said need not be repeated. It is enough for present purposes to say that statutes of the former class deal with an incident of the employment having no necessary effect upon wages. The parties are left free to contract about wages, and thereby equalize such additional burdens as may be imposed upon the employer as a result of the restrictions as to hours by an adjustment in respect of the amount of wages. This court, wherever the question is adverted to, has been careful to disclaim any purpose to uphold such legislation as fixing wages, and has recognized an essential difference between the two. E.g., Bunting v. Oregon, 243 U.S. 426; Wilson v. New, 243 U.S. 332, 345-346, 353-354, and see Freund, Police Power, § 318.

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We then pointed out that minimum wage legislation such as that here involved does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court.

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Two cases were involved in the Adkins decision. In one of them, it appeared that a woman 21 years of age, [300 U.S. 408] who brought the suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer, while willing to retain her, was obliged to dispense with her services on account of the penalties prescribed by the act. The wages received by her were the best she was able to obtain for any work she was capable of performing, and the enforcement of the order deprived her, as she alleged, not only of that employment, but left her unable to secure any position at which she could make a living with as good physical and moral surroundings and as good wages as she was receiving and was willing to take. The Washington statute, of course, admits of the same situation and result, and, for aught that appears to the contrary, the situation in the present case may have been the same as that just described. Certainly, to the extent that the statute applies to such cases, it cannot be justified as a reasonable restraint upon the freedom of contract. On the contrary, it is essentially arbitrary.

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Neither the statute involved in the Adkins case nor the Washington statute, so far as it is involved here, has the slightest relation to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of ,he employment. The sole basis upon which the question of validity rests is the assumption that the employee is entitled to receive a sum of money sufficient to provide a living for her, keep her in health, and preserve her morals. And, as we pointed out at some length in that case (pp. 555-557), the question thus presented for the determination of the board cannot be solved by any general formula prescribed by a statutory bureau, since it is not a composite, but an individual, question to be answered for each individual, considered by herself. [300 U.S. 409] What we said further in that case (pp. 557-559), is equally applicable here:

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The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers, but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

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The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it [300 U.S. 410] exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it, in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money, but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more simply because he needs more, and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission [300 U.S. 411] power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

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Whether this would be equally or at all true in respect of the statutes of some of the states we are not called upon to say. They are not now before us, and it is enough that it applies in every particular to the Washington statute now under consideration.

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The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please, and it is a significant and an important fact that all state statutes to which our attention has been called are of like character. The common law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal [300 U.S. 412] right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so. In the Tipaldo case, 298 U.S. 587, 615, it appeared that the New York legislature had passed two minimum wage measures—one dealing with women alone, the other with both men and women. The act which included men was vetoed by the governor. The other, applying to women alone, was approved. The "factual background" in respect of both measures was substantially the same. In pointing out the arbitrary discrimination which resulted (pp. 615-617) we said:

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These legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all, that in them is said in justification of the regulations that the Act imposes in respect of women's wages applies with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the Act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents, and, because of need, will work for whatever wages they can get, and that without regard to the value of the service, and even though the pay is less than minima prescribed in accordance with this Act. It is plain that, under circumstances such as those portrayed in the "Factual background," prescribing of minimum wages for women alone would unreasonably restrain them [300 U.S. 413] in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work.

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An appeal to the principle that the legislature is free to recognize degrees of harm, and confine its restrictions accordingly, is but to beg the question, which is, since the contractual rights of men and women are the same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does. Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex.

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If, in the light of the facts, the state legislation, without reason or for reasons of mere expediency, excluded men from the provisions of the legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women, 261 U.S. 553.

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Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to [300 U.S. 414] become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

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A more complete discussion may be found in the Adkins and Tipaldo cases cited supra.

Footnotes

HUGHES, J., lead opinion (Footnotes)

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1. Allgeyer v. Louisiana, 165 U.S. 578; Lochner v. New York, 198 U.S. 45; Adair v. United States, 208 U.S. 161.

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2. Munn v. Illinois, 94 U.S. 113; Railroad Commission Cases, 116 U.S. 307; Willcox v. Consolidated Gas Co., 212 U.S. 19; Atkin v. Kansas, 191 U.S. 207; Mugler v. Kansas, 123 U.S. 623; Crowley v. Christensen, 137 U.S. 86; Gundling v. Chicago, 177 U.S. 183; Booth v. Illinois, 184 U.S. 425; Schmidinger v. Chicago, 226 U.S. 578; Armour & Co. v. North Dakota, 240 U.S. 510; National Fire Insurance Co. v. Wanberg, 260 U.S. 71; Radice v. New York, 264 U.S. 292; Yeiser v. Dysart, 267 U.S. 540; Liberty Warehouse Co. v. Burley Tobacco Growers' Assn., 276 U.S. 71, 97; Highland v. Russell Car Co., 279 U.S. 253, 261; O'Gorman & Young v. Hartford Insurance Co., 282 U.S. 249, 251; Hardware Dealers Insurance Co. v. Glidden Co., 284 U.S. 151, 157; Packer Corp. v. Utah, 285 U.S. 95, 111; Stephenson v. Binford, 287 U.S. 251, 274; Hartford Accident Co. v. Nelson Mfg. Co., 291 U.S. 352, 360; Petersen Baking Co. v. Bryan, 290 U.S. 570; Nebbia v. New York, 291 U.S. 502, 527-529.

Virginian Railway Co. v. Railway Employees, 1937

Title: Virginian Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor

Author: U.S. Supreme Court

Date: March 29, 1937

Source: 300 U.S. 515

This case was argued February 8 and 9, 1937, and was decided March 29, 1937.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

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FOR THE FOURTH CIRCUIT

Syllabus

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 515

1. Concurrent findings of fact by district court and circuit court of appeals are conclusive when not plainly erroneous.

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2. The amended Railway Labor Act seeks to avoid interruptions of interstate commerce resulting from disputes concerning pay, rules, or working conditions on the railroads, by the promotion of collective bargaining between the carrier and the authorized representative of its employees, and by mediation and arbitration when such bargaining does not result in agreement. To facilitate agreement, it gives to employees the right to organize and bargain collectively through a representative of their own selection, doing away with company interference and "company unions." Section 2, Ninth, makes it the duty of the National Mediation Board, when any dispute arises among a carrier's employees "as to who are the representatives of such employees," to investigate the dispute and to certify the name of the organization authorized to represent the employees; and it commands that,

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Upon receipt of such certification, the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.

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Held:

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(1) That the duty to "treat" with the representative so certified is mandatory. P. 547.

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(2) The statute does not undertake to compel agreement, and does not preclude the employer from entering into individual contracts directly with individual employees, but it requires the employer to "treat with" the authorized representative of the employees, that is, to meet and confer with their representative, to listen to their complaints, and to make reasonable effort to compose differences. P. 548.

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(3) The duty is to treat with the authorized representative exclusively. P. 548.

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(4) The duty is enforceable by injunction. P. 549. [300 U.S. 516]

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3. A court of equity may refuse to act when it cannot give effective relief; but whether a decree should be refused as useless is a matter of judgment addressed to the special circumstances of each case. P. 550.

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4. In determining whether the duty of a carrier to treat with the authorized representative of its employees is enforceable by mandatory injunction, weight is attached to the judgment of Congress that conference between carriers and employees is a powerful aid to industrial peace; and it will not be assumed that such negotiation will not result in agreement or lead to successful mediation or arbitration. P. 551.

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5. The peaceable settlement of labor controversies that may seriously impair the ability of an interstate carrier to perform its service to the public is a matter of public concern. P. 552.

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6. Courts of equity go much farther in furtherance of the public interest than when only private interests are involved. P. 552.

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7. The fact that, by the Railway Labor Act, Congress has indicated its purpose to make negotiation between carrier and employees obligatory in case of industrial controversy is, in itself, a declaration of public interest and policy. P. 552.

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8. The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. P. 553.

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9. It was for Congress to choose the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, expressed in the Railway Labor Act and confirmed by the history of industrial disputes and of railroad labor relations, is not open to review here. P. 553.

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10. The activities of "back shop" employees engaged on heavy repairs on locomotives and cars withdrawn from service for long periods are held to bear such relation to the interstate activities of the carrier as to be regarded as part of them—(Employers' Liability Cases, 207 U.S. 463 distinguished)—all subject to the power of Congress over interstate commerce. P. 554.

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11. Although the carrier in this case might have turned over its back shop repair work to independent contractors, its determination to make its own repairs, and the nature of the work done, brought its relations with the back shop employees within the purview of the Railway Labor Act. P. 557.

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12. The provisions of the Railway Labor Act prohibiting company unions and imposing on the railway the duty of "treating with" [300 U.S. 517] the authorized representative of its employees for the purpose of negotiating a labor dispute do not infringe the rights of the carrier under the due process clause of the Fifth Amendment. P. 557.

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13. In this regard, the Railway could complain only of infringement of its own constitutional immunity, not that of the employees. P. 558.

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14. Under § 2, Fourth, of the Railway Labor Act, at an election participated in by a majority of the employees entitled to vote, the vote of a majority of the participants determines the choice of representative. P. 559.

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15. A certificate of the National Mediation Board, certifying, in conformity with the Railway Labor Act, that, as the result of an election, a specified union has been designated to represent a craft of employees, and showing on its face the total number of votes case in favor of each candidate, is not void because it fails to state the total number of eligible voters in the craft, but is prima facie sufficient, and the omitted fact is open to inquiry by the court asked to enforce the command of the statute, § 2, Ninth. P. 561.

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16. Section 9 of the Act of March 23, 1932, c. 90, 47 Stat. 70, which provides that

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every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in…findings of fact made and filed by the court

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is not inconsistent with the mandatory injunction in this case. P. 562.

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17. Specific provisions of a later Act cannot be rendered nugatory by more general provisions of an earlier Act. P. 563.

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84 F.2d 641 affirmed. D.C., 11 F.Supp. 621.

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Certiorari, 299 U.S. 529, to review the affirmance of a decree rendered by the District Court against the Railway Company in a suit by the Federation. The decree commanded the Company to treat with the Federation as the duly accredited representative of the Company's shop craft employees in respect of pay, working conditions, etc., and restrained the Company from interfering with, influencing, or coercing such employees in their free choice of their representatives, etc. [300 U.S. 538]

STONE, J., lead opinion

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MR. JUSTICE STONE delivered the opinion of the Court.

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This case presents questions as to the constitutional validity of certain provisions of the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. §§ 151-163, and as to the nature and extent of the relief which courts are authorized by the act to give.

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Respondents are System Federation No. 40, which will be referred to as the Federation, a labor organization affiliated with the American Federation of Labor and representing shop craft employees of petitioner railway, and certain individuals who are officers and members of the System Federation. They brought the present suit in equity in the District Court for Eastern Virginia, to compel petitioner, an interstate rail carrier, to recognize and treat with respondent Federation as the duly accredited representative of the mechanical department employees of petitioner, and to restrain petitioner from in any way interfering with, influencing, or coercing its shop craft employees in their free choice of representatives, for the purpose of contracting with petitioner with respect to rules, rates of pay, and working conditions, and for the purpose of considering and settling disputes between petitioner and such employees. [300 U.S. 539]

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The history of this controversy goes back to 1922, when, following the failure of a strike by petitioner's shop employees affiliated with the American Federation of Labor, other employees organized a local union known as the "Mechanical Department Association of the Virginian Railway." The Association thereupon entered into an agreement with petitioner providing for rates of pay and working conditions, and for the settlement of disputes with respect to them, but no substantial grievances were ever presented to petitioner by the Association. It maintained its organization and held biennial elections of officers, but the notices of election were sent out by petitioner and all Association expenses were paid by petitioner.

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In 1927, the American Federation of Labor formed a local organization which, in 1934, demanded recognition by petitioner of its authority to represent the shop craft employees, and invoked the aid of the National Mediation Board, constituted under the Railway Labor Act, as amended, to establish its authority. The Board, pursuant to agreement between the petitioner, the Federation, and the Association, and in conformity to the statute, held an election by petitioner's shop craft employees to choose representatives for the purpose of collective bargaining with petitioner. As the result of the election, the Board certified that the Federation was the duly accredited representative of petitioner's employees in the six shop crafts.

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Upon this and other evidence, not now necessary to be detailed, the trial court found that the Federation was the duly authorized representative of the mechanical department employees of petitioner, except the carmen and coach cleaners; that the petitioner, in violation of § 2 of the Railway Labor Act, had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to [300 U.S. 540] prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification, by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees. 1

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Upon the basis of these findings, the trial court gave its decree applicable to petitioner's mechanical department employees except the carmen and coach cleaners. It directed petitioner to "treat with" the Federation and to

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exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise….

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It restrained petitioner from

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entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its Mechanical Department employees,…except…with [300 U.S. 541] the Federation,

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and from "interfering with, influencing or coercing" its employees with respect to their free choice of representatives "for the purpose of making and maintaining contracts" with petitioner

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relating to rules, rates of pay and working conditions or for the purpose of considering and deciding disputes between the Mechanical Department employees

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and petitioner. The decree further restrained the petitioner from organizing or fostering any union of its mechanical department employees for the purpose of interfering with the Federation as the accredited representative of such employees. 11 F.Supp. 621.

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On appeal, the Circuit Court of Appeals for the Fourth Circuit approved and adopted the findings of the District Court and affirmed its decree. 84 F.2d 641. This Court granted certiorari to review the cause as one of public importance. 299 U.S. 529.

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Petitioner here, as below, makes two main contentions: first, with respect to the relief granted, it maintains that § 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforceable obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity. Second, that § 2, Ninth, insofar as it attempts to regulate labor relations between petitioner and its "back shop" employees, is not a regulation of interstate commerce authorized by the commerce clause because, as it asserts, they are engaged solely in intrastate activities, and that, so far as it imposes on the carrier any obligation to negotiate with a labor union authorized to represent its employees, and restrains it from making agreements with any other labor organization, it is a denial of due process guaranteed by the Fifth Amendment. Other minor objections to the decree, so far as relevant to [300 U.S. 542] our decision, will be referred to later in the course of this opinion.

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The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision, Texas & N.O. R. Co. v. Brotherhood of Railway & S.S. Clerks, 281 U.S. 548, 558; Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3, 4, and address ourselves to the questions of law raised on the record.

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First. The Obligation Imposed by the Statute. By title III of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 469, Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. It sought

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to encourage settlement without strikes, first by conference between the parties, failing that, by reference to adjustment boards of the parties' own choosing and, if this is ineffective, by a full hearing before a national board.

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Pennsylvania R. Co. v. Railroad Labor Board, 261 U.S. 72, 79. The decisions of the Board were supported by no legal sanctions. The disputants were not

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in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion.

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Pennsylvania Federation v. Pennsylvania R. Co., 267 U.S. 203, 216.

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In 1926, Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their employees, made a fresh start toward the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act. Report, Senate Committee on Interstate Commerce, No. 222, 69th Cong., 1st Sess. Texas & N.O. R. Co. v. Brotherhood of Railway & S.S. Clerks, supra, 563. By the new measure, Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission [300 U.S. 543] to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes. Section 9. In certain circumstances, it prohibited any change in conditions, by the parties to an unadjusted labor dispute, for a period of thirty days, except by agreement. Section 10. It recognized their right to designate representatives for the purposes of the act "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." Section 2, Third. 44 Stat. 577. Under the last-mentioned provision, this Court held, in the Railway Clerks Case, supra, that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer, and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

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The prohibition against such interference was continued and made more explicit by the amendment of 1934. 2 Petitioner does not challenge that part of the [300 U.S. 544] decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the Railway Clerks Case, supra, and of the unambiguous language of § 2, Third, and Fourth, of the act, as amended.

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But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to "treat with" respondent Federation

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and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise.

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It points out that the requirement for reasonable effort to reach an agreement is couched in the very words of § 2, First, which were taken from § 301 of the Transportation Act, and which were held to be without legal sanction in that Act. Pennsylvania Federation v. Pennsylvania R. Co., supra, 215. It is argued that they cannot now be given greater force as reenacted in the Railway Labor Act of 1926, and continued in the 1934 amendment. But these words no longer stand alone and unaided by mandatory provision of the statute, as they did when first enacted. The amendment of the Railway Labor Act added new provisions in § 2, Ninth, which makes it the duty of the Mediation Board, when any dispute arises among the carrier's employees, "as to who are the representatives of such employees," to investigate the dispute and to certify, as was done in this case, the name of the organization authorized to represent the employees. It commands that,

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upon receipt of such certification, the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. [300 U.S. 545]

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It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later act, as amended, nor its provisions when read, as they must be, in the light of our decision in the Railway Clerks Case, supra, lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction. 3

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Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided. 4 On the other hand, a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management [300 U.S. 546] of the authority of representatives chosen by their employees. Report of House Committee on Interstate and Foreign Commerce, No. 1944, 73rd Cong., 2d Sess., pp. 1-2. 5 Section 2, Ninth, of the amended act, was specifically aimed at this practice. It provided a means for ascertaining who are the authorized representatives of the employees through intervention [300 U.S. 547] and certification by the Mediation Board, and commanded the carrier to treat with the representative so certified. That the command was limited in its application to the case of intervention and certification by the Mediation Board indicates not that its words are precatory, but only that Congress hit at the evil "where experience shows it to be most felt." Keokee Consol. Coke Co. v. Taylor, 234 U.S. 224, 227.

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Petitioner argues that the phrase "treat with" must be taken as the equivalent of "treat" in its intransitive sense, as meaning "regard" or "act towards," so that compliance with its mandate requires the employer to meet the authorized representative of the employees only if and when he shall elect to negotiate with them. This suggestion disregards the words of the section, and ignores the plain purpose made manifest throughout the numerous provisions of the act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee. The command to the employer to "treat with" the authorized representative of the employees adds nothing to the 1926 Act, unless it requires some affirmative act on the of the employer. Compare the Railway Clerks case, supra. As we cannot assume that its addition to the statute was purposeless, we must take its meaning to be that which the words suggest, which alone would add something to the statute as [300 U.S. 548] it was before amendment, and which alone would tend to effect the purpose of the legislation. The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.

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Petitioner's insistence that the statutes does not warrant so much of the decree as forbids it to enter into contracts of employment with its individual employees is based upon a misconstruction of the decree. Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. We think, as the government concedes in its brief, 6 that [300 U.S. 549] the injunction against petitioner's entering into any contract concerning rules, rates of pay, and working conditions, except with respondent, is designed only to prevent collective bargaining with any one purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context, it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees. The decree, thus construed, conforms, in both its affirmative and negative aspects, to the requirements of § 2.

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Propriety of Relief in Equity. Petitioner contends that, if the statute is interpreted as requiring the employer to negotiate with the representative of his employees, its obligation is not the appropriate subject of a decree in equity; that negotiation depends on desires and mental attitudes which are beyond judicial control; and that, since equity cannot compel the parties to agree, it will not [300 U.S. 550] compel them to take the preliminary steps which may result in agreement.

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There is no want of capacity in the court to direct complete performance of the entire obligation; both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent and the affirmative duty to treat with respondent. Full performance of both is commanded by the decree in terms which leave in no uncertainty the requisites of performance. In compelling compliance with either duty, it does far less than has been done in compelling the discharge of a contractual or statutory obligation calling for a construction or engineering enterprise, New Orleans, M. & T. Ry. Co. v. Mississippi, 112 U.S. 12; Wheeling Traction Co. v. Board of Commissioners, 248 F. 205; see Gas Securities Co. v. Antero & Lost Park Reservoir Co., 259 F. 423, 433; Board of Commissioners v. A. V. Wills & Sons, 236 F. 362, 380; Jones v. Parker, 163 Mass. 564, 40 N.E. 1044, or in granting specific performance of a contract for the joint use of a railroad bridge and terminals, Joy v. St. Louis, 138 U.S. 1; Union Pacific Ry. Co. v. Chicago, R.I. & P. Ry. Co., 163 U.S. 564; cf. Prospect Park & Coney Island R. Co. v. Coney Island & Brooklyn R. Co., 144 N.Y. 152, 39 N.E. 17, 26 L.R.A. 610. Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees.

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It is true that a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff. Equity will not decree the execution of a partnership agreement, since it cannot compel the parties to remain partners, see Hyer v. Richmond Traction Co., 168 U.S. 471, 482, or compel one to enter into performance of a contract of personal service which it cannot adequately control, Rutland Marble Co. [300 U.S. 551] v. Ripley, 10 Wall. 339, 358; Karrick v. Hannaman, 168 U.S. 328, 336; Tobey v. Bristol, Fed.Cas. No. 14,065; Weeks v. Pratt, 43 F.2d 53, 57; Railway Labor Act, § 2, Tenth. But the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests, rather, in the sound discretion of the court. Willard v. Tayloe, 8 Wall. 557, 565; Joy v. St. Louis, supra, 47; Morrison v. Work, 266 U.S. 481, 490; Curran v. Holyoke Water Power Co., 116 Mass. 90, 92. Whether the decree will prove so useless as to lead a court to refuse to give it is a matter of judgment to be exercised with reference to the special circumstances of each case, rather than to general rules, which, at most, are but guides to the exercise of discretion. It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, United States ex rel. Greathouse v. Dern, 289 U.S. 352, 359, to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority, Interstate Commerce Comm'n v. Humboldt S.S. Co., 224 U.S. 474; Louisville Cement Co. v. Interstate Commerce Comm'n, 246 U.S. 638; see Work v. United States ex rel. Rives, 267 U.S. 175, 184; Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218.

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In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace. Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules, or working conditions, are "not adjusted by the parties in conference," either party may invoke the mediation services of the [300 U.S. 552] Mediation Board, § 5, First, or the parties may agree to seek the benefits of the arbitration provision of § 7. With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort.

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More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Pennsylvania v. Williams, 294 U.S. 176, 185; Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264, 270-273; City of Harrisonville W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 338; Beasley v. Texas & Pac. Ry. Co., 191 U.S. 492, 497; Joy v. St. Louis, supra, 47; Texas & Pac. Ry. Co. v. Marshall, 136 U.S. 393, 405-406; Conger v. New York, West Shore & Buffalo R. Co., 120 N.Y. 29, 32, 33, 23 N.E. 983. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, Tobey v. Bristol, supra, enforce statutes commanding performance of arbitration agreements, Red Cross [300 U.S. 553] Line v. Atlantic Fruit Co., 264 U.S. 109, 119, 121; Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278.

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The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court.

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Second. Constitutionality of § 2 of the Railway Labor Act. (A) Validity Under the Commerce Clause. The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. Wilson v. New, 243 U.S. 332, 347-348. The Railway Labor Act, § 2, declares that its purposes, among others, are "to avoid any interruption to commerce or to the operation of any carrier engaged therein," and "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." The provisions of the act and its history, to which reference has been made, establish that such are its purposes, and that the latter is in aid of the former. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here. 7 The means chosen are appropriate [300 U.S. 554] to the end sought, and hence are within the congressional power. See Railway Clerks case, supra, 570; Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 369.

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But petitioner insists that the Act, as applied to its "back shop" employees, is not within the commerce power, since their duties have no direct relationship to interstate transportation. Of the 824 employees in the six shop crafts eligible to vote for a choice of representatives, 322 work in petitioner's "back shops" at Princeton, W. Va. They are there engaged in making classified repairs, which consist of heavy repairs [300 U.S. 555] on locomotives and cars withdrawn from service for that purpose for long periods (an average of 105 days for locomotives and 109 days for cars). The repair work is [300 U.S. 556] upon the equipment used by petitioner in its transportation service, 97 percent of which is interstate. At times, a continuous stream of engines and cars passes through the "back shops" for such repairs. When not engaged in repair work, the back shop employees perform "store order work," the manufacture of material such as rivets and repair parts, to be placed in railroad stores for use at the Princeton shop and other points on the line.

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 556

The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All, taken together, fall within the power of Congress over interstate commerce. Baltimore & Ohio R. Co. v. Interstate Commerce Comm'n, 221 U.S. 612, 619; cf. Pedersen v. Delaware, Lackawanna & Western R. Co., 229 U.S. 146, 151. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between than is not tenuous. The effect on commerce cannot be regarded as negligible. See United States v. Railway Employees' Department of American Federation of Labor, 290 F. 978, 981, holding participation of back shop employees in the nationwide railroad shopmen's strike of 1922 to constitute an interference with interstate commerce. As the regulation here in question is shown to be an appropriate means of avoiding that danger, it is within the power of Congress. [300 U.S. 557]

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 557

It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops or in those of another is a question of railroad management. It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act. It is the nature of the work done and its relation to interstate transportation which afford adequate basis for the exercise of the regulatory power of Congress.

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The Employers' Liability Cases, 207 U.S. 463, 498, which mentioned railroad repair shops as a subject beyond the power to regulate commerce, are not controlling here. Whatever else may be said of that pronouncement, it is obvious that the commerce power is as much dependent upon the type of regulation as its subject matter. It is enough for present purposes that experience has shown that the failure to settle, by peaceful means, the grievances of railroad employees with respect to rates of pay, rules or working conditions, is far more likely to hinder interstate commerce than the failure to compensate workers who have suffered injury in the course of their employment.

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 557

(B) Validity of § 2 of the Railway Labor Act Under the Fifth Amendment. The provisions of the Railway Labor Act applied in this case, as construed by the court below, and as we construe them, do not require petitioner to enter into any agreement with its employees, and they do not prohibit its entering into such contract of employment as it chooses, with its individual employees. They prohibit only such use of the company union as, despite the objections repeated here, was enjoined in the Railway Clerks case, supra, and they impose on petitioner only the affirmative duty of "treating with" the authorized representatives of its employees for the purpose of negotiating a labor dispute. [300 U.S. 558]

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 558

Even though Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process, Railroad Retirement Board v. Alton R. Co., supra, 347; Chicago, R.I. & P. Ry. Co. v. United States, 284 U.S. 80, 97; see Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589, it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause. The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees. Erie R. Co. v. Williams, 233 U.S. 685, 697; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Rail & River Coal Co. v. Yaple, 236 U.S. 338, 349; cf. Hawkins v. Bleakly, 243 U.S. 210, 214. And the Fifth Amendment, like the Fourteenth, see West Coast Hotel Co. v. Parrish, decided this day, ante, is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable. Such are the restraints of the Safety Appliance Act, Johnson v. Southern Pac. Co., 196 U.S. 1; of the act imposing a wage scale on rail carriers; Wilson v. New, supra; of the Railroad Employers' Liability Act, Second Employers' Liability Cases, 223 U.S. 1; of the act fixing maximum hours of service for railroad employees whose duties control or affect the movement of trains, Baltimore & Ohio R. Co. v. Interstate Commerce Commission, supra; of the act prohibiting the prepayment of seamen's wages, Patterson v. Bark Eudora, 190 U.S. 169.

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 558

Each of the limited duties imposed upon petitioner by the statute and the decree do not differ in their purpose and nature from those imposed under the earlier statute and enforced in the Railway Clerks case, supra. The quality of the action compelled, its reasonableness, and therefore the lawfulness of the compulsion, must be [300 U.S. 559] judged in the light of the conditions which have occasioned the exercise of governmental power. If the compulsory settlement of some differences, by arbitration, may be within the limits of due process, see Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, it seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process.

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 559

Adair v. United States, 208 U.S. 161, and Coppage v. Kansas, 236 U.S. 1, have no present application. The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement nor preclude it from entering into any contract with individual employees. They do not "interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." See the Railway Clerks case, supra, 571.

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 559

There remains to be considered petitioner's contentions that the certificate of the National Mediation Board is invalid, and that the injunction granted is prohibited by the provisions of the Norris-LaGuardia Act, of March 23, 1932, c. 90, 47 Stat. 70, 29 U.S.C. §§ 101-115.

1937, Virginian Railway Co. v. System Federation No. 40, Railway, 300 U.S. 559

Validity of the Certificate of the National Mediation Board. In each craft of petitioner's mechanical department, a majority of those voting cast ballots for the Federation. In the case of the blacksmiths, the Federation failed to receive a majority of the ballots of those eligible to vote, although a majority of the craft participated in the election. In the case of the carmen and coach cleaners, a majority of the employees eligible to vote did not participate in the election. There has been no appeal from the ruling of the District Court that the designation of the Federation as the representative of the carmen and coach cleaners was invalid. Petitioner assails [300 U.S. 560] the certification of the Federation as the representative of the blacksmiths because less than a majority of that craft, although a majority of those voting, voted for the Federation.

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Section 2, Fourth, of the Railway Labor Act provides:

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The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

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Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as a requiring only the consent of the specified majority of those participating in the election. Carroll County v. Smith, 111 U.S. 556; Douglass v. Pike County, 101 U.S. 677; Louisville & Nashville R. Co. v. County Court of Davidson County, 1 Sneed.(Tenn.) 637; Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 47 S.W. 773. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting." Cass County v. Johnston, 95 U.S. 360, 369, and see Carroll County v. Smith, supra.

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We see no reason for supposing that § 2, Fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer. The opinion of the trial court discloses that the [300 U.S. 561] Mediation Board scheduled an election to be determined by a majority of the eligible voters, but that the Federation's subsequent protest that the Railway was influencing the men not to vote caused the Board to hold a new election to be decided by the ballots of a majority of those voting.

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It is significant of the congressional intent that the language of § 2, Fourth, was taken from a rule announced by the United States Railroad Labor Board, acting under the labor provisions of the Transportation Act of 1920, Decision No. 119, International Association of Machinists v. Atchison, Topeka & Santa Fe Ry. 2 Dec.U.S.Railroad Labor Board, 87, 96, par. 15. Prior to the adoption of the Railway Labor Act, this rule was interpreted by the Board, in Decision No. 1971, Brotherhood of Railway & S.S. Clerks v. Southern Pacific Lines, 4 Dec.U.S.Railroad Labor Board 625, where it appeared that a majority of the craft participated in the election. The Board ruled, p. 639, that a majority of the votes cast was sufficient to designate a representative. A like interpretation of § 2, Fourth, was sustained in Association of Clerical Employees v. Brother of Railway & S.S. Clerks, 85 F.2d 152.

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The petitioner also challenges the validity of the certificate of the National Mediation Board in this case because it fails to state the number of eligible voters in each craft or class. The certificate states that respondent "has been duly designated and authorized to represent the mechanical department employees" of petitioner. It also shows on its face the total number of votes cast in each craft in favor of each candidate, but omits to state the total number of eligible voters in each craft. Petitioner insists that this is a fatal defect in the certificate, upon the basis of those cases which hold that where a finding of fact of an administrative officer or tribunal is prerequisite to the making of a rule or order, the finding must be explicitly [300 U.S. 562] set out. See Panama Refining Co. v. Ryan, 293 U.S. 388; United States v. Chicago, Milwaukee, St. Paul & P.R. Co., 294 U.S. 499; Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U.S. 193.

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The practice contended for is undoubtedly desirable, but it is not required by the present statute or by the authorities upon which petitioner relies. The National Mediation Board makes no order. The command which the decree of the court enforces is that of the statute, not of the Board. Its certificate that the Federation is the authorized representative of the employees is the ultimate finding of fact prerequisite to enforcement by the courts of the command of the statute. There is no contention that this finding is conclusive in the absence of a finding of the basic facts on which it rests—that is to say, the number of eligible voters, the number participating in the election, and the choice of the majority of those who participate. Whether the certification, if made as to those facts, is conclusive it is unnecessary now to determine. But we think it plain that, if the Board omits to certify any of them, the omitted fact is open to inquiry by the court asked to enforce the command of the statute. See Dismuke v. United States, 297 U.S. 167, 171-173. Such inquiry was made by the trial court which found the number of eligible voters, and thus established the correctness of the Board's ultimate conclusion. The certificate which conformed to the statutory requirement, was prima facie sufficient, and was not shown to be invalid for want of the requisite supporting facts.

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Validity of the Injunction under the Norris-LaGuardia Act. Petitioner assails the decree for its failure to conform to the requirements of § 9 of the Norris-LaGuardia Act, which provides:

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Every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act [300 U.S. 563] or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in…findings of fact made and filed by the court.

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The evident purpose of this section, as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, § 2, that the employee

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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.

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It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act. See the Railway Clerks case, supra, 571; cf. Callahan v. United States, 285 U.S. 515, 518; Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 22; International Alliance v. Rex Theatre Corp., 73 F.2d 92, 93.

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Affirmed.

Footnotes

STONE, J., lead opinion (Footnotes)

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1. The court found that, after the certification by the Mediation Board,

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the defendant, by and through its officers, agents and servants, undertook by means of the circulation of a petition or petitions addressed to the National Mediation Board to have the certification of the National Mediation Board aforesaid altered, changed, or revoked so as to deprive its Mechanical Department employes of the right to representation by said System Federation No. 40, Railway Employes Department of the American Federation of Labor, so designated as aforesaid, and thereafter did cause to be organized the Independent Shop Crafts Association by individual Mechanical Department employes by circulating or causing to be circulated applications for membership in said Independent Shop Crafts Association notwithstanding the certification as aforesaid by the National Mediation Board of said System Federation No. 40, Railway Employes Department of the American Federation of Labor, as the authorized representative of its Mechanical Department employes,…

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2. Section 2 of the act, as amended in 1934, declares that its purposes, among others, are

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(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization

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and

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(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act (chapter).

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The section was also amended to provide that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives," § 2, Third, and that

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it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization…or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization,

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§ 2, Fourth.

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3. The 1934 amendment imposed various other obligations upon the carrier, to which criminal penalties were attached, e.g., prohibitions against helping unions, by contributions of funds, or assistance in the collection of dues, § 2, Fourth; against requiring employees to promise to join or not to join a labor union, § 2, Fifth; against changing rates of pay, etc., without specifying a conference upon thirty days' notice, § 2, Seventh; and see the requirement that the carrier post notices that all disputes will be determined in accordance with the act, § 2, Eighth.

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4. In the first two years after the enactment of the Railway Labor Act of 1926, 363 cases concerning rates of pay, rules, or working conditions were submitted to the United States Board of Mediation, and about 25 percent of these were withdrawn by the parties. Yet, during the same period, more than 600 direct and voluntary settlements were negotiated. See United States Board of Mediation, First Annual Report, For the Fiscal Year Ended June 30, 1927, pp. 10, 11; Second Annual Report, For the Fiscal Year Ended June 30, 1928, pp. 11, 58, 59. Compare National Mediation Board, Second Annual Report, For the Fiscal Year Ended June 30, 1936, at p. 1:

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For every dispute submitted to…these Boards, there were many others considered and settled in conferences between representatives of carriers and of the employees as required by § 2, second, of the Act.

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See also testimony of William M. Leiserson, Chairman of the National Mediation Board until February 1, 1937, at Hearing by National Labor Relations Board in the case of Jones & Laughlin Steel Corporation, 301 U.S. 1:

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If we have a threat of a strike now [on the railroads] it might be on a big fundamental question, like wages and hours, and we usually find we can settle those by arbitration or otherwise…. But if the issues involved were discrimination or discharge of men because they had joined the organization, or the question would be the right of the organization to represent them, we could not have settled those strikes.

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See Governmental Protection of Labor's Right to Organize, National Labor Relations Board, Division of Economic Research, Bull. No. 1, August, 1936, pp. 17-18.

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5. See also statement by Representative Crosser, in charge of the bill on the floor, in Hearings, House Committee on Rules, 73d Cong., 2d Sess., on H.R. 9861, pp. 10-11, 13:

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The purpose of the bill is…[inter alia] to outlaw the attempt that has been made in numerous instances by employers who control alleged labor unions, and thereby to use a slang phrase, to "gum up the works"…. We have had 8 years of operation of this act, and we have prevented any strikes. But strikes have been threatened because of the defects which have been found in this bill.

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Under the 1926 Act, disputes over the designation of employee representatives could be dealt with by the old United States Mediation Board only by agreement of the parties. The carriers agreed to an election conducted by the Board but nine times in six years, see testimony of William M. Leiserson, Chairman of National Mediation Board until February 1, 1937, at Hearing by National Labor Relations Board in the case of Jones & Laughlin Steel Corp., 301 U.S. 1; Governmental Protection of Labor's Right to Organize, National Labor Relations Board, Division of Economic Research, Bull. No. 1, August, 1936, p. 50. The 1934 amendment was followed by a large increase in the number of representation disputes submitted to the National Mediation Board. See infra, Note 7.

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6. (Note 35a.)

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The Government interprets the negative obligations imposed by the statute and decree as having the following effect:

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When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i.e., a contract which sets rates of pay, rules, or working conditions), whether the contract covers the class as a whole or a part thereof. Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort, the individual does not deal in a representative capacity with the carrier, and the hiring does not set general rates of pay, rules, or working conditions. Of course, as a matter of voluntary action, not as a result of the statute or the decree, the carrier may contract with the duly designated representative to hire individuals only on the terms of a collective understanding between the carrier and the representative; but any such agreement would be entirely voluntary on the carrier's part, and would in no sense be compelled.

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If the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions.

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7. There was evidence available to Congress that the labor policy embodied in the Railway Labor Act had been successful in curbing strikes. In the eight years subsequent to the passage of the 1926 Act, there were only two small railroad strikes. Since the 1934 amendment, there has been but one. See National Mediation Board, First Annual Report, For the Fiscal Year Ended June 30, 1935, p. 8; Second Annual Report, For the Fiscal Year Ended June 30, 1936, p. 1.

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In the water transportation and motor transportation fields, there were frequent strikes. A table submitted by the United States (see Respondent's Brief, Associated Press v. National Labor Relations Board, No. 365, October Term 1936, p. 57), and derived from United States Department of Labor, Bureau of Labor Statistics, Bulletins No. R. 339 (1936), p. 4; No. R. 389 (1936), p. 4; Monthly Labor Review (May-September, 1936), Monthly "Analysis of Strikes," shows the following:

Man-days of idleness due to labor strikes

 1933 1934 1935 (1936 Jan.-May)

Water Transportation 32,752 1,068,867 749,534 119,820

Motor Transportation 155,565 859,657 202,393 46,054

Railroads 0 0 56 0

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Yet there were many disputes between rail carriers and their employees. Apart from the more trivial grievances and differences of opinion in the interpretation of agreements, 876 disputes, principally over changes in rates of pay, rules or working conditions, were referred to the United States Board of Mediation between 1926 and 1934. The following table, derived from its Eighth Annual Report, For the Fiscal Year Ended June 30, 1934, pp. 4-5, indicates the success of the mediation and arbitration machinery set up by the Railway Labor Act.

Fiscal Year Ending June 30

Manner of Disposition 1927 1928 1929 1930 1931 1932 1933 1934 Total

Mediation Agreements 57 84 46 25 24 45 23 17 321

Withdrawn by Parties 24 45 43 20 21 69 20 26 268

Arbitration Agreements 27 14 10 4 2 4 3 9 73

Closed Account:

Refusal to Arbitrate 0 0 9 3 1 47 30 59 149

Retired or closed,

other causes 3 2 21 10 5 5 10 9 65

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But statistics show that many more labor disputes were settled by direct negotiation, supra, footnote 4, and Congress might reasonably have feared that the action of certain railroads in negotiating only with unions dominated by them would prevent such settlements and lead to strikes. See supra, footnote 5. That there were many disputes, apparent and latent, for which the 1926 Act had not provided adequate machinery is shown by the large number of representation disputes (more than 230) referred to the National Mediation Board in the first two years of its existence, see First Annual Report, For the Fiscal Year Ended June 30, 1935, p. 9; Second Annual Report, For the Fiscal Year Ended June 30, 1936, pp. 5, 7.

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It is the belief of the National Mediation Board that peace in the railroad industry is largely due to the 3,485 collective agreements covering rates of pay, rules, and working conditions, which were filed by June 30, 1936 (see National Mediation Board, Second Annual Report, For the Fiscal Year Ended June 30, 1936, p. 26). In its First Annual Report, For the Fiscal Year Ended June 30, 1935, it concluded (p. 36):

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The absence of strikes in the railroad industry, particularly during the last two years when widespread strikes, the usual accompaniment of business recovery, prevailed throughout the country, is to be explained primarily not by the mediation machinery of the Railway Labor Act, but by the existence of these collective labor contracts. For, while they are in existence, these contracts provide orderly, legal processes of settling all disputes as a substitute for strikes and industrial warfare.

Herndon v. Lowry, 1937

Title: Herndon v. Lowry

Author: U.S. Supreme Court

Date: April 26, 1937

Source: 301 U.S. 242

This case was argued February 8, 1937, and was decided April 26, 1937.

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APPEALS FROM THE SUPREME COURT OF GEORGIA

Syllabus

1937, Herndon v. Lowry, 301 U.S. 242

1. A federal constitutional question going to the validity of a conviction of crime under a state statute was not decided on an appeal to the state supreme court because not properly raised (see Herndon v. Georgia, 295 U.S. 441). Afterwards, that court considered the question and decided it against the convict, in a habeas corpus proceeding. Held, that the scope of habeas corpus, in the circumstances, was a local question, and that the ruling on the federal question was open to review by this Court. P. 247.

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2. A state statute punishing as a crime the acts of soliciting members for a political party and conducting meetings of a local unit of that party, where one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence in the indefinite future against organized government, unwarrantably invades the liberty of free speech and so violates the Fourteenth Amendment. P. 260.

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3. The power of a State to abridge freedom of speech and of assembly is the exception, rather than the rule; and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the Constitution. P. 258.

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4. The affirmance by the Supreme Court of a State of a conviction under a statute as having support in the evidence necessarily construes the statute as authorizing punishment for the act so proven. P. 255.

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5. Section 56 of the Penal Code of Georgia, as construed by the Supreme Court of the State, punishes, as an attempt to incite to insurrection, any attempt to induce others to join in any combined resistance to the lawful authority of the State. As an element, the accused must have contemplated resistance by force, but in this respect he may be found guilty if he intended that an insurrection

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should happen during any time within which he might reasonably expect his influence to continue to be directly [301 U.S. 243] operative in causing such action by those whom he sought to induce.

1937, Herndon v. Lowry, 301 U.S. 243

Held, that the statute, as construed and applied in this case, is repugnant to the Fourteenth Amendment in that it furnishes no sufficiently ascertainable standard of guilt and interferes unduly with freedom of speech and of assembly. Pp. 253, 261.

1937, Herndon v. Lowry, 301 U.S. 243

12 Ga. 582, 186 S.E. 429, reversed.

1937, Herndon v. Lowry, 301 U.S. 243

Appeals from judgments, rendered on cross-appeals, in a habeas corpus proceeding. The court below sustained the trial court in deciding that the criminal statute involved did not infringe liberty of speech and assembly, but differed with its holding that the statute was too vague and indefinite, and reversed its decision discharging the appellant here.

ROBERTS, J., lead opinion

1937, Herndon v. Lowry, 301 U.S. 243

MR. JUSTICE ROBERTS delivered the opinion of the Court.

1937, Herndon v. Lowry, 301 U.S. 243

The appellant claims his conviction in a state court deprived him of his liberty contrary to the guarantees of the Fourteenth Amendment. He assigns as error the action of the Supreme Court of Georgia in overruling his claim and refusing him a discharge upon habeas corpus. The petition for the writ, presented to the superior court of Fulton county, asserted the appellant was unlawfully detained by the appellee as sheriff under the supposed authority of a judgment pronouncing him guilty of attempting to incite insurrection, as defined in Section 56 of the Penal Code (Code 1933, § 26-902), and sentencing him to imprisonment [301 U.S. 244] for not less than eighteen nor more than twenty years. Attached were copies of the judgment and the indictment and a statement of the evidence upon which the verdict and judgment were founded. The petition alleged the judgment and sentence were void and appellant's detention illegal because the statute under which he was convicted denies and illegally restrains his freedom of speech and of assembly and is too vague and indefinite to provide a sufficiently ascertainable standard of guilt, and further alleged that there had been no adjudication by any court of the constitutional validity of the statute as applied to appellant's conduct. A writ issued. The appellee answered, demurred specially to, and moved to strike, so much of the petition as incorporated the evidence taken at the trial. At the hearing, the statement of the evidence was identified, and was conceded by the appellee to be full and accurate. The court denied the motion to strike, overruled the special demurrer and an objection to the admission of the trial record, decided that the statute, as construed and applied in the trial of the appellant did not infringe his liberty of speech and of assembly, but ran afoul of the Fourteenth Amendment because too vague and indefinite to provide a sufficiently ascertainable standard of guilt, and ordered the prisoner's discharge from custody. The appellee took the case to the Supreme Court of Georgia, assigning as error the ruling upon his demurrer, motion, and objection, and the decision against the validity of the statute. The appellant, in accordance with the state practice, also appealed, assigning as error the decision with respect to his right of free speech and of assembly. The two appeals were separately docketed, but considered in a single opinion which reversed the judgment on the appellee's appeal and affirmed on that of the appellant, 1 concluding:

1937, Herndon v. Lowry, 301 U.S. 244

Under [301 U.S. 245] the pleadings and the evidence, which embraced the record on the trial that resulted in the conviction, the court erred, in the habeas corpus proceeding, in refusing to remand the prisoner to the custody of the officers.

1937, Herndon v. Lowry, 301 U.S. 245

The federal questions presented, and the manner in which they arise, appear from the record of appellant's trial and conviction embodied in the petition, and from the opinions of the state Supreme Court in the criminal proceeding.

1937, Herndon v. Lowry, 301 U.S. 245

At the July term, 1932, of the Superior Court of Fulton County, an indictment was returned charging against the appellant an attempt to induce others to join in combined resistance to the lawful authority of the state with intent to deny, to defeat, and to overthrow such authority by open force, violent means, and unlawful acts; alleging that insurrection was intended to be manifested and accomplished by unlawful and violent acts. The indictment specified that the attempt was made by calling and attending public assemblies and by making speeches for the purpose of organizing and establishing groups and combinations of white and colored persons under the name of the Communist Party of Atlanta for the purpose of uniting, combining, and conspiring to incite riots and to embarrass and impede the orderly processes of the courts and offering combined resistance to, and, by force and violence, overthrowing and defeating the authority of the state; that, by speech and persuasion, the appellant solicited and attempted to solicit persons to join, confederate with, and become members of the Communist Party and the Young Communist League and introduced into the state and circulated, aided, and assisted in introducing and circulating, booklets, papers, and other writings with the same intent and purpose. The charge was founded on § 56 of the Penal Code, one of four related sections. Section 55 defines insurrection, § 56 defines an attempt to incite insurrection, § 57 prescribes the death [301 U.S. 246] penalty for conviction of the offenses described in the two preceding sections unless the jury shall recommend mercy, and § 58 penalizes, by imprisonment, the introduction and circulation of printed matter for the purpose of inciting insurrection, riot, conspiracy, etc. The sections are copied in the margin. 2

1937, Herndon v. Lowry, 301 U.S. 246

The appellant was brought to trial and convicted. He appealed on the ground that, under the statute as construed by the trial court in its instructions to the jury, there was no evidence to sustain a verdict of guilty. The Supreme Court affirmed the judgment upon a broader and different construction of the act. 3 The appellant moved for a rehearing, contending, inter alia, that, as so construed, the statute violated the Fourteenth Amendment. The court refused to pass upon the constitutional questions thus raised, elaborated and explained its construction of the statute in its original opinion, and denied [301 U.S. 247] a rehearing. 4 The appellant perfected an appeal to this court claiming that he had timely raised the federal questions and we, therefore, had jurisdiction to decide them. We held we were without jurisdiction. 5 Upon his commitment to serve his sentence he sought the writ of habeas corpus.

1937, Herndon v. Lowry, 301 U.S. 247

In the present proceeding, the Superior Court and Supreme Court of Georgia have considered and disposed of the contentions based upon the Federal Constitution. The scope of a habeas corpus proceeding in the circumstances disclosed is a state, and not a federal, question, and, since the state courts treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction, and all such issues are open here. We must, then, inquire whether the statute, as applied in the trial, denied appellant rights safeguarded by the Fourteenth Amendment.

1937, Herndon v. Lowry, 301 U.S. 247

The evidence on which the judgment rests consists of appellant's admissions and certain documents found in his possession. The appellant told the state's officers that, some time prior to his arrest, he joined the Communist Party in Kentucky and later came to Atlanta as a paid organizer for the party, his duties being to call meetings, to educate and disseminate information respecting the party, to distribute literature, to secure members, and to work up an organization of the party in Atlanta; and that he had held or attended three meetings called by him. He made no further admission as to what he did as an organizer, or what he said or did at the meetings. When arrested, he carried a box containing documents. After he was arrested, he conducted the officers to his room, where additional documents and bundles of newspapers and periodicals were found which [301 U.S. 248] he stated were sent him from the headquarters of the Communist Party in New York. He gave the names of persons who were members of the organization in Atlanta, and stated he had only five or six actual members at the time of his apprehension. The stubs of membership books found in the box indicated he had enrolled more members than he stated. There was no evidence that he had distributed any of the material carried on his person and found in his room, or had taken any of it to meetings, save two circulars or appeals respecting county relief which are confessedly innocuous.

1937, Herndon v. Lowry, 301 U.S. 248

The newspapers, pamphlets, periodicals, and other documents found in his room were, so he stated, intended for distribution at his meetings. These the appellee concedes were not introduced in evidence. Certain documents in his possession when he was arrested were placed in evidence. They fall into five classes: first, receipt books showing receipts of small sums of money, pads containing certificates of contributions to the Communist Party's Presidential Election Campaign Fund, receipts for rent of a post office box, and Communist Party membership books; secondly, printed matter consisting of magazines, pamphlets, and copies of the "Daily Worker," styled the "Central Organ of the Communist Party," and the "Southern Worker," also, apparently, an official newspaper of the party; thirdly, two books, one "Life and Struggles of Negro Toilers," by George Padmore, and the other "Communism and Christianism Analyzed and Contrasted from the Marxian and Darwinian Points of View," by Rt. Rev. William Montgomery Brown, D.D.; fourthly, transcripts of minutes of meetings apparently held in Atlanta; fifthly, two circulars, one of which was prepared by the appellant and both of which had been circulated by him in Fulton county. All of these may be dismissed as irrelevant except those falling within the first and second [301 U.S. 249] groups. No inference can be drawn from the possession of the books mentioned, either that they embodied the doctrines of the Communist Party or that they represented views advocated by the appellant. The minutes of meetings contain nothing indicating the purposes of the organization or any intent to overthrow organized government; on the contrary, they indicate merely discussion of relief for the unemployed. The two circulars, admittedly distributed by the appellant, had nothing to do with the Communist Party, its aims or purposes, and were not appeals to join the party, but were concerned with unemployment relief in the county and included appeals to the white and negro unemployed to organize and represent the need for further county aid. They were characterized by the Supreme Court of Georgia as "more or less harmless."

1937, Herndon v. Lowry, 301 U.S. 249

The documents of the first class disclose the activity of the appellant as an organizer, but, in this respect, add nothing to his admissions.

1937, Herndon v. Lowry, 301 U.S. 249

The matter appearing upon the membership blanks is innocent upon its face, however foolish and pernicious the aims it suggests. Under the heading "What is the Communist Party?" this appears:

1937, Herndon v. Lowry, 301 U.S. 249

The Party is the vanguard of the working class, and consists of the best, most class-conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action.

1937, Herndon v. Lowry, 301 U.S. 249

We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest contacts with our Party. [301 U.S. 250]

1937, Herndon v. Lowry, 301 U.S. 250

This vague declaration falls short of an attempt to bring about insurrection either immediately or within a reasonable time, but amounts merely to a statement of ultimate ideals. The blanks, however, indicate more specific aims for which members of the Communist Party are to vote. They are to vote Communist for:

1937, Herndon v. Lowry, 301 U.S. 250

1. Unemployment and Social Insurance at the expense of the State and employers.

1937, Herndon v. Lowry, 301 U.S. 250

2. Against Hoover's wage-cutting policy.

1937, Herndon v. Lowry, 301 U.S. 250

3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes and from forced collection of rents or debts.

1937, Herndon v. Lowry, 301 U.S. 250

4. Equal rights for the Negroes and self-determination for the Black Belt.

1937, Herndon v. Lowry, 301 U.S. 250

5. Against capitalistic terror: against all forms of suppression of the political rights of the workers.

1937, Herndon v. Lowry, 301 U.S. 250

6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union.

1937, Herndon v. Lowry, 301 U.S. 250

None of these aims is criminal upon its face. As to one, the fourth, the claim is that criminality may be found because of extrinsic facts. Those facts consist of possession by appellant of booklets and other literature of the second class illustrating the party doctrines. The state contends these show that the purposes of the Communist Party were forcible subversion of the lawful authority of Georgia. They contain, inter alia, statements to the effect that the party bases itself upon the revolutionary theory of Marxism, opposes "bosses' wars," approves of the Soviet Union, and desires the "smashing" of the National Guard, the C.M.T.C., and the R.O.T.C. But the state especially relies upon a booklet entitled "The Communist Position on the Negro Question," on the cover of which appears a map of the United States having a dark belt across certain Southern states and the [301 U.S. 251] phrase "Self-Determination for the Black Belt." The booklet affirms that the source of the Communist Slogan "Right of Self-Determination of the Negroes in the Black Belt" is a resolution of the Communist International on the Negro question in the United States adopted in 1930, which states that the Communist Party in the United States has been actively attempting to win increasing sympathy among the negro population, that certain things have been advocated for the benefit of the Negroes in the Northern states, but that, in the Southern portion of the United States, the Communist slogan must be "The Right of Self-Determination of the Negroes in the Black Belt." The resolution defines the meaning of the slogan as:

1937, Herndon v. Lowry, 301 U.S. 251

(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers…Without this revolutionary measure, without the agrarian revolution, the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement.

1937, Herndon v. Lowry, 301 U.S. 251

(b) Establishment of the State Unity of the Black Belt…. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South, where the majority of the settled population consists of negroes….

1937, Herndon v. Lowry, 301 U.S. 251

(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States…. First of all, true right of self-determination means that the negro majority and not the white minority in the entire territory of the administratively [301 U.S. 252] united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time, all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the overthrow of this class rule in the Black Belt is unconditionally necessary in the struggle for the negroes' right to self-determination. This, however, means at the same time the overthrow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the negro population of the Black Belt wins its freedom from American imperialism even to the point of deciding itself the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt.

1937, Herndon v. Lowry, 301 U.S. 252

Further statements appearing in the pamphlet are:

1937, Herndon v. Lowry, 301 U.S. 252

Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand "Right to Self-Determination", but should organize mass actions, such as demonstration, strikes, tax boycott movements,

1937, Herndon v. Lowry, 301 U.S. 252

etc.

1937, Herndon v. Lowry, 301 U.S. 252

One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful revolutionary struggle for power against the American bourgeoisie, through wresting the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is a real slogan of National Rebellion which, to be considered as such, need [301 U.S. 253] not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present.

1937, Herndon v. Lowry, 301 U.S. 253

There is more of the same purport, particularly references to the "revolutionary trade unions in the South," "revolutionary struggle against the ruling white bourgeoisie," and "revolutionary program of the Communist Party."

1937, Herndon v. Lowry, 301 U.S. 253

There is no evidence the appellant distributed any writings or printed matter found in the box he carried when arrested, or any other advocating forcible subversion of governmental authority. There is no evidence the appellant advocated, by speech or written word, at meetings or elsewhere, any doctrine or action implying such forcible subversion. There is evidence tending to prove that the appellant held meetings for the purpose of recruiting members of the Communist Party and solicited contributions for the support of that party and there is proof of the doctrines which that party espouses. Appellant's intent to incite insurrection, if it is to be found, must rest upon his procuring members for the Communist Party and his possession of that party's literature when he was arrested.

1937, Herndon v. Lowry, 301 U.S. 253

Section 55 of the Georgia Penal Code defines insurrection as

1937, Herndon v. Lowry, 301 U.S. 253

combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence. 6

1937, Herndon v. Lowry, 301 U.S. 253

The appellant was not indicted under this section. Section 58 denounces the introduction, printing, or circulation, or assisting to print or circulate any document "for the purpose of inciting insurrection." The appellant was not indicted under this section.

1937, Herndon v. Lowry, 301 U.S. 253

Section 56, under which the indictment is laid, makes no reference to force or violence except by the phrase [301 U.S. 254] "combined resistance to the lawful authority of the State." The Supreme Court evidently importing from the similar phraseology in § 55 the additional element contained in that section, namely, "manifested or intended to be manifested by acts of violence," has decided that intended resort to force is an essential element of the offense defined by § 56.

1937, Herndon v. Lowry, 301 U.S. 254

To ascertain how the act is held to apply to the appellant's conduct, we turn to the rulings of the state courts in his case. The trial court instructed the jury:

1937, Herndon v. Lowry, 301 U.S. 254

In order to convict the defendant,…it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated.

1937, Herndon v. Lowry, 301 U.S. 254

The jury rendered a verdict of guilty. In the Supreme Court, the appellant urged that the evidence was wholly insufficient to sustain the verdict under the law as thus construed. That court sustained the conviction by construing the statute thus:

1937, Herndon v. Lowry, 301 U.S. 254

Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged…. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. 7

1937, Herndon v. Lowry, 301 U.S. 254

Upon application for rehearing the court further elaborated its views as to the meaning of the statute:

1937, Herndon v. Lowry, 301 U.S. 254

Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender [301 U.S. 255] should have intended that an insurrection should follow instantly or at any given time, but, as to this element, it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. 8

1937, Herndon v. Lowry, 301 U.S. 255

The affirmance of conviction upon the trial record necessarily gives § 56 the construction that one who seeks members for or attempts to organize a local unit of a party which has the purposes and objects disclosed by the documents in evidence may be found guilty of an attempt to incite insurrection.

1937, Herndon v. Lowry, 301 U.S. 255

The questions are whether this construction and application of the statute deprives the accused of the right of freedom of speech and of assembly guaranteed by the Fourteenth Amendment, and whether the statute, so construed and applied, furnishes a reasonably definite and ascertainable standard of guilt.

1937, Herndon v. Lowry, 301 U.S. 255

The appellant, while admitting that the people may protect themselves against abuses of the freedom of speech safeguarded by the Fourteenth Amendment by prohibiting incitement to violence and crime, insists that legislative regulation may not go beyond measures forefending against "clear and present danger" of the use of force against the state. For this position, he relies upon our decisions under the Federal Espionage Acts 9 and cognate state legislation. These made it criminal willfully to cause or to attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States or willfully to obstruct or attempt to obstruct the recruiting or enlistment service of the United States or to conspire [301 U.S. 256] for these purposes. We sustained the power of the government or a state to protect the war operations of the United States by punishing intentional interference with them. We recognized, however, that words may be spoken or written for various purposes, and that willful and intentional interference with the described operations of the government might be inferred from the time, place, and circumstances of the act.

1937, Herndon v. Lowry, 301 U.S. 256

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. 10

1937, Herndon v. Lowry, 301 U.S. 256

The legislation under review differs radically from the Espionage Acts in that it does not deal with a willful attempt to obstruct a described and defined activity of the government.

1937, Herndon v. Lowry, 301 U.S. 256

The state, on the other hand, insists that our decisions uphold state statute making criminal utterances which have a "dangerous tendency" towards the subversion of government. It relies particularly upon Gitlow v. New York, 268 U.S. 652. There, however, we dealt with a statute which, quite unlike § 56 of the Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described. We said:

1937, Herndon v. Lowry, 301 U.S. 256

And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means….

1937, Herndon v. Lowry, 301 U.S. 256

P. 668. [301 U.S. 257]

1937, Herndon v. Lowry, 301 U.S. 257

By enacting the present statute, the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. Mugler v. Kansas, 123 U.S. 623, 661. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare," and that is police

1937, Herndon v. Lowry, 301 U.S. 257

statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.

1937, Herndon v. Lowry, 301 U.S. 257

P. 668. And it was in connection with the statute there involved that the court quoted language relied upon below and in argument here from People v. Lloyd, 304 Ill. 23, 136 N.E. 505, to the effect that a state is not compelled to delay adoption of such preventive measures until the apprehended danger becomes certain. Out of excess of caution, the distinction was again clearly drawn between acts of the order of the Espionage Act and the New York act under review.

1937, Herndon v. Lowry, 301 U.S. 257

…when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

1937, Herndon v. Lowry, 301 U.S. 257

It is clear that the question in such cases is entirely different from that involved in those cases where the [301 U.S. 258] statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.

1937, Herndon v. Lowry, 301 U.S. 258

Pp. 670-671.

1937, Herndon v. Lowry, 301 U.S. 258

It is evident that the decision sustaining the New York statute furnishes no warrant for the appellee's contention that, under a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor, the standard of guilt may be made the "dangerous tendency" of his words.

1937, Herndon v. Lowry, 301 U.S. 258

The power of a state to abridge freedom of speech and of assembly is the exception, rather than the rule, and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution. If, therefore, a state statute penalize innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom [301 U.S. 259] of speech and arbitrarily denies that freedom. 11 And, where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained. Upon this view, we held bad a statute of California providing that

1937, Herndon v. Lowry, 301 U.S. 259

any person who displays a red flag,…in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government…is guilty of a felony. 12

1937, Herndon v. Lowry, 301 U.S. 259

After pointing out that peaceful agitation for a change of our form of government is within the guaranteed liberty of speech, we said of the act in question:

1937, Herndon v. Lowry, 301 U.S. 259

A statute which, upon its face and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

1937, Herndon v. Lowry, 301 U.S. 259

P. 369.

1937, Herndon v. Lowry, 301 U.S. 259

1. The appellant had a constitutional right to address meetings and organize parties unless, in so doing, he violated some prohibition of a valid statute. T he only prohibition he is said to have violated is that of § 56 forbidding incitement or attempted incitement to insurrection by violence. If the evidence fails to show that he did so incite, then, as applied to him, the statute unreasonably limits freedom of speech and freedom of assembly and violates the Fourteenth Amendment. We are of opinion that the requisite proof is lacking. From what has been said above with respect to the evidence offered at [301 U.S. 260] the trial, it is apparent that the documents found upon the appellant's person were certainly, as to some of the aims stated therein, innocent and consistent with peaceful action for a change in the laws or the Constitution. The proof wholly fails to show that the appellant had read these documents; that he had distributed any of them; that he believed and advocated any or all of the principles and aims set forth in them, or that those he had procured to become members of the party knew or approved of any of these documents.

1937, Herndon v. Lowry, 301 U.S. 260

Thus, the crucial question is not the formal interpretation of the statute by the Supreme Court of Georgia, but the application given it. In its application, the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to any one by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government. It is to be borne in mind that the Legislature of Georgia has not made membership in the Communist Party unlawful by reason of its supposed dangerous tendency even in the remote future. The question is not whether Georgia might, in analogy to what other states have done, so declare. 13 The appellant induced others to become members of the Communist Party. Did he thus incite to insurrection by reason of the fact that they agreed to abide by the tenets of the party, some of them lawful, others, as may be assumed, unlawful, in the absence of proof that he brought the unlawful aims to their notice, that he approved them, or that the fantastic program [301 U.S. 261] they envisaged was conceived of by any one as more than an ultimate ideal? Doubtless circumstantial evidence might affect the answer to the question if appellant had been shown to have said that the Black Belt should be organized at once as a separate state and that that objective was one of his principal aims. But here, circumstantial evidence is all to the opposite effect. The only objectives appellant is proved to have urged are those having to do with unemployment and emergency relief which are void of criminality. His membership in the Communist Party and his solicitation of a few members wholly fails to establish an attempt to incite others to insurrection. Indeed, so far as appears, he had but a single copy of the booklet the state claims to be objectionable; that copy he retained. The same may be said with respect to the other books and pamphlets, some of them of more innocent purport. In these circumstances, to make membership in the party and solicitation of members for that party a criminal offense, punishable by death in the discretion of a jury, is an unwarranted invasion of the right of freedom of speech.

1937, Herndon v. Lowry, 301 U.S. 261

2. The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. The act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense.

1937, Herndon v. Lowry, 301 U.S. 261

The test of guilt is thus formulated by the Supreme Court of the state. Forcible action must have been contemplated, but it would be sufficient to sustain a conviction [301 U.S. 262] if the accused intended that an insurrection

1937, Herndon v. Lowry, 301 U.S. 262

should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce.

1937, Herndon v. Lowry, 301 U.S. 262

If the jury conclude that the defendant should have contemplated that any act or utterance of his in opposition to the established order or advocating a change in that order, might, in the distant future, eventuate in a combination to offer forcible resistance to the state, or, as the state says, if the jury believe he should have known that his words would have "a dangerous tendency," then he may be convicted. To be guilty under the law, as construed, a defendant need not advocate resort to force. He need not teach any particular doctrine to come within its purview. Indeed, he need not be active in the formation of a combination or group if he agitate for a change in the frame of government, however peaceful his own intent. If, by the exercise of prophesy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly of execution. Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that, if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government, he may be convicted of the offense of inciting insurrection. Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to conviction. It would be sufficient if the jury thought he reasonably might foretell that those he persuaded to join the party might, at some time in the indefinite future, resort to forcible resistance of [301 U.S. 263] government. The question thus proposed to a jury involves pure speculation as to future trends of thought and action. Within what time might one reasonably expect that an attempted organization of the Communist Party in the United States would result in violent action by that party? If a jury returned a special verdict saying twenty years, or even fifty years, the verdict could not be shown to be wrong. The law, as thus construed, licenses the jury to create its own standard in each case. In this aspect, what was said in United States v. Cohen Grocery Co., 255 U.S. 81, is particularly apposite:

1937, Herndon v. Lowry, 301 U.S. 263

Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

1937, Herndon v. Lowry, 301 U.S. 263

The decisions relied on by the state held the Sherman Law furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test. 14

1937, Herndon v. Lowry, 301 U.S. 263

The statute, as construed and applied, amounts merely to a dragnet which may enmesh any one who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some [301 U.S. 264] effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.

1937, Herndon v. Lowry, 301 U.S. 264

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

1937, Herndon v. Lowry, 301 U.S. 264

Reversed.

VANDEVANTER, J., dissenting

1937, Herndon v. Lowry, 301 U.S. 264

MR. JUSTICE VAN DEVANTER dissenting.

1937, Herndon v. Lowry, 301 U.S. 264

I am of opinion that the Georgia statute, as construed and applied by the Supreme Court of the state of Herndon's case, prescribes a reasonably definite and ascertainable standard by which to determine the guilt or innocence of the accused, and does not encroach on his right of freedom of speech or of assembly.

1937, Herndon v. Lowry, 301 U.S. 264

It plainly appears, I think, that the offense defined in the statute, and of which Herndon was convicted, was not that of advocating a change in the state government by lawful means, such as an orderly exertion of the elective franchise or of the power to amend the State Constitution, but was that of attempting to induce and incite others to join in combined forcible resistance to the lawful authority of the state.

1937, Herndon v. Lowry, 301 U.S. 264

Section 55, 56, and 57 of the Penal Code of Georgia 1 deal with insurrection, attempts to incite insurrection, and the punishment therefor, and are so closely related that all evidently have a bearing on the scope and meaning of any one of them. Section 55 denounces insurrection and defines it as

1937, Herndon v. Lowry, 301 U.S. 264

any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

1937, Herndon v. Lowry, 301 U.S. 264

Section 56 denounces [301 U.S. 265] an attempt of incite insurrection and defines it as "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." Section 57 prescribes the punishment for each of these offenses.

1937, Herndon v. Lowry, 301 U.S. 265

While § 56 does not, in direct terms, include force or violence as a feature of the "combined resistance to the lawful authority of the State," the attempt to induce which it denounces, the Supreme Court of the state has construed the section, doubtless by reason of its relation to the others, as making intended resort to force or violence an essential element of such "combined resistance." 2 Therefore, the section must be taken as if expressly embodying this construction. It was under § 56 that Herndon was indicted, tried, and convicted.

1937, Herndon v. Lowry, 301 U.S. 265

By the indictment, he was charged with attempting to induce others to join in combined resistance to the lawful authority of the state "by open force and by violent means, and by unlawful acts," the modes of attempted inducement being specified. Upon the trial, the court instructed the jury that neither "possession of literature insurrectionary in its nature" nor "engaging in academic or philosophical discussion of abstract principles of economics or political or other subjects, however, radical or revolutionary in their nature," would warrant a conviction, and that a verdict of guilt could not be given unless it clearly appeared from the evidence that "immediate serious violence against the State" was expected or advocated by the accused.

1937, Herndon v. Lowry, 301 U.S. 265

In affirming the conviction, the Supreme Court of the state held that, under the statute, "force must have been contemplated," but that it is not necessary to guilt that the accused "should have intended that an insurrection [301 U.S. 266] should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result" of his persuasion—the intent of the statute being "to arrest at its incipiency any effort to overthrow the state government, where it takes the form of an actual attempt to incite others to insurrection."

1937, Herndon v. Lowry, 301 U.S. 266

Then, coming to consider the sufficiency of the evidence, the Supreme Court stated:

1937, Herndon v. Lowry, 301 U.S. 266

From what has been said, the question here is simply this: did the evidence show that the defendant made any attempt to induce others to come together in any combined forcible resistance to the lawful authority of the state?

1937, Herndon v. Lowry, 301 U.S. 266

And the court concluded its consideration of this question by saying,

1937, Herndon v. Lowry, 301 U.S. 266

The jury were amply authorized to infer that violence was intended, and that the defendant did attempt to induce others to combine in such resistance to the lawful authority of the state.

1937, Herndon v. Lowry, 301 U.S. 266

(Italics supplied.) 3

1937, Herndon v. Lowry, 301 U.S. 266

The accused sought a rehearing, largely because of his understanding of what was said in the court's opinion respecting the expected time of the intended resort to force. A rehearing was denied, and, in that connection, the court said: 4

1937, Herndon v. Lowry, 301 U.S. 266

The language used by this court should be considered with the usual reasonable implications. The phrase "at any time" as criticized in the motion for rehearing was not intended to mean at any time in the indefinite future, or at any possible later time, however remote. An activity now could hardly be expected to be the direct producing cause of an insurrection after the lapse of a great period of time, and it was not the purpose of this court to suggest that, as to the mental requisite, any such intent would be a sufficient ingredient of an attempt to incite an insurrection. On the contrary, the phrase "at [301 U.S. 267] any time" was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection. Accordingly, the statements by this court as quoted in the motion for rehearing are to be accepted in the following sense: force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. This statement, considered with what was said in the original decision, represents the view of this court as to the proper construction of the statute under consideration, and, under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction. In view of what has been said above, it would seem that all contentions made in the motion for rehearing should necessarily fail, based as they are upon an erroneous construction of our decision.

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(Italics supplied.)

1937, Herndon v. Lowry, 301 U.S. 267

It thus is made quite plain that the case proceeded from beginning to end, and in both state courts, upon the theory that the offense denounced by the statute and charged in the indictment was that of attempting to induce and incite others to join in combined forcible resistance to the lawful authority of the state; that the jury returned a verdict of guilty upon that the theory; and that it was upon the same theory that the Supreme Court held [301 U.S. 268] the jury's verdict was supported by the evidence, and affirmed the conviction.

1937, Herndon v. Lowry, 301 U.S. 268

The present appeal is not from that judgment of affirmance, but from a judgment denying a subsequent petition for habeas corpus. 5

1937, Herndon v. Lowry, 301 U.S. 268

If it be assumed that, on this appeal, the evidence produced on the trial in the criminal case may be examined to ascertain how the statute was applied, I am of opinion, after such an examination, that the statute was applied as if the words "combined resistance" therein were, in letter and meaning, "combined forcible resistance."

1937, Herndon v. Lowry, 301 U.S. 268

The evidence, all of which is embodied in the present record, will be here stated in reduced volume without omitting anything material.

1937, Herndon v. Lowry, 301 U.S. 268

Herndon is a negro, and a member of the Communist Party of the U.S.A., which is a section of the Communist International. He was sent from Kentucky to Atlanta, Ga., as a paid organizer for the party. Atlanta is within an area where there is a large negro population, and the Communist Party has been endeavoring to extend its activities and membership to that population among others. Herndon's duties as an organizer were to call and conduct meetings, to disseminate information respecting the party, to distribute its literature, to educate prospects and secure members, to receive dues and contributions, and to work up a subordinate organization of the party. He called and conducted meetings which evidently were secret, solicited and secured members, and received dues and contributions. He and others, when becoming members, subscribed to an obligation saying

1937, Herndon v. Lowry, 301 U.S. 268

The undersigned declares his adherence to the program and statutes of the Communist International and the Communist Party of the [301 U.S. 269] U.S.A., and agrees to submit to the discipline of the party and to engage actively in its work.

1937, Herndon v. Lowry, 301 U.S. 269

When arrested, he had under his arm a box in which he was carrying membership and collection books which he had been using and various pamphlets, books and documents, all pertaining to the structure, purposes, and activities of the party. Two or three of the papers had been prepared by him, and disclosed that he was an active spirit in the "Section Committee" and the "Unemployment Committee," both subordinate local agencies of the party. The membership books, besides showing names of those whom he had induced to become members and dates of their admission, contained extracts from the party statutes, some of which read:

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A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U.S.A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues.

1937, Herndon v. Lowry, 301 U.S. 269

The strictest Party Discipline is the most solemn duty of all Party members and all Party organizations. The decisions of the CI and the Party Convention of the CC and of all leading committees of the Party must be promptly carried out. Discussion of questions over which there have been differences must not continue after the decision has been made.

1937, Herndon v. Lowry, 301 U.S. 269

The Party is the vanguard of the working class, and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the [301 U.S. 270] whole of the working class. The Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action.

1937, Herndon v. Lowry, 301 U.S. 270

The collection books contained the statement "Every dollar collected is a bullet fired into the boss class."

1937, Herndon v. Lowry, 301 U.S. 270

The membership and collection books had been sent to Herndon from the main office of the party in New York for use by him, and he had been using them in securing members and in collecting dues and contributions. With the exception of two or three papers prepared by him and heretofore mentioned, the literature which he was carrying under his arm when arrested had been sent to him from the same office, together with many pamphlets, books, and other publications, for use and distribution by him in his work as an organizer. The literature which he had with him when arrested was produced in evidence, and will now be described, chiefly by titles and extracts (italics supplied).

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APPEAL TO SOUTHERN YOUNG WORKERS

1937, Herndon v. Lowry, 301 U.S. 270

The Young Communist League is the champion not only of the young white workers, but especially of the doubly oppressed negro young workers. The Young Communist League fights against the whole system of race discrimination, and stands for full racial, political, economic and social equality of all workers.

1937, Herndon v. Lowry, 301 U.S. 270

The chief aim of the Young Communist League is to organize the young workers for a struggle against the bosses and against the whole profit system….

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1937, Herndon v. Lowry, 301 U.S. 270

The Young Communist League fights for:

1937, Herndon v. Lowry, 301 U.S. 270

\* \* \* \*

1937, Herndon v. Lowry, 301 U.S. 270

Full political, social and racial equality for the negro workers.

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Against bosses' wars! Defend the Soviet Union!

1937, Herndon v. Lowry, 301 U.S. 270

Smash the National Guard, the C.M.T.C. and R.O.T.C. [301 U.S. 271]

1937, Herndon v. Lowry, 301 U.S. 271

LIFE AND STRUGGLES OF NEGRO TOILERS

1937, Herndon v. Lowry, 301 U.S. 271

In no other so-called civilized country in the world are human beings treated as badly as these 15 million negroes [in the United States]. They live under a perpetual regime of white terror…. They are absolutely at the mercy of every fiendish mob incited by the white landlords and capitalists.

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COMMUNISM AND CHRISTIANISM

1937, Herndon v. Lowry, 301 U.S. 271

Banish the Gods from the Skies and Capitalists from the Earth, and make the World safe for Industrial Communism….

1937, Herndon v. Lowry, 301 U.S. 271

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1937, Herndon v. Lowry, 301 U.S. 271

The trouble with every reformatory socialism of modern times is that it undertakes the impossibility of changing the fruit of the capitalist state into that of the communistic one without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence, an uprooting and replanting are necessary (a revolution, not a reformation) which will give the world a new tree of state.

1937, Herndon v. Lowry, 301 U.S. 271

Capitalism no longer grows the fruits (foods, clothes, and houses) which are necessary to the sustenance of all the world. Hence it must be dug up by the roots in order that a tree which is so organized that it will bear these necessities for the whole world may be planted in its place.

1937, Herndon v. Lowry, 301 U.S. 271

The people of Russia have accomplished this uprooting and replanting (this revolution) in the case of their state, and those of every nation are destined to do the same in one way or another, each according to its historical and economic development, some with much violence; most, I hope, with but little.

1937, Herndon v. Lowry, 301 U.S. 271

COMMUNIST POSITION ON THE NEGRO QUESTION

1937, Herndon v. Lowry, 301 U.S. 271

This is a booklet of several pages and bears on the front of its cover a map of the United States showing a dark [301 U.S. 272] belt stretching across considerable portions of Georgia and eight other southern states. Parts of the text are here copied:

1937, Herndon v. Lowry, 301 U.S. 272

The slogan of the right of self-determination occupies the central place in the liberation struggle of the Negro population in the Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with two other basic demands. Thus, there are three basic demands to be kept in mind in the Black Belt, namely, the following:

1937, Herndon v. Lowry, 301 U.S. 272

(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers. The land property in the hands of the white American exploiters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bound in actual serfdom to the farms and plantations of the white exploiters by the feudal system of "sharecropping."

1937, Herndon v. Lowry, 301 U.S. 272

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1937, Herndon v. Lowry, 301 U.S. 272

Without this revolutionary measure, without the agrarian revolution, the right of self-determination of the Negro population would be only a Utopia, or, at best, would remain only on paper without changing in any way the actual enslavement.

1937, Herndon v. Lowry, 301 U.S. 272

(b) Establishment of the State Unity of the Black Belt. At the present time, this Negro zone—precisely for the purpose of facilitating national oppression—is artificially split up and divided into a number of various states which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consists of negroes. Within [301 U.S. 273] the limits of this state, there will of course remain a fairly significant white minority which must submit to the right of self-determination of the negro majority….

1937, Herndon v. Lowry, 301 U.S. 273

(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States.

1937, Herndon v. Lowry, 301 U.S. 273

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1937, Herndon v. Lowry, 301 U.S. 273

Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand, "Right to Self-Determination," but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc.

1937, Herndon v. Lowry, 301 U.S. 273

\* \* \* \*

1937, Herndon v. Lowry, 301 U.S. 273

A direct question of power is also the demand of confiscation of the land of the white exploiters in the South, as well as the demand of the negroes that the entire Black Belt be amalgamated into a State unit.

1937, Herndon v. Lowry, 301 U.S. 273

Hereby, every single fundamental demand of the liberation struggle of the negroes in the Black Belt is such that—if once thoroughly understood by the negro masses and adopted as their slogan—it will lead them into the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle. One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful revolutionary struggle for power against the American bourgeoisie, through wresting the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is a real slogan of National Rebellion which, to be [301 U.S. 274] considered as such, need not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present.

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(d) Communists must fight in the forefront of the national liberation movement, and must do their utmost for the progress of this mass movement and its revolutionization. Negro Communists must clearly disassociate themselves from all bourgeois currents in the negro movement, must indefatigably oppose the spread of the influence of the bourgeois groups on the working negroes.

1937, Herndon v. Lowry, 301 U.S. 274

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1937, Herndon v. Lowry, 301 U.S. 274

Their constant call to the negro masses must be: Revolutionary struggle against the ruling white bourgeoisie, through a fighting alliance with the revolutionary white proletariat!…

1937, Herndon v. Lowry, 301 U.S. 274

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1937, Herndon v. Lowry, 301 U.S. 274

We are Bolsheviks, members of a fighting Party of the working class, who know that the only road to the revolutionary overthrow of capitalism and the establishment of Communism is through welding together the iron unity of class ideology which penetrates into our ranks, as the prerequisite to the effective struggle against the class enemy physically.

1937, Herndon v. Lowry, 301 U.S. 274

There was no direct testimony that Herndon distributed the literature just described. No member of the Communist Party came forward to tell what he did in their meetings or in inducing them to become members. Nor does this seem strange when regard is had to the obligation taken by members and to the discipline imposed. Nevertheless there was evidence from which distribution by him reasonably could be inferred. It was shown that he was an active member, was sent to Atlanta as a paid organizer, and was subject to party discipline; also that he received the literature for distribution in the course of his work and had copies of it, together with current [301 U.S. 275] membership and collection books, under his arm when he was arrested; and further that he had been soliciting and securing members, which was part of the work in which the literature was to be used. He had declared his "adherence to the program and statutes" of the party, and had taken like declarations from those whom he secured as members; and this tended strongly to show not only that he understood the party program and statutes as outlined in the literature, but also that he brought them to the attention of others whom he secured as members. Besides, at the trial, he made an extended statement to the court and jury in his defense, 6 but did not refer in any wise to the literature or deny that he had been using or distributing it. Thus, there was in the evidence not merely some but adequate and undisputed basis for inferring that he had been using the literature for the purposes for which he received it. Evidently, and with reason, the jury drew this inference.

1937, Herndon v. Lowry, 301 U.S. 275

It should not be overlooked that Herndon was a negro member and organizer in the Communist Party, and was engaged actively in inducing others, chiefly southern negroes, to become members of the party and participate in effecting its purposes and program. The literature placed in his lands by the party for that purpose was particularly adapted to appeal to negroes in that section, for it pictured their condition as an unhappy one resulting from asserted wrongs on the part of white landlords and employers, and sought by alluring statements of resulting advantages to induce them to join in an effort to carry into effect the measures which the literature proposed. These measures included a revolutionary uprooting of the existing capitalist state, as it was termed; confiscation of the landed property of white landowners and capitalists for the benefit of negroes; establishment [301 U.S. 276] in the black belt of an independent state, possibly followed by secession from demonstrations, strikes, and tax boycotts in aid of this measure; adoption of a fighting the United States; organization of mass alliance with the revolutionary white proletariat; revolutionary overthrow of capitalism and establishment of Communism through effective physical struggles against the class enemy. Proposing these measures was nothing short of advising a resort to force and violence, for all know that such measures could not be effected otherwise. Not only so, but the literature makes such repelling use of the terms "revolution," "national rebellion," "revolutionary struggle," "revolutionary overthrow," "effective physical struggle," "smash the National Guard," "mass strikes," and "violence," as to leave no doubt that the use of force in an unlawful sense is intended.

1937, Herndon v. Lowry, 301 U.S. 276

The purpose and probable effect of such literature, when under consideration in a prosecution like that against Herndon, are to be tested and determined with appropriate regard to the capacity and circumstances of those who are sought to be influenced. 7 In this instance, the literature is largely directed to a people whose past and present circumstances would lead them to give unusual credence to its inflaming and inciting features.

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And so it is that examination and consideration of the evidence convince me that the Supreme Court of the state applied the statute, conformably to its opinion, as making criminal an attempt to induce and incite others to join in combined forcible resistance to the lawful authority of the state.

1937, Herndon v. Lowry, 301 U.S. 276

That the constitutional guaranty of freedom of speech and assembly does not shield or afford protection for acts of intentional incitement to forcible resistance to the lawful authority of a state is settled by repeated decisions [301 U.S. 277] of this Court, 8 and the Georgia decisions are to the same effect. 9

1937, Herndon v. Lowry, 301 U.S. 277

Under the statute as construed and applied, it is essential that the accused intended to induce combined forcible resistance. The presence of the intent aggravates the inducement and brings it more certainly within the power of the state to denounce it as a crime than otherwise it would be. The Supreme Court of the State, in both of its opinions, was dealing with a statute, and a charge in which the intent of the accused was an element of the offense. In the original opinion, the court incautiously said "it would be sufficient that he intended it [the combined and forcible resistance] to happen at any time." In its opinion on rehearing, it said the phrase "at any time" had not been intended to mean any time in the indefinite future, and, by way of avoiding such a meaning, the court changed that part of the original opinion by making it read

1937, Herndon v. Lowry, 301 U.S. 277

at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce.

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I do not perceive that this puts the standard of guilt at large, or renders it inadmissibly vague. The accused must intend that combined forcible resistance shall proximately result from his act of inducement. There is no uncertainty in that. The intended point of time must be within the period during which he "might reasonably expect" his inducement to remain directly operative in causing the combined forcible resistance. The words "might reasonably expect" have as much precision as is admissible in such a matter, are not [301 U.S. 278] difficult to understand, and conform to decisions heretofore given by this Court in respect of related questions. 10 I therefore am of opinion that there is no objectionable uncertainty about the standard of guilt, and that the statute does not in that regard infringe the constitutional guaranty of due process of law.

1937, Herndon v. Lowry, 301 U.S. 278

Believing that the statute under which the conviction was had is not subject to the objections leveled against it, I think the judgment of the Supreme Court of the state denying the petition for habeas corpus should be affirmed.

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MR. JUSTICE McREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER join in this dissent.

Footnotes

ROBERTS, J., lead opinion (Footnotes)

1937, Herndon v. Lowry, 301 U.S. 278

1. 182 Ga. 582, 186 S.E. 429, 430.

1937, Herndon v. Lowry, 301 U.S. 278

2.

1937, Herndon v. Lowry, 301 U.S. 278

55. Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

1937, Herndon v. Lowry, 301 U.S. 278

56. Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.

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57. Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death, or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than 20 years.

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58. If any person shall bring, introduce, print, or circulate, or cause to be introduced, circulated, or printed, or aid or assist, or be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than 20 years.

1937, Herndon v. Lowry, 301 U.S. 278

Georgia Code, 1933, §§ 26-901 to 26-904, inclusive.

1937, Herndon v. Lowry, 301 U.S. 278

3. Herndon v. State, 178 Ga. 832, 174 S.E. 597.

1937, Herndon v. Lowry, 301 U.S. 278

4. Herndon v. State, 179 Ga. 597, 176 S.E. 620.

1937, Herndon v. Lowry, 301 U.S. 278

5. Herndon v. Georgia, 295 U.S. 441.

1937, Herndon v. Lowry, 301 U.S. 278

6. Note 2, supra.

1937, Herndon v. Lowry, 301 U.S. 278

7. 178 Ga. 832, 855, 174 S.E. 597, 610.

1937, Herndon v. Lowry, 301 U.S. 278

8. 179 Ga. 597, 600, 176 S.E. 620, 622.

1937, Herndon v. Lowry, 301 U.S. 278

9. Act of June 15, 1917, c. 30, 40 Stat. 217, 219, amended by Act of May 16, 1918, c. 75, 40 Stat. 553.

1937, Herndon v. Lowry, 301 U.S. 278

10. See Schenck v. United States, 249 U.S. 47, 52; Frohwerk v. United States, 249 U.S. 204; Debs v. United States, 249 U.S. 211; Abrams v. United States, 250 U.S. 616; Schaefer v. United States, 251 U.S. 466; Pierce v. United States, 252 U.S. 239; O'Connell v. United States, 253 U.S. 142; State v. Holm, 139 Minn. 267, 166 N.W. 181; Gilbert v. Minnesota, 254 U.S. 325.

1937, Herndon v. Lowry, 301 U.S. 278

11. DeJonge v. Oregon, 299 U.S. 353.

1937, Herndon v. Lowry, 301 U.S. 278

12. Stromberg v. California, 283 U.S. 359.

1937, Herndon v. Lowry, 301 U.S. 278

13. See the statutes drawn in question in Gitlow v. New York, 268 U.S. 652, at 654, and in Whitney v. California, 274 U.S. 357, 359.

1937, Herndon v. Lowry, 301 U.S. 278

14. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86; Nash v. United States, 229 U.S. 373.

VANDEVANTER, J., dissenting (Footnotes)

1937, Herndon v. Lowry, 301 U.S. 278

1. Georgia Code 1933, §§ 26-901, 26-902, 26-903.

1937, Herndon v. Lowry, 301 U.S. 278

2. Carr v. State, 176 Ga. 747, 169 S.E. 201; Herndon v. State, 178 Ga. 832, 855, 174 S.E. 597.

1937, Herndon v. Lowry, 301 U.S. 278

3. Herndon v. State, 178 Ga. 832, 855, 867, 174 S.E. 597.

1937, Herndon v. Lowry, 301 U.S. 278

4. Herndon v. State, 179 Ga. 597, 599, 176 S.E. 620.

1937, Herndon v. Lowry, 301 U.S. 278

5. Lowry v. Herndon, 182 Ga. 582, 186 S.E. 429.

1937, Herndon v. Lowry, 301 U.S. 278

6. See Georgia Code 1933, § 38-415.

1937, Herndon v. Lowry, 301 U.S. 278

7. Burns v. United States, 274 U.S. 328, 335.

1937, Herndon v. Lowry, 301 U.S. 278

8. Gitlow v. New York, 268 U.S. 652, 666, et seq.,; Whitney v. California, 274 U.S. 357, 371; Fiske v. Kansas, 274 U.S. 380, 385; Stromberg v. California, 283 U.S. 359, 368; Near v. Minnesota, 283 U.S. 697, 708.

1937, Herndon v. Lowry, 301 U.S. 278

9. Carr v. State, 176 Ga. 55, 166 S.E. 827, 167 S.E. 103; Carr v. State, 176 Ga. 747, 169 S.E. 201.

1937, Herndon v. Lowry, 301 U.S. 278

10. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 108-111; Nash v. United States, 229 U.S. 373, 376-378.

Helvering v. Davis, 1937

Title: Helvering v. Davis

Author: U.S. Supreme Court

Date: May 24, 1937

Source: 301 U.S. 619

This case was argued May 5, 1937, and was decided May 24, 1937.

1937, Helvering v. Davis, 301 U.S. 619

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1937, Helvering v. Davis, 301 U.S. 619

FOR THE FIRST CIRCUIT

Syllabus

1937, Helvering v. Davis, 301 U.S. 619

1. The Court abstains from dismissing, sua sponte, as not properly within equity jurisdiction, a bill by a shareholder to restrain his corporation from making the tax payments and the deductions from wages required by Title VIII of the Social Security Act of August 14, 1935, the bill alleging that the exactions are void and that compliance will subject the corporation and its shareholders to irreparable damage. P. 639.

1937, Helvering v. Davis, 301 U.S. 619

The corporation acquiesced. The Collector and Commissioner of Internal Revenue intervened in the court below, defended on the merits, brought the case to this Court by certiorari, and here expressly waived a defense under R.S. § 3224 and any objection upon the ground of adequate legal remedy, and urged that the validity of the taxes be determined.

1937, Helvering v. Davis, 301 U.S. 619

2. The scheme of "Federal Old-Age Benefits" set up by Title II of the Social Security Act does not contravene the limitations of the Tenth Amendment. P. 640.

1937, Helvering v. Davis, 301 U.S. 619

3. Congress may spend money in aid of the "general welfare." P. 640.

1937, Helvering v. Davis, 301 U.S. 619

4. In drawing the line between what is "general" welfare, and what is particular, the determination of Congress must be respected by the courts, unless it be plainly arbitrary. P. 640.

1937, Helvering v. Davis, 301 U.S. 619

5. The concept of "general welfare" is not static, but adapts itself to the crises and necessities of the times. P. 641.

1937, Helvering v. Davis, 301 U.S. 619

6. The problem of security for the aged, like the general problem of unemployment, is national, as well as local. Cf. Steward Machine Co. v. Davis, ante, p. 548. P. 644.

1937, Helvering v. Davis, 301 U.S. 619

There is ground to believe that laws and resources of the separate States, unaided, cannot deal with this problem effectively. State governments are reluctant to place such heavy burdens upon their residents lest they incur economic disadvantages as compared with neighbors or competitors, and a system of old age pensions established in one State encourages immigration of needy persons from other States which have rejected such systems. P. 644. [301 U.S. 620]

1937, Helvering v. Davis, 301 U.S. 620

7. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the States. P. 645.

1937, Helvering v. Davis, 301 U.S. 620

8. Title II of the Social Security Act provides for "Federal Old-Age Benefits" for persons who have attained the age of 65. It creates an "Old-Age Reserve Account" in the Treasury and authorizes future appropriations to provide for the required old-age payments, but, in itself, neither appropriates money nor brings any money into the Treasury. Title VIII imposes an "excise" tax on employers, to be paid "with respect to having individuals in their employ," measured on the wages, and an "income tax on employees," measured on their wages, to be collected by their employers by deduction from wages. These taxes are not applicable to certain kinds of employment, including agricultural labor, domestic service, service for the national or state governments, and service performed by persons who have attained the age of 65 years.

1937, Helvering v. Davis, 301 U.S. 620

Held:

1937, Helvering v. Davis, 301 U.S. 620

(1) Title II being valid, there is no occasion to inquire whether Title VIII must fall if Title II were void. P. 645.

1937, Helvering v. Davis, 301 U.S. 620

(2) The tax upon employers is a valid excise or duty upon the relation of employment. Steward Machine Co. v. Davis, ante, p. 548. P. 645.

1937, Helvering v. Davis, 301 U.S. 620

(3) The tax is not invalid as a result of its exemptions. Steward Machine Co. v. Davis, ante, p. 548. P. 646.

1937, Helvering v. Davis, 301 U.S. 620

89 F.2d 393, reversed.

1937, Helvering v. Davis, 301 U.S. 620

CERTIORARI, post, p. 674, to review the reversal of a decree of the District Court denying an injunction and dismissing the bill in a suit by Davis, a shareholder of the Edison Electric Illuminating Company of Boston, to enjoin the corporation from complying with tax requirements of Title VIII of the Social Security Act. [301 U.S. 634]

CARDOZO, J., lead opinion

1937, Helvering v. Davis, 301 U.S. 634

MR. JUSTICE CARDOZO delivered the opinion of the Court.

1937, Helvering v. Davis, 301 U.S. 634

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C. c. 7, (Supp.)), is challenged once again.

1937, Helvering v. Davis, 301 U.S. 634

In Steward Machine Co. v. Davis, decided this day, ante, p. 548, we have upheld the validity of Title IX of the act, imposing an excise upon employers of eight or more. In this case, Titles VIII and II are the subject of attack. Title VIII lays another excise upon employers in addition to the one imposed by Title IX (though with different exemptions). It lays a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provides for the payment of Old Age Benefits, and supplies the motive and occasion, in the view of the assailants of the statute, for [301 U.S. 635] the levy of the taxes imposed by Title VIII. The plan of the two titles will now be summarized more fully.

1937, Helvering v. Davis, 301 U.S. 635

Title VIII, as we have said, lays two different types of tax, an "income tax on employees" and "an excise tax on employers." The income tax on employees is measured by wages paid during the calendar year. § 801. The excise tax on the employer is to be paid "with respect to having individuals in his employ," and, like the tax on employees, is measured by wages. § 804. Neither tax is applicable to certain types of employment, such as agricultural labor, domestic service, service for the national or state governments, and service performed by persons who have attained the age of 65 years. § 811(b). The two taxes are at the same rate. §§ 801, 804. For the years 1937 to 1939, inclusive, the rate for each tax is fixed at one percent. Thereafter the rate increases 1/2 of 1 percent every three years, until, after December 31, 1948, the rate for each tax reaches 3 percent. Ibid. In the computation of wages, all remuneration is to be included except so much as is in excess of $3,000 during the calendar year affected. § 811(a). The income tax on employees is to be collected by the employer, who is to deduct the amount from the wages "as and when paid." § 80a(a). He is indemnified against claims and demands of any person by reason of such payment. Ibid. The proceeds of both taxes are to be paid into the Treasury like internal revenue taxes generally, and are not earmarked in any way. § 807(a). There are penalties for nonpayment. § 807(c).

1937, Helvering v. Davis, 301 U.S. 635

Title II has the caption "Federal Old-Age Benefits." The benefits are of two types, first, monthly pensions, and second, lump sum payments, the payments of the second class being relatively few and unimportant.

1937, Helvering v. Davis, 301 U.S. 635

The first section of this title creates an account in the United States Treasury to be known as the "Old-Age [301 U.S. 636] Reserve Account." § 201. No present appropriation, however, is made to that account. All that the statute does is to authorize appropriations annually thereafter, beginning with the fiscal year which ends June 30, 1937. How large they shall be is not known in advance. The "amount sufficient as an annual premium" to provide for the required payments is

1937, Helvering v. Davis, 301 U.S. 636

to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 percentum per annum compounded annually.

1937, Helvering v. Davis, 301 U.S. 636

§ 201(a). Not a dollar goes into the Account by force of the challenged act alone, unaided by acts to follow.

1937, Helvering v. Davis, 301 U.S. 636

Section 202 and later sections prescribe the form of benefits. The principal type is a monthly pension payable to a person after he has attained the age of 65. This benefit is available only to one who has worked for at least one day in each of at least five separate years since December 31, 1936, who has earned at least $2,000 since that date, and who is not then receiving wages "with respect to regular employment." §§ 202(a), (d), 210(c). The benefits are not to begin before January 1, 1942. § 202(a). In no event are they to exceed $85 a month. § 202(b). They are to be measured (subject to that limit) by a percentage of the wages, the percentage decreasing at stated intervals as the wages become higher. § 202(a). In addition to the monthly benefits, provision is made in certain contingencies for "lump sum payments" of secondary importance. A summary by the Government of the four situations calling for such payments is printed in the margin. 1 [301 U.S. 637]

1937, Helvering v. Davis, 301 U.S. 637

This suit is brought by a shareholder of the Edison Electric Illuminating Company of Boston, a Massachusetts corporation, to restrain the corporation from making the payments and deductions called for by the act, which is stated to be void under the Constitution of the United States. The bill tells us that the corporation has decided to obey the statute, that it has reached this decision in the face of the complainant's protests, and that it will make the payments and deductions unless restrained by a decree. The expected consequences are indicated substantially as follows: the deductions from the wages of the employees will produce unrest among them, and will be followed, it is predicted, by demands that wages be increased. If the exactions shall ultimately be held void, the company will have parted with moneys which, as a practical matter, it will be impossible to recover. Nothing is said in the bill about the promise of indemnity. The prediction is made also that serious consequences will ensue [301 U.S. 638] if there is a submission to the excise. The corporation and its shareholders will suffer irreparable loss, and many thousands of dollars will be subtracted from the value of the shares. The prayer is for an injunction and for a declaration that the act is void.

1937, Helvering v. Davis, 301 U.S. 638

The corporation appeared and answered without raising any issue of fact. Later, the United States Commissioner of Internal Revenue and the United States Collector for the District of Massachusetts, petitioners in this court, were allowed to intervene. They moved to strike so much of the bill as has relation to the tax on employees, taking the ground that the employer, not being subject to tax under those provisions, may not challenge their validity, and that the complainant shareholder, whose rights are no greater than those of his corporation, has even less standing to be heard on such a question. The intervening defendants also filed an answer which restated the point raised in the motion to strike, and maintained the validity of Title VIII in all its parts. The District Court held that the tax upon employees was not properly at issue, and that the tax upon employers was constitutional. It thereupon denied the prayer for an injunction, and dismissed the bill. On appeal to the Circuit Court of Appeals for the First Circuit, the decree was reversed, one judge dissenting. 89 F.2d 393. The court held that Title II was void as an invasion of powers reserved by the Tenth Amendment to the states or to the people, and that Title II, in collapsing, carried Title VIII along with it. As an additional reason for invalidating the tax upon employers, the court held that it was not an excise as excises were understood when the Constitution was adopted. Cf. Davis v. Boston & Mane R. Co., 89 F.2d 368, decided the same day.

1937, Helvering v. Davis, 301 U.S. 638

A petition for certiorari followed. It was filed by the intervening defendants, the Commissioner and the Collector, and brought two questions, and two only, to our [301 U.S. 639] notice. We were asked to determine: (1) "whether the tax imposed upon employers by § 804 of the Social Security Act is within the power of Congress under the Constitution," and (2)

1937, Helvering v. Davis, 301 U.S. 639

whether the validity of the tax imposed upon employees by § 801 of the Social Security Act is properly in issue in this case, and if it is, whether that tax is within the power of Congress under the Constitution.

1937, Helvering v. Davis, 301 U.S. 639

The defendant corporation gave notice to the Clerk that it joined in the petition, but it has taken no part in any subsequent proceedings. A writ of certiorari issued.

1937, Helvering v. Davis, 301 U.S. 639

First. Questions as to the remedy invoked by the complainant confront us at the outset.

1937, Helvering v. Davis, 301 U.S. 639

Was the conduct of the company in resolving to pay the taxes a legitimate exercise of the discretion of the directors? Has petitioner a standing to challenge that resolve in the absence of an adequate showing of irreparable injury? Does the acquiescence of the company in the equitable remedy affect the answer to those questions? Though power may still be ours to take such objections for ourselves, is acquiescence effective to rid us of the duty? Is duty modified still further by the attitude of the Government, its waiver of a defense under § 3224 of the Revised Statutes, its waiver of a defense that the legal remedy is adequate, its earnest request that we determine whether the law shall stand or fall? The writer of this opinion believes that the remedy is ill-conceived, that, in a controversy such as this, a court must refuse to give equitable relief when a cause of action in equity is neither pleaded nor proved, and that the suit for an injunction should be dismissed upon that ground. He thinks this course should be followed in adherence to the general rule that constitutional questions are not to be determined in the absence of strict necessity. In that view he is supported by MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS. However, a majority of the [301 U.S. 640] court have reached a different conclusion. They find in this case extraordinary features making it fitting in their judgment to determine whether the benefits and the taxes are valid or invalid. They distinguish Norman v. Consolidated Gas Co., 89 F.2d 619, recently decided by the Court of Appeals for the Second Circuit, on the ground that, in that case, the remedy was challenged by the company and the Government at every stage of the proceeding, thus withdrawing from the court any marginal discretion. The ruling of the majority removes from the case the preliminary objection as to the nature of the remedy which we took of our own motion at the beginning of the argument. Under the compulsion of that ruling, the merits are now here.

1937, Helvering v. Davis, 301 U.S. 640

Second. The scheme of benefits created by the provisions of Title II is not in contravention of the limitations of the Tenth Amendment.

1937, Helvering v. Davis, 301 U.S. 640

Congress may spend money in aid of the "general welfare." Constitution, Art. I, section 8; United States v. Butler, 297 U.S. 1, 65; Steward Machine Co. v. Davis, supra. There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. United States v. Butler, supra. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground, or certainly a penumbra, in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. [301 U.S. 641]

1937, Helvering v. Davis, 301 U.S. 641

When such a contention comes here, we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.

1937, Helvering v. Davis, 301 U.S. 641

United States v. Butler, supra, p. 67. Cf. Cincinnati Soap Co. v. United States, ante, p. 308; United States v. Realty Co., 163 U.S. 427, 440; Head Money Cases, 112 U.S. 580, 595. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the wellbeing of the Nation. What is critical or urgent changes with the times.

1937, Helvering v. Davis, 301 U.S. 641

The purge of nationwide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that, in pioneer days gave an avenue of escape. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 442. Spreading from State to State, unemployment is an ill not particular, but general, which may be checked, if Congress so determines, by the resources of the Nation. If this can have been doubtful until now, our ruling today in the case of the Steward Machine Co., supra, has set the doubt at rest. But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house, as well as from the haunting fear that such a lot awaits them when journey's end is near.

1937, Helvering v. Davis, 301 U.S. 641

Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory [301 U.S. 642] groups. 2 Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance. 3 A great mass of evidence was brought together supporting the policy which finds expression in the act. Among the relevant facts are these: the number of persons in the United States 65 years of age or over is increasing proportionately as well as absolutely. What is even more important, the number of such persons unable to take care of themselves is growing at a threatening pace. More and more, our population is becoming urban and industrial, instead of rural and agricultural. 4 The evidence is impressive that, among industrial workers, the younger men and women are preferred over the older. 5 In times of retrenchment, the older are commonly the first to go, and even if retained, their wages are likely to be lowered. The plight of men and women at so low an age as 40 is hard, almost hopeless, when they are driven to seek for reemployment. Statistics are in the brief. A few illustrations will be chosen from many there collected. In 1930, out of 224 American factories investigated, 71, or almost one third, had fixed maximum hiring age limits; in 4 plants, the limit was under 40; in 41, it was under 46. In the other 153 plants, there were no fixed limits, but in practice few were hired if they were over 50 years of age. 6 With the loss of savings inevitable in periods of idleness, [301 U.S. 643] the fate of workers over 65, when thrown out of work, is little less than desperate. A recent study of the Social Security Board informs us that

1937, Helvering v. Davis, 301 U.S. 643

one-fifth of the aged in the United States were receiving old-age assistance, emergency relief, institutional care, employment under the works program, or some other form of aid from public or private funds; two-fifths to one-half were dependent on friends and relatives, one-eighth had some income from earnings, and possibly one-sixth had some savings or property. Approximately three out of four persons 65 or over were probably dependent wholly or partially on others for support. 7

1937, Helvering v. Davis, 301 U.S. 643

We summarize in the margin the results of other studies by state and national commissions. 8 They point the same way. [301 U.S. 644]

1937, Helvering v. Davis, 301 U.S. 644

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. This is brought out with a wealth of illustration in recent studies of the problem. 9 Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. We have seen this in our study of the problem of unemployment compensation. Steward Machine Co. v. Davis, supra. A system of old age pensions has special dangers of its own if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.

1937, Helvering v. Davis, 301 U.S. 644

Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom. Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government [301 U.S. 645] may sap those sturdy virtues and breed a race of weaklings. If Massachusetts so believes and shapes her laws in that conviction, must her breed of sons be changed, he asks, because some other philosophy of government finds favor in the halls of Congress? But the answer is not doubtful. One might ask with equal reason whether the system of protective tariffs is to be set aside at will in one state or another whenever local policy prefers the rule of laissez faire. The issue is a closed one. It was fought out long ago. 10 When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art. VI, Par. 2.

1937, Helvering v. Davis, 301 U.S. 645

Third. Title II being valid, there is no occasion to inquire whether Title VIII would have to fall if Title II were set at naught.

1937, Helvering v. Davis, 301 U.S. 645

The argument for the respondent is that the provisions of the two titles dovetail in such a way as to Justify the conclusion that Congress would have been unwilling to pass one without the other. The argument for petitioners is that the tax moneys are not earmarked, and that Congress is at liberty to spend them as it will. The usual separability clause is embodied in the act. § 1103.

1937, Helvering v. Davis, 301 U.S. 645

We find it unnecessary to make a choice between the arguments, and so leave the question open.

1937, Helvering v. Davis, 301 U.S. 645

Fourth. The tax upon employers is a valid excise or duty upon the relation of employment.

1937, Helvering v. Davis, 301 U.S. 645

As to this, we need not add to our opinion in Steward Machine Co. v. Davis, supra, where we considered a like question in respect of Title IX. [301 U.S. 646]

1937, Helvering v. Davis, 301 U.S. 646

Fifth. The tax is not invalid as a result of its exemptions. Here again, the opinion in Steward Machine Co. v. Davis, supra, says all that need be said.

1937, Helvering v. Davis, 301 U.S. 646

Sixth. The decree of the Court of Appeals should be reversed, and that of the District Court affirmed.

1937, Helvering v. Davis, 301 U.S. 646

Reversed.

1937, Helvering v. Davis, 301 U.S. 646

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER are of opinion that the provisions of the act here challenged are repugnant to the Tenth Amendment, and that the decree of the Circuit Court of Appeals should be affirmed.

Footnotes

CARDOZO, J., lead opinion (Footnotes)

1937, Helvering v. Davis, 301 U.S. 646

1.

1937, Helvering v. Davis, 301 U.S. 646

(1) If through an administrative error or delay a person who is receiving a monthly pension dies before he receives the correct amount, the amount which should have been paid to him is paid in a lump sum to his estate [§ 203(c)].

1937, Helvering v. Davis, 301 U.S. 646

(2) If a person who has earned wages in each of at least five separate years since December 31, 1936, and who has earned in that period more than $2,000, dies after attaining the age of 65, but before he has received in monthly pensions an amount equal to 3 1/2 percent of the "wages" paid to him between January 1, 1937, and the time he reaches 65, then there is paid in a lump sum to his estate the difference between said 3 1/2 percent and the total amount paid to him during his life as monthly pensions [§ 203(b)].

1937, Helvering v. Davis, 301 U.S. 646

(3) If a person who has earned wages since December 31, 1936, dies before attaining the age of 65, then there is paid to his estate 3 1/2 percent of the "wages" paid to him between January 1, 1937, and his death [§ 203(a)].

1937, Helvering v. Davis, 301 U.S. 646

(4) If a person has, since December 31, 1936, earned wages in employment covered by Title II, but has attained the age of 65 either without working for at least one day in each of 5 separate years since 1936, or without earning at least $2,000 between January 1, 1937, and the time he attains 65, then there is paid to him [or to his estate, § 204(b)], a lump sum equal to 3 1/2 percent of the "wages" paid to him between January 1, 1937, and the time he attained 65 [§ 204(a)].

1937, Helvering v. Davis, 301 U.S. 646

2. Report to the President of the Committee on Economic Security, 1935.

1937, Helvering v. Davis, 301 U.S. 646

3. Hearings before the House Committee on Ways and Means on H.R. 4120, 74th Congress, 1st session; Hearings before the Senate Committee on Finance on S. 1130, 74th Congress, 1st Session.

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4. See Report of the Committee on Recent Social Trends, 1932, vol. 1, pp. 8, 502; Thompson and Whelpton, Population Trends in the United States, pp. 1, 19.

1937, Helvering v. Davis, 301 U.S. 646

5. See the authorities collected at pp. 54-62 of the Government's brief.

1937, Helvering v. Davis, 301 U.S. 646

6. Hiring and Separation Methods in American Industry, 35 Monthly Labor Review, pp. 1005, 1009.

1937, Helvering v. Davis, 301 U.S. 646

7. Economic Insecurity in Old Age (Social Security Board, 1937), p. 15.

1937, Helvering v. Davis, 301 U.S. 646

8. The Senate Committee estimated, when investigating the present act, that over one half of the people in the United States over 65 years of age are dependent upon others for support. Senate Report No. 628, 74th Congress, 1st Session, p. 4. A similar estimate was made in the Report to the President of the Committee on Economic Security, 1935, p. 24.

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A Report of the Pennsylvania Commission on Old Age Pensions made in 1919 (p. 108) after a study of 16,281 persons and interviews with more than 3,500 persons 65 years and over showed two fifths with no income but wages and one fourth supported by children; 1.5 percent had savings and 11.8 percent had property.

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A report on old age pensions by the Massachusetts Commission on Pensions (Senate No. 5, 1925, pp. 41, 52) showed that, in 1924, two thirds of those above 65 had, alone or with a spouse, less than $5,000 of property, and one fourth had none. Two thirds of those with less than $5,000 and income of less than $1,000 were dependent in whole or in part on others for support.

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A report of the New York State Commission made in 1930 (Legis.Doc. No. 67, 1930, p. 39) showed a condition of total dependency as to 58 percent of those 65 and over, and 62 percent of those 70 and over.

1937, Helvering v. Davis, 301 U.S. 646

The national Government has found in connection with grants to states for old age assistance under another title of the Social Security Act (Title I) that, in February, 1937, 38.8 percent of all persons over 65 in Colorado received public assistance; in Oklahoma, the percentage was 44.1, and in Texas 37.5. In 10 states out of 40 with plans approved by the Social Security Board, more than 25 percent of those over 65 could meet the residence requirements and qualify under a means test and were actually receiving public aid. Economic Insecurity in Old Age, supra, p. 15.

1937, Helvering v. Davis, 301 U.S. 646

9. Economic Insecurity in Old Age, supra, chap VI, p. 184.

1937, Helvering v. Davis, 301 U.S. 646

10. IV Channing, History of the United States, p. 404 (South Carolina Nullification); 8 Adams, History of the United States (New England Nullification and the Hartford Convention).

President Roosevelt's Press Conference Proposing Judicial Reform, 1937

Title: President Roosevelt's Press Conference Proposing Judicial Reform

Author: Franklin D. Roosevelt

Date: February 5, 1937

Source: Public Papers of the Presidents, F. D. Roosevelt, 1937, Item 26

Public Papers of FDR, 1937, Item 26

MR. DONALDSON: All in.

Public Papers of FDR, 1937, Item 26

THE PRESIDENT: I have a somewhat important matter to take up with you today. And I am asking that this message of today be held in very strict confidence until the message is released in accordance with the wording of the release on the press copies that will be given to you in a few moments. It is also requested that nobody reveal what is said or the text of the material to any person outside of the employ, outside of those in your own organization, until the time of the release, until it is actually read in either the Senate or the House, whichever one reads it first. Copies will be given to you as you go out and don't anybody go out until that time. (Laughter)

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Q. We brought our lunches. (Laughter)

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THE PRESIDENT: That is all right; I am glad you did.

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As you know, for a long time the subject of constitutionality of laws has been discussed; and for a good many months now I have been working with a small group in going into what I have thought of as the fundamentals of the subject rather than those particular details which make the headlines.

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In this review of the Federal Judiciary we have come to the very definite conclusion that there is required the same kind of reorganization of the Judiciary as has been recommended to this Congress for the Executive branch of the Government.

Public Papers of FDR, 1937, Item 26

As a part of it, I have received from the Attorney General a letter which you will also get and of which I shall just touch the high spots. It is a part of the message. (Reading)

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My dear Mr. President:

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Delay in the administration of justice is the outstanding defect of our federal judicial system. It has been a cause of concern to practically every one of my predecessors in office. It has exasperated the bench, the bar, the business community and the public.

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He goes on and speaks of the fact that

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The litigant conceives the judge as one promoting justice through the mechanism of the Courts. He assumes that the directing power of the judge is exercised over its officers from the time a case is filed with the clerk of the court. He is entitled to assume that the judge is pressing forward litigation in the full recognition of the principle that "justice delayed is justice denied." It is a mockery of justice to say to a person when he files suit, that he may receive a decision years later. Under a properly ordered system rights should be determined promptly. The course of litigation should be measured in months and not in years.

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Yet in some jurisdictions, the delays in the administration of justice are so interminable that to institute suit is to embark on a life-long adventure. (Laughter)

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Many persons submit to acts of injustice rather than resort to the courts. Inability to secure a prompt judicial adjudication leads to improvident and unjust settlements. Moreover, the time factor is an open invitation to those who are disposed to institute unwarranted litigation or interpose unfounded defenses in the hope of forcing an adjustment which could not be secured upon the merits. This situation frequently results in extreme hardships. The small business man or the litigant of limited means labors under a grave and constantly increasing disadvantage because of his inability to pay the price of justice.

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Statistical data—very carefully collected from every district—indicate that in many districts a disheartening and unavoidable interval must elapse between the date that issue is joined in a pending case and the time when it can be reached for trial in due course. These computations do not take into account the delays that occur in the preliminary stages of litigation or the postponements after a case might normally be expected to be heard.

Public Papers of FDR, 1937, Item 26

The evil is a growing one. The business of the courts is continually increasing in volume, importance, and complexity. The average case load borne by each judge has grown nearly fifty percent since 1913, when the District Courts were first organized on their present basis. When the courts are working under such pressure it is inevitable that the character of their work must suffer.

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The number of new cases offset those that are disposed of, so that the Courts are unable to decrease the enormous back-log of undigested matters. More than fifty thousand pending cases (exclusive of bankruptcy proceedings) overhang the federal dockets —a constant menace to the orderly processes of justice. When-. ever a single case requires a protracted trial, the routine business of the court is further neglected. It is an intolerable situation and we should make shift to amend it.

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Efforts have been made from time to time to alleviate some of the conditions that contribute to the slow rate of speed with which causes move through the Courts. The Congress has recently conferred on the Supreme Court the authority to prescribe rules of procedure after verdict in criminal cases and the power to adopt and promulgate uniform rules of practice for civil actions at law in the District Courts. It has provided terms of Court in certain places at which federal Courts had not previously convened. A small number of judges have been added from time to time.

Public Papers of FDR, 1937, Item 26

Despite these commendable accomplishments, sufficient progress has not been made. Much remains to be done in developing procedure and administration, but this alone will not meet modern needs. The problem must be approached in a more comprehensive fashion, if the United States is to have a judicial system worthy of the nation. Reason and necessity require the appointment of a sufficient number of judges to handle the business of the federal Courts. These additional judges should be of a type and age which would warrant us in believing that they would vigorously attack their dockets, rather than permit their dockets to overwhelm them.

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The cost of additional personnel should not deter us. It must be borne in mind that the expense of maintaining the judicial system constitutes hardly three-tenths of one percent of the cost of maintaining the federal establishment. While the estimates for the current fiscal year aggregate over $23,000,000 for the maintenance of the legislative branch of the government, and over $2,100,000,000 for the permanent agencies of the executive branch, the estimated cost of maintaining the judiciary is only about $6,500,000. An increase in the judicial personnel, which I earnestly recommend, would result in a hardly perceptible percentage of increase in the total annual budget.

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This result should not be achieved, however, merely by creating new judicial positions in specific circuits or districts. The reform should be effectuated on the basis of a consistent system which would revitalize our whole judicial structure and assure the activity of judges at places where the accumulation of business is greatest. As congestion is a varying factor and cannot be foreseen, the system should be flexible and should permit the temporary assignment of judges to points where they appear to be most needed. The newly created personnel should constitute a mobile force, available for service in any part of the country at the assignment and direction of the Chief Justice. A functionary might well be created to be known as Proctor, or by some other suitable title, to be appointed by the Supreme Court and to act under its direction, charged with the duty of continuously keeping informed as to the state of federal judicial business throughout the United States and of assisting the Chief Justice in assigning judges to pressure areas.

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He then appends statistical information. The Attorney General then says,

Public Papers of FDR, 1937, Item 26

The time has come when further legislation is essential.

Public Papers of FDR, 1937, Item 26

The statistical information shows, for example, that while we have added judges since 1913—we have increased them from 92 to 154—the criminal and civil cases other than bankruptcy have increased from 25,000 to 75,000, the average number of cases filed per judge from 276 per judge to 484 per judge. It has nearly doubled. The number of bankruptcy proceedings has increased from 20,000 to 60,000.

Public Papers of FDR, 1937, Item 26

The second table gives the case load in the courts. The cases filed and terminated show that over the past six years we have made practically no progress in cutting down the number of cases, this back-log of cases in the Federal courts.

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The message itself is fairly long, and has to be long on a subject like this. I will try to do a little high spotting as I go through it. (Reading)

Public Papers of FDR, 1937, Item 26

I have recently called the attention of the Congress to the clear need for a comprehensive program to reorganize the administrative machinery of the Executive Branch of our Government. I now make a similar recommendation to the Congress in regard to the Judicial Branch of the Government, in order that it also may function in accord with modern necessities.

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The Constitution provides that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." No one else is given a similar mandate. It is therefore the duty of the President to advise the Congress in regard to the Judiciary whenever he deems such information or recommendation necessary.

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I address you for the further reason that the Constitution vests in the Congress direct responsibility in the creation of courts and judicial offices and in the formulation of rules of practice and procedure. It is, therefore, one of the definite duties of the Congress constantly to maintain the effective functioning of the Federal Judiciary.

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The Judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice.

Public Papers of FDR, 1937, Item 26

Since the earliest days of the Republic, the problem of the personnel of the courts has needed the attention of the Congress. For example, from the beginning, over repeated protests to President Washington, the Justices of the Supreme Court were required to "ride Circuit" and, as Circuit Justices, to hold trials throughout the length and breadth of the land—a practice which endured over a century.

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And I might add that riding Circuit in those days meant riding on horseback. It might be called a pre-horse and buggy era. (Laughter) That is not in the message. (Laughter)

Public Papers of FDR, 1937, Item 26

In almost every decade since 1789, changes have been made by the Congress whereby the numbers of judges and the duties of judges in federal courts have been altered in one way or another. The Supreme Court was established with six members of 1789; it was reduced to five in 1801; it was increased to seven in 1807; it was increased to nine in 1837; it was increased to ten in 1863; it was reduced to seven in 1866; it was increased to nine in 1869.

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This is all by statute.

Public Papers of FDR, 1937, Item 26

The simple fact is that today a new need for legislative action arises because the personnel of the Federal Judiciary is insufficient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in United States Courts.

Public Papers of FDR, 1937, Item 26

I then mention the letter from the Attorney General.

Public Papers of FDR, 1937, Item 26

Delay in any court results in injustice.

Public Papers of FDR, 1937, Item 26

Now we will take up the case of the lower courts showing delay:

Public Papers of FDR, 1937, Item 26

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

Public Papers of FDR, 1937, Item 26

Now we come to the next, the courts of appeal.

Public Papers of FDR, 1937, Item 26

Delays in the determination of appeals have the same effect. Moreover, if trials of original actions are expedited and existing accumulations of cases are reduced, the volume of work imposed on the Circuit Courts of Appeals will further increase.

Public Papers of FDR, 1937, Item 26

Then we come to the highest court:

Public Papers of FDR, 1937, Item 26

The attainment of speedier justice in the courts below will enlarge the task of the Supreme Court itself. And still more work would be added by the recommendation which I make later in this message for the quicker determination of constitutional questions by the highest court.

Public Papers of FDR, 1937, Item 26

Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases.

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That is a tremendously important fact. As you know, any litigant seeking to appeal to the Supreme Court takes it there on certiorari. That is a certiorari process and out of 867 cases the Supreme Court last year turned down 727. It declined without an opinion even to hear them.

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If petitions in behalf of the Government are excluded, it appears that the court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants.

Public Papers of FDR, 1937, Item 26

That is an amazing statement.

Public Papers of FDR, 1937, Item 26

It seems clear, therefore, that the necessity of relieving present congestion extends to the enlargement of the capacity of all the federal courts.

Public Papers of FDR, 1937, Item 26

In other words, let us apply the same rule from top to bottom.

Public Papers of FDR, 1937, Item 26

A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves. This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion.

Public Papers of FDR, 1937, Item 26

In the federal courts there are in all 237 life tenure permanent judgeships.

Public Papers of FDR, 1937, Item 26

There are a very small number of judges whose places are not to be filled when they die. They are really temporary judges.

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Twenty-five of them are now held by judges over seventy years of age and eligible to leave the bench on full pay. Originally no pension or retirement allowance was provided by the Congress. When after eighty years of our national history—that was in 1869—the Congress made provision for pensions, it found a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity. Their salaries were small. As with other men, responsibilities and obligations accumulated. No alternative had been open to them except to attempt to perform the duties of their offices to the very edge of the grave.

Public Papers of FDR, 1937, Item 26

I am talking about 1869. (Laughter)

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In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. "They seem to be tenacious of the appearance of adequacy."

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That is a quotation from a very important justice. It is in quotes. You will have to find out who said it. I am not going to tell you.

Public Papers of FDR, 1937, Item 26

The voluntary retirement law of 1869 provided, therefore, only a partial solution. That law, still in force, has not proved effective in inducing aged judges to retire on a pension.

Public Papers of FDR, 1937, Item 26

This result had been foreseen in the debates when the measure was being considered. It was then proposed that when a judge refused to retire upon reaching the age of seventy, an additional judge should be appointed to assist in the work of the court. The proposal passed the House but was eliminated in the Senate.

Public Papers of FDR, 1937, Item 26

With the opening of the twentieth century, and the great increase of population and commerce, and the growth of a more complex type of litigation, similar proposals were introduced in the Congress. To meet the situation, in 1913, 1914, 1915 and 1916, the Attorneys General then in office—I will end the suspense by saying that it was McReynolds and Gregory—recommended to the Congress that when a district or a circuit judge failed to retire at the age of seventy, an additional judge be appointed in order that the affairs of the court might be promptly and adequately discharged.

Public Papers of FDR, 1937, Item 26

In 1919 a law was finally passed providing that the President "may" appoint additional district and circuit judges, but only upon a finding that the incumbent judge over seventy "is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character." The discretionary and indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge.

Public Papers of FDR, 1937, Item 26

The duty of a judge involves more than presiding or listening to testimony or arguments.

Public Papers of FDR, 1937, Item 26

And I go on and talk about the complexity of the modern average case, that it has increased tremendously in the last twenty or twenty-five years.

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Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

Public Papers of FDR, 1937, Item 26

We have recognized this truth in the civil service of the nation and of many states by compelling retirement on pay at the age of seventy. We have recognized it in the Army and Navy by retiring officers at the age of sixty-four. A number of states have recognized it by providing in their constitutions for compulsory retirement of aged judges.

Public Papers of FDR, 1937, Item 26

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments: it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

Public Papers of FDR, 1937, Item 26

It is obvious, therefore, from both reason and experience, that some provision must be adopted, which will operate automatically to supplement the work of older judges and accelerate the work of the court.

Public Papers of FDR, 1937, Item 26

Now, some recommendations.

Public Papers of FDR, 1937, Item 26

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or to resign. If an elder judge is not in fact incapacitated, only good can come from the presence of an additional judge in the crowded state of the dockets; if the capacity of an elder judge is in fact impaired, the appointment of an additional judge is indispensable. This seems to be a truth which cannot be contradicted.

Public Papers of FDR, 1937, Item 26

I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion in the lower courts. The Supreme Court should be given power to appoint an administrative assistant who may be called a Proctor. He would be charged with the duty of watching the calendars and the business of all the courts in the federal system. The Chief Justice thereupon should be authorized to make a temporary assignment of any circuit or district judge hereafter appointed—this would not apply to the members of the bench at the present time, only the new ones—in order that he may serve as long as needed in any circuit or district where the courts are in arrears.

Public Papers of FDR, 1937, Item 26

I attach a carefully considered draft of a proposed bill, which, if enacted, would, I am confident, afford substantial relief. The proposed measure also contains a limit on the total number of judges who might thus be appointed and also a limit on the potential size of any one of our federal courts.

Public Papers of FDR, 1937, Item 26

That bill, I might add, as I explained to the Chairmen of the Judiciary Committees of the House and Senate just now, is merely something for them to work on, as in any other case when any bill goes in. It is simply something for them to work on to save them trouble of trying to put the language together.

Public Papers of FDR, 1937, Item 26

These proposals do not raise any issue of constitutional law. Some of you may, perhaps, realize why I said what I did in my annual message of January sixth.

Public Papers of FDR, 1937, Item 26

They do not suggest any form of compulsory retirement for incumbent judges. Indeed, those who have reached the retirement age, but desire to continue their judicial work, would be able to do so under less physical and mental strain and would be able to play a useful part in relieving the growing congestion in the business of our courts. Among them are men of eminence and great ability whose services the Government would be loath to lose. If, on the other hand, any judge eligible for retirement should feel that his court would suffer because of an increase in its membership, he may retire or resign under already existing provisions of law if he wishes so to do. In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other federal judges, has my entire approval.

Public Papers of FDR, 1937, Item 26

You know what the situation is there. Any Circuit or District Judge may retire on full pay. A Supreme Court Justice can resign and get full pay. The only difference is that if he resigns and gets full pay, he is subject to changes in the income tax laws and things like that. This recommendation, would put him on the same status as the judges in the other courts.

Public Papers of FDR, 1937, Item 26

One further matter requires immediate attention.

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This is the other important one.

Public Papers of FDR, 1937, Item 26

We have witnessed the spectacle of conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation.

Public Papers of FDR, 1937, Item 26

This is concerned primarily with constitutional questions.

Public Papers of FDR, 1937, Item 26

Such a welter of uncomposed differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.

Public Papers of FDR, 1937, Item 26

A federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as one year or two years or three years—until final determination can be made by the Supreme Court—the law loses its most indispensable element—equality.

Public Papers of FDR, 1937, Item 26

Moreover, during the long processes of preliminary motions, original trials, petitions for rehearings, appeals, reversals on technical grounds requiring re-trials, motions before the Supreme Court and the final hearing by the highest tribunal—during all this time labor, industry, agriculture, commerce and the Government itself go through an unconscionable period of uncertainty and embarrassment. And it is well to remember that during these long processes the normal operations of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice—certainty.

Public Papers of FDR, 1937, Item 26

Finally, we find the processes of government itself brought to a complete stop from time to time by injunctions issued almost automatically, sometimes even without notice to the Government, and not infrequently in clear violation of the principle of equity that injunctions should be granted only in those rare cases of manifest illegality and irreparable damage against which the ordinary course of the law offers no protection. Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party.

Public Papers of FDR, 1937, Item 26

In the uncertain state of the law, it is not difficult for the ingenious to devise novel reasons for attacking the validity of new legislation or its application. While these questions are laboriously brought to issue and debated through a series of courts, the Government must stand aside. It matters not that the Congress has enacted the law, that the Executive has signed it and that the administrative machinery is waiting to function. Government by injunction lays a heavy hand upon normal processes; and no important statute can take effect —against any individual or organization with the means to employ lawyers and engage in wide flung litigation—until it has. passed through the whole hierarchy of the courts. Thus the judiciary, by postponing the effective date of Acts of the Congress, is assuming an additional function and is coming more and more to constitute a scattered, loosely organized and slowly operating third house of the National Legislature.

Public Papers of FDR, 1937, Item 26

This state of affairs has come upon the nation gradually over a period of decades. In my annual message to this Congress I expressed some views and some hopes.

Public Papers of FDR, 1937, Item 26

Now, as an immediate step, I recommend that the Congress provide that no decision, injunction, judgment or decree on any constitutional question be promulgated by any federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard. This is to prevent court action on the constitutionality of Acts of the Congress in suits between private individuals, where the Government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land.

Public Papers of FDR, 1937, Item 26

That sounds like common sense.

Public Papers of FDR, 1937, Item 26

I also earnestly recommend that in cases in which any court of first instance—that is the District Court—determines a question of constitutionality, the Congress provide that there shall be a direct and immediate appeal to the Supreme Court—it does not take away any right of any lower court to pass on constitutionality, but it provides for an immediate appeal to the Supreme Court, and that such cases—take precedence over all other matters pending in that court. Such legislation will, I am convinced, go far to alleviate the inequality, uncertainty and delay in the disposition of vital questions of constitutionality arising under our fundamental law.

Public Papers of FDR, 1937, Item 26

My desire is to strengthen the administration of justice and to make it a more effective servant of public need. In the American ideal of government the courts find an essential and constitutional place. In striving to fulfill that ideal, not only the judges but the Congress and the Executive as well, must do all in their power to bring the judicial organization and personnel to the high standards of usefulness which sound and efficient government and modern conditions require.

Public Papers of FDR, 1937, Item 26

This message has dealt with four present needs:

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First, to eliminate congestion of calendars and to make the judiciary as a whole less static by the constant and systematic addition of new blood to its personnel—that is the first need—second, to make the judiciary more elastic by providing for temporary transfers of circuit and district judges to those places where federal courts are most in arrears; third, to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; fourth, to eliminate inequality, uncertainty and delay now existing in the determination of constitutional questions involving federal statutes.

Public Papers of FDR, 1937, Item 26

If we increase the personnel of the federal courts so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals; if we invigorate all the courts by the persistent infusion of new blood; if we grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire federal judiciary; and if we assure government participation in the speedier consideration and final determination of all constitutional questions, we shall go a long way toward our high objectives. If these measures achieve their aim, we may be relieved of the necessity of considering any fundamental changes in the powers of the courts or the constitution of our Government—changes which involve consequences so far-reaching as to cause uncertainty as to the wisdom of such course.

Public Papers of FDR, 1937, Item 26

As to the bill itself, so that you will get a practical idea of the bill—most of it is technical—I will only go over the high lights:

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When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired—in other words, when he gets to be seventy years and six months old and has neither resigned nor retired—the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned.

Public Papers of FDR, 1937, Item 26

Is that clear?

Public Papers of FDR, 1937, Item 26

The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States, (2) more than two additional members so appointed to a circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the Customs Court, or (3) more than twice the number of judges now authorized to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts.

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Then Section 2 relates to assignments by the Chief Justice of any judge hereafter appointed to any other district or circuit.

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The rest of the bill, that is Section 3, relates to the appointment of the Proctor, whose duty is to get information for the court in regard to the volume and status of litigation in all the courts of the United States, the need of assigning District Judges to congested areas or methods for expediting cases pending on the dockets. The Proctor, we suggest, should get a salary of $10,000 a year.

Public Papers of FDR, 1937, Item 26

That is about all in the Act. The rest is technical.

Public Papers of FDR, 1937, Item 26

And that is all the news.

Public Papers of FDR, 1937, Item 26

Q. Mr. President, will you deliver this message or read it in person?

Public Papers of FDR, 1937, Item 26

THE PRESIDENT: It will be read in about half an hour.

Public Papers of FDR, 1937, Item 26

Q. Mr. President, this question is for background, but is this intended to take care of cases where the appointee has lost mental capacity to resign? (Laughter)

Public Papers of FDR, 1937, Item 26

THE PRESIDENT: That is all.

Public Papers of FDR, 1937, Item 26

Q. Was that the reason for the special Cabinet meeting?

Public Papers of FDR, 1937, Item 26

THE PRESIDENT: Yes.

Public Papers of FDR, 1937, Item 26

Q. Can you tell us what the reaction was this morning?

Public Papers of FDR, 1937, Item 26

THE PRESIDENT: I did exactly what I did here. As soon as I finished I came in here. There was no discussion.

Public Papers of FDR, 1937, Item 26

MR. YOUNG: Thank you, Mr. President.

President Roosevelt's Fireside Chat on Judicial Reform, 1937

Title: President Roosevelt's Fireside Chat on Judicial Reform

Author: Franklin D. Roosevelt

Date: March 9, 1937

Source: Public Papers of the Presidents, F. D. Roosevelt, 1937, Item 46

Public Papers of FDR, 1937, Item 46

Last Thursday I described in detail certain economic problems which everyone admits now face the Nation. For the many messages which have come to me after that speech, and which it is physically impossible to answer individually, I take this means of saying "thank you."

Public Papers of FDR, 1937, Item 46

Tonight, sitting at my desk in the White House, I make my first radio report to the people in my second term of office.

Public Papers of FDR, 1937, Item 46

I am reminded of that evening in March, four years ago, when I made my first radio report to you. We were then in the midst of the great banking crisis.

Public Papers of FDR, 1937, Item 46

Soon after, with the authority of the Congress, we asked the Nation to turn over all of its privately held gold, dollar for dollar, to the Government of the United States.

Public Papers of FDR, 1937, Item 46

Today's recovery proves how right that policy was.

Public Papers of FDR, 1937, Item 46

But when, almost two years later, it came before the Supreme Court its constitutionality was upheld only by a five-to-four vote. The change of one vote would have thrown all the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation.

Public Papers of FDR, 1937, Item 46

In 1933 you and I knew that we must never let our economic system get completely out of joint again—that we could not afford to take the risk of another great depression.

Public Papers of FDR, 1937, Item 46

We also became convinced that the only way to avoid a repetition of those dark days was to have a government with power to prevent and to cure the abuses and the inequalities which had thrown that system out of joint.

Public Papers of FDR, 1937, Item 46

We then began a program of remedying those abuses and inequalities-to give balance and stability to our economic system to make it bomb-proof against the causes of 1929.

Public Papers of FDR, 1937, Item 46

Today we are only part-way through that program—and recovery is speeding up to a point where the dangers of 1929 are again becoming possible, not this week or month perhaps, but within a year or two.

Public Papers of FDR, 1937, Item 46

National laws are needed to complete that program. Individual or local or state effort alone cannot protect us in 1937 any better than ten years ago.

Public Papers of FDR, 1937, Item 46

It will take time—and plenty of time—to work out our remedies administratively even after legislation is passed. To complete our program of protection in time, therefore, we cannot delay one moment in making certain that our National Government has power to carry through.

Public Papers of FDR, 1937, Item 46

Four years ago action did not come until the eleventh hour. It was almost too late.

Public Papers of FDR, 1937, Item 46

If we learned anything from the depression we will not allow ourselves to run around in new circles of futile discussion and debate, always postponing the day of decision.

Public Papers of FDR, 1937, Item 46

The American people have learned from the depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing that protection—not after long years of debate, but now.

Public Papers of FDR, 1937, Item 46

The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.

Public Papers of FDR, 1937, Item 46

We are at a crisis in our ability to proceed with that protection. It is a quiet crisis. There are no lines of depositors outside closed banks. But to the far-sighted it is far-reaching in its possibilities of injury to America.

Public Papers of FDR, 1937, Item 46

I want to talk with you very simply about the need for present action in this crisis—the need to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed.

Public Papers of FDR, 1937, Item 46

Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.

Public Papers of FDR, 1937, Item 46

It is the American people themselves who are in the driver's seat. It is the American people themselves who want the furrow plowed.

Public Papers of FDR, 1937, Item 46

It is the American people themselves who expect the third horse to pull in unison with the other two.

Public Papers of FDR, 1937, Item 46

I hope that you have re-read the Constitution of the United States in these past few weeks. Like the Bible, it ought to be read again and again.

Public Papers of FDR, 1937, Item 46

It is an easy document to understand when you remember that it was called into being because the Articles of Confederation under which the original thirteen States tried to operate after the Revolution showed the need of a National Government with power enough to handle national problems. In its Preamble, the Constitution states that it was intended to form a more perfect Union and promote the general welfare; and the powers given to the Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

Public Papers of FDR, 1937, Item 46

But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers "to levy taxes…and provide for the common defense and general welfare of the United States."

Public Papers of FDR, 1937, Item 46

That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote a Federal Constitution to create a National Government with national power, intended as they said, "to form a more perfect union for ourselves and our posterity."

Public Papers of FDR, 1937, Item 46

For nearly twenty years there was no conflict between the Congress and the Court. Then Congress passed a statute which, in 1803, the Court said violated an express provision of the Constitution. The Court claimed the power to declare it unconstitutional and did so declare it. But a little later the Court itself admitted that it was an extraordinary power to exercise and through Mr. Justice Washington laid down this limitation upon it: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

Public Papers of FDR, 1937, Item 46

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures in complete disregard of this original limitation.

Public Papers of FDR, 1937, Item 46

In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.

Public Papers of FDR, 1937, Item 46

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of the Congress—and to approve or disapprove the public policy written into these laws.

Public Papers of FDR, 1937, Item 46

That is not only my accusation. It is the accusation of most distinguished Justices of the present Supreme Court. I have not the time to quote to you all the language used by dissenting Justices in many of these cases. But in the case holding the Railroad Retirement Act unconstitutional, for instance, Chief Justice Hughes said in a dissenting opinion that the majority opinion was "a departure from sound principles," and placed "an unwarranted limitation upon the commerce clause." And three other Justices agreed with him.

Public Papers of FDR, 1937, Item 46

In the case holding the A.A.A. unconstitutional, Justice Stone said of the majority opinion that it was a "tortured construction of the Constitution." And two other Justices agreed with him.

Public Papers of FDR, 1937, Item 46

In the case holding the New York Minimum Wage Law unconstitutional, Justice Stone said that the majority were actually reading-into the Constitution their own "personal economic predilections," and that if the legislative power is not left free to choose the methods of solving the problems of poverty, subsistence and health of large numbers in the community, then "government is to be rendered impotent." And two other Justices agreed with him.

Public Papers of FDR, 1937, Item 46

In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people.

Public Papers of FDR, 1937, Item 46

In the face of such dissenting opinions, it is perfectly clear, that as Chief Justice Hughes has said: "We are under a Constitution, but the Constitution is what the Judges say it is."

Public Papers of FDR, 1937, Item 46

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a super-legislature, as one of the justices has called it-reading into the Constitution words and implications which are not there, and which were never intended to be there.

Public Papers of FDR, 1937, Item 46

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men.

Public Papers of FDR, 1937, Item 46

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.

Public Papers of FDR, 1937, Item 46

How then could we proceed to perform the mandate given us? It was said in last year's Democratic platform, "If these problems cannot be effectively solved within the Constitution, we shall seek such clarifying amendment as will assure the power to enact those laws, adequately to regulate commerce, protect public health and safety, and safeguard economic security." In other words, we said we would seek an amendment only if every other possible means by legislation were to fail.

Public Papers of FDR, 1937, Item 46

When I commenced to review the situation with the problem squarely before me, I came by a process of elimination to the conclusion that, short of amendments, the only method which was clearly constitutional, and would at the same time carry out other much needed reforms, was to infuse new blood into all our Courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have Judges who will bring to the Courts a present-day sense of the Constitution—Judges who will retain in the Courts the judicial functions of a court, and reject the legislative powers which the courts have today assumed.

Public Papers of FDR, 1937, Item 46

In forty-five out of the forty-eight States of the Union, Judges are chosen not for life but for a period of years. In many States Judges must retire at the age of seventy. Congress has provided financial security by offering life pensions at full pay for Federal Judges on all Courts who are willing to retire at seventy. In the case of Supreme Court Justices, that pension is $20,000 a year. But all Federal Judges, once appointed, can, if they choose, hold office for life, no matter how old they may get to be.

Public Papers of FDR, 1937, Item 46

What is my proposal? It is simply this: whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.

Public Papers of FDR, 1937, Item 46

That plan has two chief purposes. By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.

Public Papers of FDR, 1937, Item 46

The number of Judges to be appointed would depend wholly on the decision of present Judges now over seventy, or those · who would subsequently reach the age of seventy.

Public Papers of FDR, 1937, Item 46

If, for instance, any one of the six Justices of the Supreme Court now over the age of seventy should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than fifteen, there may be 'only fourteen, or thirteen, or twelve. And there may be only nine.

Public Papers of FDR, 1937, Item 46

There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.

Public Papers of FDR, 1937, Item 46

Why was the age fixed at seventy? Because the laws of many States, the practice of the Civil Service, the regulations of the Army and Navy, and the rules of many of our Universities and of almost every great private business enterprise, commonly fix the retirement age at seventy years or less.

Public Papers of FDR, 1937, Item 46

The statute would apply to all the courts in the Federal system. There is general approval so far as the lower Federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. If such a plan is good for the lower courts it certainly ought to be equally good for the highest Court from which there is no appeal.

Public Papers of FDR, 1937, Item 46

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to "pack" the Supreme Court and that a baneful precedent will be established.

Public Papers of FDR, 1937, Item 46

What do they mean by the words "packing the Court"?

Public Papers of FDR, 1937, Item 46

Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

Public Papers of FDR, 1937, Item 46

If by that phrase "packing the Court" it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

Public Papers of FDR, 1937, Item 46

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions, that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called "packing the Courts," then I say that I and with me the vast majority of the American people favor doing just that thing—now.

Public Papers of FDR, 1937, Item 46

Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of Justices has been changed several times before, in the Administrations of John Adams and Thomas Jefferson—both signers of the Declaration of Independence—Andrew Jackson, Abraham Lincoln and Ulysses S. Grant.

Public Papers of FDR, 1937, Item 46

I suggest only the addition of Justices to the bench in accordance with a clearly defined principle relating to a clearly defined age limit. Fundamentally, if in the future, America cannot trust the Congress it elects to refrain from abuse of our Constitutional usages, democracy will have failed far beyond the importance to it of any kind of precedent concerning the Judiciary.

Public Papers of FDR, 1937, Item 46

We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly Judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make it dependent upon the desire or prejudice of any individual Justice?

Public Papers of FDR, 1937, Item 46

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the Judiciary. Normally every President appoints a large number of District and Circuit Judges and a few members of the Supreme Court. Until my first term practically every President of the United States had appointed at least one member of the Supreme Court. President Taft appointed five members and named a Chief Justice; President Wilson, three; President Harding, four, including a Chief Justice; President Coolidge, one; President Hoover, three, including a Chief Justice.

Public Papers of FDR, 1937, Item 46

Such a succession of appointments should have provided a Court well-balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

Public Papers of FDR, 1937, Item 46

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a Judge reaches the age of seventy, a new and younger Judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal Courts, including the highest, to be determined by chance or the personal decision of individuals.

Public Papers of FDR, 1937, Item 46

If such a law as I propose is regarded as establishing a new precedent, is it not a most desirable precedent?

Public Papers of FDR, 1937, Item 46

Like all lawyers, like all Americans, I regret the necessity of this controversy. But the welfare of the United States, and indeed of the Constitution itself, is what we all must think about first. Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present.

Public Papers of FDR, 1937, Item 46

This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our system of Constitutional Government and to have it resume its high task of building anew on the Constitution "a system of living law." The Court itself can best undo what the Court has done.

Public Papers of FDR, 1937, Item 46

I have thus explained to you the reasons that lie behind our efforts to secure results by legislation within the Constitution. I hope that thereby the difficult process of constitutional amendment may be rendered unnecessary. But let us examine that process.

Public Papers of FDR, 1937, Item 46

There are many types of amendment proposed. Each one is radically different from the other. There is no substantial group within the Congress or outside it who are agreed on any single amendment.

Public Papers of FDR, 1937, Item 46

It would take months or years to get substantial agreement upon the type and language of an amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both Houses of the Congress.

Public Papers of FDR, 1937, Item 46

Then would come the long course of ratification by threefourths of all the States. No amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And thirteen States which contain only five percent of the voting population can block ratification even though the thirty-five States with ninety-five percent of the population are in favor of it.

Public Papers of FDR, 1937, Item 46

A very large percentage of newspaper publishers, Chambers of Commerce, Bar Associations, Manufacturers' Associations, who are trying to give the impression that they really do want a constitutional amendment would be the first to exclaim as soon as an amendment was proposed, "Oh! I was for an amendment all right, but this amendment that you have proposed is not the kind of an amendment that I was thinking about. I am, therefore, going to spend my time, my efforts and my money to block that amendment, although I would be awfully glad to help get some other kind of amendment ratified."

Public Papers of FDR, 1937, Item 46

Two groups oppose my plan on the ground that they favor a constitutional amendment. The first includes those who fundamentally object to social and economic legislation along modern lines. This is the same group who during the campaign last Fall tried to block the mandate of the people.

Public Papers of FDR, 1937, Item 46

Now they are making a last stand. And the strategy of that last stand is to suggest the time-consuming process of amendment in order to kill off by delay the legislation demanded by the mandate.

Public Papers of FDR, 1937, Item 46

To them I say: I do not think you will be able long to fool the American people as to your purposes.

Public Papers of FDR, 1937, Item 46

The other group is composed of those who honestly believe the amendment process is the best and who would be willing to support a reasonable amendment if they could agree on one.

Public Papers of FDR, 1937, Item 46

To them I say: we cannot rely on an amendment as the immediate or only answer to our present difficulties. When the time comes for action, you will find that many of those who pretend to support you will sabotage any constructive amendment which is proposed. Look at these strange bed-fellows of yours. When before have you found them really at your side in your fights for progress?

Public Papers of FDR, 1937, Item 46

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.

Public Papers of FDR, 1937, Item 46

This proposal of mine will not infringe in the slightest upon the civil or religious liberties so dear to every American.

Public Papers of FDR, 1937, Item 46

My record as Governor and as President proves my devotion to those liberties. You who know me can have no fear that I would tolerate the destruction by any branch of government of any part of Our heritage of freedom.

Public Papers of FDR, 1937, Item 46

The present attempt by those opposed to progress to play upon the fears of danger to personal liberty brings again to mind that crude and cruel strategy tried by the same opposition to frighten the workers of America in a pay-envelope propaganda against the Social Security Law. The workers were not fooled by that propaganda then. The people of America will not be fooled by such propaganda now.

Public Papers of FDR, 1937, Item 46

I am in favor of action through legislation:

Public Papers of FDR, 1937, Item 46

First, because I believe that it can be passed at this session of the Congress.

Public Papers of FDR, 1937, Item 46

Second, because it will provide a reinvigorated, liberal-minded Judiciary necessary to furnish quicker and cheaper justice from bottom to top.

Public Papers of FDR, 1937, Item 46

Third, because it will provide a series of Federal Courts willing to enforce the Constitution as written, and unwilling to assert legislative powers by writing into it their own political and economic policies.

Public Papers of FDR, 1937, Item 46

During the past half century the balance of power between the three great branches of the Federal Government, has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part.

United States v. Carolene Products Co., 1938

Title: United States v. Carolene Products Co.

Author: U.S. Supreme Court

Date: April 25, 1938

Source: 304 U.S. 144

This case was argued April 6, 1938, and was decided April 25, 1938.

1938, United States v. Carolene Products Co., 304 U.S. 144

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

1938, United States v. Carolene Products Co., 304 U.S. 144

FOR THE SOUTHERN DISTRICT OF ILLINOIS

Syllabus

1938, United States v. Carolene Products Co., 304 U.S. 144

The Filled Milk Act of Congress of Mar. 4, 1923, defines the term Filled Milk as meaning any milk, cream, or skimmed milk, whether or not condensed or dried, etc., to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, dried, etc.; it declares that Filled Milk, as so defined, "is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public", and it forbids and penalizes the shipment of such Filled Milk in interstate commerce. Defendant was indicted for shipping interstate certain packages of an article described in the indictment as a compound of condensed skimmed milk and coconut oil made in the imitation or semblance of condensed milk or cream, and further characterized by the indictment in the words of the statute, as "an adulterated article of food, injurious to the public health."

1938, United States v. Carolene Products Co., 304 U.S. 144

Held: [304 U.S. 145]

1938, United States v. Carolene Products Co., 304 U.S. 145

1. That upon its face, and as supported by judicial knowledge, including facts found in the reports of the congressional committees, the Act is presumptively within the scope of the power to regulate interstate commerce and consistent with due process. Demurrer to the indictment should have been overruled. Hebe Co. v. Shaw, 248 U.S. 297. P. 147.

1938, United States v. Carolene Products Co., 304 U.S. 145

2. It is no valid objection that the prohibition of the Act does not extend to oleomargarine or other butter substitutes in which vegetable fats or oils replace butter. P. 151.

1938, United States v. Carolene Products Co., 304 U.S. 145

3. The statutory characterization of filled milk as injurious to health and as a fraud upon the public may, for the purposes of this case, be considered as a declaration of legislative findings deemed to support the Act as a constitutional exertion of the legislative power, aiding informed judicial review by revealing the rationale of the legislation, as do the reports of legislative committees. P. 152.

1938, United States v. Carolene Products Co., 304 U.S. 145

7 F.Supp. 500, reversed.

1938, United States v. Carolene Products Co., 304 U.S. 145

APPEAL under the Criminal Appeals Act from a judgment sustaining a demurrer to an indictment.

STONE, J., lead opinion

1938, United States v. Carolene Products Co., 304 U.S. 145

MR. JUSTICE STONE delivered the opinion of the Court

1938, United States v. Carolene Products Co., 304 U.S. 145

The question for decision is whether the "Filled Milk Act" of Congress of March 4, 1923 (c. 262, 42 Stat. 1486, 21 U.S.C. § 61-63), 1 which prohibits the shipment in [304 U.S. 146] interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

1938, United States v. Carolene Products Co., 304 U.S. 146

Appellee was indicted in the district court for southern Illinois for violation of the Act by the shipment in interstate commerce of certain packages of "Milnut," a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. The indictment states, in the words of the statute, that Milnut "is an adulterated article of food, injurious to the public health," and that it is not a prepared food product of the type excepted from the prohibition of the Act. The trial court sustained a demurrer to the indictment on the authority of an earlier case in the same court, United States v. Carolene Products Co., 7 F.Supp. 500. The case was brought here on appeal under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, 18 U.S.C. § 682. The Court of Appeals for the Seventh Circuit has meanwhile, in another case, upheld the Filled Milk Act as an appropriate exercise of the commerce power in Carolene Products Co. v. Evaporated Milk Assn., 93 F. (2d) 202.

1938, United States v. Carolene Products Co., 304 U.S. 146

Appellee assails the statute as beyond the power of Congress over interstate commerce, and hence an invasion of a field of action said to be reserved to the states by the Tenth Amendment. Appellee also complains that the [304 U.S. 147] statute denies to it equal protection of the laws and, in violation of the Fifth Amendment, deprives it of its property without due process of law, particularly in that the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee's product "is an adulterated article of food injurious to the public health and its sale constitutes a fraud on the public."

1938, United States v. Carolene Products Co., 304 U.S. 147

First. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed," Gibbons v. Ogden, 9 Wheat. 1, 196, and extends to the prohibition of shipments in such commerce. Reid v. Colorado, 187 U.S. 137; Lottery Case, 188 U.S. 321; United States v. Delaware & Hudson Co., 213 U.S. 366; Hope v. United States, 227 U.S. 308; Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311; United States v. Hill, 248 U.S. 420; McCormick & Co. v. Brown, 286 U.S. 131. The power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution." Gibbons v. Ogden, supra, 196. Hence, Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, Reid v. Colorado, supra; Lottery Case, supra; Hipolite Egg Co. v. United States, 220 U.S. 45; Hope v. United States, supra, or which contravene the policy of the state of their destination. Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U.S. 334. Such regulation is not a forbidden invasion of state power either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. Seven Cases v. United States, 239 U.S. 510, 514; Hamilton v. Kentucky [304 U.S. 148] Distilleries & Warehouse Co., 251 U.S. 146, 156. The prohibition of the shipment of filled milk in interstate commerce is a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment.

1938, United States v. Carolene Products Co., 304 U.S. 148

Second. The prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago, this Court, in Hebe Co. v. Shaw, 248 U.S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions was not doubted, and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

1938, United States v. Carolene Products Co., 304 U.S. 148

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned, and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years, evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. The conclusions drawn from evidence presented at the hearings were embodied in reports of the [304 U.S. 149] House Committee on Agriculture, H.R. No. 365, 67th Cong., 1st Sess., and the Senate Committee on Agriculture and Forestry, Sen.Rep. No. 987, 67th Cong., 4th Sess. Both committees concluded, as the statute itself declares, that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public. 2

1938, United States v. Carolene Products Co., 304 U.S. 149

There is nothing in the Constitution which compels a legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from [304 U.S. 150] a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult. 3 [304 U.S. 151]

1938, United States v. Carolene Products Co., 304 U.S. 151

Here, the prohibition of the statute is inoperative unless the product is "in imitation or semblance milk, cream, or skimmed milk, whether or not condensed." Whether in such circumstances the public would be adequately protected by the prohibition of false labels and false branding imposed by the Pure Food and Drugs Act, or whether it was necessary to go farther and prohibit a substitute food product thought to be injurious to health if used as a substitute when the two are not distinguishable, was a matter for the legislative Judgment, and not that of courts. Hebe Co. v. Shaw, supra; South Carolina v. Barnwell Bros. Inc., 303 U.S. 177. It was upon this ground that the prohibition of the sale of oleomargarine made in imitation of butter was held not to infringe the Fourteenth Amendment in Powell v. Pennsylvania, 127 U.S. 678; Capital City Dairy Co. v. Ohio, 183 U.S. 238. Compare McCray v. United States, 195 U.S. 27, 63; Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192.

1938, United States v. Carolene Products Co., 304 U.S. 151

Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another. Central Lumber Co. v. South Dakota, 226 U.S. 157, 160; Miller v. Wilson, 236 U.S. 373, 384; Hall v. Geiger-Jones Co., 242 U.S. 539, 556; Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 661. [304 U.S. 152]

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Third. We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

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But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. 4 See Metropolitan Casualty Ins. Co. v. [304 U.S. 153] Brownell, 294 U.S. 580, 584, and cases cited. The present statutory findings affect appellee n more than the reports of the Congressional committees, and since, in the absence of the statutory findings, they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

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Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be male the subject of judicial inquiry, Boren's Farm Products Co. v. Baldwin, 293 U.S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. Chastleton Corporation v. Sinclair, 264 U.S. 543. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular [304 U.S. 154] article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 349, 351, 352; see Whitney v. California, 274 U.S. 357, 379; cf. Morf v. Bingaman, 298 U.S. 407, 413, though the effect of such proof depends on the relevant circumstances of each case, as, for example, the administrative difficulty of excluding the article from the regulated class. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 511-512; South Carolina v. Barnwell Bros., 303 U.S. 177, 192-193. But, by their very nature, such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here, the demurrer challenges the validity of the statute on its face, and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence nor the verdict of a jury can be substituted for it. Price v. Illinois, 238 U.S. 446, 452; Hebe Co. v. Shaw, supra, 303; Standard Oil Co. v. Marysville, 279 U.S. 582, 584; South Carolina v. Barnwell Bros., Inc., supra, 191, citing Worcester County Trust Co. v. Riley, 302 U.S. 292, 299.

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The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce. As the statute is not unconstitutional on its face the demurrer should have been overruled, and the judgment will be

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Reversed. [304 U.S. 155]

1938, United States v. Carolene Products Co., 304 U.S. 155

MR. JUSTICE BLACK concurs in the result and in all of the opinion except the part marked "Third."

1938, United States v. Carolene Products Co., 304 U.S. 155

MR. JUSTICE McREYNOLDS thinks that the judgment should be affirmed.

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MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the consideration or decision of this case.

BUTLER, J., separate opinion

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MR. JUSTICE BUTLER.

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I concur in the result. Prima facie, the facts alleged in the indictment are sufficient to constitute a violation of the statute. But they are not sufficient conclusively to establish guilt of the accused. At the trial, it may introduce evidence to show that the declaration of the Act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation. Mobile, J. & K.C. R. Co. v. Turnipseed, 219 U.S. 35, 43. Manley v. Georgia, 279 U.S. 1, 6. The provisions on which the indictment rests should, if possible, be construed to avoid the serious question of constitutionality. Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298, 307. Panama R. Co. v. Johnson, 264 U.S. 375, 390. Missouri Pacific R. Co. v. Boone, 270 U.S. 466, 472. Richmond Co. v. United States, 275 U.S. 331, 346. If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they are repugnant to the Fifth Amendment. Weaver v. Palmer Bros. Co., 270 U.S. 402, 412-13. See People v. Carolene Products Co., 345 Ill. 166. Carolene Products Co. v. McLaughlin, 365 Ill. 62, 5 N.E.2d 447. Carolene Products Co. v. Thomson, 276 Mich. 172, 267 N.W. 608. Carolene Products Co. v. Banning, 131 Neb. 429, 268 N.W. 313. The allegation of the indictment that Milnut "is an adulterated article of food, injurious to the public health," tenders an issue of fact to be determined upon evidence.

Footnotes

STONE, J., lead opinion (Footnotes)

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1. The relevant portions of the statute are as follows:

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Section 61…. (c) The term "filled milk" means any milk cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated.

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Section 62…. It is hereby declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to…ship or deliver for shipment in interstate or foreign commerce, any filled milk.

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Section 63 imposes as penalties for violations "a fine of not more than $1,000 or imprisonment of not more than one year, or both…"

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2. The reports may be summarized as follows: there is an extensive commerce in milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted. These compounds resemble milk in taste and appearance, and are distributed in packages resembling those in which pure condensed milk is distributed. By reason of the extraction of the natural milk fat, the compounded product can be manufactured and sold at a lower cost than pure milk. Butter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutrition and are wanting in vegetable oils. The use of filled milk as a dietary substitute for pure milk results, especially in the case of children, in undernourishment, and induces diseases which attend malnutrition. Despite compliance with the branding and labeling requirements of the Pure Food and Drugs Act, there is widespread use of filled milk as a food substitute for pure milk. This is aided by their identical taste and appearance, by the similarity of the containers in which they are sold, by the practice of dealers in offering the inferior product to customers as being as good as or better than pure condensed milk sold at a higher price, by customers' ignorance of the respective food values of the two products, and, in many sections of the country, by their inability to read the labels placed on the containers. Large amounts of filled milk, much of it shipped and sold in bulk, are purchased by hotels and boarding houses, and by manufacturers of food products, such as ice cream, to whose customers labeling restrictions afford no protection.

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3. There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet. See Dr. Henry C. Sherman, The Meaning of Vitamin A, in Science, Dec. 21, 1928, p. 619; Dr. E. V. McCollum et al., The Newer Knowledge of Nutrition (1929 ed.), pp. 134, 170, 176, 177; Dr. A. S. Root, Food Vitamins (N.Car. State Board of Health, May 1931), p. 2; Dr. Henry C. Sherman, Chemistry of Food and Nutrition (1932), p. 367; Dr. Mary S. Rose, The Foundations of Nutrition (1933), p. 237.

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When the Filled Milk Act was passed, eleven states had rigidly controlled the exploitation of filled milk, or forbidden it altogether. H.R. 365, 67th Cong., 1st Sess. Some thirty-five states have now adopted laws which, in terms or by their operation, prohibit the sale of filled milk. Ala.Agri.Code, 1927, § 51, Art. 8; Ariz.Rev.Code, 1936 Supp., § 943y; Pope's Ark.Dig.1937, § 3103; Deering's Cal.Code, 1933 Supp., Tit. 149, Act 1943, p. 1302; Conn.Gen.Stat., 1930, § 2487, c. 135; Del.Rev.Code, 1935, § 649; Fla.Comp.Gen.Laws, 1927, §§ 3216, 7676; Ga.Code, 1933, § 42-511; Idaho Code, 1932, Tit. 36, §§ 502-504; Jones Ill.Stat.Ann., 1937 Supp., § 53.020(1), (2), (3); Burns Ind.Stat., 1933, § 35-1203; Iowa Code, 1935, § 3062; Kan.Gen.Stat., 1935, c. 65, § 707; Md.Ann.Code, Art. 27, § 281; Mass.Ann.Laws, 1933, § 17-A, c. 94; Mich.Comp.Laws, 1929, § 5358; Mason's Minn.Stat., 1927, § 3926; Mo.Rev.Stat., 1929, §§ 12408-12413; Mont.Rev.Code, Anderson and McFarland, 1935, c. 240, § 2620.39; Neb.Comp.Stat., 1929, § 81-1022; N.H.Pub.L.1926 v. 1, c. 163, § 37, p. 619; N.J.Comp.Stat., 1911-1924, § 8l-8j, p. 1400; Cahill's N.Y.Cons.Laws, 1930, § 60, c. 1; N.D. Comp.Laws, 1913-1925, Pol.Code, c. 38, § 2855(a) 1; Page's Ohio Gen.Code, § 12725; Purdon's Penna.Stat., 1936, Tit. 31, §§ 553, 582; S.D.Comp.Laws, 1929, c.192, § 7926-O, p. 2493; Williams Tenn.Code, 1934, c. 15, §§ 6549, 6551; Vernon's Tex.Pen.Code, Tit. 12, c. 2, Art. 713a; Utah Rev.Stat., 1933, §§ 3-10-59, 3-10-60; Vt.Pub.L., 1933, Tit. 34, c. 303, § 7724, p. 1288; Va.1936 Code, § 1197c; W.Va.1932 Code, § 2036; Wis.Stat., 11th ed.1931, c. 98, § 98.07, p. 1156; cf. N.Mex.Ann.Stat., 1929, §§ 25-104, 25-108. Three others have subjected its sale to rigid regulations. Colo.L.1921, c. 30, § 1007, p. 440; Ore.1930 Code v. 2, c. XII, §§ 41-1208 to 41-1210; Remington's Wash.Rev.Stat. v. 7, Tit. 40, c. 13, §§ 6206, 6207, 6713, 6714, p. 360, et seq.

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4. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369-370; Lovell v. Griffin, 303 U.S. 444, 452.

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It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; on restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-714, 718-720, 722; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 369; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 357, 373-378; Herndon v. Lowry, 301 U.S. 242, and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365.

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Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 284, or racial minorities, Nixon v. Herndon, supra; Nixon v. Condon, supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n 2, and cases cited.

President Roosevelt's Address to the Governing Board of the Pan American Union, 1939

Title: President Roosevelt's Address to the Governing Board of the Pan American Union

Author: Franklin D. Roosevelt

Date: April 14, 1939

Source: Public Papers of the Presidents, F. D. Roosevelt, 1939, Item 56

Public Papers of FDR, 1939, Item 56

Gentlemen of the Pan American Union:

Public Papers of FDR, 1939, Item 56

I am glad to come here today on our Pan American forty-ninth birthday.

Public Papers of FDR, 1939, Item 56

The American family of Nations pays honor today to the oldest and most successful association of sovereign Governments which exists in all the world.

Public Papers of FDR, 1939, Item 56

Few of us realize that the Pan American organization as we know it, has now attained a longer history and a greater catalogue of achievements than any similar group known to modern history. Justly we can be proud of it. With even more right we can look to it as a symbol of great hope at a time when much of the world finds hope dim and difficult. Never was it more fitting to salute Pan American Day than in the stormy present.

Public Papers of FDR, 1939, Item 56

For upwards of half a century the Republics of the Western World have been working together to promote their common civilization under a system of peace. That venture, launched so hopefully fifty years ago, has succeeded. The American family is today a great cooperative group facing a troubled world in serenity and calm.

Public Papers of FDR, 1939, Item 56

This success of the Western Hemisphere is sometimes attributed to good fortune. I do not share that view. There are not wanting here all of the usual rivalries, all of the normal human desires for power and expansion, all of the commercial problems. The Americas are sufficiently rich to have been themselves the object of desire on the part of overseas Governments; our traditions in history are as deeply rooted in the Old World as are those of Europe.

Public Papers of FDR, 1939, Item 56

It was not accident that prevented South America, and our own West, from sharing the fate of other great areas of the world in the nineteenth century. We have here diversities of race, of language, of custom, of natural resources; and of intellectual forces at least as great as those which prevailed in Europe.

Public Papers of FDR, 1939, Item 56

What was it that has protected us from the tragic involvements which are today making the Old World a new cockpit of old struggles? The answer is easily found. A new, and powerful ideal—that of the community of nations—sprang up at the same time that the Americas became free and independent. It was nurtured by statesmen, thinkers and plain people for decades. Gradually it brought together the Pan American group of Governments; today it has fused the thinking of the peoples, and the desires of their responsible representatives toward a common objective.

Public Papers of FDR, 1939, Item 56

The result of this thinking through all these years has been to shape a typically American institution. This is the Pan American group, which works in open conference, by open agreement. We hold our conferences not as a result of wars, but as the result of our will to peace.

Public Papers of FDR, 1939, Item 56

Elsewhere in the world, to hold conferences such as ours, which meet every five years, it is necessary to fight a major war, until exhaustion or defeat at length brings Governments together to reconstruct their shattered fabrics.

Public Papers of FDR, 1939, Item 56

Greeting a conference at Buenos Aires in 1956, I took occasion to say this:

Public Papers of FDR, 1939, Item 56

"the madness of a great war in another part of the world would affect us and threaten our good in a hundred ways. And the economic collapse of any Nation or nations must of necessity harm our own prosperity. Can we, the Republics of the New World, help the Old World to avert the catastrophe which impends? Yes, I am confident that we can."

Public Papers of FDR, 1939, Item 56

I still have that confidence. There is no fatality which forces the Old World towards new catastrophe. Men are not prisoners of fate, but only prisoners of their own minds. They have within themselves the power to become free at any moment.

Public Papers of FDR, 1939, Item 56

Only a few days ago the head of a great Nation referred to his country as a "prisoner" in the Mediterranean. A little later, another chief of state, on learning that a neighbor country had agreed to defend the independence of another neighbor, characterized that agreement as a "threat" and an "encirclement." Yet there is no such thing as encircling or threatening, or imprisoning any peaceful Nation by other peaceful nations. We have reason to know that in our own experience.

Public Papers of FDR, 1939, Item 56

For instance, on the occasion of a visit to the neighboring Dominion of Canada last summer, I stated that the United States would join in defending Canada were she ever attacked from overseas. Again at Lima, in December last, the twenty-one American Nations joined in a declaration that they would coordinate their common efforts to defend the integrity of their institutions from any attack, direct or indirect.

Public Papers of FDR, 1939, Item 56

At Buenos Aires, in 1936, all of us agreed that in the event of any war or threat of war on this continent, we would consult together to remove or obviate that threat. Yet in no case did any American Nation regard any of these understandings as making any one of them a "prisoner," or as "encircling" any American country, or as a threat of any sort or kind.

Public Papers of FDR, 1939, Item 56

Measures of this kind taken in this hemisphere are taken as guarantees, not of war but of peace, for the simple reason that no Nation on this hemisphere has any will to aggression, or any desire to establish dominance or mastery. Equally, because we are interdependent, and because we know it, no American Nation seeks to deny any neighbor access to the economic and other resources which it must have to live in prosperity.

Public Papers of FDR, 1939, Item 56

In these circumstances, my friends, dreams of conquest appear to us as ridiculous as they are criminal. Pledges designed to prevent aggression, accompanied by the open doors of trade and intercourse, and bound together by common will to cooperate peacefully, make warfare between us as outworn and useless as the weapons of the Stone Age. We may proudly boast that we have begun to realize in Pan American relations what civilization in intercourse between countries really means.

Public Papers of FDR, 1939, Item 56

If that process can be successful here, is it too much to hope that a similar intellectual and spiritual process may succeed elsewhere? Do we really have to assume that nations can find no 'better methods of realizing their destinies than those which were used by the Huns and the Vandals fifteen hundred years ago?

Public Papers of FDR, 1939, Item 56

The American peace which we celebrate today has no quality of weakness in it! We are prepared to maintain it, and to defend it to the fullest extent of our strength, matching force to force if any attempt is made to subvert our institutions, or to impair the independence of any one of our group.

Public Papers of FDR, 1939, Item 56

Should the method of attack be that of economic pressure, I pledge that my country will also give economic support, so that no American Nation need surrender any fraction of its sovereign freedom to maintain its economic welfare. This is the spirit and intent of the Declaration of Lima: the solidarity of the continent.

Public Papers of FDR, 1939, Item 56

The American family of Nations may also rightfully claim, now, to speak to the rest of the world. We have an interest, wider than that of the mere defense of our sea-ringed continent. We know now that the development of the next generation will so narrow the oceans separating us from the Old World, that our customs and our actions are necessarily involved with hers, whether we like it or not.

Public Papers of FDR, 1939, Item 56

Beyond question, within a scant few years air fleets will cross the ocean as easily as today they cross the closed European seas. Economic functioning of the world becomes therefore necessarily a unit; no interruption of it anywhere can fail, in the future, to disrupt economic life everywhere.

Public Papers of FDR, 1939, Item 56

The past generation in Pan American matters was concerned with constructing the principles and the mechanisms through which this hemisphere would work together. But the next generation will be concerned with the methods by which the New World can live together in peace with the Old.

Public Papers of FDR, 1939, Item 56

The issue is really whether our civilization is to be dragged into the tragic vortex of unending militarism punctuated by periodic wars, or whether we shall be able to maintain the ideal of peace, individuality and civilization as the fabric of our lives. We have the right to say that there shall not be an organization of world affairs which permits us no choice but to turn our countries into barracks, unless we are to be the vassals of some conquering empire.

Public Papers of FDR, 1939, Item 56

The truest defense of the peace of our hemisphere must always lie in the hope that our sister nations beyond the seas will break the bonds of the ideas that constrain them toward perpetual warfare. By example we can at least show them the possibility. We, too, have a stake in world affairs.

Public Papers of FDR, 1939, Item 56

Our will to peace can be as powerful as our will to mutual defense; it can command greater loyalty, greater devotion, greater discipline than that enlisted elsewhere for temporary conquest or equally futile glory. It will have its voice in determining the order of world affairs in the days to come.

Public Papers of FDR, 1939, Item 56

This, gentlemen, is the living message which the New World can and does send to the Old. It can be light opening on dark waters. It shows the path of peace.

President Roosevelt's Message to Adolf Hitler and Benito Mussolini, 1939

Title: President Roosevelt's Message to Adolf Hitler and Benito Mussolini

Author: Franklin D. Roosevelt

Date: April 14, 1939

Source: Public Papers of the Presidents, F. D. Roosevelt, 1939, Item 57

Public Papers of FDR, 1939, Item 57

His Excellency

Adolf Hitler,

Chancellor of the German Reich,

Berlin, Germany

Public Papers of FDR, 1939, Item 57

You realize, I am sure, that throughout the world hundreds of millions of human beings are living today in constant fear of a new war or even a series of wars.

Public Papers of FDR, 1939, Item 57

The existence of this fear—and the possibility of such a conflict—are of definite concern to the people of the United States for whom I speak, as they must also be to the peoples of the other nations of the entire Western Hemisphere. All of them know that any major war, even if it were to be confined to other continents, must bear heavily on them during its continuance and also for generations to come.

Public Papers of FDR, 1939, Item 57

Because of the fact that after the acute tension in which the world has been living during the past few weeks there would seem to be at least a momentary relaxation—because no troops are at this moment on the march—this may be an opportune moment for me to send you this message.

Public Papers of FDR, 1939, Item 57

On a previous occasion I have addressed you in behalf of the settlement of political, economic, and social problems by peaceful methods and without resort to arms.

Public Papers of FDR, 1939, Item 57

But the tide of events seems to have reverted to the threat of arms. If such threats continue, it seems inevitable that much of the world must become involved in common ruin. All the world, victor nations, vanquished nations, and neutral nations, will suffer. I refuse to believe that the world is, of necessity, such a prisoner of destiny. On the contrary, it is clear that the leaders of great nations have it in their power to liberate their peoples from the disaster that impends. It is equally clear that in their own minds and in their own hearts the peoples themselves desire that their fears be ended.

Public Papers of FDR, 1939, Item 57

It is, however, unfortunately necessary to take cognizance of recent facts.

Public Papers of FDR, 1939, Item 57

Three nations in Europe and one in Africa have seen their independent existence terminated. A vast territory in another independent Nation of the Far East has been occupied by a neighboring State. Reports, which we trust are not true, insist that further acts of aggression are contemplated against still other independent nations. Plainly the world is moving toward the moment when this situation must end in catastrophe unless a more rational way of guiding events is found.

Public Papers of FDR, 1939, Item 57

You have repeatedly asserted that you and the German people have no desire for war. If this is true there need be no war. Nothing can persuade the peoples of the earth that any governing power has any right or need to inflict the consequences of war on its own or any other people save in the cause of self-evident home defense.

Public Papers of FDR, 1939, Item 57

In making this statement we as Americans speak not through selfishness or fear or weakness. If we speak now it is with the voice of strength and with friendship for mankind. It is still clear to me that international problems can be solved at the council table.

Public Papers of FDR, 1939, Item 57

It is therefore no answer to the plea for peaceful discussion for one side to plead that unless they receive assurances beforehand that the verdict will be theirs, they will not lay aside their arms. In conference rooms, as in courts, it is necessary that both sides enter upon the discussion in good faith, assuming that substantial justice will accrue to both; and it is customary and necessary that they leave their arms outside the room where they confer.

Public Papers of FDR, 1939, Item 57

I am convinced that the cause of world peace would be greatly advanced if the nations of the world were to obtain a frank statement relating to the present and future policy of Governments.

Public Papers of FDR, 1939, Item 57

Because the United States, as one of the Nations of the Western Hemisphere, is not involved in the immediate controversies which have arisen in Europe, I trust that you may be willing to make such a statement of policy to me as head of a Nation far removed from Europe in order that I, acting only with the responsibility and obligation of a friendly intermediary, may communicate such declaration to other nations now apprehensive as to the course which the policy of your Government may take.

Public Papers of FDR, 1939, Item 57

Are you willing to give assurance that your armed forces will not attack or invade the territory or possessions of the following independent nations: Finland, Estonia, Latvia, Lithuania, Sweden, Norway, Denmark, The Netherlands, Belgium, Great Britain and Ireland, France, Portugal, Spain, Switzerland, Liechtenstein, Luxemburg, Poland, Hungary, Rumania, Yugoslavia, Russia, Bulgaria, Greece, Turkey, Iraq, the Arabias, Syria, Palestine, Egypt and Iran.

Public Papers of FDR, 1939, Item 57

Such an assurance clearly must apply not only to the present day but also to a future sufficiently long to give every opportunity to work by peaceful methods for a more permanent peace. I therefore suggest that you construe the word "future" to apply to a minimum period of assured non-aggression ten years at the least a quarter of a century, if we dare look that far ahead.

Public Papers of FDR, 1939, Item 57

If such assurance is given by your Government, I shall immediately transmit it to the Governments of the nations I have named and I shall simultaneously inquire whether, as I am reasonably sure, each of the nations enumerated will in turn give like assurance for transmission to you.

Public Papers of FDR, 1939, Item 57

Reciprocal assurances such as I have outlined will bring to the world an immediate measure of relief.

Public Papers of FDR, 1939, Item 57

I propose that if it is given, two essential problems shall promptly be discussed in the resulting peaceful surroundings, and in those discussions the Government of the United States will gladly take part.

Public Papers of FDR, 1939, Item 57

The discussions which I have in mind relate to the most effective and immediate manner through which the peoples of the world can obtain progressive relief from the crushing burden of armament which is each day bringing them more closely to the brink of economic disaster. Simultaneously the Government of the United States would be prepared to take part in discussions looking toward the most practical manner of opening up avenues of international trade to the end that every Nation of the earth may be enabled to buy and sell on equal terms in the world market as well as to possess assurance of obtaining the materials and products of peaceful economic life.

Public Papers of FDR, 1939, Item 57

At the same time, those Governments other than the United States which are directly interested could undertake such political discussions as they may consider necessary or desirable.

Public Papers of FDR, 1939, Item 57

We recognize complex world problems which affect all humanity but we know that study and discussion of them must be held in an atmosphere of peace. Such an atmosphere of peace cannot exist if negotiations are overshadowed by the threat of force or by the fear of war.

Public Papers of FDR, 1939, Item 57

I think you will not misunderstand the spirit of frankness in which I send you this message. Heads of great Governments in this hour are literally responsible for the fate of humanity in the coming years. They cannot fail to hear the prayers of their peoples to be protected from the foreseeable chaos of war. History will hold them accountable for the lives and the happiness of all—even unto the least.

Public Papers of FDR, 1939, Item 57

I hope that your answer will make it possible for humanity to lose fear and regain security for many years to come.

Public Papers of FDR, 1939, Item 57

A similar message is being addressed to the Chief of the Italian Government.

Einstein's Atomic Bomb Proposal, 1939

Title: Einstein's Atomic Bomb Proposal

Author: Albert Einstein

Date: August 2, 1939

Source: Franklin D. Roosevelt Papers, Franklin D. Roosevelt Library

Aware that Germany was possibly developing an atomic weapon, Leo Szilard approached his good friend, Albert Einstein, and urged him to convince President Roosevelt to authorize an atomic weapons research program. Szilard and Einstein worked on several drafts of the following letter. An intermediary hand-delivered the letter to President Roosevelt two months later on 11 October 1939. It did not have an immediate effect. The suggested research project (later known as the "Manhatten Project") did not begin until two years later, 6 December 1941, the day before Japan attacked Pearl Harbor.

Albert Einstein

Old Grove Road

Nassau Point

Peconic, Long Island

August 2nd, 1939

F. D. Roosevelt

President of the United States,

White House

Washington, D. C.

Sir:

Einstein's Atomic Bomb Proposal

Some recent work by E. Fermi and L. Szilard, which has been communicated to me in a manuscript, leads me to expect that the element uranium may be turned into a new and important source of energy in the immediate future. Certain aspects of this situation which has arisen seem to call for watchfulness and, if necessary, quick action on the part of the Administration. I believe therefore that it is my duty to bring to your attention the following facts and recommendations:

Einstein's Atomic Bomb Proposal

In the course of the last four months it has been made probable—through the work of Joliot in France as well as Fermi and Szilard in America—that it may become possible to set up a nuclear chain reaction in a large mass of uranium, by which vast amounts of power and large quantities of new radium-like elements would be generated. Now it appears almost certain that this could be achieved in the immediate future.

Einstein's Atomic Bomb Proposal

This new phenomena would also lead to the construction of bombs, and it is conceivable—though much less certain—that extremely powerful bombs of a new type may thus be constructed. A single bomb of this type, carried by boat and exploded in a port, might very well destroy the whole port together with some of the surrounding territory. However, such bombs might very well prove to be too heavy for transportation by air.

Einstein's Atomic Bomb Proposal

The United States has only very poor ores of uranium in moderate quantities. There is some good ore in Canada and the former Czechoslovakia, while the most important source of uranium is Belgian Congo.

Einstein's Atomic Bomb Proposal

In view of this situation you may think it desirable to have some permanent contact maintained between the administration and the group of physicists working on chain reactions in America. One possible way of achieving this might be for you to entrust with this task a person who has your confidence and who could perhaps serve in an inofficial capacity. His task might comprise the following:

Einstein's Atomic Bomb Proposal

a) to approach Government Departments, keep them informed of the further development, and put forward recommendations for Government action, giving particular attention to the problem of securing a supply of uranium or for the United States;

Einstein's Atomic Bomb Proposal

b) to speed up the experimental work, which is at present being carried on within the limits of the budgets of University Laboratories, by providing funds, if such funds be required, through his contacts with private persons who are willing to make contributions for this cause, and perhaps also by obtaining the co-operation of industrial laboratories which have the necessary equipment.

Einstein's Atomic Bomb Proposal

I understand that Germany has actually stopped the sale of uranium from the Czechoslovakian mines which she has taken over. That she should have taken such an early action might perhaps be understood on the ground that the son of the German Under-Secretary of State, von Weizsäcker, is attached to the Kaiser-Wilhelm-Institute in Berlin where some of the American work on uranium is now being repeated.

Yours very truly,

[Einstein's Signature]

(Albert Einstein)

President Roosevelt's Message to Congress on the Hatch Act, 1939

Title: President Roosevelt's Message to Congress on the Hatch Act

Author: Franklin D. Roosevelt

Date: August 2, 1939

Source: Public Papers of the Presidents, F. D. Roosevelt, 1939, Item 100

Public Papers of FDR, 1939, Item 100

To the Congress:

Public Papers of FDR, 1939, Item 100

Because there have been so many misrepresentations, some unpremeditated, some deliberate, in regard to the attitude of the Executive Branch of the Government in relation to Senate Bill 1871, "An Act to Prevent Pernicious Political Activities," and because a number of questions have been raised as to the meaning and application of some of its provisions, I deem it advisable at the time of executive approval to make certain observations to the Congress of the United States.

Public Papers of FDR, 1939, Item 100

The genesis of this legislation lies in the message of the President of January 5, 1939, respecting an additional appropriation for the Works Progress Administration. I said in that message: "It is my belief that improper political practices can be eliminated only by the imposition of rigid statutory regulations and penalties by the Congress, and that this should be done. Such penalties should be imposed not only upon persons within the administrative organization of the Works Progress Administration, but also upon outsiders who have in fact in many instances been the principal offenders in this regard. My only reservation in this matter is that no legislation should be enacted which will in any way deprive workers on the Works Progress Administration program of the civil rights to which they are entitled in common with other citizens."

Public Papers of FDR, 1939, Item 100

Furthermore, in applying to all employees of the Federal Government (with a few exceptions) the rules to which the Civil Service employees have been subject for many years, this measure is in harmony with the policy that I have consistently advocated during all my public life, namely, the wider extension of Civil Service as opposed to its curtailment.

Public Papers of FDR, 1939, Item 100

It is worth noting that nearly all exemptions from the Civil Service, which have been made during the past six years and a half, have originated in the Congress itself and not in the Executive.

Public Papers of FDR, 1939, Item 100

Furthermore, it is well known that I have consistently advocated the objectives of the present bill. It has been currently suggested that partisan political reasons have entered largely into the passage of the bill: but with this I am not concerned, because it is my hope that if properly administered the measure can be made an effective instrument of good Government.

Public Papers of FDR, 1939, Item 100

As is usual with all bills passed by the Congress, this bill has been examined, on its receipt at the Executive Offices, by the appropriate departments or agencies, in this case the Attorney General of the United States and the Civil Service Commission.

Public Papers of FDR, 1939, Item 100

The Attorney General has advised me that it seems clear that the Federal Government has the power to describe as qualifications for its employees that they refrain from taking part in other endeavors which, in the light of common experience, may well consume time and attention required by their duties as public officials. He points out, however, that such qualifications cannot properly preclude Government employees from the exercise of the right of free speech or from their right to exercise the franchise.

Public Papers of FDR, 1939, Item 100

The question of constitutionality being resolved in favor of the bill, our next inquiry relates to the exercise and preservation of these rights. It is obvious that the intent of the bill is to follow broadly the provisions of Civil Service regulations that have existed for many years in regard to political activities of Federal employees.

Public Papers of FDR, 1939, Item 100

It is because I have received and will continue to receive so many queries asking what a Government employee may or may not do that it seems appropriate at the outset to postulate the broad principle that if the bill is administered in accord with its spirit, and if it is in the future administered without abuse, oppression or groundless fear, it will serve the purpose intended by the Congress.

Public Papers of FDR, 1939, Item 100

For example, I have been asked by employees of the Government whether under this law they would lose their positions if they merely attend political meetings. The answer is, of course, No.

Public Papers of FDR, 1939, Item 100

I have been asked whether they would lose their positions if they contributed voluntarily to party or individual campaign funds without being solicited. The answer is, of course, No.

Public Papers of FDR, 1939, Item 100

I have been asked whether they would lose their positions if they should merely express their opinion or preference publicly-orally, by radio, or in writing—without doing so as part of an organized political campaign. The answer is No.

Public Papers of FDR, 1939, Item 100

I have been asked if citizens who have received loans from the Home Owners' Loan Corporation, from the Farm Credit Administration or its subsidiaries, from the Farm Security Administration, from the Reconstruction Finance Corporation and other Government lending agencies, would be subject to the terms of this bill. The answer is No.

Public Papers of FDR, 1939, Item 100

I have been asked whether farmers receiving farm benefits would be bound by the terms of the bill. Again, the answer is No.

Public Papers of FDR, 1939, Item 100

I have been asked if Government employees who belong to Young Republican Clubs, Young Democratic Clubs, Civil Service Reform Associations, the League of Women Voters, the American Federation of Labor, the Congress of Industrial Organizations, and similar bodies are subject to the penalties of the measure because of mere membership in these organizations. The answer is No.

Public Papers of FDR, 1939, Item 100

There will be hundreds of similar questions raised in the actual administration and enforcement of this bill. Such questions will be asked in most cases by individuals in good faith. And it is only fair that they should receive an answer. I am, therefore, asking the Attorney General to take the necessary steps through the new Civil Liberties unit of the Department of Justice in order that the civil rights of every government employee may be duly protected and that the element of fear may be removed.

Public Papers of FDR, 1939, Item 100

I have been asked if the bill applies to veterans—Civil War, Indian Wars, the War with Spain, the World War—retired officers and men of the Army, Navy and Marine Corps who, though not Government employees, are receiving benefits or pensions of one kind or another. The answer is, of course, No.

Public Papers of FDR, 1939, Item 100

I have been asked if the Act applies to those who get Government benefits under the Social Security Act in the form of old age pensions or in the form of unemployment compensation. The answer is No.

Public Papers of FDR, 1939, Item 100

Finally, I have been asked various questions relating to the right of a Government employee publicly to answered unwarranted attacks made on him or on his work or on the work of his superiors or on the work of his subordinates, notwithstanding the fact that such attacks or misrepresentations were made for political purposes by newspapers or by individuals as a part of a political campaign.

Public Papers of FDR, 1939, Item 100

This raises the interesting question as to whether all Government officials except the President and Vice President, persons in the office of the President, heads and assistant heads of Executive Departments and policy determining officers appointed by and with the advice and consent of the Senate must remain mute if and when they or the work with which they are concerned are attacked and misrepresented in a political campaign or preliminary thereto.

Public Papers of FDR, 1939, Item 100

It will be noted that the language of the bill wholly excludes members or employees of the Legislative Branch of the Government from its operation.

Public Papers of FDR, 1939, Item 100

It can hardly be maintained that it is an American way of doing things to allow newspapers, magazines, radio broadcasters, members and employees of the Senate and House of Representatives and all kinds of candidates for public office and their friends to make any form of charge, misrepresentation, falsification or vituperation against the acts of any individual or group of individuals employed in the Executive Branch of the Federal Government with complete immunity against reply except by a handful of high executive officials. That, I repeat, would be un-American because it would be unfair, and the great mass of Americans like fair play and insist on it. They do not stand for any gag act.

Public Papers of FDR, 1939, Item 100

It is, therefore, my considered opinion, in which the Attorney General of the United States joins me, that all Federal employees, from the highest to the lowest, have the right publicly to answer any attack or misrepresentation, provided, of course, they do not make such reply as part of active participation in political campaigns.

Public Papers of FDR, 1939, Item 100

The same definition of fair and proper administration of the bill applies to the right of any Government employee, from the highest to the lowest, to give to the public factual information relating to the conduct of governmental affairs. To rule otherwise would make it impossible for the people of the United States to learn from those who serve the Government vital, necessary and interesting facts relating to the manifold activities of the Federal Government. To rule otherwise would give a monopoly to originate and disseminate information to those who, primarily for political purposes, unfortunately have been given to the spreading of false information. That again is unfair and, therefore, un-American.

Public Papers of FDR, 1939, Item 100

It is, I am confident, the purpose of the proponents of this legislation that the new law be thus administered so that the right of free speech will remain, even to those who serve their Government; and that the Government itself shall have full right to place all facts in its possession before the public. If some future Administration should undertake to administer this legislation to the detriment of these rights, such action would be contrary to the purpose of the Act itself and might well infringe upon the constitutional rights of citizens. I trust that public vigilance will for all time prevent this.

Public Papers of FDR, 1939, Item 100

The Attorney General calls my attention to a practical difficulty which should be corrected by additional legislation as soon as possible. For many years there has been an exception to the Civil Service regulation whereby employees permanently residing in the District of Columbia or in municipalities adjacent thereto may become candidates for or hold municipal office in their municipalities. This and a few similar exceptions should, I believe, be maintained.

Public Papers of FDR, 1939, Item 100

The other question relates to the fact that the bill does not in any way cover the multitude of State and local employees who greatly outnumber Federal employees and who may continue to take part in elections in which there are candidates for Federal office on the same ballot with candidates for State and local office. It is held by many who have examined the constitutional question that because the Congress, under the Constitution, may maintain the integrity of Federal elections, it has the power to extend the objectives of this bill so as to cover State and local Government employees who participate actively in Federal elections. This is at least worth the study of the Congress at its next session and therefore before the next Federal election.

Public Papers of FDR, 1939, Item 100

It is because for so many years I have striven in public life and in private life for decency in political campaigns, both on the part of Government servants, of candidates, of newspapers, of corporations and of individuals, that I regard this new legislation as at least a step in the right direction.

Chambers v. Florida, 1940

Title: Chambers v. Florida

Author: U.S. Supreme Court

Date: February 12, 1940

Source: 309 U.S. 227

This case was argued January 4, 1940, and was decided February 12, 1940.

1940, Chambers v. Florida, 309 U.S. 227

CERTIORARI TO THE SUPREME COURT OF FLORIDA

Syllabus

1940, Chambers v. Florida, 309 U.S. 227

1. Convictions of murder obtained in the state courts by use of coerced confessions are void under the clue process clause of the Fourteenth Amendment. P. 228.

1940, Chambers v. Florida, 309 U.S. 227

2. This Court is not concluded by the finding of a jury that a confession by one convicted in a state court of murder was voluntary, but determines that question for itself from the evidence. P. 228.

1940, Chambers v. Florida, 309 U.S. 227

3. Confessions of murder procured by repeated inquisitions of prisoners without friends or counselors present, and under circumstances calculated to inspire terror, held compulsory. Pp. 238-241.

1940, Chambers v. Florida, 309 U.S. 227

136 Fla. 568; 187 So. 156, reversed.

1940, Chambers v. Florida, 309 U.S. 227

CERTIORARI, 308 U.S. 541, to review convictions of murder upon the question whether confessions used in the trial were in violation of due process of law.

BLACK, J., lead opinion

1940, Chambers v. Florida, 309 U.S. 227

MR. JUSTICE BLACK delivered the opinion of the Court.

1940, Chambers v. Florida, 309 U.S. 227

The grave question presented by the petition for certiorari, granted in forma pauperis, 1 is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment. 2 [309 U.S. 228]

1940, Chambers v. Florida, 309 U.S. 228

First. The State of Florida challenges our jurisdiction to look behind the judgments below, claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined because passed upon by a jury. However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. 3 Since petitioners have seasonably asserted the right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means [309 U.S. 229] proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns. 4

1940, Chambers v. Florida, 309 U.S. 229

Second. The record shows—

1940, Chambers v. Florida, 309 U.S. 229

About nine o'clock on the night of Saturday, May 13, 1933, Robert Darsey, an elderly white man, was robbed and murdered in Pompano, Florida, a small town in Broward County about twelve miles from Fort Lauderdale, the Count seat. The opinion of the Supreme Court of Florida affirming petitioners' conviction for this crime stated that "It was one of those crimes that induced an enraged community…. " 5 And, as the dissenting judge pointed out,

1940, Chambers v. Florida, 309 U.S. 229

The murder and robbery of the elderly Mr. Darsey…was a most dastardly and atrocious crime. It naturally aroused great and well justified public indignation. 6

1940, Chambers v. Florida, 309 U.S. 229

Between 9:30 and 10 o'clock after the murder, petitioner Charlie Davis was arrested, and, within the next twenty-four hours, from twenty-five to forty negroes living in the community, including petitioners Williamson, Chambers, and Woodward, were arrested without warrants and confined in the Broward County jail, at Fort Lauderdale. On the night of the crime, attempts to trail the murderers by bloodhounds brought J. T. Williams, a convict guard, into the proceedings. From then until confessions were obtained and petitioners were sentenced, he took a prominent part. About 11 P.M. on the following Monday, May 15, the sheriff and Williams took several of the imprisoned negroes, including Williamson and Chambers, to the Dade County jail at Miami. The [309 U.S. 230] sheriff testified that they were taken there because he felt a possibility of mob violence, and "wanted to give protection to every prisoner…in jail." Evidence of petitioners was that, on the way to Miami, a motorcycle patrolman drew up to the car in which the men were riding, and the sheriff "told the cop that he had some negroes that he—[was] taking down to Miami to escape a mob." This statement was not denied by the sheriff in his testimony, and Williams did not testify at all; Williams apparently has now disappeared. Upon order of Williams, petitioner Williamson was kept in the death cell of the Dade County jail. The prisoners thus spirited to Miami were returned to the Fort Lauderdale jail the next day, Tuesday.

1940, Chambers v. Florida, 309 U.S. 230

It is clear from the evidence of both the State and petitioners that from Sunday, May 14, to Saturday, May 20, the thirty to forty negro suspects were subjected to questioning and cross-questioning (with the exception that several of the suspects were in Dade County jail over one night). From the afternoon of Saturday, May 20, until sunrise of the 21st, petitioners and possibly one or two others underwent persistent and repeated questioning. The Supreme Court of Florida said the questioning "was in progress several days and all night before the confessions were secured," and referred to the last night as an "all-night vigil." The sheriff who supervised the procedure of continued interrogation testified that he questioned the prisoners "in the day time all the week," but did not question them during any night before the all-night vigil of Saturday, May 20, because, after having "questioned them all day…, [he] was tired." Other evidence of the State was "that the officers of Broward County were in that jail almost continually during the whole week questioning these boys, and other boys, in connection with this" case. [309 U.S. 231]

1940, Chambers v. Florida, 309 U.S. 231

The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrest and until their confessions were finally acceptable to the State's Attorney in the early dawn of Sunday, May 21st, petitioners and their fellow prisoners were led one at a time from their cells to the questioning room, quizzed, and returned to their cells to await another turn. So far as appears, the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community.

1940, Chambers v. Florida, 309 U.S. 231

The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after daylight. Be that as it may, it is certain that, by Saturday, May 20th, five days of continued questioning had elicited no confession. Admittedly, a concentration of effort—directed against a small number of prisoners including petitioners—on the part of the questioners, principally the sheriff and Williams, the convict guard, began about 3:30 that Saturday afternoon. From that hour on, with only short intervals for food and rest for the questioners—"They all stayed up all night." "They bring one of them at a time backwards and forwards…until they confessed." And Williams was present and participating that night, during the whole of which the jail cook served coffee and sandwiches to the men who "grilled" the prisoners.

1940, Chambers v. Florida, 309 U.S. 231

Sometime in the early hours of Sunday, the 21st, probably about 2:30 A.M., Woodward apparently "broke"—[309 U.S. 232] as one of the state's witnesses put it—after a fifteen or twenty minute period of questioning by Williams, the sheriff and the constable "one right after the other." The State's Attorney was awakened at his home, and called to the jail. He came, but was dissatisfied with the confession of Woodward which he took down in writing at that time, and said something like "tear this paper up, that isn't what I want, when you get something worthwhile, call me." 7 This same State's Attorney conducted the state's case in the circuit court below and also made himself a witness, but did not testify as to why Woodward's [309 U.S. 233] first alleged confession was unsatisfactory to him. The sheriff did, however:

1940, Chambers v. Florida, 309 U.S. 233

A. No, it wasn't false, part of it was true and part of it wasn't; Mr. Maire [the State's Attorney] said there wasn't enough. It wasn't clear enough.

1940, Chambers v. Florida, 309 U.S. 233

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 233

Q…. Was that voluntarily made at that time?

1940, Chambers v. Florida, 309 U.S. 233

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 233

Q. It was voluntarily made that time?

1940, Chambers v. Florida, 309 U.S. 233

A. Yes, sir. [309 U.S. 234]

1940, Chambers v. Florida, 309 U.S. 234

Q. You didn't consider it sufficient?

1940, Chambers v. Florida, 309 U.S. 234

A. Mr. Maire.

1940, Chambers v. Florida, 309 U.S. 234

Q. Mr. Maire told you that it wasn't sufficient, so you kept on questioning him until the time you got him to make a free and voluntary confession of other matters that he hadn't included in the first?

1940, Chambers v. Florida, 309 U.S. 234

A. No sir, we questioned him there and we caught him in lies.

1940, Chambers v. Florida, 309 U.S. 234

Q. Caught all of them telling lies?

1940, Chambers v. Florida, 309 U.S. 234

A. Caught every one of them lying to us that night, yes, sir.

1940, Chambers v. Florida, 309 U.S. 234

Q. Did you tell them they were lying?

1940, Chambers v. Florida, 309 U.S. 234

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 234

Q. Just how would you tell them that?

1940, Chambers v. Florida, 309 U.S. 234

A. Just like I am talking to you. [309 U.S. 235]

1940, Chambers v. Florida, 309 U.S. 235

Q. You said "Jack, you told me a lie"?

1940, Chambers v. Florida, 309 U.S. 235

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 235

After one week's constant denial of all guilt, petitioners "broke."

1940, Chambers v. Florida, 309 U.S. 235

Just before sunrise, the state officials got something "worthwhile" from petitioners which the State's Attorney would "want"; again he was called; he came; in the presence of those who had carried on and witnessed the all-night questioning, he caused his questions and petitioners' answers to be stenographically reported. These are the confessions utilized by the State to obtain the judgments upon which petitioners were sentenced to death. No formal charges had been brought before the confessions. Two days thereafter, petitioners were indicted, were arraigned and Williamson and Woodward pleaded guilty; Chambers and Davis pleaded not guilty. Later the sheriff, accompanied by Williams, informed an attorney who presumably had been appointed to defend Davis that Davis wanted his plea of not guilty withdrawn. This was done, and Davis then pleaded guilty. When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and the sheriff "were in the Court room sitting down in a seat." And from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions.

1940, Chambers v. Florida, 309 U.S. 235

Third. The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. 8 However, in view of its historical [309 U.S. 236] setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that, in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, 9 to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty-loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already, by "the law of the land," forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public [309 U.S. 237] tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against' ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed. 10

1940, Chambers v. Florida, 309 U.S. 237

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and [309 U.S. 238] the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless. 11

1940, Chambers v. Florida, 309 U.S. 238

This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, Brown v. Mississippi, that

1940, Chambers v. Florida, 309 U.S. 238

It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process. 12

1940, Chambers v. Florida, 309 U.S. 238

Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross-questioning of these ignorant young colored tenant farmers by state officers and other white citizens, in a fourth floor jail room, where, as prisoners, they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and [309 U.S. 239] the stoutest resistance. Just as our decision in Brown v. Mississippi was based upon the fact that the confessions were the result of compulsion, so, in the present case, the admitted practices were such as to justify the statement that "The undisputed facts showed that compulsion was applied." 13

1940, Chambers v. Florida, 309 U.S. 239

For five days, petitioners were subjected to interrogations culminating in Saturday's (May 20th) all-night examination. Over a period of five days, they steadily refused to confess, and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning, without an formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. 14 Some were practical strangers in [309 U.S. 240] the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first "confession," given in the early hours of Sunday morning because it was found wanting, demonstrates the relentless tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

1940, Chambers v. Florida, 309 U.S. 240

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. 15 The Constitution proscribes [309 U.S. 241] such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion. [309 U.S. 242]

1940, Chambers v. Florida, 309 U.S. 242

The Supreme Court of Florida was in error, and its judgment is

1940, Chambers v. Florida, 309 U.S. 242

Reversed.

1940, Chambers v. Florida, 309 U.S. 242

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

Footnotes

BLACK, J., lead opinion (Footnotes)

1940, Chambers v. Florida, 309 U.S. 242

1. 308 U.S. 541.

1940, Chambers v. Florida, 309 U.S. 242

2. Petitioners Williamson, Woodward and Davis pleaded guilty of murder, and petitioner Chambers was found guilty by a jury; all were sentenced to death, and the Supreme Court of Florida affirmed. 111 Fla. 707, 151 So. 499, 152 So. 437. Upon the allegation that, unknown to the trial judge, the confessions on which the judgments and sentences of death were based were not voluntary and had been obtained by coercion and duress, the State Supreme Court granted leave to present a petition for writ of error coram nobis to the Broward County Circuit Court, 111 Fla. 707, 152 So. 437. The Circuit Court denied the petition without trial of the issues raised by it and the State Supreme Court reversed and ordered the issues submitted to a jury. 117 Fla. 642, 158 So. 153. Upon a verdict adverse to petitioners, the Circuit Court reaffirmed the original judgments and sentences. Again the State Supreme Court reversed, holding that the issue of force, fear of personal violence and duress had been properly submitted to the jury, but the issue raised by the assignment of error alleging that the confessions and pleas "were not, in fact, freely and voluntarily made" had not been clearly submitted to the jury. 123 Fla. 734, 737, 167 So. 697, 700. A change of venue, to Palm Beach County, was granted, a jury again found against petitioners, and the Broward Circuit Court once more reaffirmed the judgments and sentences of death. The Supreme Court of Florida, one judge dissenting, affirmed. 136 Fla. 568, 187 So. 156. While the petition thus seeks review of the judgments and sentences of death rendered in the Broward Circuit Court and reaffirmed in the Palm Beach Circuit Court, the evidence before us consists solely of the transcript of proceedings (on writ of error coram nobis) in Palm Beach County Court wherein the circumstances surrounding the obtaining of petitioners' alleged confessions were passed on by a jury.

1940, Chambers v. Florida, 309 U.S. 242

3. Brown v. Mississippi, 297 U.S. 278.

1940, Chambers v. Florida, 309 U.S. 242

4. Pierre v. Louisiana, 306 U.S. 354, 358; Norris v. Alabama, 294 U.S. 587, 590.

1940, Chambers v. Florida, 309 U.S. 242

5. 136 Fla. 568, 572, 187 So. 156, 157.

1940, Chambers v. Florida, 309 U.S. 242

6. Id. 574.

1940, Chambers v. Florida, 309 U.S. 242

7. A constable of the community, testifying about this particular incident, said in part:

1940, Chambers v. Florida, 309 U.S. 242

Q. Were you there when Mr. Maire [State's Attorney] talked to Walter Woodward the first time he came over there?

1940, Chambers v. Florida, 309 U.S. 242

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 242

Q. Take his confession down in writing?

1940, Chambers v. Florida, 309 U.S. 242

A. Yes.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. If he made a confession why did you all keep on questioning him about it. As a matter of fact, what he said that time wasn't what you wanted him to say, was it?

1940, Chambers v. Florida, 309 U.S. 242

A. It wasn't what he said the last time.

1940, Chambers v. Florida, 309 U.S. 242

Q. It wasn't what you wanted him to say, was it?

1940, Chambers v. Florida, 309 U.S. 242

A. We didn't think it was all correct.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. What part of it did you think wasn't correct. Would you say what he told you there at that time was freely and voluntarily made?

1940, Chambers v. Florida, 309 U.S. 242

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. What he freely and voluntarily told you in the way of a confession at that time, it wasn't what you wanted?

1940, Chambers v. Florida, 309 U.S. 242

A. It didn't make up like it should.

1940, Chambers v. Florida, 309 U.S. 242

Q. What matter didn't make up?

1940, Chambers v. Florida, 309 U.S. 242

A. There was some things he told us that couldn't possible be true.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. What did Mr. Maire say about it at that time; did you hear Mr. Maire say at this time "tear this paper up, that isn't what I want, when you get something worthwhile call me," or words to that effect?

1940, Chambers v. Florida, 309 U.S. 242

A. Something similar to that.

1940, Chambers v. Florida, 309 U.S. 242

Q. That did happen that night?

1940, Chambers v. Florida, 309 U.S. 242

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 242

Q. That was in the presence of Walter Woodward?

1940, Chambers v. Florida, 309 U.S. 242

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 242

And petitioner Woodward testified on this subject as follows:

1940, Chambers v. Florida, 309 U.S. 242

A…. I was taken out several times on the night of the 20th…. So I still denied it…. .

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

A. He said I had told lies and kept him sitting up all the week and he was tired, and if I didn't come across, I would never see the sun rise.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

A…. then I was taken back to the private cell…and shortly after that they come back, shortly after that, twenty or twenty-five minutes, and bring me out…. I [told Williams] if he would send for the State Attorney, he could take down what I said, I said send for him and I will tell him what I know. So he sent for Mr. Maire sometime during Saturday night, must have been around one or two o'clock in the night, it was after midnight, and so he sent for Mr. Maire, I didn't know Mr. Maire then, but I know him now by his face.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

A. Well he come in and said "this boy got something to tell me," and Captain Williams says, "yes, he is ready to tell you."…

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

…Mr. Maire had a pen and a book to take down what I told him, which he said had to be on the typewriter, but I didn't see any typewriter, I saw him with a pen and book, so whether it was shorthand or regular writing I don't know, but he took it down with pen. After I told him my story, he said it was no good, and he tore it up….

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. What was it Mr. Maire said?

1940, Chambers v. Florida, 309 U.S. 242

A. He told them it wasn't no good, when they got something out of me, he would be back. It was late—he had to go back and go to bed.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

A…. I wasn't in the cell long before they come back….

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. How long was that from the time you was brought into that room until Mr. Maire left there?

1940, Chambers v. Florida, 309 U.S. 242

A. Something like two or three hours, I guess, because it was around sunrise when I went into the room.

1940, Chambers v. Florida, 309 U.S. 242

Q. Had you slept any that night, Walter?

1940, Chambers v. Florida, 309 U.S. 242

A. No, sir. I was walked all night, not continually, but I didn't have no time to sleep except in short spaces of the night.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. When Mr. Maire got there it was after daylight?

1940, Chambers v. Florida, 309 U.S. 242

A. Yes, sir.

1940, Chambers v. Florida, 309 U.S. 242

\* \* \* \*

1940, Chambers v. Florida, 309 U.S. 242

Q. Why did you say to them that morning anything after you were brought into the room?

1940, Chambers v. Florida, 309 U.S. 242

A. Because I was scared….

1940, Chambers v. Florida, 309 U.S. 242

8. There have been long-continued and constantly recurring differences of opinion as to whether general legislative acts regulating the use of property could be invalidated as violating the due process clause of the Fourteenth Amendment. Munn v. Illinois, 94 U.S. 113, 125, dissent 136-154; Chicago, M. & St.P. R. Co. v. Minnesota, 134 U.S. 418, dissent 461-466. And there has been a current of opinion—which this court has declined to adopt in many previous cases—that the Fourteenth Amendment was intended to make secure against state invasion all the rights, privileges and immunities protected from federal violation by the Bill of Rights (Amendments I to VIII). See, e.g., Twining v. New Jersey, 211 U.S. 78, 98-99, Mr. Justice Harlan, dissenting, 114; MacDowell v. Dow, 176 U.S. 581, dissent 606; O'Neil v. Vermont, 144 U.S. 323, dissent 361; Palko v. Connecticut, 302 U.S. 319, 325, 326; Hague v. CIO, 307 U.S. 496.

1940, Chambers v. Florida, 309 U.S. 242

9. Cf. Weems v. United States, 217 U.S. 349, 372, 373, and dissent setting out (p. 396) argument of Patrick Henry, 3 Elliot, Debates 447.

1940, Chambers v. Florida, 309 U.S. 242

10. As adopted, the Constitution provided,

1940, Chambers v. Florida, 309 U.S. 242

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

1940, Chambers v. Florida, 309 U.S. 242

(Art. I, § 9.) "No Bill of Attainder or ex post facto Law shall be passed" (id.), "No State shall…pass any Bill of Attainder, or ex post facto Law…" (id., § 10), and "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court" (Art. III, § 3). The Bill of Rights (Amend. I to VIII). Cf. Magna Carta 1297 (25 Edw. 1); The Petition of Right, 1627 (3 Car. 1, c. 1.); The Habeas Corpus Act, 1640 (16 Car. 1, c. 10.), An Act for [the Regulating] the Privie Councell and for taking away the Court commonly called the Star Chamber; Stat. (1661) 13 Car. 2, Stat. 1, C. 1 (Treason); The Bill of Rights (1688) (1 Will. & Mar. sess. 2, c. 2.); all collected in "Halsbury's Stat. of Eng." (1929) Vol. 3.

1940, Chambers v. Florida, 309 U.S. 242

11.

1940, Chambers v. Florida, 309 U.S. 242

In all third degree cases, it is remarkable to note that the confessions were taken from "men of humble station in life and of a comparatively low degree of intelligence, and most of them apparently too poor to employ counsel and too friendless to have anyone advise them of their rights." Filamor, "Third Degree Confession," 13 Bombay L.J. 339, 346.

1940, Chambers v. Florida, 309 U.S. 242

That the third degree is especially used against the poor and uninfluential is asserted by several writers, and confirmed by official informants and judicial decisions.

1940, Chambers v. Florida, 309 U.S. 242

IV National Commission On Law Observance and Enforcement, Reports (1931), Ch. 3, p. 159. Cf. Morrison v. California, 291 U.S. 82, 95.

1940, Chambers v. Florida, 309 U.S. 242

12. 297 U.S. 278, 286.

1940, Chambers v. Florida, 309 U.S. 242

13. See Ziang Sung Wan v. United States, 266 U.S. 1, 16. The dissenting Judge below noted, 136 Fla. 568, 576, 187 So. 156, 159, that, in a prior appeal of this same case, the Supreme Court of Florida had said:

1940, Chambers v. Florida, 309 U.S. 242

Even if the jury totally disbelieved the testimony of the petitioners, the testimony of Sheriff Walter Clark and one or two of the other witnesses introduced by the State was sufficient to show that these confessions were only made after such constantly repeated and persistent questioning and cross-questioning on the part of the officers and one J. T. Williams, a convict guard, at frequent intervals while they were in jail, over a period of about a week, and culminating in an all-night questioning of the petitioners separately in succession, throughout practically all of Saturday night, until confessions had been obtained from all of them, when they were all brought into a room in the jailer's quarters at 6:30 on Sunday morning and made their confessions before the state attorney, the officers, said J. T. Williams, and several disinterested outsiders, the confessions, in the form of questions and answers, being taken down by the court reporter, and then typewritten.

1940, Chambers v. Florida, 309 U.S. 242

Under the principles laid down in Nickels v. State, 90 Fla. 659, 106 So. 479; Davis v. State, 90 Fla. 317, 105 So. 843; Deiterle v. State, 98 Fla. 739, 124 So. 47; Mathieu v. State, 101 Fla. 94, 133 So. 550, these confessions were not legally obtained.

1940, Chambers v. Florida, 309 U.S. 242

123 Fla. 734, 741, 167 So. 697, 700.

1940, Chambers v. Florida, 309 U.S. 242

14. Cf. the statement of the Supreme Court of Arkansas, Bell v. State, 180 Ark. 79, 89, 20 S.W.2d 618, 622:

1940, Chambers v. Florida, 309 U.S. 242

This negro boy was taken, on the day after the discovery of the homicide while he was at his usual work, and placed in jail. He had heard them whipping Swain in the jail; he was taken from the jail to the penitentiary at Little Rock and turned over to the warden, Captain Todhunter, who was requested by the sheriff to question him. This Todhunter proceeded to do, day after day, an hour at a time. There Bell was, an ignorant country boy surrounded by all of those things that strike terror to the negro heart;…

1940, Chambers v. Florida, 309 U.S. 242

See Munsterberg, On the Witness Stand, (1927) 137 et seq.

1940, Chambers v. Florida, 309 U.S. 242

15. The police practices here examined are to some degree widespread throughout our country. See Report of Comm. on Lawless Enforcement of the Law (Amer. Bar Ass'n) 1 Amer.Journ. of Pol.Sci., 575; Note 43 H.L.R. 617; IV National Commission On Law Observance And Enforcement, supra, Ch. 2, § 4. Yet our national record for crime detection and criminal law enforcement compares poorly with that of Great Britain, where secret interrogation of an accused or suspect is not tolerated. See Report of Comm. on Lawless Enforcement of the Law, supra, 588; 43 H.L.R., supra, 618. It has even been suggested that the use of the "third degree" has lowered the esteem in which administration of justice is held by the public, and has engendered an attitude of hostility to and unwillingness to cooperate with the police on the part of many people. See IV National Commission, etc., supra, p. 190. And, after scholarly investigation, the conclusion has been reached

1940, Chambers v. Florida, 309 U.S. 242

that such methods, aside from their brutality, tend in the long run to defeat their own purpose; they encourage inefficiency on the part of the police.

1940, Chambers v. Florida, 309 U.S. 242

Glueck, Crime and Justice, (1936) 76. See IV National Commission, etc., supra, 5; cf. 4 Wigmore, Evidence, (2d ed.) § 2251. The requirement that an accused be brought promptly before a magistrate has been sought by some as a solution to the problem of fostering law enforcement without sacrificing the liberties and procedural rights of the individual. 2 Wig., supra, § 851, IV National Commission, etc., supra, 5.

United States v. Socony-Vacuum Oil Co., Inc., 1940

Title: United States v. Socony-Vacuum Oil Co., Inc.

Author: U.S. Supreme Court

Date: May 6, 1940

Source: 310 U.S. 150 (No. 346)

This case was argued February 5 and 6, 1940, and was decided May 6, 1940, together with No. 347, Socony-Vacuum Oil Co., Inc. et al. v. United States, also on writ of certiorari (308 U.S. 540) to the Circuit Court of Appeals for the Seventh Circuit.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150

FOR THE SEVENTH CIRCUIT

Syllabus

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150

1. Agreements to fix prices in interstate commerce are unlawful per se under the Sherman Act, and no showing of so-called competitive abuses or evils which the agreements were designed to eliminate or alleviate may be interposed as a defense. Pp. 210, 218.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150

2. Numerous oil companies and individuals were convicted under an indictment alleging that, in violation of § 1 of the Sherman Act, they conspired to raise and maintain spot market prices of gasoline, and prices to jobbers and consumers in the "Midwestern Area," embracing many States, by buying up "distress" gasoline on the spot markets and eliminating it as a market factor. In support of allegations of the indictment, there was evidence to prove that the defendants, with intent to raise and maintain prices, devised and carried out an organized program of regularly ascertaining the amounts of surplus spot market gasoline, of assigning its sellers to buyers who were in the combination, and of purchasing it at fair going market prices, and that this process, by removing part of the spot market supply, was at least a contributing factor in stabilizing the spot market and thereby causing an increase of prices, so that jobbers and consumers in the midwestern area paid more for their gasoline than they would have paid but for the conspiracy, their prices being geared to spot market prices.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150

Held:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150

(1) It is immaterial to the question of guilt that other factors also may have contributed to the rise and stability of the markets, and that competition on the spot markets was not entirely eliminated. P. 219.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150

(2) The elimination of so-called competitive evils is no legal justification for such buying programs. So far as price-fixing agreements are concerned, the Act establishes one uniform rule applicable to all industries alike. P. 220. [310 U.S. 151]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(3) Even though the members of the price-fixing group were in no position to control the market, yet to the extent that they raised, lowered, fixed, pegged, or stabilized prices they would be directly interfering with the free play of market forces. P. 221.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(4) There was no error in the refusal to charge that, in order to convict, the jury must find that the resultant prices were raised and maintained at "high, arbitrary and noncompetitive levels." A charge in the indictment to that effect was surplusage. P. 222.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(5) Nor is it important that the prices paid by the combination were not fixed in the sense of being uniform and inflexible. P. 222.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(6) A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se under the Act. P. 223.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(7) Where the means for price-fixing are purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the market, power to fix prices may be found to exist though the combination does not control a substantial part of the commodity. P. 224.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(8) Price-fixing agreements may have effective influence over the market, and utility to members of the conspiracy group, though the power possessed or exerted by the combination falls far short of domination and control. The Sherman Act is not concerned solely with monopoly power. P. 224.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(9) Proof that a combination was formed for the purpose of fixing prices, and that it caused them to be fixed or contributed to that result, is proof of the completion of a price-fixing conspiracy under § 1 of the Act. P. 224.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(10) A conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. P. 225n.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 151

(11) Under the National Industrial Recovery Act, 48 Stat. 195, a price-fixing agreement could be exempted from the provisions of the Sherman Act only through the code machinery with the approval of the President as provided in §§ 3(a) and 5; mere knowledge, acquiescence, or tacit approval by government employees would not suffice. Pp. 225-227. [310 U.S. 152]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

(12) A practice contrary to the Sherman Act, even if approved under the National Industrial Recovery Act, became unlawful when continued after the expiration of the Recovery Act. P. 227.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

(13) The fact that the buying program in this case may have been consistent with the general objectives of the National Industrial Recovery Act is irrelevant to its legality under the Sherman Act where the method provided by Congress for alleviating the penalties of the Sherman Act was not followed. P. 227.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

(14) Offers of proof by defendants to show that, by their buying program, they had not raised spot market prices of gasoline to an artificial, noncompetitive level, held properly denied as immaterial. P. 229.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

(15) Offers of proof by defendants to establish and evaluate other contributing causes for price rise and market stability during the indictment period, held properly denied as cumulative and collateral. A trial court has a wide range of discretion in the exclusion of such evidence. P. 229.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

3. In a trial under the Sherman Act, where much evidence had been given of general economic conditions before and during the indictment period, the defense offered further evidence of market conditions antedating that period, introduction of which would have complicated the case, confused the jury possibly, and protracted an already lengthy trial, held that refusal of the offers was not ground for a new trial, matters of substance not being affected. P. 229.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

4. Use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge, and no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropriate procedure is adopted to prevent its improper use. Pp. 231, 233.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

5. Grand jury testimony is ordinarily confidential. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. Pp. 233-234.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

6. Permission to use grand jury testimony to refresh the memories of witnesses in a criminal case is not ground for a new trial, even if erroneous, where it was clearly not prejudicial and did not affect substantial rights of the defendant. Jud.Code, § 269. P. 235.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 152

7. In the absence of exceptional circumstances, improper remarks made by a prosecuting attorney in his argument to the jury in a criminal trial are not ground for a new trial if they were not objected to at the time. Pp. 237, 238-239. [310 U.S. 153]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 153

8. It is not improper in a Sherman Act case to discuss corporate power, its use and abuse, relevantly to the issues; for the subject is material to the philosophy of that Act, and its purposes and objectives are clearly legitimate subjects for discussion before the jury. P. 239.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 153

9. Appeals to class prejudice in argument to a jury are highly improper, and cannot be condoned, and trial courts should ever be alert to prevent them. P. 239.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 153

10. Although some of the remarks made to the jury by government counsel in argument of this case appealed to class prejudice, were undignified and intemperate, and did not comport with the standards of propriety expected of a prosecutor, they are, in the particular circumstances, not regarded as prejudicial, but as minor aberrations in a prolonged trial of a strong case which could not have influenced the minds of jurors. P. 239.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 153

11. Statements made in argument to the jury by government counsel in a prosecution under the Sherman Act to the effect that it was the wish and desire of the highest officials in the Government to have the defendants convicted held not ground for a new trial, because the defendants had sought to justify their activities as done with government approval and because the statements were but casual episodes in a long summation, and not at all reflective of the quality of the argument as a whole. Pp. 241-242.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 153

12. Assertions of personal knowledge, made in argument to the jury by government counsel, held not prejudicial where they related to a matter irrelevant to the case and, upon objection, were withdrawn, and the jury instructed to disregard them. P. 242.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 153

13. The granting of a new trial to some of the defendants convicted of a conspiracy does not require that a new trial be granted to the others where participation by the former was not necessary to the existence of the crime charged and the jury was instructed that it could convict any of the defendants found to have been members of the combination, and that it need not convict all or none. Pp. 243, 246.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 153

14. In a Sherman Act case, as in other conspiracy cases, the grant of a new trial to some defendants and its denial to others is not per se reversible error. After the jury's verdict has been set aside as respects some of the alleged coconspirators, those remaining cannot seize on that action as ground for the granting of a new trial to them unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion. P. 247. [310 U.S. 154]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 154

15. As a general rule, neither this Court nor the Circuit Court of Appeals will renew the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. P. 247.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 154

16. A denial of a motion for a new trial on the ground that the verdict was against the weight of the evidence is not subject to review. P. 248.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 154

17. Where an indictment charges various means by which a conspiracy is to be effectuated, not all of them need be proved. P. 249.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 154

18. Where a price-fixing conspiracy violating the Sherman Act embraced, at least by clear implication, the making of sales at advanced price to jobbers and consumers in a wide area, held that prosecution would lie in a judicial district within that area and within which such sales were made by any of the conspirators, though the conspiracy was formed elsewhere. P. 250.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 154

19. Conspiracies under the Act are not dependent on the doing of any act other than the act of conspiring, as a condition of liability. P. 252.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 154

105 F.2d 809, reversed.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 154

CERTIORARI, 308 U.S. 540, on cross-petitions, to review the rulings of the court below in a case involving the indictment and conviction of corporations and individuals for a conspiracy in violation of § 1 of the Sherman Anti-Trust Act. The opinion of the District Court is reported in 23 F.Supp. 937. [310 U.S. 165]

DOUGLAS, J., lead opinion

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 165

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 165

Respondents 1 were convicted by a jury, 2 23 F.Supp. 937, under an indictment charging violation of § 1 of the Sherman Anti-Trust Act, 3 26 Stat. 209; 50 Stat. 693. [310 U.S. 166] The Circuit Court of Appeals reversed and remanded for a new trial. 105 F.2d 809. The case is here on a petition and cross-petition for certiorari, both of which we granted because of the public importance of the issues raised. 308 U.S. 540.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 166

I. The Indictment.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 166

The indictment was returned in December, 1936, in the United States District Court for the Western District of Wisconsin. It charges that certain major oil companies, 4 selling gasoline in the Mid-Western area 5 (which includes the Western District of Wisconsin), (1) "combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline" in the "spot markets" in the East Texas 6 and Mid-Continent 7 fields; (2)

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have artificially raised and fixed said spot market tank car prices of gasoline, and have maintained said prices at artificially high and noncompetitive levels, and at levels agreed upon among them. and have thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area;

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(3) "have arbitrarily," by reason of the provisions of the prevailing form of jobber contracts which made the price to the jobber dependent on the average spot market price, "exacted large sums of money from thousands of jobbers with [310 U.S. 167] whom they have had such contracts in said Mid-Western area", and (4) "in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area."

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The manner and means of effectuating such conspiracy are alleged in substance as follows: Defendants, from February, 1935, to December, 1936. "have knowingly and unlawfully engaged and participated in two concerted gasoline buying programs" for the purchase

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from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields at uniform, high, and at times progressively increased, prices.

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The East Texas buying program is alleged to have embraced purchases of gasoline in spot transactions from most of the independent refiners in the East Texas field, who were members of the East Texas Refiners' Marketing Association, formed in February, 1935, with the knowledge and approval of some of the defendants "for the purpose of selling and facilitating the sale of gasoline to defendant major oil companies." It is alleged that arrangements were made and carried out for allotting orders for gasoline received from defendants among the members of that association, and that such purchases amounted to more than 50% of all gasoline produced by those independent refiners. The Mid-Continent buying program is alleged to have included "large and increased purchases of gasoline" by defendants from independent refiners located in the Mid-Continent fields pursuant to allotments among themselves. Those purchases, it is charged, were made from independent refiners who were assigned to certain of the defendants at monthly meetings of a group representing defendants. It is alleged that the purchases in this buying program amounted to nearly 50% of all gasoline sold by those independents. As respects both the East Texas and the Mid-Continent buying programs, it is alleged that the purchases of gasoline were in excess of the amounts which defendants would have [310 U.S. 168] purchased but for those programs; that, at the instance of certain defendants, these independent refiners curtailed their production of gasoline.

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The independent refiners selling in these programs were named as coconspirators, but not as defendants.

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Certain market journals—Chicago Journal of Commerce, Platt's Oilgram, National Petroleum News—were made defendants. 8 Their participation in the conspiracy is alleged as follows: that they have been "the chief agencies and instrumentalities" through which the wrongfully raised prices "have affected the prices paid by jobbers, retail dealers, and consumers for gasoline in the Mid-Western area," that they "knowingly published and circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by" defendants in these buying programs, while "representing the price quotations published by them" to be gasoline prices "prevailing in spot sales to jobbers in tank car lots" and while "knowing and intending them to be relied on as such by jobbers, and to be made the basis of prices to jobbers."

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Jurisdiction and venue in the Western District of Wisconsin are alleged as follows: that most of defendant major oil companies have sold large quantities of gasoline in tank car lots to jobbers in that district at the "artificially raised and fixed and noncompetitive prices"; that they have "solicited and taken contracts and orders" for [310 U.S. 169] gasoline in that district, and that they have required retail dealers and consumers therein "to pay artificially increased prices for gasoline" pursuant to the conspiracy.

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The methods of marketing an selling gasoline in the Mid-Western area are set forth in the indictment in some detail. Since we hereafter develop the facts concerning them, it will suffice at this point to summarize them briefly. Each defendant major oil company owns, operates or leases retail service stations in this area. It supplies those stations, as well as independent retail stations, with gasoline from its bulk storage plants. All but one sell large quantities of gasoline to jobbers in tank car lots under term contracts. In this area, these jobbers exceed 4000 in number, and distribute about 50% of all gasoline distributed to retail service stations therein, the bulk of the jobbers' purchases being made from the defendant companies. The price to the jobbers under those contracts with defendant companies is made dependent on the spot market price, pursuant to a formula hereinafter discussed. And the spot market tank car prices of gasoline directly and substantially influence the retail prices in the area. In sum, it is alleged that defendants, by raising and fixing the tank car prices of gasoline in these spot markets, could and did increase the tank car prices and the retail prices of gasoline sold in the Mid-Western area. The vulnerability of these spot markets to that type of manipulation or stabilization is emphasized by the allegation that spot market prices published in the journals were the result of spot sales made chiefly by independent refiners of a relatively small amount of the gasoline sold in that area—virtually all gasoline sold in tank car quantities in spot market transactions in the Mid-Western [310 U.S. 170] area being sold by independent refiners, such sales amounting to less than 5% of all gasoline marketed therein.

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So much for the indictment.

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II. Background of the Alleged Conspiracy.

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Evidence was introduced (or respondents made offers of proof) showing or tending to show the following conditions preceding the commencement of the alleged conspiracy in February, 1935. As we shall develop later, these facts were, in the main, relevant to certain defenses which respondents at the trial unsuccessfully sought to interpose to the indictment.

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Beginning about 1926, there commenced a period of production of crude oil in such quantities as seriously to affect crude oil and gasoline markets throughout the United States. Overproduction was wasteful, reduced the productive capacity of the oil fields, and drove the price of oil down to levels below the cost of production from pumping and stripper 9 wells. When the price falls below such cost, those wells must be abandoned. Once abandoned, subsurface changes make it difficult or impossible to bring those wells back into production. Since such wells constitute about 40% of the country's known oil reserves, conservation requires that the price of crude oil be maintained at a level which will permit such wells to be operated. As Oklahoma and Kansas were attempting to remedy the situation through their proration laws, the largest oil field in history was discovered in East Texas. That was in 1930. The supply of oil from this [310 U.S. 171] field was so great that, at one time, crude oil sank to 10 or 15 cents a barrel, and gasoline was sold in the East Texas field for 2 1/8¢ a gallon. Enforcement by Texas of its proration law was extremely difficult. Orders restricting production were violated, the oil unlawfully produced being known as "hot oil," and the gasoline manufactured therefrom, "hot gasoline." Hot oil sold for substantially lower prices than those posted for legal oil. Hot gasoline therefore cost less, and, at times, could be sold for less than it cost to manufacture legal gasoline. The latter, deprived of its normal outlets, had to be sold at distress prices. The condition of many independent refiners using legal crude oil was precarious. In spite of their unprofitable operations, they could not afford to shut down, for, if they did so, they would be apt to lose their oil connections in the field and their regular customers. Having little storage capacity, they had to sell their gasoline as fast as they made it. As a result, their gasoline became "distress" gasoline—gasoline which the refiner could not store, for which he had no regular sales outlets, and which therefore he had to sell for whatever price it would bring. Such sales drove the market down.

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In the spring of 1933, conditions were acute. The wholesale market was below the cost of manufacture. As the market became flooded with cheap gasoline, gasoline was dumped at whatever price it would bring. On June 1, 1933, the price of crude oil was 25¢ a barrel; the tank car price of regular gasoline was 2 5/8¢ a gallon. In June, 1933, Congress passed the National Industrial Recovery Act (48 Stat. 195). Sec. 9(c) of that Act authorized the President to forbid the interstate and foreign shipment of petroleum and its products produced or withdrawn from storage in violation of state laws. By Executive Order, the President, on July 11, 1933, forbade such shipments. On August 19, 1933, a Code of fair competition [310 U.S. 172] for the petroleum industry was approved. 10 The Secretary of the Interior was designated as Administrator of that Code. He established a Petroleum Administrative Board to "advise with and make recommendations" to him. A Planning and Coordination Committee was appointed, of which respondent Charles E. Arnott, a vice-president of Socony-Vacuum, was a member, to aid in the administration of the Code. In addressing that Committee in the fall of 1933, the Administrator said: "Our task is to stabilize the oil industry upon a profitable basis." Considerable progress was made. The price of crude oil was a dollar a barrel near the end of September, 1933, as a result of the voluntary action of the industry, 11 but, according to respondents, in accordance with the Administrator's policy and desire. In April, 1934, an amendment to the Code was adopted under which an attempt was made to balance the supply of gasoline with the demand by allocating the amount of crude oil which each refiner could process with the view of creating a firmer condition in the market, and thus increasing the [310 U.S. 173] price of gasoline. 12 This amendment also authorized the Planning and Coordination Committee, with the approval of the President, to make suitable arrangements for the purchase of gasoline from non-integrated or semi-integrated refiners, and the resale of the same through orderly channels. Thereafter four buying programs were approved by the Administrator. 13 These permitted the major companies to purchase distress gasoline from the independent refiners. Standard forms of contract were provided. The evil aimed at was, in part at least, the production of hot oil and hot gasoline. The contracts (to at least one of which the Administrator was a party) were made pursuant to the provisions of the National Industrial Recovery Act and the Code, and bound the purchasing company to buy fixed amounts of gasoline at designated prices 14 on condition that the seller [310 U.S. 174] should abide by the provisions of the Code. According to the 1935 Annual Report of the Secretary of the Interior, these buying programs were not successful, as

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the production of gasoline from "hot oil" continued, stocks of gasoline mounted, wholesale prices for gasoline remained below parity with crude-oil prices, and, in the early fall of 1934, the industry approached a serious collapse of the wholesale market. 15

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Restoration of the price of gasoline to parity with crude oil at one dollar per barrel was not realized.

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The flow of hot oil out of East Texas continued. Refiners in the field could procure such oil for 35¢ or less a barrel, and manufacture gasoline from it for 2 or 2 1/2¢ a gallon. This competition of the cheap hot gasoline drove the price of legal gasoline down below the cost of production. The problem of distress gasoline also persisted. The disparity between the price of gasoline and the cost of crude oil, which had been at $1 per barrel since September, 1933, caused losses to many independent refiners no matter how efficient they were. In October, 1934, the Administrator set up a Federal Tender Board and issued an order making it illegal to ship crude oil or gasoline out of East Texas in interstate or foreign commerce unless it were accompanied by a tender issued by that Board certifying that it had been legally produced or manufactured. Prices rose sharply. But the improvement was only temporary, as the enforcement of § 9(c) of the Act was enjoined in a number of suits. On January 7, 1935, this Court held § 9(c) to be unconstitutional. Panama Refining Co. v. Ryan, 293 U.S. 388. Following that decision, there was a renewed influx of hot gasoline into the Mid-Western area, and the tank car market fell. [310 U.S. 175]

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Meanwhile, the retail markets had been swept by a series of price wars. These price wars affected all markets—service station, tank wagon, and tank car. Early in 1934, the Petroleum Administrative Board tried to deal with them—by negotiating agreements between marketing companies and persuading individual companies to raise the price level for a period. On July 9, 1934, that Board asked respondent Arnott, chairman of the Planning and Coordination Committee's Marketing Committee, 16 if he would head up a voluntary, cooperative movement to deal with price wars. According to Arnott, he pointed out that, in order to stabilize the retail market it was necessary to stabilize the tank car market through elimination of hot oil and distress gasoline. 17 On July 20, 1934, the Administrator wrote Arnott, described the disturbance caused by price wars, and said:

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Under Article VII, Section 3 of the Code, it is the duty of the Planning and Coordination Committee to cooperate with the Administration as a planning and fair practice agency for the industry. I am therefore requesting you, as Chairman of the Marketing Committee of the Planning and Coordination Committee, to take action which we deem necessary to restore markets to their normal conditions in areas where wasteful competition has caused them to become depressed. The number and extent of these situations would make it impractical for the Petroleum Administrative Board, acting alone, to deal with each specific situation. Therefore, I am requesting [310 U.S. 176] and authorizing you, as Chairman of the Marketing Committee, to designate committees for each locality when and as price wars develop, with authority to confer and to negotiate and to hold due public hearings with a view to ascertaining the elements of conflict that are present, and, in a cooperative manner, to stabilize the price level to conform to that normally prevailing in contiguous areas where marketing conditions are similar. Any activities of your Committee must, of course, be consistent with the requirements of Clause 2 of Sub-section (a) of Section III of the Act,… 18 [310 U.S. 177]

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After receiving that letter Arnott appointed a General Stabilization Committee, with headquarters in Washington and a regional chairman in each region. Over fifty state and local committees were set up. The Petroleum Administrative Board worked closely with Arnott and the committees until the end of the Code near the middle of 1935. The effort (first local, then statewide, and finally regional) was to eliminate price wars by negotiation and by persuading suppliers to see to it that those who bought from them sold at a fair price. In the first week of December, 1934, Arnott held a meeting of the General Stabilization Committee in Chicago and a series of meetings on the next four or five days attended by hundreds of members of the industry from the middle west. These meetings were said to have been highly successful in elimination of many price wars. Arnott reported the results to members of the Petroleum Administrative Board on December 18, 1934, and stated that he was going to have a follow-up meeting in the near future. It was at that next meeting that the groundwork for the alleged conspiracy was laid.

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III. The Alleged Conspiracy.

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The alleged conspiracy is not to be found in any formal contract or agreement. It is to be pieced together from the testimony of many witnesses and the contents of over 1,000 exhibits, extending through the 3,900 printed pages of the record. What follows is based almost entirely on unequivocal testimony or undisputed contents of exhibits, only occasionally on the irresistible inferences from those facts. [310 U.S. 178]

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A. FORMATION OF THE MID-CONTINENT BUYING PROGRAM

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The next meeting of the General Stabilization Committee was held in Chicago on January 4, 1935, and was attended by all of the individual respondents, by representatives of the corporate respondents, and by others. Representatives of independent refiners, present at the meeting, complained of the failure of the price of refined gasoline to reach a parity with the crude oil price of $1 a barrel. And complaints by the independents of the depressing effect on the market of hot and distress gasoline were reported. Views were expressed to the effect that, "if we were going to have general stabilization in retail markets, we must have some sort of a firm market in the tank car market." As a result of the discussion, Arnott appointed a Tank Car Stabilization Committee 19 to study the situation and make a report, or, to use the language of one of those present, "to consider ways and means of establishing and maintaining an active and strong tank car market on gasoline." Three days after this committee was appointed, this Court decided Panama Refining Co. v. Ryan, supra. As we have said, there was evidence that, following that decision, there was a renewed influx of hot gasoline into the Mid-Western area, with a consequent falling off of the tank car market prices.

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The first meeting of the Tank Car Committee was held February 5, 1935, and the second on February 11, 1935. At these meetings, the alleged conspiracy was formed, the substance of which, so far as it pertained to the Mid-Continent phase, was as follows:

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It was estimated that there would be between 600 and 700 tank cars of distress gasoline produced in the Mid-Continent [310 U.S. 179] oil field every month by about 17 independent refiners. These refiners, not having regular outlets for the gasoline, would be unable to dispose of it except at distress prices. Accordingly, it was proposed and decided that certain major companies (including the corporate respondents) would purchase gasoline from these refiners. The Committee would assemble each month information as to the quantity and location of this distress gasoline. Each of the major companies was to select one (or more) of the independent refiners having distress gasoline as its "dancing partner," 20 and would assume responsibility for purchasing its distress supply. In this manner, buying power would be coordinated, purchases would be effectively placed, and the results would be much superior to the previous haphazard purchasing. There were to be no formal contractual commitments to purchase this gasoline, either between the major companies or between the majors and the independents. Rather, it was an informal gentlemen's agreement or understanding whereby each undertook to perform his share of the joint undertaking. [310 U.S. 180] Purchases were to be made at the "fair going market price."

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A Mechanical Sub-Committee 21 was appointed to find purchasers for any new distress gasoline which might appear between the monthly meetings of the Tank Car Stabilization Committee and to handle detailed problems arising during these periods. It was agreed that any such attempt to stabilize the tank car market was hopeless until the flow of hot gasoline was stopped. But it was expected that a bill pending before Congress to prohibit interstate shipment of hot gasoline would soon be enacted which would deal effectively with that problem. Accordingly, it was decided not to put any program into operation until this bill had been enacted and became operative. It was left to respondent Arnott to give the signal for putting the program into operation after this had occurred.

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The Connally Act (49 Stat. 30) became law on February 22, 1935. The enforcement agency under this Act was the Federal Tender Board, which was appointed about March 1st. It issued its first tenders March 4th. On March 1st, respondents Arnott and Ashton explained the buying program to a group of Mid-Continent independent refiners in Kansas City, who expressed a desire to cooperate and who appointed a committee to attend a meeting of the Tank Car Stabilization Committee in St. Louis on March 5th to learn more about the details. This meeting was held with the committee of the independents present at one of the sessions. At a later session that day, the final details of the Mid-Continent buying program were worked out, including an assignment [310 U.S. 181] of the "dancing partners" among the major companies. 22 On March 6th, Ashton telephoned Arnott and told him what had been accomplished at the St. Louis meeting. Later the same day, Arnott told Ashton by telephone that the program should be put into operation as soon as possible, since the Federal Tender Board seemed to be cleaning up the hot oil situation in East Texas. Ashton advised McDowell, chairman of the Mechanical Sub-Committee, of Arnott's instructions. And on March 7th, that committee went into action. They divided up the major companies; each communicated with those on his list, advised them that the program was launched, and suggested that they get in touch with their respective "dancing partners." Before the month was out, all companies alleged to have participated in the program (except one or two) made purchases; 757 tank cars were bought from all but three of the independent refiners who were named in the indictment as sellers.

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B. THE MID-CONTINENT BUYING PROGRAM IN OPERATION

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No specific term for the buying program was decided upon, beyond the first month. But it was started with the hope of its continuance from month to month. And, in fact, it did go on for over a year, as we shall see.

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The concerted action under this program took the following form:

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The Tank Car Stabilization Committee had A. V. Bourque, Secretary of the Western Petroleum Refiners' [310 U.S. 182] Association, 23 make a monthly survey, showing the amount of distress gasoline which each independent refiner would have during the month. From March, 1935, through February, 1936, that Committee met once a month. At these meetings, the surveys showing the amount and location of distress gasoline were presented and discussed. They usually revealed that from 600 to 800 tank cars of distress gasoline would become available during the month. Each member of the Committee present would indicate how much his company would buy, and from whom. Those companies which were not represented at the meetings were approached by the Mechanical Sub-Committee; "word was gotten to them as to the amount of gasoline that it was felt they could take in that month." Also, as we have stated, the Mechanical Sub-Committee would endeavor to find purchasers for any new distress gasoline which appeared between the meetings of the Tank Car Stabilization Committee. It would report such new surpluses to Bourque. The functions of the Mechanical Sub-Committee were apparently not restricted merely to dissemination of information to the buyers. One of its members testified that he urged the majors to buy more distress gasoline. Throughout, persuasion was apparently used to the end that all distress gasoline would be taken by the majors, and so kept from the tank car markets. As the program progressed, most of the major companies continued to buy from the same "dancing partners" with whom they had started. One of the tasks of the Mechanical Sub-Committee was to keep itself informed as to the current prices of [310 U.S. 183] gasoline and to use its persuasion and influence to see to it that the majors paid a fair going market price and did not "chisel" on the small refiners. It did so. At its meetings during the spring of 1935, the question of the fair going market price was discussed. For example, Jacobi, a member of the Sub-Committee, testified that, at the meeting of March 14, 1935, "the Sub-Committee…arrived at what we thought was a fair market price for the week following," viz.m 3 2/4¢ and 4 2/4¢. 24 Jacobi termed these prices arrived at by the Sub-Committee as the "recommended prices." He made it a practice of recommending these prices to the major companies with which he communicated. According to his testimony, those "recommendations" were represented by him to be not the Sub-Committee's, but his own, idea. McDowell testified that he never made any such price recommendations, but, if asked, would tell the purchasing companies what his own company was paying for gasoline. 25 Up to June 7, 1935, price "recommendations" were made five or seven times, each time the "recommended" prices constituting a price advance of 1/8 or 1/4¢ over the previous "recommendation." No more price "recommendations" were made in 1935. In January, 1936, there was an advance in the price of crude oil. The members of the Sub-Committee discussed the price situation and concluded that an advance of 1/2¢ a gallon of gasoline purchased under the program should be made. Jacobi made that "recommendation" to the companies on his list. [310 U.S. 184]

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We shall discuss later the effect of this buying program on the market.

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The major companies regularly reported to Bourque, the trade association representative of the Mid-Continent independent refiners, the volume of their purchases under the program and the prices paid. Representatives of one of the corporate respondents repeatedly characterized its purchases under the program as "quotas," "obligations," or "allocations." They spoke of one of its "dancing partners" under the buying program as "one of the babies placed in our lap last spring when this thing was inaugurated." And they stated that

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we don't have much choice as to whose material we are to take when we purchase outside third grade gasoline in connection with the Buying Program Committee's operations. On such purchases, we have refineries "assigned" to us.

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This was doubtless laymen's, not lawyers', language. As we have said, there does not appear to have been any binding commitment to purchase; the plan was wholly voluntary; there is nothing in the record to indicate that a participant would be penalized for failure to cooperate. But though the arrangement was informal, it was nonetheless effective, as we shall see. And, as stated by the Circuit Court of Appeals, there did appear to be at least a moral obligation to purchase the amounts specified at the fair market prices "recommended." That alone would seem to explain why some of the major companies cancelled or declined to enter into profitable deals for the exchange of gasoline with other companies in order to participate in this buying program. Respondent Skelly Oil Co. apparently lost at least some of its pipeline transportation profit of 2/16¢ a gallon "on every car of gasoline" purchased by it in the buying program. And both that company and respondent Wadhams Oil Co. continued to make purchases of gasoline under the program although they were unable then to dispose of it. [310 U.S. 185]

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Up to June, 1935, the expenses incurred by the members of the Mechanical Sub-Committee were charged to and paid by the Planning and Coordination Committee of the Code of Fair Competition for the Petroleum Industry. On May 27, 1935, this Court held in Schechter Poultry Corp. v. United States, 295 U.S. 495, that the code-making authority conferred by the National Industrial Recovery Act was an unconstitutional delegation of legislative power. Shortly thereafter, the Tank Car Stabilization Committee held a meeting to discuss their future course of action. It was decided that the buying program should continue. Accordingly, that Committee continued to meet each month through February, 1936. The procedure at these meetings was essentially the same as at the earlier ones. Gradually, the buying program worked almost automatically, as contacts between buyer and seller became well established. The Mechanical Sub-Committee met at irregular intervals until December, 1935. Thereafter it conducted its work on the telephone.

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C. FORMATION AND NATURE OF THE EAST TEXAS BUYING PROGRAM

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 185

In the meetings when the Mid-Continent buying program was being formulated, it was recognized that it would be necessary or desirable to take the East Texas surplus gasoline off the market so that it would not be a "disturbing influence in the Standard of Indiana territory." The reason was that weakness in East Texas spot market prices might make East Texas gasoline competitive with Mid-Continent gasoline in the Mid-Western area, and thus affect Mid-Continent spot market prices. The tank car rate on gasoline shipments from the East Texas field to points in the Mid-Western area was about l/8¢ a gallon higher than from the Mid-Continent field. With East Texas spot market prices more than 1/8¢ a [310 U.S. 186] gallon below Mid-Continent spot market prices, there might well be a resulting depressing effect on the Mid-Continent spot market prices. 26

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Early in 1935, the East Texas Refiners' Marketing Association was formed to dispose of the surplus gasoline manufactured by the East Texas refiners. The occasion for the formation of this Association was the stoppage of the shipment of hot oil and gasoline as a consequence of a Texas law enacted in December, 1934. As long as these refiners had operated on cheap hot oil, they had been able to compete for business throughout the Middle West. If they used legal crude at a dollar a barrel, their costs would increase. Their shift from a hot oil to a legal oil basis necessitated a change in their marketing methods. They were already supplying jobbers and dealers of Texas with all the gasoline they could use. Hence, their problem was to find additional markets for the surplus gasoline which they manufactured from legal crude. The Association was to act as the sales agency for those surpluses. Shipments north would be against the freight differential. Therefore, without regular outlets for this surplus gasoline, they would have been forced to dump it on the market at distress prices. Their plan was to persuade the major companies, if possible, to buy more East Texas gasoline, and to purchase it through the Association, which would allocate it among its members who had surpluses. Neil Buckley, a buyer for Cities Service [310 U.S. 187] Export Corporation in Tulsa, was recommended by one of the independents as the contact man. Buckler undertook the job. 27

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Thus, it was not established that the major companies caused the Association to be formed. But it is clear that the services of the Association were utilized in connection with a buying program by defendant companies. The record is quite voluminous on the activities of Buckley in getting the support of the majors to the Association's program. Suffice it to say that he encountered many difficulties, most of them due to the suspicion and mistrust of the majors as a result of the earlier hot oil record of the East Texas independents. His initial task was to convince the majors of the good faith of the East Texas independents. Many conferences were had. Arnott gave help to Buckley. Thus, on March 1, 1935, Arnott wired a small group of representatives of major companies, who were buyers and users of East Texas gasoline, inviting them to attend a meeting in New York City on March 6th

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to hear outcome my meeting with East Texas refiners and to consider future action surplus gasoline this and other groups that is awaiting our decision…matter of extreme importance.

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The problem was discussed at that meeting, 28 but reliable information was lacking as to the probable amount of distress gasoline, the size of the independents' federal allocations, and whether or not such gasoline was going to be manufactured within [310 U.S. 188] those allocations. Accordingly, Arnott appointed a committee to attend the meeting of the District Allocators 29 on March 13th, and to obtain the information. That information was obtained, and a schedule was prepared showing the probable amount of surplus gasoline in East Texas and the Gulf, the names of the regular buyers in those areas, and the amounts they might take. Arnott, on March 14th, by telegraph, called another meeting in New York City for the next day, saying "The question of surplus gasoline which has been under consideration must be finalized tomorrow." At that meeting, someone (apparently a representative of respondent Sinclair) "arose with a slip of paper in his hand and stated that it had been suggested" that each of 12 to 15 major companies "take so much gasoline" from East Texas, "the amounts being read off as to what each company would take." Nothing definite was decided at the meeting. Buckley continued his efforts, talking with Arnott and representatives of other majors. It is impossible to find from the record the exact point of crystallization of a buying program. But it is clear that, as a result of Buckley's and Arnott's efforts and of the discussions at the various meetings, various major companies did come into line, and that a concerted buying program was launched. The correspondence of employees of some of the majors throughout the period in question is replete with references such as the following: "buying program in East Texas"; "our allocation of five cars per day"; "a general buying movement"; "regular weekly purchases from the East Texas group"; "allocations and purchases" in the East Texas field, and the like. [310 U.S. 189]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 189

In 1935, the East Texas refiners named in the indictment sold 285,592,188 gallons of gasoline. Of this, certain defendant companies 30 bought 40,195,754 gallons or 14.07%. In the same year, all independent refiners in East Texas sold 378,920,346 gallons—practically all of it on the spot market. Of this amount, those defendant companies purchased 12.03%, or 45,598,453 gallons. Of the 8,797 tank cars purchased by all defendants (except Sinclair) from March, 1935, through April, 1936, from independent refiners in the East Texas field, 2,412 tank cars were purchased by the present corporate respondents.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 189

Every Monday morning, the secretary of the East Texas association ascertained from each member the amount of his forthcoming weekly surplus gasoline and the price he wanted. He used the consensus of opinion as the asking price. He would call the major companies; they would call him. He exchanged market information with them. Orders received for less than the asking price would not be handled by the Association; rather, the secretary would refer the buyer to one of the independents, who might sell at the lower price. Very few cars were purchased through the Association by others than the major oil companies. 31 The majors bought about 7,000 tank cars through the Association in 1935, and about 2,700 tank cars in the first four months of 1936. And, in 1935, the secretary of the Association placed an additional 1,000 tank cars by bringing the purchasers and the independent refiners together. The purchases in 1935 in East Texas were, with minor exceptions, either [310 U.S. 190] at the low or slightly below the low quotation in Platt's Oilgram, following it closely as the market rose in March, April, and May, 1935; they conformed to the market as it flattened out into more or less of a plateau through the balance of 1935 with a low for third grade gasoline of 4 5/8¢. This was consistent with the policy of the buying program. For the majors were requested to purchase at the "fair, going market price." 32 And it is clear that this East Texas buying program was, as we have said, supplementary or auxiliary to the Mid-Continent program. As stated in March, 1935, in an inter-company memorandum of one of the majors:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 190

…with east coast refiners having a program to purchase surplus East Texas gasoline over the next four months, we feel that still further advances can be made in the tank car market, and a resultant increase in the service station price.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 190

D. SCOPE AND PURPOSE OF THE ALLEGED CONSPIRACY

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 190

As a result of these buying programs, it was hoped and intended that both the tank car and the retail markets would improve. The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices, but, as the real and ultimate end, to raise the price of gasoline in their sales to jobbers and consumers in the Mid-Western area. Their agreement or plan embraced not only buying on the spot markets but also, at least by clear implication, an understanding to maintain such improvements in Mid-Western prices as would result from those purchases of distress gasoline. The latter obviously would be achieved by selling at the increased prices, not [310 U.S. 191] by price-cutting. Any other understanding would have been wholly inconsistent with and contrary to the philosophy of the broad stabilization efforts which were under way. In essence, the raising and maintenance of the spot market prices were but the means adopted for raising and maintaining prices to jobbers and consumers. The broad sweep of the agreement was indicated by Arnott before a group of the industry on March 13, 1935. He described the plan as one

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whereby this whole stabilization effort of markets, the holding up of normal sales market structures, the question of the realization of refineries, the working together of those two great groups in order that we may balance this whole picture and in order that we may interest a great many buyers in this so-called surplus or homeless gasoline, can be done along organized lines….

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 191

Certainly there was enough evidence to support a finding by the jury that such were the scope and purpose of the plan.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 191

But there was no substantial competent evidence that defendants, as charged in the indictment, induced the independent refiners to curtail their production.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 191

E. MARKETING AND DISTRIBUTION METHODS

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 191

Before discussing the effect of these buying programs, some description of the methods of marketing and distributing gasoline in the Mid-Western area during the indictment period is necessary.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 191

The defendant companies sold about 83% of all gasoline sold in the Mid-Western area during 1935. As we have noted, major companies, such as most of the defendants, are those whose operations are fully integrated—producing crude oil, having pipelines for shipment of the crude to its refineries, refining crude oil, and marketing gasoline at retail and at wholesale. During the greater part of the indictment period, the defendant companies [310 U.S. 192] owned and operated many retail service stations 33 through which they sold about 20% of their Mid-Western gasoline in 1935 and about 12% during the first seven months of 1936. Standard Oil Company (Indiana) 34 was known during this period as the price leader or market leader throughout the Mid-Western area. It was customary for retail distributors, whether independent or owned or controlled by major companies, to follow Standard's posted retail prices. Its posted retail price in any given place in the Mid-Western area was determined by computing the Mid-Continent spot market price and adding thereto the tank car freight rate from the Mid-Continent field, taxes and 5 1/2¢. The 5 1/2¢ was the equivalent of the customary 2¢ jobber margin and 3 1/2¢ service station margin. In this manner, the retail price structure throughout the Mid-Western area during the indictment period was based in the main on Mid-Continent spot market quotations, 35 or, as stated by one of the witnesses for the defendants, the spot market was a "peg to hang the price structure on."

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 192

About 24% of defendant companies' sales in the Mid-Western area in 1935 were to jobbers, who perform the function of middlemen or wholesalers. Since 1925, jobbers were purchasing less of their gasoline on the spot tank car markets and more under long-term supply contracts from major companies and independent refiners. These contracts usually ran for a year or more, and covered all of the jobber's gasoline requirements during the period. The price which the jobber was to pay over the life of the contract was not fixed; but a formula for its computation [310 U.S. 193] was included. About 80% or more of defendant companies' jobber contracts provided that the price of gasoline sold thereunder should be the Mid-Continent spot market price on the date of shipment. This spot market price was to be determined by averaging the high and low spot market quotations reported in the Chicago Journal of Commerce and Platt's Oilgram or by averaging the high and low quotations reported in the Journal alone. The contracts also gave the jobber a wholly or partially guaranteed margin between the price he had to pay for the gasoline and the normal price to service stations—customarily a 2¢ margin. 36

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 193

There is no central exchange or market place for spot market transactions. Each sale is the result of individual bargaining between a refiner and his customers, sales under long-term contracts not being included. It is a "spot" market because shipment is to be made in the immediate future—usually within ten or fifteen days. Sales on the spot tank car markets are either sales to jobbers or consumers, sales by one refiner to another not being included. 37 The prices paid by jobbers and consumers in the various spot markets are published daily [310 U.S. 194] in the trade journals, Platt's Oilgram and Chicago Journal of Commerce. In the case of the Oilgram, these prices are obtained by a market checker who daily calls refiners in the various refinery areas (major companies as well as independents) and ascertains the quantity and price of gasoline which they have sold to jobbers in spot sales. 38 After checking the prices so obtained against other sources of information (such as brokers' sales), and after considering the volume of sales reported at each price, he determines the lowest and highest prices at which gasoline is being sold to jobbers in substantial quantities on the spot market. 39 Thus, if he finds that substantial sales are reported at 5 1/8¢, 5 1/4¢ and 5 2/8¢, the Oilgram reports a price range of 5 1/8-5 2/8¢. The result is published in the Oilgram that same day. 40 The Chicago Journal of Commerce publishes similar quotations the day after the sales are reported. And its quotations cover sales to industrial consumers as well as to jobbers. But it was not shown that either journal had published prices paid by a major company as a price paid by jobbers on the tank car market.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 194

F. THE SPOT MARKET PRICES DURING THE BUYING PROGRAM

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 194

In 1935, the 14 independent Mid-Continent refiners named in the indictment sold 377,988,736 gallons of gasoline. Of that output, the corporate respondents purchased [310 U.S. 195] about 56,200,000 gallons or approximately 15%, 41 and the defendant companies who went to trial, about 17%. The monthly purchases of all defendant companies from Mid-Continent independents from March, 1935, to April, 1936, usually ranged between 600 and 900 tank cars, and, in a few months, somewhat exceeded those amounts.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 195

Major company buying began under the Mid-Continent program on March 7, 1935. During the week before that buying commenced, the Mid-Continent spot market for third grade gasoline rose 2/8¢. The low quotation on third grade gasoline was 3 1/2¢ on March 6, 1935. It rose to 4 2/4¢ early in June. That advance was evidenced by ten successive steps. The market on third grade gasoline then leveled out on a plateau which extended into January, 1936, except for a temporary decline in the low quotation late in 1935. By the middle of January, the low again had risen, this time to 5 1/4¢. It held substantially at that point until the middle of February, 1936. By the end of February, it had dropped to 5¢. It then leveled off at that low and remained there into May, 1936, when the low dropped first to 4 7/8¢ and then to 4 2/4¢. It stayed there until the first week in July, 1936. The low then rose to 4 7/8¢, maintained that level until mid-August, then started to drop until, by successive steps, it had declined to 4 1/2¢ before the middle of September. It stayed there [310 U.S. 196] until early October, when it rose to 4 5/8¢, continuing at that level until middle November, when it rose to 4 2/4¢. The low remained at substantially that point throughout the balance of 1936.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 196

During 1935, as the Mid-Continent spot market for third grade gasoline was rising, so was the East Texas spot market. And when, in June, 1935, the former leveled off for the balance of the year at a low of 4 2/4¢, the latter 42 leveled off, as we have seen, at a low of 4 5/8¢.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 196

During this period, there were comparable movements on the Mid-Continent spot market for regular gasoline. From a low of 4 2/8¢ on March 7, 1935, it rose to a low of 5 5/8¢ early in June, that advance being evidenced by nine successive steps. As in the case of third grade gasoline, the market for regular gasoline then leveled out on a plateau which extended into January, 1936. By the middle of January, the low had risen to 6 1/8¢. It held at that point until the middle of February, 1936. By the end of February, it had dropped to 5 7/8¢. It rose to 6¢ in the first week of March, leveled off at that low, and remained there into August, 1936. By mid-August, it started to drop—reaching 5 1/2¢ in September, going to 5 5/8¢ in October and to 5 2/4¢ in November, where it stayed through the balance of 1936.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 196

These plateaus are clearly shown by a chart of the market journals' quotations. But that does not, of course, mean that all sales on the spot market were made between the high and the low during the period in question. As we have said, the quotations of the market journals merely indicated the range of prices (usually an eighth) within which the bulk of the gasoline was being sold. Hence, actual sales took place above the high and below [310 U.S. 197] the low. Thus, between June and December, 1935, while the low for third grade gasoline remained substantially at 4 2/4¢ and the high at 4 7/8¢, jobbers' and consumers' purchases 43 ranged from 4 2/8¢ to 5 1/8¢. A similar condition existed as respects regular gasoline.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 197

Purchases by the major companies likewise did not always fall within the range of these quotations. In fact, between 85% and 90% of their purchases from the independent refiners were made at prices which were at or below the low quotations in the market journals. 44 [310 U.S. 198] There were few such purchases above the high, and not a substantial percentage at the high. 45

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 198

G. JOBBER AND RETAIL PRICES DURING THE BUYING PROGRAMS

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 198

That the spot market prices controlled prices of gasoline sold by the majors to the jobbers in the Mid-Western area during the indictment period is beyond question. For, as we have seen, the vast majority of jobbers' supply contracts during that period contained price formulae which were directly dependent on the Mid-Continent spot market prices. 46 Hence, as the latter rose, the prices to the jobbers under those contracts increased.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 198

There was also ample evidence that the spot market prices substantially affected the retail prices in the Mid-Western area during the indictment period. As we have seen, Standard of Indiana was known during this period as the price or market leader throughout this area. It was customary for the retailers to follow Standard's posted retail prices, which had as their original base the Mid-Continent spot market price. Standard's policy was [310 U.S. 199] to make changes in its posted retail price only when the spot market base went up or down at least 2/10¢ a gallon and maintained that change for a period of 7 days or more. 47 Standard's net reduction in posted prices for the 6 months preceding March, 1935, was 1.9¢ per gallon. From March, 1935, to June, 1935, its posted retail prices were advanced 2/10¢ four times.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 199

Retail prices in the Mid-Western area kept close step with Mid-Continent spot market prices during 1935 and 1936, though there was a short lag between advances in the spot market prices and the consequent rises in retail prices. 48 This was true in general both of the subnormal 49 [310 U.S. 200] and normal retail prices. To be sure, when the tank car spot market leveled out on a plateau from June to the end of 1935, there was not quite the same evenness in the higher plateau of the average retail prices. For there were, during the period in question, large numbers of retail price cuts in various parts of the Mid-Western area, though they diminished substantially during the spring and summer of 1935. Yet the average service station price 50 (less tax) having reached 13.26¢ by the middle of April (from 12.56¢ near the first of March) never once fell below that amount; advanced regularly to 13.83¢ by the middle of June; declined to 13.44¢ in August, and, after an increase to 13.60¢ during the last of the summer, remained at 13.41¢ during the balance of 1935 except for a minor intermediate drop. In sum, the contours of the retail prices conformed in general to those of the tank car spot markets. The movements of the two were not just somewhat comparable; they were strikingly similar. Irrespective of whether the tank car spot market prices controlled the retail prices in this area, there was substantial competent evidence that they influenced them—substantially and effectively. And, in this connection, it will be recalled that, when the buying program was formulated, it was in part predicated on the proposition that a firm tank car market was necessary for a stabilization of the retail markets. As reported by one who attended the meeting on February 5, 1935, where the buying program was being discussed: "It was generally assumed that all companies would come into the picture, since a stable retail market requires a higher tank car market." [310 U.S. 201]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

IV. Other Circumstances Allegedly Relevant to the Offense

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

Charged in the Indictment

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

The following facts or circumstances were developed at the trial by testimony or other evidence, or were embraced in offers of proof made by respondents.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

A. ALLEGED KNOWLEDGE AND ACQUIESCENCE

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

OF THE FEDERAL GOVERNMENT.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

Such of the following facts as were included in respondents' offers of proof were not sought to be proved in order to establish immunity from prosecution under the antitrust laws. For admittedly the authorization under the National Industrial Recovery Act necessary for such immunity 51 had not been obtained. Rather, respondents' offers of proof were made in order to show the circumstances which, respondents argue, should be taken into consideration in order to judge the purpose, effect and reasonableness of their activities in connection with the buying program.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

Arnott testified that, on January 8 or 9, 1935, he reported the appointment of the Tank Car Stabilization Committee to officials of the Petroleum Administrative Board, who, he said, expressed great interest in it. A member of that Committee, late in January, 1935, advised the Chairman of that Board of the "necessity for action in getting tank car prices up before it is too late." The chairman replied that

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

the tank car situation in relation to the price of crude is one about which we have no disagreement. How to bring about a correction is the stumbling block.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 201

There was evidence that at least general information concerning the meetings of the Tank Car Stabilization Committee was given a representative of the Board in February, 1935. In March, 1935, the Code [310 U.S. 202] authorities, with the approval of the Administrator, asked the major companies to curtail their manufacture of gasoline during that month by 1,400,000 barrels. The purpose was said to be to aid the small refiners by forcing the majors to buy part of their requirements from them. A voluntary curtailment of some 960,000 barrels was made.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 202

On March 12, 1935, Arnott saw the Chairman and at least one other representative of the Board. Among other things, the buying programs were discussed. Arnott did not ask for the Board's approval of these programs, nor its "blessing." A representative of the Board testified that Arnott told them that he was conducting those buying programs "on his own responsibility." Arnott denied this. The Chairman of the Board asked Arnott if the programs violated the antitrust laws. Arnott said he did not believe they did, and described what his group was doing. Arnott testified that he felt that the Board thought the program was sound, and hoped it would work, and that, if he had thought they disapproved, he would have discontinued his activities. There was no evidence that the Board told Arnott to discontinue the program. But, on March 13, 1935, Arnott, in addressing the District Allocators' meeting, said respecting these buying programs:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 202

I am perfectly conscious that we have made other efforts at times to have this question dealt with. It has always been done in group form. That has involved agreements, group agreements. Those of us who have had anything to do whatsoever with the whole national picture, who have come to Washington and have had any experience with the PAB and eventually the Department of Justice, know just how long that road is, and, for some good reason or for some unknown reason or for no reason [310 U.S. 203] at all, those agreements seem to have disappeared; those outstanding attempts—and they were really sincere and worthy attempts—have disappeared in a sort of cloud of mystery, and I don't think I, for one, or anybody else, can tell you just where they have gone—they are out of our minds, they are completed, they are finished, and we are not interested.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 203

Respondents also offered to prove that a committee of the industry (the Blazer Committee) appointed by the Administrator to study the condition of the small units in the industry, made a report to him in March, 1935, which stated, inter alia, as a recommendation:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 203

We know of nothing, apart from continued improvement in crude production control, which would be so helpful to the tank-car price of gasoline at this time as the substantial buying of distress gasoline by major companies. We understand a program of this sort is being considered by the Industry now in connection with a broad stabilization program. We therefore urge that the Administrator give it his approval and active support. 52

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 203

They also offered a memorandum dated March 22, 1935, from the Chairman of the Petroleum Administrative [310 U.S. 204] Board to the Administrator 53 commenting on the above report and making the following suggestion;

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 204

We believe success in Code administration, assuming that it is to continue, requires that some of the recommendations made should be adopted; e.g., we have encouraged stabilization efforts designed at this time to aid the independent refiner,…

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 204

On April 2, 1935, the Administrator wrote Arnott, referred to his letter of July 20, 1934, and stated, inter alia:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 204

The matter that at present concerns me is the necessity of complying with the requirements of the basic law. In authorizing the formulation of a stabilization program, I necessarily conditioned the authority granted by providing that the requirements of Clause 2 of Subsection (a) of Section 3 of the National Industrial Recovery Act should be observed. I know you will appreciate that agreements between supplying companies which might be in conflict with the antitrust laws of the United States require specific approval after due consideration if companies are to receive the protection afforded by Sections 4 and 5 of the National Industrial Recovery Act. [310 U.S. 205]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 205

I understand that the temporary character of a number of situations and the need for immediate action has made formalized agreements impracticable, and, in a number of instances, they may be unnecessary. However, when the understandings arrived at as bases of solution of price wars affecting the industry over a considerable area are intended to operate over a definite period of time or involve substantial changes in the policy of the various supplying companies made only in consideration of similar action on the part of other companies, it is necessary that the procedure required by the Recovery Act be followed in order that the arrangement be legal. If any such agreements have been made, I should like a report as to them. If they require approval to be effective…, I should be glad to give consideration to them under the provisions of the Act.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 205

On April 22, 1935, the Petroleum Administrative Board wrote a letter to Arnott imposing three conditions on general stabilization work: (1) there should be no stabilization meeting without a representative of the Board being present; (2) every element in the industry should be heard from before any decisions were made; (3) no general instructions should be given under the July 20, 1934, letter. A meeting of Arnott's committee and members of the Board was held on May 8, 1935. A representative of the Board testified that they called Arnott "on the carpet to request him to explain" to them "what he had been doing." Arnott's group considered the conditions imposed by the Board quite impossible. The Board assigned two of its staff to work the problem out with one of Arnott's men. According to the testimony of one of the representatives of the Board at that meeting, Arnott [310 U.S. 206] did not ask for the Board's approval of the buying programs—nothing being said "one way or the other, about approval or disapproval." And he testified that Arnott in substance was told at that meeting by the Board's Chairman that the letter of July 20, 1934, from the Administrator to Arnott (quoted supra, p. 175) did not give authority to conduct any buying program; 54 and that Arnott said he was not relying on that letter for approval. Arnott, however, testified that he recalled no such statement made by the Board's Chairman. Apparently, however, Arnott, in answer to questions, gave a general explanation of the buying programs, stating that the majors were continuing informally to buy; that there was no pool; that no one was obliged to make purchases; that they were trying to lift from independent refiners distress gasoline which was burdening the market. 55

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 206

Respondents also offered to prove that, on May 14, 1935, the Chairman of the Petroleum Administrative Board asked Arnott to undertake to stabilize the Pennsylvania refinery market in the way that he had stabilized the Mid-Continent refinery market; that, in connection with this request, the Board evinced support and approval [310 U.S. 207] of the Mid-Continent buying program, and that Arnott undertook to do what he could in the matter, and called a meeting of the Pennsylvania refiners for May 28, 1935. Apparently the Schechter decision terminated that undertaking.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 207

Respondents also offered portions of a final report 56 prepared by the Marketing Division of the Petroleum Administrative Board which discussed the work of the General Stabilization Committee, 57 saying, inter alia:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 207

One of the most important was the tank-car committee, which attempted to get the tank-car market raised more in line with the price of crude recovery cost on the theory that a firm tank-car market was essential to a stabilized retail structure.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 207

And respondents offered testimony of a member of the Board before a Senate Committee in 1937 respecting the "buying pool efforts, that began in December of 1933 and continued from then on during the entire period of the Petroleum Code." That testimony was:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 207

It was an effort of the Department and the industrial committees to bring about the normal relationship between gasoline prices and crude oil prices, in order to permit the independent, non-integrated refiner to be able to operate without loss.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 207

In sum, respondents, by this and similar evidence, offered to establish that the Petroleum Administrative Board knew of the buying programs and acquiesced in them. And respondents, by those facts, together with those discussed under II, supra, undertook to show that their objectives under the buying programs were in line [310 U.S. 208] with those of the federal government under the Code: to keep the price of crude oil at a minimum of $1 a barrel; to restore the wholesale price level of gasoline at the refinery to a parity with crude oil; to stabilize retail prices at a normal spread between the refinery price and the retail price.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 208

B. OTHER FACTORS ALLEGED TO HAVE CAUSED OR CONTRIBUTED

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 208

TO THE RISE IN THE SPOT MARKET.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 208

Respondents do not contend that the buying programs were not a factor in the price rise and in the stabilization of the spot markets during 1935 and 1936. But they do contend that they were relatively minor ones, because of the presence of other economic forces such as the following:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 208

1. Control of production of crude oil.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 208

Under the Code, an attempt was made for the first time to balance the production of crude oil with the consumptive demand for gasoline. Monthly estimates of gasoline consumption would be made by the Bureau of Mines. The quantity of crude oil necessary to satisfy that demand was also estimated, broken down into allowables for each state, and recommended to the states. And there was evidence that the states would approximately conform to those recommendations. After the Code, the oil states continued the same practice under an Interstate Compact which permitted them to agree as to the quantities of crude oil which they would allow to be produced. 58

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 208

2. Connally Act.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 208

As we have noted, this law was enacted late in February, 1935, and began to be effective the first part of March, 1935. Prior to this act, control of hot oil by the states [310 U.S. 209] had not been effective for any extended period of time. Throughout 1933 and 1934, from 150,000 to 200,000 barrels of crude oil a day were estimated to have been produced in East Texas in excess of the state's allowables, much of it going into interstate commerce. After the Connally Act went into operation, no hot gasoline went into interstate commerce, according to respondents' evidence.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 209

3. $1 Crude oil.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 209

As we have noted, crude oil was brought to a dollar a barrel near the end of September, 1933. Before the Connally Act, however, hot oil flooded the market at substantially lower prices. Gasoline produced from hot oil forced the price of gasoline produced from crude oil down below cost. But, with the elimination of the hot oil, fluctuations in the price of crude ceased. This had a stabilizing effect on the price of gasoline.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 209

4. Increase in consumptive demand.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 209

Beginning in the spring of 1935, there was an increase in demand for gasoline. During the whole indictment period, every month showed an increase over the corresponding month in the previous year. For the entire year of 1935, consumption for the country as a whole was 7% more than for 1934; that for 1936 was about 10% over 1935—substantially the same increases taking place in the Mid-Western area.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 209

5. Control of inventory withdrawal and of manufacture of gasoline.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 209

Under the Code, crude oil could be withdrawn from storage only with the approval of the Administrator. Also under the Code, there were manufacturing quotas for gasoline which, through Code authorities, were allocated among the refiners. In March, 1935, as we have seen, gasoline inventories of the majors were reduced by over [310 U.S. 210] 900,000 barrels through a voluntary curtailment program. The demand was so heavy that the industry withdrew from storage and refined over 22,000,000 barrels of crude oil in storage in 1935. Further, imports of crude oil were limited by order of the Administrator.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 210

6. Improved business conditions.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 210

The years 1935 and 1936 were marked by improving general business conditions and rising prices everywhere.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 210

Much testimony was taken on these and related points. It was designed to show that, under the conditions which existed during the indictment period, stability in the market was to be expected from the play of these various economic forces. For it was argued that, by reason of those forces, supply and demand were brought into a reasonable continuing balance, with the resultant stabilization of the markets. And there was much testimony from respondents' witnesses that the above factors, as well as the buying programs, did contribute to price stability during this period. But no witness assumed to testify as to how much of a factor the buying program had been.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 210

V. Application of the Sherman Act

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 210

A. CHARGE TO THE JURY

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 210

The court charged the jury that it was a violation of the Sherman Act for a group of individuals or corporations to act together to raise the prices to be charged for the commodity which they manufactured where they controlled a substantial part of the interstate trade and commerce in that commodity. The court stated that, where the members of a combination had the power to raise prices and acted together for that purpose, the combination was illegal, and that it was immaterial how reasonable or unreasonable those prices were or to what extent they had been affected by the combination. It further charged that, if such illegal combination existed, [310 U.S. 211] it did not matter that there may also have been other factors which contributed to the raising of the prices. In that connection, it referred specifically to the economic factors which we have previously discussed and which respondents contended were primarily responsible for the price rise and the spot markets' stability in 1935 and 1936, viz., control of production, the Connally Act, the price of crude oil, an increase in consumptive demand, control of inventories and manufacturing quotas, and improved business conditions. The court then charged that, unless the jury found beyond a reasonable doubt that the price rise and its continuance were "caused" by the combination, and not caused by those other factors, verdicts of "not guilty" should be returned. It also charged that there was no evidence of governmental approval which would exempt the buying programs from the prohibitions of the Sherman Act, and that knowledge or acquiescence of officers of the government or the good intentions of the members of the combination would not give immunity from prosecution under that Act.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 211

The Circuit Court of Appeals held this charge to be reversible error, since it was based upon the theory that such a combination was illegal per se. In its view, respondents' activities were not unlawful unless they constituted an unreasonable restraint of trade. Hence, since that issue had not been submitted to the jury and since evidence bearing on it had been excluded, that court reversed and remanded for a new trial so that the character of those activities and their effect on competition could be determined. In answer to the government's petition, respondents here contend that the judgment of the Circuit Court of Appeals was correct, since there was evidence that they had affected prices only in the sense that the removal of the competitive evil of distress gasoline by the buying programs had permitted prices to rise to a normal competitive level; that their activities promoted, rather [310 U.S. 212] than impaired, fair competitive opportunities, and therefore that their activities had not unduly or unreasonably restrained trade. And they also contend that certain evidence which was offered should have been admitted as bearing on the purpose and end sought to be attained, the evil believed to exist, and the nature of the restraint and its effect. By their cross-petition, respondents contend that the record contains no substantial competent evidence that the combination, either in purpose or effect, unreasonably restrained trade within the meaning of the Sherman Act, and therefore that the Circuit Court of Appeals erred in holding that they were not entitled to directed verdicts of acquittal.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 212

In United States v. Trenton Potteries Co., 273 U.S. 392, this Court sustained a conviction under the Sherman Act where the jury was charged that an agreement on the part of the members of a combination, controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity is, in itself, an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of the combining units. There, the combination was composed of those who controlled some 82 percent of the business of manufacturing and distributing in the United States vitreous pottery. Their object was to fix the prices for the sale of that commodity. In that case, the trial court refused various requests to charge that the agreement to fix prices did not itself constitute a violation of law unless the jury also found that it unreasonably restrained interstate commerce. This Court reviewed the various price-fixing cases under the Sherman Act, beginning with United States v. Trans-Missouri Freight Assn., 166 U.S. 290, and United States v. Joint Traffic Assn., 171 U.S. 505, and said

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 212

…it has since often been decided and always assumed that uniform [310 U.S. 213] price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law despite the reasonableness of the particular prices agreed upon.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 213

(P. 398.) This Court pointed out that the so-called "rule of reason" announced in Standard Oil Co. v. United States, 221 U.S. 1, and in United States v. American Tobacco Co., 221 U.S. 106, had not affected this view of the illegality of price-fixing agreements. And, in holding that agreements "to fix or maintain prices" are not reasonable restraints of trade under the statute merely because the prices themselves are reasonable, it said (pp. 397-398):

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 213

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may, through economic and business changes, become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be, in themselves, unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed, and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made [310 U.S. 214] only after a complete survey of our economic organization and a choice between rival philosophies.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 214

In conclusion, this Court emphasized that the Sherman Act is not only a prohibition against the infliction of a particular type of public injury, but also, as stated in Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49, a "limitation of rights" which may be "pushed to evil consequences, and therefore restrained."

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 214

But respondents claim that other decisions of this Court afford them adequate defenses to the indictment. Among those on which they place reliance are Appalachian Coals, Inc. v. United States, 288 U.S. 344; Sugar Institute, Inc. v. United States, 297 U.S. 553; Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563; Cement Mfrs. Protective Assn. v. United States, 268 U.S. 588; Chicago Board of Trade v. United States, 246 U.S. 231, and the American Tobacco and Standard Oil cases, supra.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 214

But we do not think that line of cases is apposite. As clearly indicated in the Trenton Potteries case, the American Tobacco and Standard Oil cases have no application to combinations operating directly on prices or price structures.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 214

And we are of the opinion that Appalachian Coals, Inc. v. United States, supra, is not in point.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 214

In that case, certain producers of bituminous coal created an exclusive selling agency for their coal. The agency was to establish standard classifications and sell the coal of its principals at the best prices obtainable. The occasion for the formation of the agency was the existence of certain so-called injurious practices and conditions in the industry. One of these was the problem of "distress coal"—coal shipped to the market which was unsold at the time of delivery and therefore dumped on the market irrespective of demand. The agency was to promote the systematic study of the marketing and distribution [310 U.S. 215] of coal, its demand and consumption; to maintain an inspection and an engineering department to demonstrate to customers the advantages of this type of coal and to promote an extensive advertising campaign; to provide a research department to demonstrate proper and efficient methods of burning coal, and thus to aid producers in their competition with substitute fuels; to operate a credit department dealing with the reliability of purchasers, and to make the sale of coal more economical. That agency was also to sell all the coal of its principals at the best prices obtainable and, if all could not be sold, to apportion orders upon a stated basis. And, save for certain stated exceptions, it was to determine the prices at which sales would be made without consultation with its principals. This Court concluded that, so far as actual purpose was concerned, the defendant producers were engaged in a "fair and open endeavor to aid the industry in a measurable recovery from its plight." And it observed that the plan did not either contemplate or involve "the fixing of market prices"; that defendants would not be able to fix the price of coal in the consuming markets; that their coal would continue to be subject to "active competition." To the contention that the plan would have a tendency to stabilize market prices and to raise them to a higher level, this Court replied (p. 374):

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 215

The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. [310 U.S. 216]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 216

In distinguishing the Trenton Potteries case, this Court said (p. 375):

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 216

In the instant case, there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 216

Thus, in reality, the only essential thing in common between the instant case and the Appalachian Coals case is the presence in each of so-called demoralizing or injurious practices. The methods of dealing with them were quite divergent. In the instant case, there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. The increase in the spot market prices was to be accomplished by a well organized buying program on that market: regular ascertainment of the amounts of surplus gasoline; assignment of sellers among the buyers; regular purchases at prices which would place and keep a floor under the market. Unlike the plan in the instant case, the plan in the Appalachian Coals case was not designed to operate vis-a-vis the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental, but also highly conjectural. For the plan had not then been put into operation. Hence, this Court expressly reserved jurisdiction in the District Court to take further proceedings if, inter alia, in "actual operation," the plan proved to be "an undue restraint upon interstate commerce." And. as we have seen. it would per se constitute such a restraint if price-fixing were involved. [310 U.S. 217]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 217

Nor are Maple Flooring Mfrs. Assn. v. United States and Cement Mfrs. Protective Assn. v. United States, supra, at all relevant to the problem at hand. For the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing. And they were decided, as indicated in the Trenton Potteries case, on the express assumption that any agreement for price-fixing would have been illegal per se. And since that element was lacking, the only issues were whether or not, on the precise facts there presented, such activities of the combinations constituted unlawful restraints of commerce. A majority of the Court held that they did not.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 217

Nor can respondents find sanction in Chicago Board of Trade v. United States, supra, for the buying programs here under attack. That case involved a prohibition on the members of the Chicago Board of Trade from purchasing or offering to purchase between the closing of the session and its opening the next day grains (under a special class of contracts) at a price other than the closing bid. The rule was somewhat akin to rules of an exchange limiting the period of trading, for as stated by this Court, the "restriction was upon the period of price-making." No attempt was made to show that the purpose or effect of the rule was to raise or depress prices. The rule affected only a small proportion of the commerce in question. And among its effects was the creation of a public market for grains under that special contract class, where prices were determined competitively and openly. Since it was not aimed at price manipulation or the control of the market prices, and since it had "no appreciable effect on general market prices," the rule survived as a reasonable restraint of trade.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 217

There was no deviation from the principle of the Trenton Potteries case in Sugar Institute v. United States, [310 U.S. 218] supra. For, in that case, so-called competitive abuses were not permitted as defenses to violations of the Sherman Act bottomed on a trade association's efforts to create and maintain a uniform price structure.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 218

Thus, for over forty years, this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act, and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. And we reaffirmed that well established rule in clear and unequivocal terms in Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 458, where we said:

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 218

Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, United States v. Trenton Potteries Co., 273 U.S. 392, and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are, in themselves, unlawful restraints within the meaning of the Sherman Act,…

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 218

Therefore, the sole remaining question on this phase of the case is the applicability of the rule of the Trenton Potteries case to these facts.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 218

Respondents seek to distinguish the Trenton Potteries case from the instant one. They assert that, in that case, the parties substituted an agreed-on price for one determined by competition; that the defendants there had the power and purpose to suppress the play of competition in the determination of the market price, and therefore that the controlling factor in that decision was the destruction of market competition, not whether prices were higher or lower, reasonable or unreasonable. Respondents contend that, in the instant case, there was no elimination in the spot tank car market of competition [310 U.S. 219] which prevented the prices in that market from being made by the play of competition in sales between independent refiners and their jobber and consumer customers; that, during the buying programs, those prices were, in fact, determined by such competition; that the purchases under those programs were closely related to or dependent on the spot market prices; that there was no evidence that the purchases of distress gasoline under those programs had any effect on the competitive market price beyond that flowing from the removal of a competitive evil, and that, if respondents had tried to do more than free competition from the effect of distress gasoline and to set an arbitrary noncompetitive price through their purchases, they would have been without power to do so.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 219

But we do not deem those distinctions material.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 219

In the first place, there was abundant evidence that the combination had the purpose to raise prices. And likewise, there was ample evidence that the buying programs at least contributed to the price rise and the stability of the spot markets, and to increases in the price of gasoline sold in the Mid-Western area during the indictment period. That other factors also may have contributed to that rise and stability of the markets is immaterial. For, in any such market movement, forces other than the purchasing power of the buyers normally would contribute to the price rise and the market stability. So far as cause and effect are concerned, it is sufficient in this type of case if the buying programs of the combination resulted in a price rise and market stability which, but for them, would not have happened. For this reason, the charge to the jury that the buying programs must have "caused" the price rise and its continuance was more favorable to respondents than they could have required. Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise [310 U.S. 220] is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 220

Secondly, the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is indisputable that that competition was restricted through the removal by respondents of a part of the supply which, but for the buying programs, would have been a factor in determining the going prices on those markets. But the vice of the conspiracy was not merely the restriction of supply of gasoline by removal of a surplus. As we have said, this was a well organized program. The timing and strategic placement of the buying orders for distress gasoline played an important and significant role. Buying orders were carefully placed so as to remove the distress gasoline from weak hands. Purchases were timed. Sellers were assigned to the buyers, so that regular outlets for distress gasoline would be available. The whole scheme was carefully planned and executed to the end that distress gasoline would not overhang the markets and depress them at any time. And, as a result of the payment of fair going market prices, a floor was placed and kept under the spot markets. Prices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy. Competition was not eliminated from the markets, but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs, and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 220

The elimination of so-called competitive evils is no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the protestations [310 U.S. 221] usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price-cutting, and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 221

The reasonableness of prices has no constancy, due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper, and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale, and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied [310 U.S. 222] competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike. There was, accordingly, no error in the refusal to charge that, in order to convict, the jury must find that the resultant prices were raised and maintained at "high, arbitrary and noncompetitive levels." The charge in the indictment to that effect was surplusage.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 222

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing, as used in the Trenton Potteries case, has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. That price-fixing includes more than the mere establishment of uniform prices is clearly evident from the Trenton Potteries case itself, where this Court noted with approval Swift & Co. v. United States, 196 U.S. 375, in which a decree was affirmed which restrained a combination from "raising or lowering prices or fixing uniform prices" at which meats will be sold. Hence, prices are fixed within the meaning of the Trenton Potteries case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if, by various formulae, they are related to the market prices. They are fixed because they are agreed upon. And the [310 U.S. 223] fact that, as here, they are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price-fixing. In this case, the result was to place a floor under the market—a floor which served the function of increasing the stability and firmness of market prices. That was repeatedly characterized in this case as stabilization. But, in terms of market operations, stabilization is but one form of manipulation. And market manipulation, in its various manifestations, is implicitly an artificial stimulus applied to (or, at times, a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. Respondents, however, argue that there was no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the spot markets. They point to the fact that such purchasing was lightest during the period of the market rise in the spring of 1935, and heaviest in the summer and early fall of 1936, when the prices declined, and that it decreased later in 1936, when the prices rose. But those facts do not militate against the conclusion that these buying programs were a species of price-fixing or manipulation. Rather, they are wholly consistent with the maintenance of a floor under the market or a stabilization operation of this type, since the need for purchases under such a program might well decrease as prices rose and increase as prices declined.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 223

As we have indicated, the machinery employed by a combination for price-fixing is immaterial.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 223

Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists [310 U.S. 224] if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation, or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case, that power may be established if, as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders, and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it. Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control. Monopoly power (United States v. Patten, 226 U.S. 525) is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices, and that it caused them to be fixed or contributed to that result, is proof of the completion of a price-fixing conspiracy under § 1 of the Act. 59 The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it. Hence, the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that the buying programs caused or contributed to the rise and stability of prices. [310 U.S. 225]

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 225

As to knowledge or acquiescence of officers of the Federal Government, little need be said. The fact that Congress, through utilization of the precise methods here employed, could seek to reach the same objectives sought by respondents does not mean that respondents, or any other [310 U.S. 226] group may do so without specific Congressional authority. Admittedly, no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§ 2(c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise [310 U.S. 227] manner and method of securing immunity. None other would suffice. Otherwise, national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority, but by virtual volunteers. The method adopted by Congress for alleviating the penalties of the Sherman Act through approval by designated public representatives 60 would be supplanted by a foreign system. But even had approval been obtained for the buying programs, that approval would not have survived the expiration in June, 1935, of the Act which was the source of that approval. As we have seen, the buying program continued unabated during the balance of 1935 and far into 1936. As we said in United States v. Borden Co., 308 U.S. 188, 202, "A conspiracy thus continued is in effect renewed during each day of its continuance." Hence, approval or knowledge and acquiescence of federal authorities prior to June, 1935, could have no relevancy to respondents' activities subsequent thereto. The fact that the buying programs may have been consistent with the [310 U.S. 228] general objectives and ends sought to be obtained under the National Industrial Recovery Act is likewise irrelevant to the legality under the Sherman Act of respondents' activities either prior to or after June, 1935. For, as we have seen, price-fixing combinations which lack Congressional sanction are illegal per se; they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils. Only in the event that they were would such considerations have been relevant.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 228

Accordingly, we conclude that the Circuit Court of Appeals erred in reversing the judgments on this ground. A fortiori, the position taken by respondents in their cross-petition that they were entitled to directed verdicts of acquittal is untenable.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 228

B. RESPONDENTS' OFFERS OF PROOF

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 228

What we have said disposes of most of the errors alleged in exclusion of evidence. The offers of proof covering the background and operation of the National Industrial Recovery Act and the Petroleum Code, the condition of the oil industry, the alleged encouragement, cooperation and acquiescence of the Federal Petroleum Administration in the buying programs, and the like were properly excluded insofar as they bore on the nature of the restraint and the purpose or end sought to be attained. For, as we have seen, the reasonableness of the restraint was not properly an issue in the case.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 228

There were, however, offers of proof alleged to be relevant to the cause of the price rise and the subsequent stability of the markets during the period in question.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 228

In addition to the foregoing offers, respondents sought to show that the presence of hot oil and hot gasoline had greatly depressed the market from 1932 to early in 1935, when the Connally Act became effective, except for [310 U.S. 229] one short period from October to December, 1934; that, beginning in October, 1934, shipment of hot oil from East Texas into interstate commerce had, for the first time, been effectively controlled; that, within a period of six weeks thereafter, the tank car spot market rose 1 1/2¢—an amount corresponding to the price rise from March to June, 1935; that the various factors which primarily affect price were almost precisely the same in the fall of 1934 as they were in the spring of 1935; that the price of gasoline had borne a constant relationship to the price of crude oil from January, 1918, to October, 1933—that relationship disappearing when the price of hot oil fell below legal crude, but reappearing in October, 1934, and again in March, 1935, when hot oil was eliminated; that gasoline prices were more depressed than the prices of other commodities and the cost of living in 1933 and 1934, and recovered and rose less than such other prices and the cost of living in 1935 and 1936.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 229

We think there was no reversible error in exclusion of these various offers.

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To the extent that they were designed to show that respondents, by their buying programs, had not raised the spot market prices to an artificial and noncompetitive level, these offers of proof were properly denied as immaterial. For, as we have said, the reasonableness of the prices and the fact that respondents' activities merely removed from the market the depressive effect of distress gasoline were not relevant to the issues.

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And, to the extent that these offers of proof were aimed at establishing and evaluating other contributory causes for the price rise and market stability during the indictment period, they were not improperly denied. In the first place, the record is replete with evidence showing the condition of the oil industry at the time of the adoption of the code and during the code period. There was [310 U.S. 230] ample testimony bearing on the other causal factors which respondents contend were primarily responsible for the price rise and market stability during the indictment period. Much of the refused testimony was merely cumulative in nature. A trial court has wide discretion in a situation of that kind. The trial lasted about three and a half months. Terminal points are necessary even in a conspiracy trial involving intricate business facts and legal issues. In the second place, the offer to show the market conditions late in 1934, when hot oil was temporarily under control, was not improperly denied. There was substantial evidence in the record to demonstrate the depressive market effect of hot oil. While the offer was not wholly irrelevant to the issues, it was clearly collateral. The trial court has a wide range for discretion in the exclusion of such evidence. See Golden Reward Mining Co. v. Buxton Mining Co., 97 F. 413, 416-417; Chesterfield Mfg. Co. v. Leota Cotton Mills, 194 F. 358, 359. Admission of testimony showing the market conditions late in 1934 would have opened an inquiry into causal factors as involved and interrelated as those present during the indictment period. That might have confused, rather than enlightened, the jury. In any event, it would not have eliminated the buying programs as contributory causes to the market rise and stability in 1935 and 1936. And it would have prolonged the inquiry and protracted the trial. As once stated by Mr. Justice Holmes, one objection to the introduction of collateral issues is a "purely practical one, a concession to the shortness of life." Reeve v. Dennett, 145 Mass. 23, 28; 11 N.E. 938, 944. And see Union Stock Yard Transit Co. v. United States, 308 U.S. 213, 223-224. Similar reasons sustain the action of the trial court in limiting the inquiry into general economic conditions antedating and during the indictment period. In conclusion, we do not think that there was an abuse of discretion by the [310 U.S. 231] trial court in the exclusion of the proffered evidence. A great mass of evidence was received, the range of inquiry was wide, the factual questions relating to the oil industry and respondents' activities were intricate and involved. In such a case, a new trial will not be ordered for alleged errors in exclusion of evidence where matters of substance are not affected. See United States v. Trenton Potteries Co., supra, p. 404.

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VI. Use of The Grand Jury Transcript.

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The Circuit Court of Appeals held that the trial court committed prejudicial error in refusing to permit defense counsel to inspect the transcript of grand jury testimony used to refresh the recollection of certain witnesses called by the government. Respondents here urge that the use made of the grand jury transcript was error because (1) they were denied the right to inspect it, (2) it had not been properly authenticated, (3) the reading of the grand jury testimony must have led the jury to conclude that it was affirmative testimony, and (4) such testimony was not given contemporaneously with the occurrences to which it was related. And, in all respects, respondents contend that such use of the grand jury testimony was highly prejudicial.

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There were about 90 instances when the government used that testimony. In practically all those cases, the witnesses were employees or representatives of respondents or former defendants, or were closely associated with them. That most of them were hostile witnesses—evasive and reluctant to testify—clearly appears from a reading of their entire testimony. Each of those witnesses had testified before the grand jury which returned the indictment in the case. At times, counsel for the government would state to the court that he was surprised at the witness' answer to a question, and that it contradicted testimony before the grand jury. More frequently, [310 U.S. 232] counsel would ask the witness if his memory could be refreshed by his grand jury testimony. During the first part of the trial, government counsel apparently read some grand jury testimony to two witnesses from his notes. After objection had been made, the court instructed counsel to use the transcript. Soon thereafter, and early in the trial, the court adopted the practice of inspecting the transcript and itself seeking to refresh the witness' recollection by reading from his prior testimony. At no time was the transcript shown to the witness. At all times, respondents appropriately objected to the practice.

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Throughout the trial, the stated single reason for the use of such prior testimony was the refreshment of the witness' recollection. Counsel for the defense were ever alert to denounce the practice, especially when it appeared that government counsel might seek to impeach the witness. In such cases, the court normally would sustain the objection or admonish government counsel, or the question and answer would be stricken. In many instances where such testimony was used, the incident ended by the witness' merely saying that his recollection had not been refreshed. In case it had been, he would state what his present recollection was. Only in about one-sixth of the instances was any inconsistency in testimony developed. In the balance, recollection was either not refreshed or the testimony which had been given was wholly or substantially consistent with the previous grand jury testimony.

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During the trial, the court told the jury:

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I have used some of the testimony and read some of it for the purpose only of refreshing the witnesses' memories, and many times I have indicated that there was no conflict or nothing inconsistent between the testimony of the witness and the transcript of testimony. The only reason we use this transcript of testimony of each witness before the Grand Jury is to, if we can, refresh their [310 U.S. 233] memories so as to enable them to recall correctly what the fact is.

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And the court made a similar statement in its charge to the jury.

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As in case of leading questions, St. Clair v. United States, 154 U.S. 134, 150, such use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. See Di Carlo v. United States, 6 F.2d 364, 367-368; Bosselman v. United States, 239 F. 82, 85; Felder v. United States, 9 F.2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not, under all the circumstances, the use of grand jury minutes is necessary or appropriate for refreshing his recollection. As once stated by Judge Hough, "The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection." Felder v. United States, supra, p. 874. Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness. Morris v. United States, 149 F. 123, 126; Lennon v. United States, 20 F.2d 490, 493-494; Wigmore, Evidence (2d ed.), § 762. And the reasons are that only in that way can opposing counsel avoid the risks of imposition on, and improper communication with, the witness, and "detect circumstances not appearing on the surface" and "expose all that detracts from the weight of testimony." See 2 Wigmore, supra, p. 42. The first of these reasons has no relevancy here. And as to the second, no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropriate procedure is adopted to prevent its improper use. That again is a matter which rests in the sound discretion of the court. Grand jury testimony is ordinarily confidential. See Wigmore, supra, 2362. [310 U.S. 234] But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. See Metzler v. United States, 64 F.2d 203, 206. Since there is no inexorable rule which, under all circumstances, entitles the witness and his counsel to see the prior statement made under oath, and since, in this case, the court itself examined, and thus directly controlled the use of, the grand jury testimony, we cannot say that the refusal to make it available to counsel for the defense is per se reversible error. To hold that it was error in the instances here under review would be to find abuse of discretion, where, in fact, we conclude from the entire record on this phase of the case that the judge supervised the procedure with commendable fairness. In sum, the selective use of this testimony and the precautions taken by the trial judge make it impossible for us to say that he transcended the limits of sound discretion in permitting it to be used by the government without making it available to the defense.

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If the record showed that the refreshing material was deliberately used for purposes not material to the issues, but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise there would be error where, under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence. Rosenthal v. United States, 248 F. 684, 686. But here, the grand jury testimony was used simply to refresh the recollection on material facts, New York & Colorado Mining Syndicate & Co. v. Fraser, 130 U.S. 611, not as independent affirmative evidence. Bates v. Preble, 151 U.S. 149. Furthermore, it was not used for impeachment purposes, and the content of this refreshing material related solely to conversations and events relevant to the formation and execution of the buying programs. [310 U.S. 235]

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In addition, it clearly appears that the use of this material was not prejudicial. So far as the subject matter of the inquiry is concerned, that prior testimony was either cumulative or dealt only with the minutiae of the conspiracy. The record minus that testimony clearly establishes all the facts necessary for proof of the illegal conspiracy. No portion of it was dependent on the minor facts concerning which the memory of these witnesses was refreshed. 61 Hence, the situation is vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted. See Little v. United States, 93 F.2d 401; Putnam v. United States, 162 U.S. 687. Hence, assuming, arguendo, that there was error in the use of the prior testimony, to order a new trial would be to violate the standards of § 269 of the Judicial Code (28 U.S.C. § 391), since the "substantial rights" of respondents were not affected. There are no vested individual rights in the ordinary rules of evidence; their observance should not be reduced to an idle ceremony. [310 U.S. 236]

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Putnam v. United States, supra, held it was prejudicial error to use grand jury minutes to refresh the memory of a witness unless that testimony was contemporaneous with the occurrences as to which the witness was testifying. There, the testimony before the grand jury was more than four months after the occurrence. This Court held that, because of that lapse of time, the testimony was not contemporaneous. Whatever may be said of the Putnam case on the merits (see Wigmore, supra, § 761) it does not establish an inflexible four-months' period of limitation. There, the event was a single isolated conversation, most damaging to the defendant. Here, there was a continuing conspiracy extending at least up to the period when the witnesses were testifying before the grand jury. Much of the testimony related to events a year or more old. But, in the main, those matters were woven into the conspiracy, related to events in which the witness actively participated, concerned the regular business matters with which he was familiar, pertained to his regular employment, or constituted admissions against interest. On these facts, we do not think there was an abuse of discretion on the part of the trial judge in permitting the testimony to be used. Measured by the test of whether or not the prior statement made under oath was reasonably calculated to revive the witness' present recollection within the rule of the Putnam case, there certainly cannot be said to have been error as a matter of law.

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Respondents say that the manner employed in refreshing the recollection of the witnesses was bound to inculcate in the minds of the jurors the feeling that the witnesses were testifying falsely, or were concealing the truth. But here again we find no reversible error. The trial judge, as we have said, was alert to stop impeachment. And, in view of the obvious hostility and evasiveness of most of those witnesses, we cannot say that the judge transcended the bounds of discretion in permitting [310 U.S. 237] their memories to be refreshed in this manner. "As is true of most that takes place in a trial, the right result is a matter of degree, and depends upon the sense of measure of the judge." See United States v. Freundlich, 95 F.2d 376, 379.

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VII. Arguments to the Jury by Government Counsel

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Respondents complain of certain statements made to the jury by government counsel. Their objections are that government counsel (1) appealed to class prejudice, and (2) requested a conviction regardless of the evidence because the prosecution was convinced of respondents' guilt and because a conviction "was the wish and the desire of the highest officials in the Government of the United States."

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Under the first of these, they point to the opening statement that this conspiracy involved some of the "biggest men" in the country—big in the sense of "controlling vast volumes of financial influence", and that it is a

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terrible thing that a group of influential, wealthy millionaires or billionaires should take over the power, take over the control, the power to make prices.

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At the close of those opening remarks and on objection of defense counsel, the court counseled the jury that

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any reference to the wealth of any of the defendants is entirely immaterial. A man of wealth has just as much standing in a court as a man that is poverty-stricken.

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But respondents complain that, in the closing arguments, the same matter was referred to again as follows:

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A hundred lawyers employed—the very cream of the American Bar, the very best legal talent that these people can obtain—every one of them working night and day with suggestions as to how the red herring can be drawn across the clear-cut issue in this case;

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that it should not be taken for granted "that these more powerful people are above the law, and can't be reached and [310 U.S. 238] can't be brought to book"; that the "fear of corporate power in combination" is part of the American tradition, as illustrated by a speech made in 1873 by a Wisconsin judge, who said:

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There is looming up a new and dark power…. The accumulation of individual wealth seems to be greater than it ever has been since the downfall of the Roman Empire. The enterprises of the country are…coldly marching, not for economic conquests only, but for political power…; money is taking the field as an organized power. The question will arise…which shall rule, wealth or man? Which shall lead, money or intellect? Who shall fill the public stations, educated and patriotic free men or the futile serfs of corporate capital?

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But, as to these statements, no objection was made at the time by defense counsel.

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There were other such references e.g., "malefactors of great wealth," "eager, grasping men" or corporations who

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take the law into their own hands…without any consideration for the underdog or the poor man…. We are going to stop it, as our forefathers stopped it before us and left this country with us as it is now, or we are going down into ruin, as did the Roman Empire.

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Counsel for the defense objected to these statements as improper and prejudicial. The court overruled the objections, stating it would deal with the matter in its charge to the jury. In its charge, the court warned against convicting a corporation "solely because of its size or the extent of its business"; that it was "your duty to give these corporations the same impartial consideration" as an individual or small corporation would receive, and instructed the jurors not to be concerned

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with the financial condition of any of these defendants. Whether a man be rich or poor, he is entitled to the same consideration in this Court.

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On this phase of the matter, several observations are pertinent. In the first place, counsel for the defense [310 U.S. 239] cannot, as a rule, remain silent, interpose no objections, and, after a verdict has been returned, seize for the first time on the point that the comments to the jury were improper and prejudicial. See Crumpton v. United States, 138 U.S. 361, 364. Of course, appellate courts,

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in the public interest, may, of their own motion, notice errors to which no exception has been taken if the errors are obvious or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

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See United States v. Atkinson, 297 U.S. 157, 160. But, as we point out hereafter, the exceptional circumstances which call for an invocation of that rule are not present here. In the second place, it is not improper, in a Sherman Act case, to discuss corporate power, its use and abuse, so long as those statements are relevant to the issues at hand. For that subject is material to the philosophy of that Act. Its purposes and objectives are clearly legitimate subjects for discussion before the jury. But, thirdly, appeals to class prejudice are highly improper, and cannot be condoned, and trial courts should ever be alert to prevent them. Some of the statements to which respondents now object fall in this class. They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case, as was Berger v. United States, 295 U.S. 78, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct "that we are not justified in assuming its nonexistence." (P. 89.) Cf. New York Central R. Co. v. Johnson, 279 [310 U.S. 240] U.S. 310. Of course, appeals to passion and prejudice may so poison the minds of jurors, even in a strong case, that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial, and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice.

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Under the second of these objections, respondents complain of the plea to the jury not to "let your Government and the United States and its citizens and society down," and that government counsel "believe to the bottom of their hearts in the justice of the cause that they espouse here." No objection at that time was made by defense counsel. But they did object at the trial to the statements by government counsel,

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…do you honestly think that these boys here (government counsel)…would be trying to convict these men unless that was the wish and the desire of the highest officials in the government of the United States?;

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You don't think the government of the United States would allow four or five lawyers to come out here and prosecute this case against them against their wishes, or that the Secretary of the Department of the Interior would allow us to do it if he didn't want it done?

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The court overruled the objections, stating, "I suppose we have a right to assume that they are here under the instructions of the Attorney General of the United States." Respondents further complain of the statements that the evidence is "so overwhelming and overpowering that it doesn't even leave the trace or the shadow of a doubt"; that, if "you are going to say they are not guilty on this evidence, then you take the responsibility, I won't; you get an alibi, I won't"; that the hundreds of thousands of dollars spent by the government "in trying to get before you the facts" should not be [310 U.S. 241] "thrown to the winds," nor should these men "go clear." But no objection was made at the time by defense counsel.

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As respects the statement that it was the "wish and the desire of the highest officials" in the government to have defendants convicted, some background should be given. This came near the end of the closing arguments. In the opening statement, during the trial, and in the closing arguments, the defense continuously emphasized the knowledge and acquiescence by government officials of the buying programs. As we have noted, that was one of the main lines of defense. From the beginning of the trial to the end, the defense sought to prove not official approval in the legal sense, but official acquiescence, or at least condonation. Bald statements were made that respondents "were conducting a program which resulted from the instigation and inducement of the Government itself"; after the Schechter case, they endeavored to "stabilize marketing practices" at the "instance of officials of the Oil Administration";

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what was done by these defendants was done for the purpose of accomplishing the objectives and purposes of the National Industrial Recovery Act, and was undertaken at the request and pursuant to the authorization of the Secretary of the Interior, Mr. Ickes, the Administrator of the Petroleum Code;

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respondents

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acted to carry out the purposes and objectives sought by the Government and initiated by the Government…They were objectives defined by the President of the United States. They were purposes the accomplishment of which the Secretary of the Interior had been charged, under his oath, to seek to obtain;

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with all this backing and all this help from the government, and all this urging from the government, are you going to brand these men as just selfish individuals?

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On innumerable instances, the impression was sought to be conveyed by subtle intimation, inference, or suggestion [310 U.S. 242] that responsibility for these buying programs should be placed on the shoulders of high government officials. Government counsel accordingly justified his statement on the grounds that it denied what the defense had continuously stated, viz., that the buying programs were conducted with the consent and approval of the Secretary of the Interior. At a subsequent point in the closing arguments, government counsel again referred to the matter. On objection of defense counsel, he withdrew the statement. And the court instructed the jury to disregard it, saying "This prosecution was commenced at the instigation of the Attorney General of the United States."

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In view of these various circumstances, we do not think that the above statements were prejudicial. Standing by themselves, they appear to be highly improper. Even as a rebuttal to the defense which had been interposed throughout the trial, they overstep the bounds. But, in view of the justification which respondents sought to establish for their acts, the subject matter of these statements was certainly relevant. The fact that government counsel transgressed in his rebuttal certainly cannot be said to constitute prejudicial error. For a reading of the entire argument before the jury leads to the firm conviction that the comments which respondents now rely on for their assertions of error were isolated, casual episodes in a long summation of over 200 printed pages, and not at all reflective of the quality of the argument as a whole.

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Respondents further urge as prejudicial error the assertions by government counsel of personal knowledge in contradiction of the record for the purpose of discrediting an important defense witness. The statement of government counsel was that, in "1935 and 1936, you couldn't get a rowboat up the Mississippi River, north of Winona." Respondents contend that testimony as to navigability of that river was vitally material as establishing such outside competition as would have prevented them from [310 U.S. 243] raising prices to artificial and noncompetitive levels. But such testimony was wholly irrelevant, since the reasonableness of the prices was not properly an issue in the case. Furthermore, when objection was made to the remark, counsel withdrew it and the jury was instructed to disregard it. That must be deemed to have cured the error if it could be considered such. As stated in Dunlop v. United States, 165 U.S. 486, 498, "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand."

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VIII. Granting of New Trials to Some Defendants.

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Respondents contend that the trial court committed reversible error in granting new trials to some defendants and denying them to respondents.

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The court charged the jury that it could convict any of the defendants found to have been members of the combination, and that it need not convict all or none. As has been noted, the jury found sixteen corporations and thirty individuals guilty. Thereafter, the court discharged one corporation and ten individuals, and granted new trials to three corporations and fifteen individuals. Such action left the verdict standing as to only twelve corporations and five individuals. The trial court gave as its reason for granting some of the defendants a new trial its belief that they had not had

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an adequate separate consideration of their defense in view of the fact that, as to some of them, direct evidence of participation was lacking or slight, and the circumstantial evidence, viewed as a whole, may well have obscured other facts and circumstances shown, in some cases, to be highly suggestive of innocence, and in all cases entitled to be considered and weighed.

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United States v. Standard Oil Co. (Indiana), 23 F.Supp. 937, 939. In denying the motions of respondents for a new trial, it stated (p. 944) that there was "evidence to go to the jury and to sustain [310 U.S. 244] its verdict as to every essential charge in the indictment" as to them. 62

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Respondents' argument runs as follows: the court charged the jury that it was the purpose and the power of the combination to raise prices which were material. Hence, the fact that the jury found that the entire group possessed such power does not necessarily mean that the jury would have found that respondents, acting alone, possessed such power. Since the jury did not consider that issue, it is argued that denial of a new trial to respondents violates their constitutional right to a jury trial. And, [310 U.S. 245] in support of their contention, respondents insist that Standard of Indiana alone (one of the defendants granted a new trial) possessed such power as would make it impossible for them to raise prices without its agreement and cooperation.

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Respondents' argument does not focus sharply the basic and essential elements of the offense, and of the instructions to the jury. As we have stated above, the offense charged in this indictment was proved once it was established that any of the defendants conspired to fix prices through the buying programs, and that those programs caused or contributed to the price rise. Power of the combination to fix prices was therefore but a conclusion from the fact that the combination did fix prices. Hence, in that posture of the case, the issue here is whether or not the finding of the jury that the buying programs affected prices was necessarily dependent on the participation in those programs of all who were convicted.

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Obviously it was not. The order granting new trials in no manner impeached or questioned the evidence as to the total spot market purchases made by all companies (whether defendants, coconspirators or others). Cf. Bartkus v. United States, 21 F.2d 425. In their efforts to place a floor under the spot markets, respondents assuredly received benefits and assistance from the purchases made by other companies. And the amount of benefit and assistance received did not necessarily depend on whether or not those other companies were coconspirators. Market manipulators commonly obtain assistance from the activities of the innocent, as well as from those of their allies. The fact that they may capitalize on the purchases of others is no more significant than the fact that they may gain direct or collateral benefits from market trends, bullish factors, or fortuitous circumstances. And the mere fact that those circumstances [310 U.S. 246] might have changed, and that Standard of Indiana, say, might have substantially impaired the effect of the buying programs on prices by a change in its retail policies was as irrelevant, as was the chance that the Connally Act might have been repealed. The effect of the concerted activities was not rebutted by the fact that changes in events might have destroyed that effect.

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Nor did the case against respondents automatically fall when three of the corporate defendants 63 were awarded a new trial. We have here a situation quite different from that where the participation of those to whom a new trial was granted or against whom the judgment of conviction was reversed was necessary for the existence of the crime charged. See Gebardi v. United States, 287 U.S. 112; Morrison v. California, 291 U.S. 82; King v. Plummer [1902], 2 K.B. 339. In this case, the crime was not indivisible (cf. Queen v. Gompertz, 9 A. & E. (N.S.) 824; Feder v. United States, 257 F. 694) in the sense that the existence of a conspiracy under the Sherman Act was necessarily dependent on the cooperation of the other defendants with respondents. Nor was the case submitted to the jury on the assumption that the participation of any of the corporations which were granted new trials was indispensable to the finding of a conspiracy among the rest. As we have seen, the court charged that the jury could convict any of the defendants found to have been members of the combination, and that it need not convict all or none. It was the existence of a combination and the participation in it of all or some of the defendants which were important, not the identity of each [310 U.S. 247] and every participant. A conspiracy under the Sherman Act may embrace two or more individuals or corporations. Conviction of some need not await the apprehension and conviction of all. The erroneous conviction of one does not necessarily rebut the finding that the others participated. The theory of the charge to the jury was not that the defendants must be convicted, if at all, as a body; rather, the issue of guilt was distributive; the identity of all the co-conspirators was irrelevant.

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In a Sherman Act case, as in other conspiracy cases, the grant of a new trial to some defendants and its denial to others is not, per se, reversible error. After the jury's verdict has been set aside as respects some of the alleged coconspirators, the remaining ones cannot seize on that action as grounds for the granting of a new trial to them unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion. See Dufour v. United States, 37 App.D.C. 497, 510-511; State v. Christianson, 131 Minn. 276, 280; 154 N.W. 1095; Commonwealth v. Bruno, 324 Pa. 236, 248; 188 A. 320; People v. Kuland, 266 N.Y. 1; 193 N.E. 439; Browne v. United States, 145 F. 1. There is a complete lack of any showing of abuse of discretion here, for no prejudice has been established.

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Hence, this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474. Certain exceptions have been noted, such as instances where the trial court has "erroneously excluded from consideration matters which were appropriate to a decision on the motion." Fairmount Glass Works v. Cub Fork Coal Co., supra, p. 483. But there [310 U.S. 248] are no such circumstances here. No iota of evidence has been adduced that the trial court, in denying respondents' motions, failed to take into consideration the effect of the buying programs on gasoline prices in the Mid-Western area. In fact, it seems apparent that the trial court considered that issue, and ruled thereon adversely to respondents. It concluded, in substance, that whoever may have been all the members of the conspiracy, there was ample evidence to go to the jury on the nature and effect of these programs.

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Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. Moore v. United States, 150 U.S. 57, 61-62; J. W. Bishop Co. v. Shelhorse, 141 F. 643, 648; O'Donnell v. New York Transp. Co., 187 F. 109, 110. In substance, no more than that is involved here.

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IX. Variance.

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By their cross-petition, respondents contend that there was a fatal variance between the agreement charged in the indictment and the agreement proved, with a consequent violation of respondents' rights under the Sixth Amendment.

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As we have noted, certain trade journals were made defendants. The indictment charged that they were "the chief agencies and instrumentalities" through which the illegally raised prices affected prices paid for gasoline in the Mid-Western area; that they "knowingly published and circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by" defendants in the buying programs, while "representing the price quotations published by them" to be gasoline prices "prevailing in spot sales to jobbers in tank car lots" and while "knowing and intending them to be relied on as such by jobbers and to be made the basis of prices to jobbers." [310 U.S. 249]

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At the close of the government's case, the indictment was dismissed, on motion of the government, as against all trade journal defendants who went to trial. This was clearly proper, as the evidence adduced exculpated them from any wrongdoing. But respondents contend that the device charged in the indictment was one by which respondents were to pay higher than the actual spot market prices for their purchases, and then to substitute in the trade journal quotations such prices for the lower prices actually paid by jobbers in spot market sales. Since there was failure of proof on this point of falsification, it is argued that there was a variance. For, according to respondents, that feature was an integral and essential part of the plan as charged.

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We agree with the Circuit Court of Appeals that there was no variance. Analysis of the indictment which we have set forth supra, pp. 166-170, makes it clear that the charge against respondents was separate from, and independent of, the charge against the trade journals, and that the allegations against those journals constituted not the only means by which the conspiracy was to be effectuated, but only one of several means (supra, pp. 167-168). In effect, those charges in the indictment sought to connect the trade journals with the conspiracy as aiders and abettors. On the other hand, the gist of the indictment charged a conspiracy by defendants (1) to raise and fix the spot market prices and (2) thereby to raise and fix the prices in the Mid-Western area. So far as means and methods of accomplishing those objectives were concerned, the charge of falsification of the trade journal quotations was as unessential as was the charge, likewise unproved, that defendants caused the independent refiners to curtail their production. The purpose and effect of the buying programs in raising and fixing prices were in no way made dependent on the utilization of fraudulent trade journal quotations. As charged, the trade journals [310 U.S. 250] were the chief instrumentalities by which the spot market prices were converted into prices in the Mid-Western area. Hence, under this indictment, they were wholly effective for respondents' purposes, though they were innocent and though their quotations were not falsified as charged. A variation between the means charged and the means utilized is not fatal. And where an indictment charges various means by which the conspiracy is effectuated, not all of them need be proved. See Nash v. United States, 229 U.S. 373, 380. Cf. Boyle v. United States, 259 F. 803, 805.

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X. Jurisdiction or Venue.

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The Sixth Amendment provides that the accused shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed." Respondents contend that the district court for the Western District of Wisconsin had no jurisdiction or venue to try them, since the crime was not committed in that district. The Circuit Court of Appeals held to the contrary, one judge dissenting.

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As we have noted, the indictment charged that the defendants (1) conspired together to raise and fix the prices on the spot markets; (2) raised, fixed, and maintained those prices at artificially high and noncompetitive levels, and

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thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin);

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(3) have "exacted large sums of money from thousands of jobbers" in the Mid-Western area by reason of the provisions of the prevailing form of jobber contracts which made the price to the jobber dependent on the average spot market price, and, (4) "in turn, have intentionally raised the general level of retail prices prevailing in said Mid-Western area." [310 U.S. 251]

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As we have seen, there was substantial competent evidence that the buying programs resulted in an increase of spot market prices, of prices to jobbers, and of retail prices in the Mid-Western area. And it is clear that certain corporate respondents sold gasoline during this period in the Mid-Western area at the increased prices. The court charged the jury that, even though they found that defendants had the purpose and power to raise the spot market prices, they must acquit the defendants unless they also found and believed beyond a reasonable doubt that defendants

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have also intentionally raised and fixed the tank car price of gasoline contracted to be sold and which was sold in interstate commerce in the Mid-Western area, including the Western District of Wisconsin.

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It also charged that it was not enough

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for the prosecution to show an increase in the tank car prices of gasoline within said area, but you must also find and believe beyond a reasonable doubt and to a moral certainty that the defendants combined and conspired together or with others for the purpose of increasing and fixing the same as well as for the purpose of raising and fixing the tank car prices in said spot markets, on one or more of them.

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It further charged that the jury, in order to convict, must find some overt acts in the Western District of Wisconsin, and that sales of gasoline therein by any of the defendants would constitute such overt acts.

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Respondents, though agreeing that there were such sales in the Mid-Western area and that the prices on such sales were affected by the rise in the spot markets, deny that they were overt acts in pursuance of the conspiracy. Rather, they contend that each of such sales was an individual act of a particular conspirator in the ordinary course of his business by which he enjoyed the results of a conspiracy carried out in another district. That is to say, they take the position that the alleged conspiracy was limited to a restraint of competition in buying and [310 U.S. 252] selling on the spot markets, and included no joint agreement or understanding as respects sales in the Mid-Western area. In support of this view, they cite the government's concessions that it

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does not claim that each defendant "entered into an agreement not to sell jobbers except in accordance with" the contract described in Paragraph 11 of the Indictment; 64

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and that it does not contend that defendants were "sitting around a table and agreeing on a uniform retail price." And they assert that there was no evidence that respondents agreed not to sell gasoline in the Western District of Wisconsin except on the basis of spot market prices.

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Conspiracies under the Sherman Act are on "the common law footing": they are not dependent on the "doing of any act other than the act of conspiring" as a condition of liability. Nash v. United States, supra, at p. 378. But since there was no evidence that the conspiracy was formed within the Western District of Wisconsin, the trial court was without jurisdiction unless some act pursuant to the conspiracy took place there. United States v. Trenton Potteries Co., supra, pp. 402-403, and cases cited. We agree with the Circuit Court of Appeals that [310 U.S. 253] there was ample evidence of such overt acts in that district. The finding of the jury on this aspect of the case was also supported by substantial evidence. As we indicated in our discussion of the buying programs, there was sufficient evidence to go to the jury that the conspiracy did not end with an agreement to make purchases on the spot markets; that those buying programs were but part of the wider stabilization efforts of respondents; that the chief end and objective were the raising and maintenance of Mid-Western prices at higher levels. As stated by the Circuit Court of Appeals a different conclusion would require a belief that respondents were "engaged in a philanthropic endeavor." They obviously were not. The fact that no uniform jobbers' contract and no uniform retail price policy were agreed upon is immaterial. The objectives of the conspiracy would fail if respondents did not, by some formula or method, relate their sales in the Mid-Western area to the spot market prices. The objectives of the conspiracy would also fail if respondents, contrary to the philosophy of all the stabilization efforts, indulged in price-cutting and price wars. Accordingly, successful consummation of the conspiracy necessarily involved an understanding or agreement, however informal, to maintain such improvements in Mid-Western prices as would result from the purchases of distress gasoline. The fact that that entailed nothing more than adherence to prior practice of relating those prices to the spot market is, of course, immaterial. In sum, the conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the "continuous cooperation" necessary to keep the conspiracy alive. See United States v. Kissel, 218 U.S. 601, 607. Hence, sales by any one of the respondents in the Mid-Western area bound all. For a conspiracy is a partnership in crime, and an "overt act [310 U.S. 254] of one partner may be the act of all without any new agreement specifically directed to that act." United States v. Kissel, supra, p. 608.

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XI. Respondent McElroy.

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Respondent McElroy argues that the judgment of conviction rendered against him should be reversed, and the indictment dismissed, not only for the reasons heretofore discussed, but, more specifically, on the grounds that there was no substantial evidence that he had any knowledge of and participated in the unlawful conspiracy. His motion for a directed verdict at the conclusion of the case was denied by the trial court, and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised which entails an examination of the record not for the purpose of weighing the evidence, but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. Abrams v. United States, 250 U.S. 616, 619; Troxell v. Delaware, L. & W. R. Co., 227 U.S. 434, 444; Lancaster v. Collins, 115 U.S. 222, 225. We have carefully reviewed the record for evidence of McElroy's knowledge of and participation in the conspiracy. But, without burdening the opinion with a detailed exposition of the evidence on this point, we are of opinion that there was no error in the denial of his motion.

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The judgment of the Circuit Court of Appeals is reversed, and that of the District Court affirmed.

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Reversed.

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The CHIEF JUSTICE and MR. JUSTICE MURPHY did not participate in the consideration or decision of this case.

ROBERTS, J., dissenting

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MR. JUSTICE ROBERTS, dissenting:

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I regret that I am unable to agree to the court's decision. I think that, for various reasons, the judgment of the District Court should not stand. [310 U.S. 255]

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The opinion fully and fairly sets forth the facts proved at the trial, and to its statement nothing need be added. Some of the reasons for my inability to agree with the court's conclusions follow:

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The Government relied for venue in the Western District of Wisconsin upon the commission in that district of overt acts in aid of the alleged common enterprise. I think the indictment fails to allege, and the evidence fails to disclose, the commission of any such act in the district of trial. I agree with the dissenting judge in the Circuit Court of Appeals that the case should be dismissed for this reason.

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Paragraph 17 of the indictment alleges that the spot market tank car prices of gasoline substantially influence the retail prices.

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Paragraph 18 is the only one that defines the charged conspiracy. It alleges that the defendants and others, knowing the facts pleaded by way of inducement (including the fact that retail prices follow spot market tank car prices),

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combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline in the aforementioned spot markets, and, as intended by them, defendants have artificially raised and fixed such spot market tank car prices of gasoline and have maintained such prices at artificially high and noncompetitive levels and at levels agreed upon among them and have thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold, and sold, in interstate commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin),…

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It is further alleged that the defendants have arbitrarily, due to the form of their contract 1 with jobbers, exacted [310 U.S. 256] large sums of money from jobbers and, in turn, have intentionally raised the general level of retail prices in the Mid-Western area (including the Western District of Wisconsin).

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The sole and only conspiracy charged is the agreement artificially to raise and fix spot market tank car prices of gasoline in the Mid-Continent field.

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Paragraph 19 is devoted to the means by which the conspiracy thus described was "effectuated." The conduct of the defendants in this respect is described as their engaging and participating in two concerted gasoline buying programs, one, the East Texas buying program, and the other, the Mid-Continent buying program, for the purchase by each of them from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields.

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After describing these buying programs in subsequent paragraphs, the indictment, in paragraph 25, alleges that the conspiracy "has operated and has been carried out in part within the Western District of Wisconsin." The method of its operation in that district is described as follows:

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In pursuance of said combination and conspiracy, defendant major oil companies (with the exception of Standard of Indiana and Gulf) have contracted to sell and have sold and have delivered large quantities of gasoline in tank car lots to jobbers within said district at the artificially raised and fixed and noncompetitive prices aforesaid, and have arbitrarily exacted from jobbers within said district large sums of money. Defendant major oil companies (with the exception of Gulf) have solicited and taken contracts and orders for said gasoline within said district, sometimes by sales representatives located there, which district has been an important market for their product, and they have required retail dealers and consumers in said districts to pay artificially increased prices for gasoline as aforesaid, all by virtue of said combination [310 U.S. 257] and conspiracy and pursuant to the purposes and ultimate objectives thereof.

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Thus, after describing the conspiracy as one to buy on spot markets for the purpose of raising the price of gasoline on those markets, the indictment purports to charge, as overt acts, entirely unrelated transactions of individual defendants in the resale of gasoline to jobbers and at retail in the Western District of Wisconsin.

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There is no evidence in the record that any of the purchases made by the defendants pursuant to the conspiracy was made in Wisconsin. But if the indictment could bear the construction that the charged conspiracy involved an agreement as to the terms of resale to jobbers and retailers, proof was lacking to support any such alleged agreement. Government counsel, both in pleading and in admissions at trial, so conceded.

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In its Bill of Particulars the Government said:

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The Government does not claim that each defendant entered into an agreement not to sell jobbers except in accordance with "the contract described in paragraph 11 of the indictment."

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At trial, Government counsel repeatedly disavowed any charge in the indictment or any claim of the Government that there was an agreement amongst the defendants with respect to the price at which gasoline should be sold to jobbers or at retail. The evidence showed, without contradiction, that the Standard Oil Company of Indiana was the market leader in this area, and that, when it posted its price, none of the other defendants could sell at a higher price. It further showed that, at various times, Standard was forced to reduce its price to meet the competition of others. In this connection, Government counsel made the following statements:

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…We do not say that the Standard of Indiana, when it posts a retail price, first consults with the other companies to find out what retail price should be posted. [310 U.S. 258]

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If that is what you're worrying about, if you think we're charging you with sitting around a table and agreeing on a uniform retail price, don't worry, because that isn't what we are charging.

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In its brief in this court, the Government attempts to avoid the effect of these concessions by the statement that the defendants "were not free to sell as they pleased in the Mid-Western areas," and adds that "an obligation to adhere to their prior price practice of selling on the basis of spot market prices was implicit in their unlawful agreement." This amounts to saying that the conspiracy was not the one charged in the indictment, but was a much more ample conspiracy not only to raise the general level of tank car prices on the spot market by purchasing on that market, but to raise, maintain, and fix uniform resale prices to jobbers and retailers. But this contention does not aid the Government, for there is no evidence of any agreement to raise, or to maintain, jobber and retail prices, but, on the contrary, evidence that competition in such sales existed during the period in question.

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Situations arise, and results ensue, from the prosecution of any agreement or conspiracy. Individual defendants may expect benefits to follow from their adherence to a conspiracy or agreement; but benefits or results, whether anticipated or unforeseen, occurring after consummation of the conspiracy, and because of it, are not overt acts done in aid and furtherance of the conspiracy. The authorities to this effect are uniform. 2

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The Government relies on United States v. Trenton Potteries Co., 273 U.S. 392. That case is clearly not in point. There, the conspiracy was to fix the prices of the commodity manufactured and sold by the defendants, and to adhere to the prices so fixed. This court held that [310 U.S. 259] a sale made pursuant to that agreement in the Southern District of New York afforded venue in that district of an indictment for violation of the Sherman Act. The case would be apposite if the pleading and proof in the instant case were of a conspiracy to fix and maintain jobber and retail prices and adherence to the agreement in sales to jobbers and retailers. Neither pleading nor proof goes to any such conspiracy.

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In accordance with the Government's contention, the trial court repeatedly charged that, in order to convict, the jury must find that a combination existed and that the combination agreed to, and had the over to, raise the tank car spot market price of gasoline. Of course, the jury was at liberty to find that any number of the defendants less than all fulfilled the conditions named by the court. By its verdict, the jury found that those who were convicted, as a body, (1) possessed the power to raise the price, and (2) agreed so to do. The trial court granted a new trial to a number of defendants, including Standard of Indiana, the largest major oil company doing business in the area.

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Standard was granted a new trial on the ground that there was no sufficient evidence to connect it with the conspiracy. By refusing new trials to the other corporate defendants, the court has entered its own verdict that the others involved, excluding Standard, had the power, and agreed, to raise the level of spot market prices in the Mid-Western area. There is no jury verdict to that effect; no jury has ever passed upon that question, but an affirmative finding on that question is vital to the guilt of the defendants now before us. To affirm the judgment of conviction is to affirm a finding of fact by the trial judge without a jury, and to deny the respondents the right to jury trial guaranteed by the Sixth Amendment of the Constitution. [310 U.S. 260]

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The court's instructions to the jury were that they should return a verdict of guilty if they found that the defendants' actions had in any degree contributed to a rise in gasoline prices. The defendants insisted that the test was the effect of their combination upon competition, and that they could not be convicted unless the jury found that their agreement, and their conduct pursuant thereto, unreasonably restrained competition in interstate commerce.

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There was substantial evidence that all the defendants agreed to, or did, was to act in concert to eliminate distress gasoline; that such gasoline was a competitive evil in that it tended to impair or destroy normal competition. There was substantial evidence that what they agreed to, and did, neither fixed nor controlled prices nor unreasonably affected normal competition, and that their conduct affected prices only in the sense that the purchase of distress gasoline at going prices permitted prices to rise to a normal competitive level. There was no evidence that, as charged in the indictment, they agreed to, or in fact did, fix prices. The Court of Appeals, as I think, correctly held

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that the substance of what was accomplished and agreed on was that the major companies would purchase from the independent refiners the latter's surplus gasoline at going market prices.

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I think the defendants were entitled to have the jury charged that, in order to convict them, the jury must find that, although defendants knew the result of their activities would be a rise in the level of prices, nevertheless, if what they agreed to do, and did, had no substantial tendency to restrain competition in interstate commerce in transactions in gasoline, the verdict should be not guilty.

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As has been pointed out by this court, violation of the antitrust act depends upon the circumstances of individual [310 U.S. 261] cases. 3 It is always possible to distinguish earlier decisions by reference to the facts involved in them, but, in the course of decision in this court, certain principles have been laid down to which, I think, the charge of the court ran counter.

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One of these firmly established principles is that concerted action to remove a harmful and destructive practice in an industry, even though such removal may have the effect of raising the price level, is not offensive to the Sherman Act if it is not intended, and does not operate unreasonably, to restrain interstate commerce, and such action has been held not unreasonably to restrain commerce if, as here, it involves no agreement for uniform prices, but leaves the defendants free to compete with each other in the matter of price. 4

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No case decided by this court has held a combination illegal solely because its purpose or effect was to raise prices. The criterion of legality has always been the purpose or effect of the combination unduly to restrain commerce.

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I think Appalachian Coals, Inc. v. United States, 288 U.S. 344, a controlling authority sustaining the defendants' contention that the charge foreclosed a defense available to them under the Sherman Act. It is said that their combination had the purpose and effect of putting a floor under the spot market for gasoline. But that was [310 U.S. 262] precisely the purpose and effect of the plan in the Appalachian case. True, the means adopted to overcome the effect of the dumping of distress products on the market were not the same in the two cases, but means are unimportant, provided purpose and effect are lawful.

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Ethyl Gasoline Corp. v. United States, 309 U.S. 436, is relied upon, but, in that case, as in United States v. Trenton Potteries Co., 273 U.S. 392, maintenance of prices fixed by agreement was involved. So also in Sugar Institute v. United States, 297 U.S. 553, condemned features of the common plan had to do with the maintenance of announced prices and the abstinence from selling certain sorts of sugar. The combinations or agreements in these cases specifically prevented competitive pricing or took a commodity out of competition. This is not such a case.

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As I think, the error in the court's charge is well illustrated by the following instruction:

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If you should find that the defendants, acting together, and those independent refiners acting in concert with them, did not have the power to raise the level of spot market prices in the spot markets referred to in the indictment, or that they did not combine for that purpose, and if you should find also that the purchase of the said gasoline by the defendants affected the spot market prices only indirectly and incidentally, then you may consider all the circumstances surrounding the activities of the defendants to determine whether they were intended to and did merely eliminate abuses which tended to produce destructive competition and restore competition to a fairer base and produce fairer price levels. In such event, you may conclude that the purchase of such gasoline in the manner shown by the evidence was reasonable and beneficial, and not injurious to the public interest, and that, therefore, the restraint of trade was not undue, and [310 U.S. 263] not illegal, and you may acquit the defendants.

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(Italics supplied.)

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This was to tell the jury that, if they found the combination had power and purpose to raise the general level of prices, they should convict without considering whether the defendants' concert of action was intended merely to remove a source of destructive competition, and without considering whether, as defendants contended and sought to prove, other factors in the industry, over which they had no control, limited their power to raise prices beyond a level which would be the normal result of the removal of the abuses engendered by the dumping of distress gasoline.

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I think that the closing address of counsel for the Government is ground for setting aside the verdict.

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It is true that to much that was objectionable in that address the defendants did not object, or, if they did, failed to except. However, they assigned error to the whole of it and excepted to some of the more egregious violations of the canons of fair comment. I am of opinion that a situation is presented which, regardless of the technicalities of procedure, requires action by an appellate court. But, in any event, portions which are the subject of exception alone require a reversal of the judgment.

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The final and closing address covers twenty-eight pages of the record. About five refer to the facts in the case. The balance consists largely of what the speaker himself characterized as "clowning" and personal references to counsel, parties, the court, and other subjects, the object of which apparently was to distract attention from the issues.

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At many points, counsel should have been stopped by the court and warned against continuance of such tactics.

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The Circuit Court of Appeals said as to this matter: [310 U.S. 264]

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The Government does not undertake to justify much of the argument and misconduct complained of, but it earnestly insists that any error committed is not of a reversible nature. As the case is to be reversed, there seems no occasion for us to make a determination in this respect. We shall merely express the opinion that some of the argument complained of was highly improper, and that, taken in connection with the misuse of the Grand Jury testimony, heretofore discussed, would present a very serious obstacle to the affirmance of the judgment.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 264

I shall not quote those portions of the address which are quoted or summarized in the opinion of the court. It will suffice to make added reference to several portions.

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One of the most reprehensible things a prosecutor can do is to attempt to put into evidence before the jury his own, and his colleagues', opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the Government. This fact lends it undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons.

1940, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 264

In the closing address, counsel said to the jury:

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Now, if anybody doubts, if anybody has the least shadow of a doubt about the fact that these men [referring to Government counsel] believe to the bottom of their hearts in the justice of the cause that they espouse here, I can disabuse their minds of that doubt at any time. They have been aggressive, and they have been forceful; their movements here have been intelligent, well timed; and, as I said, they have come into this court room morning after morning, worn and tired almost to the breaking point. And it seemed to me that, I some times got the feeling, coming as they did then before you [310 U.S. 265] to present this evidence and this case, they were something like the Crusaders of old, saying "God wills it, God wills it."

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Objection was not made by counsel for the defendants at the time of this statement, but, when a somewhat similar statement was made a few moments later, objection was noted and exception taken. I think, however, that the offense was so flagrant that the court itself should have intervened irrespective of any objection.

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A little later, these statements occurred:

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Now, just between yourselves, do you honestly think that these boys here (indicating counsel at government table) fired with the enthusiasm of crusaders, as I say, and having given to this case every ounce of mental and physical strength they have, and I myself have contributed, also, would be trying to convict these men unless that was the wish and the desire of the highest officials in the government of the United States?

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After objection and exception, counsel continued as follows:

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Now just what do you think about it? Do you think these are three or four or five of these young fellows, as they have been calling them, just starting out on their own, running hog-wild? These are important men. I presume you all know they are engaged in a very important business, a business, the operation of which is almost a necessity in this country today. You don't think the government of the United States would allow four or five lawyers to come out here and prosecute this case against them against their wishes, or that the Secretary of the Department of the Interior would allow us to do it if he didn't want it done? And if he wanted it done—it was because he believed, as did the other men in Washington, that there was a violation of law here, so outstanding and so withering and far-reaching in its effect that something ought to be done to stop it, and, by that, to tell the people [310 U.S. 266] of this country that you can't do these things and get away with it.

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Again there was objection and exception.

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Counsel did not confine himself to testimony as to the prosecutors' belief in the defendants' guilt, but, in attacking the credibility of an important witness for defendants, essayed to contradict that testimony by a statement of counsel's own knowledge of facts. The quotation from the address will make the matter clear:

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I want to refer in a moment to something that made an impression on me.

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You know, we lawyers have to depend—most of us are kind of tough guys. We have our own way of talking about witnesses. And one thing that we very often say and talk about is the three classes of liars. There is the plain liar, the damn liar, and the expert witness. And, of all of them, the expert witness is the worst.

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There were a few of them here. There was Swensrud, the representative of the Standard of Ohio; there was Van Govern, and I think there was another one.

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But I just didn't think much of Swensrud's whole testimony, especially after I found out that he was giving testimony that they could ship gasoline in 1935 and 1936 up the Mississippi River to St. Paul. I happen to be around the Mississippi River quite a little, and know quite a lot about it. In 1935 and 1936, you couldn't get a rowboat up the Mississippi River north of Winona—because the Government was putting in these dams for the purpose of creating the nine-foot channel that you have read so much about. They had concrete clear across the river, spaced in so many ways that, as I say, you just couldn't get a rowboat up there. When Swensrud talked about gasoline going up that river, where I knew, because I lived there and was around there, that it couldn't be done, I just thought \_\_\_\_\_. [310 U.S. 267]

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After objection and a request that the court direct the jury to disregard the statement, the court ruled:

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The jury may disregard it. I didn't hear it. I was thinking about something else.

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Thereupon, counsel resumed as follows:

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Now, if you will let me alone a few minutes, I will be through. If you don't, like "Old Man River," I will just keep rolling along. I don't want to do that.

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Now I was referring to these witnesses who knew so much. There was Van Govern, Swensrud, and a fellow named J. D. Miller. He was the fellow who never looked at anybody so you could catch his eye. They knew so much, in the way they were telling it to you, that it is impossible, just impossible to believe that they could know as much as they said they did about it. They just covered too much territory. I think all history, sacred and profane, gives us but one single example of a person who knew everything—and he was not only a man, but he was God. And He gave up His life in a shameful death, upon the cross, between two thieves.

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\* \* \* \*

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It is true that no formal exception was taken, but the matter was highly prejudicial. The court should have dealt with it in some definite and positive way, which he omitted to do.

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Considering what is set out in the opinion of this court, and the additional references I have made to the address, I am of opinion that counsel's argument was highly improper, as indeed the Government admits, and, further, that it was highly prejudicial. I do not think the court took proper means to counteract the impropriety and prejudice thus created, and I think the only remedy available is to set aside a verdict ensuing upon such misconduct. Compare Berger v. United States, 295 U.S. 78, 85, 88, 89.

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MR. JUSTICE McREYNOLDS concurs in this opinion.

Footnotes

DOUGLAS, J., lead opinion (Footnotes)

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1. The indictment charged 27 corporations and 56 individuals with violations of § 1 of the Sherman Law. There were brought to trial 26 corporations and 46 individuals. Prior to submission of the case to the jury, the court discharged, directed verdicts of acquittal, or dismissed the indictment as to 10 of the corporations and 16 of the individuals. The jury returned verdicts of guilty as to the remaining 16 corporations and 30 individuals. Thereafter, the trial court ordered new trials as to 3 corporations and 15 individuals and granted judgment non obstante veredicto to one other corporation and 10 other individuals. United States v. Stone, 308 U.S. 519. For the opinions of the District Court on that phase of the case, see 23 F.Supp. 937, 938-939; 24 F.Supp. 575, and for the opinion of the Circuit Court of Appeals, 101 F.2d 870.

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The respondents are the remaining 12 corporations and 5 individuals, viz., Socony-Vacuum Oil Company, Inc., Wadhams Oil Company, Empire Oil and Refining Company, Continental Oil Company, The Pure Oil Company, Shell Petroleum Corporation, Sinclair Refining Company, Mid-Continent Petroleum Corporation, Phillips Petroleum Company, Skelly Oil Company, The Globe Oil & Refining Company (Oklahoma), The Globe Oil & Refining Company (Illinois), C. E. Arnott, vice-president of Socony-Vacuum, H. T. Ashton, manager of Lubrite Division of Socony-Vacuum, R. H. McElroy, Jr., tank-car sales manager of Pure Oil, P. E. Lakin, general manager of sales of Shell, R. W. McDowell, vice-president in charge of sales of Mid-Continent.

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2. Each of the corporations was fined $5,000; each individual, $1,000.

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3. Sec. 1 provides:

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Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:…Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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4. The major oil companies, in the main, engage in every branch of the business—owning and operating oil wells, pipelines, refineries, bulk storage plants, and service stations. Those engaging in all such branches are major integrated oil companies; those lacking facilities for one or more of those branches are semi-integrated. "Independent refiners" describes companies engaged exclusively in refining.

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5. Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, North Dakota, South Dakota, and Wisconsin.

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6. Located in the north, eastern part of Texas.

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7. Described as including Oklahoma, the northern and western portions of Texas, the southern and eastern portions of Kansas, the southern portion of Arkansas, the northern portion of Louisiana.

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8. Two individuals connected with those journals were also made defendants. One of the individuals was not brought to trial. At the close of the government's case, the indictment was dismissed, on motion of the government, as against the other four trade journal defendants.

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9. Described by one witness as

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wells that have gotten down to less than 5 barrels a day, and in some cases down to less than a barrel a day, so that they only have to be pumped, sometimes, an hour or two a day to get all the oil they will produce at that stage of the game.

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10. It provided for maximum hours of work and minimum rates of pay; forbade sales below cost; required integrated companies to conduct each branch of their business on a profitable basis; established, within certain limits, the parity between the price of a barrel of crude oil and a gallon of refined gasoline as 18.5 to 1, and authorized the fixing of certain minimum prices.

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11. An order of the Administrator fixing minimum prices never became effective. Respondents also made an offer of proof that the Petroleum Administrative Board endeavored, in the fall of 1933, to obtain voluntary action by the larger companies to acquire and hold large stocks of crude oil, said to be overhanging the market and in danger of depressing the price of refined gasoline. The offer of proof indicated that some purchases had been made, but did not show the extent. Respondents offered to show, through testimony of the chairman of the Planning & Coordination Committee, that it was the desire of the Administrator that crude oil not fall below $1 a barrel.

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12. The testimony of one of respondents' witnesses was that this policy caused the major companies to buy gasoline—in the main, from small, non-integrated refiners.

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13. June 23, 1934; August 13, 1934; September 8, 1934; November 2, 1934. They apparently were short-lived, their legality having been questioned by the Department of Justice. Late in 1933, the industry proposed the formation of a National Petroleum Agency, of which twenty-three of the larger companies, including most of the corporate respondents, were to be members, "to purchase, hold and, in an orderly way, dispose of surplus gasoline which threatens the stability of the oil price structure." Subscriptions for a pool of nearly $9,000,000 were obtained. The plan was never put into operation. In May, 1934, there was another voluntary plan (which was abortive); the Planning & Coordination Committee addressed a resolution to certain major companies calling upon each to purchase an amount of gasoline in May equal to 3% of their sales.

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14. Under the November 2, 1934, program, the contract provided that the price to be paid for the gasoline purchased should increase 1/4¢ per gallon with each 5¢ per barrel increase in the posted price of crude oil, and should decrease 1/4¢ per gallon with each 5¢ per barrel decrease in crude.

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15. P. 37. Excerpts from this report were part of an offer of proof by respondents.

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16. The Marketing Committee had an extensive organization of regional, state, local, or temporary committees, scattered throughout the country and representative of the various marketing elements in the industry.

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17. He also testified that the Board said that it could not tell him how to deal with the price wars, but that it would authorize him to deal with "the elements [of] that conflict that cause them."

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18. Sec. 3(a) of the Act read:

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Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

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Section 5 provided:

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While this title is in effect (or, in the case of a license, while section 4(a) is in effect), and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

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19. This committee eventually was composed of respondents McDowell, Ashton and Lakin, and five former defendants, who were either discharged or granted new trials.

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20. Respondent R. W. McDowell, a vice-president of Mid-Continent, testified as follows respecting the origin and meaning of this term:

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The phrase "dancing partners" came up right there after Mr. Ashton had gone around the room. There were these 7 or 8 small refiners whom no one had mentioned. He said this situation reminded him of the dances that he used to go to when he was a young fellow. He said, "Here we are at a great economic ball." He said, "We have these major companies who have to buy gasoline and are buying gasoline, and they are the strong dancers." And he said, "They have asked certain people to dance with them. They are the better known independent refiners." He said, "Here are 7 or 8 that no one seems to know." He said, "They remind me of the wallflowers that always used to be present at those old country dances." He said,

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I think it is going to be one of the jobs of this Committee to introduce some of these wallflowers to some of the strong dancers, so that everybody can dance.

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And from that simile, or whatever you want to call it, the term "dancing partner" arose.

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21. This was a committee of three of which respondent McDowell was chairman.

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22. The list of the independent refiners having the distress gasoline was read, and the majors made their selections—some on the basis of prior business dealings, some on the basis of personal friendships, some because of location, freight advantages, etc.

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23. Practically all of the independent refiners named in the indictment were members of this Association. C. M. Boggs, the president of the Association, and A. V. Bourque, its secretary, were named in the indictment as defendants. As to the former, a motion for directed verdict of acquittal was granted; as to the latter, the verdict of the jury was set aside, and the indictment dismissed.

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24. On March 15, 1935, Jacobi in a letter to his superiors wrote:

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The writer has been busy this week on tank car stabilization work, and thus far results are gratifying. Our Committee decided on a price of 3 2/4¢ for third grade, and 4 2/4¢ for "Q," for next week. Purchasing companies, including our own units, are paying these prices today.

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"Q" gasoline is regular gasoline with an octane rating of 68-70.

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25. What the practice of the other member of the Mechanical Sub-Committee was in this respect does not appear.

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26. Arnott was reported as saying:

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East Texas has been a menace to not only the Eastern Seaboard, but its gasoline also has found its way up into the Mid-Continent, and has been competitive with the so-called Mid-Continent suppliers' or refiners' gasoline.

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The normal market for gasoline refined in East Texas was the State of Texas and the Atlantic Seaboard, reached through tanker shipments from Gulf ports.

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27. Buckley first secured the approval of his employer. His company, not the Association, paid his salary while he was engaged in this work; the Association paid his travel and telephone expenses.

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28. Representatives of respondents Socony-Vacuum, Pure Oil, Sinclair and probably of Shell were present, as well as representatives of other majors. The only individual respondents present were Arnott and McElroy.

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29. They were part of the organization of the Planning & Coordination Committee under the Code. As to allocations under the Code see infra, pp. 201 et seq.

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30. Not including, inter alia, Cities Service Export Oil Co., Louisiana Oil Refining Corp., Tide Water Assoc. Oil Co., The Texas Co., and Gulf Refining Co., as respects which the indictment had been dismissed.

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31. Only three of the corporate respondents purchased through the Association.

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32. An inter-company communication between employees of respondent Pure Oil written in May, 1935, stated:

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Prices were advanced this week in both regions to 4 1/2¢ and 4 5/8-5 2/8¢ in view of some of the refiners squawking because our buying was considerably lower than the publications.

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33. It appears that, beginning in 1935 and increasing in the latter part of 1936, state chain store legislation resulted in the majors leasing many of their retail service stations.

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34. A defendant to whom a new trial was granted.

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35. Further details of Standard's policy in posting retail prices are discussed, p. 198.

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36. The following is illustrative: the spot market price (computed as indicated) was to govern when that price plus freight, plus 5 1/2¢ per gallon did not exceed the posted service station price, exclusive of tax, at destination on date of shipment. In case that aggregate figure exceeded the service station price, then the price to the jobber would be reduced by an amount equal to one-half of the excess. In some cases, the major companies assumed the full amount of the difference. The margin of 5 1/2¢ was based on the seller's discount of 3 1/2¢ to jobbers. Hence, if the seller increased or decreased that discount generally, then the margin of 5 1/2¢ would be increased or decreased by an equal or like amount. The wording of the various contracts varied, but there was great uniformity in principle.

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37. For this reason, "spot open market" is frequently used, "open" market referring to sales which are not made on contract nor based on future publications.

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38. In case actual sales cannot be obtained, he gets the prices at which the refiners will sell to jobbers in that open spot market.

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39. Major companies sell little gasoline to jobbers on a spot basis. The spot market prices published in the trade journals are based largely on sales by independent refiners.

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40. The National Petroleum News gives the Oilgram quotations in weekly form.

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41. That percentage is apparently reduced to about 10.5% if sales of 29 independent refiners (including the 14 named in the indictment) are taken.

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What percentage these purchases by respondents were of the Mid-Continent spot market in 1935 does not clearly appear, the government's estimate of one-third to a half apparently being somewhat high.

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42. Comparable movements took place in the East Texas spot market for regular gasoline until April 21, 1935, when those quotations were discontinued.

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43. Respondents computed that, for 1935, 8% of these purchases of third grade gasoline were above the high; 10% were at the high; 7% were between the high and low; 16% were below the low.

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44. Respondents' computations comparing their tabulations with the government's tabulations are as follows:

Price Group Government's Respondents'

Tank-Cars % Tank-Cars %

Above the lowest quotations in Platt's Oilgram 745 8.09 516 7.5

Above the lowest quotations in

Chicago Journal of Commerce 984 10.7 992 14.3

At the lowest quotations in Platt's Oilgram 6,407 69.64 4,491 64.9

Above the lowest quotations in

Chicago Journal of Commerce 6,564 71.31 4,419 63.9

At the lowest quotations in Platt's Oilgram 2,052 22.27 1,912 3 27.6

Above the lowest quotations in

Chicago Journal of Commerce 1,656 17.99 1,508 3 21.8

Total 9,204 100.0 6,920 3 100.0

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The government's tabulations dealt with 9,204 tank cars which defendants (excluding Sinclair) purchased on a flat price basis from independent refiners in the Mid-Continent field between March 1, 1935, and April 30, 1936. Respondents' tabulations included Sinclair and excluded sales by defendants who had already been dismissed, and eliminated or reclassified alleged omissions or improper classifications by the government.

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Respondents' computations also show that the percentage of purchases at prices below the low quotations was higher during the March-May, 1935, price rise than during the indictment period as a whole, and that the percentage of purchases above the low was lower during that period of price rise than during the period as a whole.

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45. Respondents' figures were: .7% above the high of the Journal; .8% above the high of the Oilgram; 3.7% at the high of the Journal; 6.1% at the high of the Oilgram. Apparently all purchases above the high were purchases of third grade, not regular, gasoline.

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46. One government witness testified that, out of 1,729 contracts made by the defendant major oil companies with jobbers in the Mid-Western area during 1935, 1,461 provided that the basic price was to be determined

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on the basis of the average of the averages of the high and low quotations of the Chicago Journal of Commerce and Platt's Oilgram on spot market tank car gasoline.

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During 1935, defendant companies sold over 900,000,000 gallons to jobbers in the Mid-Western area out of total sales by them in that area of over 4,000,000,000 gallons.

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47. These changes were apparently not made automatically, as the factor of competition was taken into consideration.

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48. A comparison of Monday low quotations for house brand gasoline (Oklahoma market) with average service station prices for Standard's regular grade gasoline (less taxes) for 28 cities (including La Crosse and Milwaukee, Wis.) in the Mid-Western area shows the latter following the former upward from March to June, 1935, and in January 1936.

 Oklahoma Service Station

March 4, 1935 4.375¢ 12.56¢

March 11, 1935 4.625 12.56

March 18, 1935 4.750 12.56

March 25, 1935 4.750 12.90

April 1, 1935 4.875 12.90

April 8, 1935 5.000 12.97

April 15, 1935 5.125 13.26

April 22, 1935 5.250 13.32

April 29, 1935 5.250 13.32

May 6, 1935 5.250 13.56

May 13, 1935 5.250 13.56

May 20, 1935 5.375 13.56

May 27, 1935 5.500 13.56

June 3, 1935 5.625 13.56

January 6, 1936 5.625 13.35

January 13, 1936 6.125 13.45

January 20, 1936 6.125 13.93

January 27, 1936 6.125 13.93

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49. Prices below the normal prices which Standard posted.

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50. Average price (28 cities Mid-Western area) for Standard's regular gasoline.

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51. Sec. 5 is set forth supra, note 18.

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52. That report went on to say:

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…we believe such a program might be successful in raising both tank-car and retail prices to their proper level in relationship to crude oil prices.

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If higher tank-car prices are obtained, we believe they can be sustained only by corresponding increases in retail gasoline prices; otherwise, the burden merely would be shifted from small refiners to small marketers, who, in many instances, have been in just as much distress as the refiners. We find that abnormally low retail prices can depress tank-car prices just as much as low tank-car prices can pull down the retail price structure. Thus, it appears to be essential that both prices move up together.

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53. The Administrator was reported as saying about that report that, if a parity between crude oil prices and gasoline prices did not come soon, he would call a meeting of representatives of the industry to see what could be done about it. On March 30, 1935, according to respondents, the Administrator wrote concerning that report:

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Concerning the independent refiners other than those in California, it appears from the report of the Committee on Small Enterprise that the outstanding difficulty is due to the disparity between posted crude oil prices and refinery realizations. This situation has been deplorable for many months, but it is my understanding that, at present, the activity of the Stabilization Committees is having a distinct effect in the improvement of refinery prices, and that, were it not for old contracts, many of which are badly shaded with respect to the posted price, the independent refiner is approaching a normal market structure.

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Respondents also offered to prove that the Blazer Committee advised the Board in April, 1935, that there was then no occasion to reduce crude oil prices, since

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we consider tank car gasoline prices now almost up to parity with sufficient additional advances anticipated in both tank car and retail prices,

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and expressed its satisfaction "with the success of the program to stabilize tank-car markets."

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54. Respondents offered to prove that Arnott's lawyer advised him on July 31, 1934, that, although the letter of July 20, 1934, was "not precisely an approval" by the Administrator of any agreement which gave "complete protection" from any prosecution under the antitrust laws, it nevertheless was,

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for all practical purposes, a complete protection to you and your committees to engage in all reasonable activities to restore prices to normal levels.

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55. A Sub-Committee of the Planning & Coordination Committee met with the Board on May 10, 1935, to discuss the report of the Blazer Committee. The recommendation in that report that the majors buy distress gasoline from the independents was discussed. Arnott testified that his group told the Board that "we already had buying of gasoline in effect," to which the Chairman of the Board was said to have replied "That is quite so, and disposes of that part of the report."

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56. Prepared between December, 1935, and February, 1936, and issued in June, 1936, by the Department of the Interior.

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57. In speaking of the general work of this Committee (which, as we have noted, was set up to deal with price wars), the report stated: "The stabilization program was perhaps the outstanding development under the code."

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58. This Compact (49 Stat. 939) was authorized in February, 1935, and became effective in August, 1935.

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59. Under this indictment, proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential, since sales of gasoline by respondents at the increased prices in that area were necessary in order to establish jurisdiction in the Western District of Wisconsin. Hence, we have necessarily treated the case as one where exertion of the power to fix prices (i.e., the actual fixing of prices) was an ingredient of the offense. But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. But it is well established that a person "may be guilty of conspiring although incapable of committing the objective offense." United States v. Rabinowich, 238 U.S. 78, 86. And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. Nash v. United States, 229 U.S. 373, 378. It is the "contract, combination…or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive, on the one hand, or successful, on the other. See United States v. Trenton Potteries Co., 273 U.S. 392, 402. Cf. Retail Lumber Dealers' Assn. v. State, 95 Miss. 337; 48 So. 1021. And the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U.S. 38), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. Steers v. United States, 192 F. 1, 5; Patterson v. United States, 222 F. 599, 618-619. In view of these considerations, a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. Whatever may have been the status of price-fixing agreements at common law (Allen, Criminal Conspiracies in Restraint of Trade at Common Law, 23 Harv.L.Rev. 531), the Sherman Act has a broader application to them than the common law prohibitions or sanctions. See United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 328. Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. See Handler, Federal Anti-Trust Laws—A Symposium (1931), pp. 91 et seq.

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The existence or exertion of power to accomplish the desired objective (United States v. United States Steel Corp., 251 U.S. 417, 444-451; United States v. International Harvester Co., 274 U.S. 693, 708-709) becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of § 2 of the Act. An intent and a power to produce the result which the law condemns are then necessary. As stated in Swift & Co. v. United States, 196 U.S. 375, 396,

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…when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability, as well as against the completed result.

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But the crime under § 1 is legally distinct from that, under § 2 (United States v. MacAndrews & Forbes Co., 149 F. 836; United States v. Buchalter, 88 F.2d 625), though the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1. Standard Oil Co. v. United States, 221 U.S. 1, 59-61; Patterson v. United States, supra, p. 620. Only a confusion between the nature of the offenses under those two sections (see United States v. Nelson, 52 F. 646; United States v. Patterson, 55 F. 605; Chesapeake & O. Fuel Co. v. United States, 115 F. 610) would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under § 1. Cf. State v. Eastern Coal Co., 29 R.I. 254; 70 A. 1; Cf. State v. Scollard, 126 Wash. 335, 218 P. 224.

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60. It should be noted in this connection that the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives. Under the NIRA, this could be done through the code machinery with the approval of the President, as provided in §§ 3(a) and 5, supra, note 18. Under § 407(8) of the Transportation Act of 1920 (41 Stat. 482; 49 U.S.C. § 5(8)), carriers, including certain express companies, which were consolidated pursuant to any order of the Interstate Commerce Commission were relieved from the operation of the Anti-Trust laws. And see the Maloney Act (§ 15A of the Securities Exchange Act of 1934; 52 Stat. 1070), providing for the formation of associations of brokers and dealers with the approval of the Securities and Exchange Commission and establishing continuous supervision by the Commission over specified activities of such associations, and the Bituminous Coal Act of 1937 (50 Stat. 72), especially §§ 4 and 12—particularly as they relate to the fixing of minimum and maximum prices by the Bituminous Coal Commission.

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61. Respondents strongly urge that this is not true in the case of the testimony of an employee of one of the trade journals. His prior testimony indicated (1) that the major companies were buying exactly at the journal quotations, so that the graph of those quotations represented prices paid under the buying program; (2) that prices paid by the majors "outweighed" the jobbers' sales reported to his journals. At the trial, he testified that those grand jury statements were not true. And they were not. But those matters are not essential issues in the case. That purchases under the buying program did not lead the market up, that the vast majority of purchases were at or below the low quotations, that the volume of purchases did not eliminate all competition, that the spot market prices were still determined by competitive forces, that the volume of purchases under the buying programs was relatively small are wholly immaterial, as we have seen.

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62. In this connection, the court said (p. 944) that it appeared "without dispute that a concerted buying movement took place in the Mid-Continent field"; that, as to its character and the existence of a concerted East Texas program, there was "ample evidence to take the case to the jury", and that the proofs were sufficient to sustain the verdict as to the charge that defendants "were able to and did effectually tie the jobbers' price" in the Mid-Western area to the tank car price in the spot market. It significantly added (p. 944):

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It is claimed by the defendants that they did not have the power to control the price as charged, and that, inasmuch as some of the large companies did not or have not been shown to have participated in the movement, the power of the defendants in that respect was inadequate for the purpose. This does not follow, for the reason that large buyers both in East Texas and in the Mid-Continent fields, while acting separately, were nevertheless buying for their requirements in these fields, as they had always done and as defendants had every reason to believe they would continue to do. The defendants were thus able to consider that these buyings would necessarily reduce the available gasoline which they proposed to take off the market just as effectively as though these other companies had joined in the program. The amount of distress gasoline would be exactly the same in any event, and the proof shows that the surplus was, in fact, a very small part of the total, so much so that most of the defendants have shown that its acquisition in addition to other buying did not materially increase their inventories. I am satisfied that there was ample evidence to sustain the contention of the Government that the defendants did have power to control the market, and that they did so as charged.

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63. The question of the effect of the buying programs on market prices obviously concerns only the corporate defendants. The one corporate defendant granted after verdict a directed verdict of acquittal was The Globe Oil & Refining Co. (Kansas). The record does not show that this company made any spot market purchases in 1935 or 1936.

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64. The standard form of jobber contract referred to in par. 11 of the indictment was described therein as follows:

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The price of gasoline to the jobber shall be the average spot market price, determined by averaging the high and low spot market prices for gasoline of comparable octane rating published by defendant Platt's Oilgram, for the Tulsa, Oklahoma, market, and by defendant Chicago Journal of Commerce on date of shipment. If the average spot market price plus freight to destination shall allow the buyer a margin of less than 5 1/2¢ per gallon below the service station price posted by defendant Standard of Indiana, then the buyer and the seller shall share equally in the deficit below a 5 1/2¢ margin. In certain States in which the Standard of Indiana has recently discontinued the posting of retail prices, such jobber margins have been calculated on the basis of a margin of 2¢ below the dealer tank wagon prices posted by the Standard of Indiana (such tank wagon prices having usually been 3 1/2¢ below the posted retail prices).

ROBERTS, J., dissenting (Footnotes)

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1. The form and use of this contract is described in paragraph 11 of the indictment.

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2. Lonabaugh v. United States, 179 F. 476; United States v. Black, 160 F. 431; Rose v. St. Clair, 28 F.2d 189.

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3. See Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563, 579.

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4. United States v. American Tobacco Co., 221 U.S. 106, 178, 180; United States v. Union Pacific R. Co., 226 U.S. 61, 84-85; American Column & Lumber Co. v. United States, 257 U.S. 377, 400, 417; Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563, 568; Appalachian Coals, Inc. v. United States, 288 U.S. 344, 362-363, 373-374; Sugar Institute v. United States, 297 U.S. 553, 597-598.

President Roosevelt's Address at University of Virginia, 1940

Title: President Roosevelt's Address at University of Virginia

Author: Franklin D. Roosevelt

Date: June 10, 1940

Source: Public Papers of the Presidents, F. D. Roosevelt, 1940, Item 59

Public Papers of FDR, 1940, Item 59

President Newcomb, my friends of the University of Virginia:

Public Papers of FDR, 1940, Item 59

I notice by the program that I am asked to address the class of 1940. I avail myself of that privilege. But I also take this very apt occasion to speak to many other classes that have graduated through all the years, classes that are still in the period of study, not alone in the schools of learning of the Nation, but classes that have come up through the great schools of experience; in other words a cross section of the country, just as you who graduate today are a cross section of the Nation as a whole.

Public Papers of FDR, 1940, Item 59

Every generation of young men and women in America has questions to ask the world. Most of the time they are the simple but nevertheless difficult questions, questions of work to do, opportunities to find, ambitions to satisfy.

Public Papers of FDR, 1940, Item 59

But every now and again in the history of the Republic a different kind of question presents itself—a question that asks, not about the future of an individual or even of a generation, but about the future of the country, the future of the American people.

Public Papers of FDR, 1940, Item 59

There was such a time at the beginning of our history as a Nation. Young people asked themselves in those days what lay ahead, not for themselves, but for the new United States.

Public Papers of FDR, 1940, Item 59

There was such a time again in the seemingly endless years of the War Between the States. Young men and young women on both sides of the line asked themselves, not what trades or professions they would enter, what lives they would make, but what was to become of the country they had known.

Public Papers of FDR, 1940, Item 59

There is such a time again today. Again today the young men and the young women of America ask themselves with earnestness and with deep concern this same question: "What is to become of the country we know?"

Public Papers of FDR, 1940, Item 59

Now they ask it with even greater anxiety than before. They ask, not only what the future holds for this Republic, but what the future holds for all peoples and all nations that have been living under democratic forms of Government—under the free institutions of a free people.

Public Papers of FDR, 1940, Item 59

It is understandable to all of us that they should ask this question. They read the words of those who are telling them that the ideal of individual liberty, the ideal of free franchise, the ideal of peace through justice, are decadent ideals. They read the word and hear the boast of those who say that a belief in force—force directed by self-chosen leaders—is the new and vigorous system which will overrun the earth. They have seen the ascendancy of this philosophy of force in nation after nation where free institutions and individual liberties were once maintained.

Public Papers of FDR, 1940, Item 59

It is natural and understandable that the younger generation should first ask itself what the extension of the philosophy of force to all the world would lead to ultimately. We see today in stark reality some of the consequences of what we call the machine age.

Public Papers of FDR, 1940, Item 59

Where control of machines has been retained in the hands of mankind as a whole, untold benefits have accrued to mankind. For mankind was then the master; and the machine was the servant.

Public Papers of FDR, 1940, Item 59

But in this new system of force the mastery of the machine is not in the hands of mankind. It is in the control of infinitely small groups of individuals who rule without a single one of the democratic sanctions that we have known. The machine in hands of irresponsible conquerors becomes the master; mankind is not only the servant; it is the victim, too. Such mastery abandons with deliberate contempt all the moral values to which even this young country for more than three hundred years has been accustomed and dedicated.

Public Papers of FDR, 1940, Item 59

Surely the new philosophy proves from month to month that it could have no possible conception of the way of life or the way of thought of a nation whose origins go back to Jamestown and Plymouth Rock.

Public Papers of FDR, 1940, Item 59

Conversely, neither those who spring from that ancient stock nor those who have come hither in later years can be indifferent to the destruction of freedom in their ancestral lands across the sea.

Public Papers of FDR, 1940, Item 59

Perception of danger to our institutions may come slowly or it may come with a rush and a shock as it has to the people of the United States in the past few months. This perception of danger has come to us clearly and overwhelmingly; and we perceive the peril in a world-wide arena—an arena that may become so narrowed that only the Americas will retain the ancient faiths.

Public Papers of FDR, 1940, Item 59

Some indeed still hold to the now somewhat obvious delusion that we of the United States can safely permit the United States to become a lone island, a lone island in a world dominated by the philosophy of force.

Public Papers of FDR, 1940, Item 59

Such an island may be the dream of those who still talk and vote as isolationists. Such an island represents to me and to the overwhelming majority of Americans today a helpless nightmare of a people without freedom—the nightmare of a people lodged in prison, handcuffed, hungry, and fed through the bars from day to day by the contemptuous, unpitying masters of other continents.

Public Papers of FDR, 1940, Item 59

It is natural also that we should ask ourselves how now we can prevent the building of that prison and the placing of ourselves in the midst of it.

Public Papers of FDR, 1940, Item 59

Let us not hesitate—all of us—to proclaim certain truths. Overwhelmingly we, as a nation—and this applies to all the other American nations—are convinced that military and naval victory for the gods of force and hate would endanger the institutions of democracy in the western world, and that equally, therefore, the whole of our sympathies lies with those nations that are giving their life blood in combat against these forces.

Public Papers of FDR, 1940, Item 59

The people and the Government of the United States have seen with the utmost regret and with grave disquiet the decision of the Italian Government to engage in the hostilities now raging in Europe.

Public Papers of FDR, 1940, Item 59

More than three months ago the Chief of the Italian Government sent me word that because of the determination of Italy to limit, so far as might be possible, the spread of the European conflict, more than two hundred millions of people in the region of the Mediterranean had been enabled to escape the suffering and the 'devastation of war.

Public Papers of FDR, 1940, Item 59

I informed the Chief of the Italian Government that this desire on the part of Italy to prevent the war from spreading met with full sympathy and response on the part of the Government and the people of the United States, and I expressed the earnest hope of this Government and of this people that this policy on the part of Italy might be continued. I made it clear that in the opinion of the Government of the United States any extension of hostilities in the region of the Mediterranean might result in a still greater enlargement of the scene of the conflict, the conflict in the Near East and in Africa and that if this came to pass no one could foretell how much greater the theater of the war eventually might become.

Public Papers of FDR, 1940, Item 59

Again on a subsequent occasion, not so long ago, recognizing that certain aspirations of Italy might form the basis of discussions among the powers most specifically concerned, I offered, in a message addressed to the Chief of the Italian Government, to send to the Governments of France and of Great Britain such specific indications of the desires of Italy to obtain readjustments with regard to her position as the Chief of the Italian Government might desire to transmit through me. While making it clear that the Government of the United States in such an event could not and would not assume responsibility for the nature of the proposals submitted nor for agreements which might thereafter be reached, I proposed that if Italy would refrain from entering the war I would be willing to ask assurances from the other powers concerned that they would faithfully execute any agreement so reached and that Italy's voice in any future peace conference would have the same authority as if Italy had actually taken part in the war, as a belligerent.

Public Papers of FDR, 1940, Item 59

Unfortunately to the regret of all of us and the regret of humanity, the Chief of the Italian Government was unwilling to accept the procedure suggested and he has made no counter proposal.

Public Papers of FDR, 1940, Item 59

This Government directed its efforts to doing what it could to work for the preservation of peace in the Mediterranean area, and it likewise expressed its willingness to endeavor to cooperate with the Government of Italy when the appropriate occasion arose for the creation of a more stable world order, through the reduction of armaments, and through the construction of a more liberal international economic system which would assure to all powers equality of opportunity in the world's markets and in the securing of raw materials on equal terms.

Public Papers of FDR, 1940, Item 59

I have likewise, of course, felt it necessary in my communications to Signor Mussolini to express the concern of the Government of the United States because of the fact that any extension of the war in the region of the Mediterranean would inevitably result in great prejudice to the ways of life and Government and to the trade and commerce of all the American Republics.

Public Papers of FDR, 1940, Item 59

The Government of Italy has now chosen to preserve what it terms its "freedom of action" and to fulfill what it states are its promises to Germany. In so doing it has manifested disregard for the rights and security of other nations, disregard for the lives of the peoples of those nations which are directly threatened by this spread of the war; and has evidenced its unwillingness to find the means through pacific negotiations for the satisfaction of what it believes are its legitimate aspirations.

Public Papers of FDR, 1940, Item 59

On this tenth day of June, 1940, the hand that held the dagger has struck it into the back of its neighbor.

Public Papers of FDR, 1940, Item 59

On this tenth day of June, 1940, in this University founded by the first great American teacher of democracy, we send forth our prayers and our hopes to those beyond the seas who are maintaining with magnificent valor their battle for freedom.

Public Papers of FDR, 1940, Item 59

In our American unity, we will pursue two obvious and simultaneous courses; we will extend to the opponents of force the material resources of this nation; and, at the same time, we will harness and speed up the use of those resources in order that we ourselves in the Americas may have equipment and training equal to the task of any emergency and every defense.

Public Papers of FDR, 1940, Item 59

All roads leading to the accomplishment of these objectives must be kept clear of obstructions. We will not slow down or detour. Signs and signals call for speed—full speed ahead.

Public Papers of FDR, 1940, Item 59

It is right that each new generation should ask questions. But in recent months the principal question has been somewhat simplified. Once more the future of the nation and of the American people is at stake.

Public Papers of FDR, 1940, Item 59

We need not and we will not, in any way, abandon our continuing effort to make democracy work within our borders. We still insist on the need for vast improvements in our own social and economic life. But that is a component part of national defense itself.

Public Papers of FDR, 1940, Item 59

The program unfolds swiftly and into that program will fit the responsibility and the opportunity of every man and woman in the land to preserve his and her heritage in days of peril.

Public Papers of FDR, 1940, Item 59

I call for effort, courage, sacrifice, devotion. Granting the love of freedom, all of these are possible.

Public Papers of FDR, 1940, Item 59

And the love of freedom is still fierce and steady in the nation today.

Minersville Sch. Dist. v. Board of Educ., 1940

Title: Minersville School District v. Board of Education

Author: U.S. Supreme Court

Date: June 3, 1940

Source: 310 U.S. 586

This case was argued April 25, 1940, and was decided June 3, 1940.

1940, Minersville School District v. Board of Education, 310 U.S. 586

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1940, Minersville School District v. Board of Education, 310 U.S. 586

FOR THE THIRD CIRCUIT

Syllabus

1940, Minersville School District v. Board of Education, 310 U.S. 586

1. A state regulation requiring that pupils in the public schools, on pain of expulsion, participate in a daily ceremony of saluting the national flag whilst reciting in unison a pledge of allegiance to it "and to the Republic for which it stands; one Nation indivisible, with liberty and justice for all"—held within the scope of legislative power, and consistent with the Fourteenth Amendment, as applied to children brought up in, and entertaining, a conscientious religious belief that such obeisance to the flag is forbidden by the Bible and that the Bible, as the Word of God, is the supreme authority. P. 591.

1940, Minersville School District v. Board of Education, 310 U.S. 586

2. Religious convictions do not relieve the individual from obedience to an otherwise valid general law not aimed at the promotion or restriction of religious beliefs. P. 594.

1940, Minersville School District v. Board of Education, 310 U.S. 586

3. So far as the Federal Constitution is concerned, it is within the province of the legislatures and school authorities of the several States to adopt appropriate means to evoke and foster a sentiment of national unity among the children in the public schools. P. 597.

1940, Minersville School District v. Board of Education, 310 U.S. 586

4. This Court cannot exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country, nor overrule the local judgment against granting exemptions from observance of such a program. P. 598.

1940, Minersville School District v. Board of Education, 310 U.S. 586

108 F.2d 683, reversed.

1940, Minersville School District v. Board of Education, 310 U.S. 586

CERTIORARI, 309 U.S. 645, to review the affirmance of a decree (24 F.Supp. 271; opinion, 21 F.Supp. 581) which perpetually enjoined the above-named School District, the members of its board of education, and its superintendent of public schools from continuing to enforce an order expelling from the public schools certain minors (suing in this case by their father as next friend), and from [310 U.S. 587] requiring them to salute the national flag as a condition to their right to attend. [310 U.S. 591]

FRANKFURTER, J., lead opinion

1940, Minersville School District v. Board of Education, 310 U.S. 591

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

1940, Minersville School District v. Board of Education, 310 U.S. 591

A grave responsibility confronts this Court whenever, in course of litigation, it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy.

1940, Minersville School District v. Board of Education, 310 U.S. 591

Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. The local Board of Education required both teachers and pupils to participate in this ceremony. The ceremony is a familiar one. The right hand is placed on the breast and the following pledge recited in unison: "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." While the words are spoken, teachers and pupils extend their right hands in salute to the flag. The Gobitis family are affiliated with "Jehovah's Witnesses," for whom the Bible as the Word of God is the supreme authority. The children [310 U.S. 592] had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of Scripture. 1

1940, Minersville School District v. Board of Education, 310 U.S. 592

The Gobitis children were of an age for which Pennsylvania makes school attendance compulsory. Thus, they were denied a free education, and their parents had to put them into private schools. To be relieved of the financial burden thereby entailed, their father, on behalf of the children and in his own behalf, brought this suit. He sough to enjoin the authorities from continuing to exact participation in the flag salute ceremony as a condition of his children's attendance at the Minersville school. After trial of the issues, Judge Maris gave relief in the District Court, 24 F.Supp. 271, on the basis of a thoughtful opinion at a preliminary stage of the litigation, 21 F.Supp. 581; his decree was affirmed by the Circuit Court of Appeals, 108 F.2d 683. Since this decision ran counter to several per curiam dispositions of this Court, 2 we granted certiorari to give the matter full reconsideration. 309 U.S. 645. By their able submissions, he Committee on the Bill of Rights of the American Bar Association and the American Civil Liberties Union, as friends of the Court, have helped us to our conclusion.

1940, Minersville School District v. Board of Education, 310 U.S. 592

We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses [310 U.S. 593] upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment.

1940, Minersville School District v. Board of Education, 310 U.S. 593

Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights. The First Amendment, and the Fourteenth through its absorption of the First, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith. So pervasive is the acceptance of this precious right that its scope is brought into question, as here, only when the conscience of individuals collides with the felt necessities of society.

1940, Minersville School District v. Board of Education, 310 U.S. 593

Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief—or even of disbelief—in the supernatural is protected, whether in church or chapel, mosque or synagogue, tabernacle or meetinghouse. Likewise, the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in government. Cantwell v. Connecticut, ante, p. 296.

1940, Minersville School District v. Board of Education, 310 U.S. 593

But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow men. When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To state the [310 U.S. 594] problem is to recall the truth that no single principle can answer all of life's complexities. The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others—even of a majority—is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. Compare Mr. Justice Holmes in Hudson Water Co. v. McCarter, 209 U.S. 349, 355. Our present task, then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because, in safeguarding conscience, we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.

1940, Minersville School District v. Board of Education, 310 U.S. 594

In the judicial enforcement of religious freedom, we are concerned with a historic concept. See Mr. Justice Cardozo in Hamilton v. Regents, 293 U.S. at 265. The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. 3 The mere possession of religious convictions [310 U.S. 595] which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. In a number of situations, the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate. Reynolds v. United States, 98 U.S. 145; Davis v. Beason, 133 U.S. 333; Selective Draft Law Cases, 245 U.S. 366; Hamilton v. Regents, 293 U.S. 245. In all these cases, the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom. Even if it were assumed that freedom of speech goes beyond the historic concept of full opportunity to utter and to disseminate views, however heretical or offensive to dominant opinion, and includes freedom from conveying what may be deemed an implied but rejected affirmation, the question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. Compare Schneider v. State, 308 U.S. 147. [310 U.S. 596]

1940, Minersville School District v. Board of Education, 310 U.S. 596

Situations like the present are phases of the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail.

1940, Minersville School District v. Board of Education, 310 U.S. 596

Unlike the instances we have cited, the case before us is not concerned with an exertion of legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government. But all these specific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that

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…the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense…. it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression.

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Halter v. Nebraska, 205 U.S. 34, 43. And see [310 U.S. 597] United States v. Glettysburg Electric Ry. Co., 160 U.S. 668. 4

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The case before us must be viewed as though the legislature of Pennsylvania had itself formally directed the flag salute for the children of Minersville; had made no exemption for children whose parents were possessed of conscientious scruples like those of the Gobitis family, and had indicated its belief in the desirable ends to be secured by having its public school children share a common experience at those periods of development when their minds are supposedly receptive to its assimilation, by an exercise appropriate in time and place and setting, and one designed to evoke in them appreciation of the nation's hopes and dreams, its sufferings and sacrifices. The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious. 5 To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no [310 U.S. 598] controlling competence. The influences which help toward a common feeling for the common country are manifold. Some may seem harsh, and others no doubt are foolish. Surely, however, the end is legitimate. And the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag saluting beyond the pale of legislative power. It mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader.

1940, Minersville School District v. Board of Education, 310 U.S. 598

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would, in effect, make us the school board for the country. That authority has not been given to this Court, nor should we assume it.

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We are dealing here with the formative period in the development of citizenship. Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. Because [310 U.S. 599] of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation compounded of so many strains, we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools. Pierce v. Society of Sisters, 268 U.S. 510. But it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.

1940, Minersville School District v. Board of Education, 310 U.S. 599

What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt, the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote. Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed 6—when it is ingrained in a people's habits, and not enforced against popular policy by the coercion of adjudicated law. That the flag salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be [310 U.S. 600] given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.

1940, Minersville School District v. Board of Education, 310 U.S. 600

The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may, in self-protection, utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. That is to say, the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected.

1940, Minersville School District v. Board of Education, 310 U.S. 600

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply cherished liberties. See Missouri, K. & T. Ry. Co. v. May, 194 U.S. 267, 270. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people. 7

1940, Minersville School District v. Board of Education, 310 U.S. 600

Reversed. [310 U.S. 601]

STONE, J., dissenting

1940, Minersville School District v. Board of Education, 310 U.S. 601

MR. JUSTICE STONE, dissenting:

1940, Minersville School District v. Board of Education, 310 U.S. 601

I think the judgment below should be affirmed.

1940, Minersville School District v. Board of Education, 310 U.S. 601

Two youths, now fifteen and sixteen years of age, are by the judgment of this Court held liable to expulsion from the public schools and to denial of all publicly supported educational privileges because of their refusal to yield to the compulsion of a law which commands their participation in a school ceremony contrary to their religious convictions. They and their father are citizens, and have not exhibited by any action or statement of opinion, any disloyalty to the Government of the United States. They are ready and willing to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God. It is not doubted that these convictions are religious, that they are genuine, or that the refusal to yield to the compulsion of the law is in good faith, and with all sincerity. It would be a denial of their faith, as well as the teachings of most religions, to say that children of their age could not have religious convictions.

1940, Minersville School District v. Board of Education, 310 U.S. 601

The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech, and more than prohibit the free exercise of religion, which concededly are forbidden by the First Amendment and are violations of the liberty guaranteed by the Fourteenth. For, by this law, the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions. It is not denied that such compulsion is a prohibited infringement of personal liberty, freedom of speech and religion, guaranteed by the Bill of Rights, except insofar as it may be justified and supported as a proper exercise of the state's power over public education. Since the state, [310 U.S. 602] in competition with parents, may, through teaching in the public schools, indoctrinate the minds of the young, it is said that, in aid of its undertaking to inspire loyalty and devotion to constituted authority and the flag which symbolizes it, it may coerce the pupil to make affirmation contrary to his belief and in violation of his religious faith. And, finally, it is said that, since the Minersville School Board and others are of the opinion that the country will be better served by conformity than by the observance of religious liberty which the Constitution prescribes, the courts are not free to pass judgment on the Board's choice.

1940, Minersville School District v. Board of Education, 310 U.S. 602

Concededly the constitutional guaranties of personal liberty are not always absolutes. Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end, it may compel citizens to give military service, Selective Draft Law Cases, 245 U.S. 366, and subject them to military training despite their religious objections. Hamilton v. Regents, 293 U.S. 245. It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. Davis v. Beason, 133 U.S. 333. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience.

1940, Minersville School District v. Board of Education, 310 U.S. 602

The very fact that we have constitutional guaranties of civil liberties and the specificity of their command where freedom of speech and of religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that those liberties be protected against the action of government [310 U.S. 603] itself. The state concededly has power to require and control the education of its citizens, but it cannot, by a general law compelling attendance at public schools, preclude attendance at a private school adequate in its instruction where the parent seeks to secure for the child the benefits of religious instruction not provided by the public school. Pierce v. Society of Sisters, 268 U.S. 510. And only recently we have held that the state's authority to control its public streets by generally applicable regulations is not an absolute to which free speech must yield, and cannot be made the medium of its suppression, Hague v. Committee for Industrial Organization, 307 U.S. 496, 514, et seq., any more than can its authority to penalize littering of the streets by a general law be used to suppress the distribution of handbills as a means of communicating ideas to their recipients. Schneider v. State, 308 U.S. 147.

1940, Minersville School District v. Board of Education, 310 U.S. 603

In these cases, it was pointed out that, where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both, and that it is the function of courts to determine whether such accommodation is reasonably possible. In the cases just mentioned, the Court was of opinion that there were ways enough to secure the legitimate state end without infringing the asserted immunity, or that the inconvenience caused by the inability to secure that end satisfactorily through other means, did not outweigh freedom of speech or religion. So here, even if we believe that such compulsions will contribute to national unity, there are other ways to teach loyalty and patriotism, which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe, and by [310 U.S. 604] commanding a form of affirmance which violates his religious convictions. Without recourse to such compulsion, the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties by requiring it to resort to the alternatives which do not coerce an affirmation of belief.

1940, Minersville School District v. Board of Education, 310 U.S. 604

The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning, they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

1940, Minersville School District v. Board of Education, 310 U.S. 604

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that, under the system which they created, most governmental curtailments [310 U.S. 605] of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection. I cannot conceive that, in prescribing, as limitations upon the powers of government, the freedom of the mind and spirit secured by the explicit guaranties of freedom of speech and religion, they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection. The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such expressions or otherwise give any indication that compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion. And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion. The very terms of the Bill of Rights preclude, it seems to me, any reconciliation of such compulsions with the constitutional guaranties by a legislative declaration that they are more important to the public welfare than the Bill of Rights.

1940, Minersville School District v. Board of Education, 310 U.S. 605

But even if this view be rejected and it is considered that there is some scope for the determination by legislatures whether the citizen shall be compelled to give public expression of such sentiments contrary to his religion, I am not persuaded that we should refrain from passing upon the legislative judgment "as long as the remedial [310 U.S. 606] channels of the democratic process remain open and unobstructed." This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. See United States v. Carolene Products Co., 304 U.S. 144, 152, note 4. And, until now, we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected. Meyer v. Nebraska, 262 U.S. 390; Pierce v. Society of Sisters, supra; Farrington v. Tokushige, 273 U.S. 284. Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances, careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest of the state in maintaining discipline in the schools.

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The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey if it is to adhere to that justice and moderation without which no free government can exist. [310 U.S. 607] For this reason, it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

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With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.

Footnotes

FRANKFURTER, J., lead opinion (Footnotes)

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1. Reliance is especially placed on the following verses from Chapter 20 of Exodus:

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3. Thou shalt have no other gods before me.

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4. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:

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5. Thou shalt not bow down thyself to them, nor serve them:…

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2. Leoles v. Landers, 302 U.S. 656; Hering v. State Board of Education, 303 U.S. 624; Gabrielli v. Knickerbocker, 306 U.S. 621; Johnson v. Deerfield, 306 U.S. 621; 307 U.S. 650. Compare New York v. Sandstrom, 279 N.Y. 523; 18 N.E.2d 840; Nicholls v. Mayor and School Committee of Lynn, 7 N.E.2d 577 (Mass.).

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3. Compare II Writings of Thomas Jefferson (Ford ed.) p. 102; 3 Letters and Other Writings of James Madison, pp. 274, 307-308; 1 Rhode Island Colonial Records, pp. 378-80; 2 Id. pp. 6; Wiener, Roger Williams' Contribution to Modern Thought, 28 Rhode Island Historical Society Collections, No. 1; Ernst, The Political Thought of Roger Williams, chap. VII; W. K. Jordan, The Development of Religious Toleration in England, passim. See Commonwealth v. Herr, 229 Pa. 132; 78 A. 68.

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4. For the origin and history of the American flag, see 8 Journals of the Continental Congress, p. 464; 22 id., pp. 338-340; Annals of Congress, 15th Cong., 1st Sess., Vol. 1, pp. 566 et seq.; id., Vol. 2, pp. 1458 et seq.

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5. Compare Balfour, Introduction to Bagehot's English Constitution, p. XXII; Santayana, Character and Opinion in the United States, pp. 110-111.

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6. In cases like Fiske v. Kansas, 274 U.S. 380; De Jonge v. Oregon, 299 U.S. 353; Lovell v. Griffin, 303 U.S. 444; Hague v. CIO, 307 U.S. 496, and Schneider v. State, 308 U.S. 147, the Court was concerned with restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function.

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7. It is to be noted that the Congress has not entered the field of legislation here under consideration.

Democratic Platform of 1940

Title: Democratic Platform of 1940

Author: Democratic Party

Date: 1940

Source: National Party Platforms, pp.381-389

Preamble

Democratic Platform of 1940, p.381

The world is undergoing violent change. Humanity, uneasy in this machine age, is demanding a sense of security and dignity based on human values.

Democratic Platform of 1940, p.381

No democratic government which fails to recognize this trend—and take appropriate action—can survive.

Democratic Platform of 1940, p.381

That is why the Government of this nation has moved to keep ahead of this trend; has moved with speed incomprehensible to those who do not see this trend.

Democratic Platform of 1940, p.381

Outside the Americas, established institutions are being overthrown and democratic philosophies are being repudiated by those whose creed recognizes no power higher than military force, no values other than a false efficiency.

Democratic Platform of 1940, p.381

What the founding fathers realized upon this continent was a daring dream, that men could have not only physical security, not only efficiency, but something else in addition that men had never had before—the security of the heart that comes with freedom, the peace of mind that comes from a sense of justice.

Democratic Platform of 1940, p.381

To this generation of Americans it is given to defend this democratic faith as it is challenged by social maladjustment within and totalitarian greed without. The world revolution against which we prepare our defense is so threatening that not until it has burned itself out in the last corner of the earth will our democracy be able to relax its guard.

Democratic Platform of 1940, p.381

In this world crisis, the purpose of the Democratic Party is to defend against external attack and justify by internal progress the system of government and way of life from which the Democratic Party takes its name.

Fulfilling American Ideal

Democratic Platform of 1940, p.381

Toward the modern fulfillment of the American ideal, the Democratic Party, during the last seven years, has labored successfully:

Democratic Platform of 1940, p.381

1. To strengthen democracy by defensive preparedness against aggression, whether by open attack or secret infiltration;

Democratic Platform of 1940, p.381

2. To strengthen democracy by increasing our economic efficiency; and

Democratic Platform of 1940, p.382

[p.382] 3. To strengthen democracy by improving the welfare of the people.

Democratic Platform of 1940, p.382

These three objectives are one and inseparable. No nation can be strong by armaments alone. It must possess and use all the necessary resources for producing goods plentifully and distributing them effectively. It must add to these factors of material strength the unconquerable spirit and energy of a contented people, convinced that there are no boundaries to human progress and happiness in a land of liberty.

Democratic Platform of 1940, p.382

Our faith that these objectives can be attained is made unshakable by what has already been done by the present Administration—in stopping the waste and exploitation of our human and natural resources, in restoring to the average man and woman a stake in the preservation of our democracy, in enlarging our national armaments, and in achieving national unity.

Democratic Platform of 1940, p.382

We shall hold fast to these gains. We are proud of our record. Therefore the Party in convention assembled endorses wholeheartedly the brilliant and courageous leadership of President Franklin D. Roosevelt and his statesmanship and that of the Congress for the past seven trying years. And to our President and great leader we send our cordial greetings.

We Must Strengthen Democracy Against Aggression

Democratic Platform of 1940, p.382

The American people are determined that war, raging in Europe, Asia and Africa, shall not come to America.

Democratic Platform of 1940, p.382

We will not participate in foreign wars, and we will not send our army, naval or air forces to fight in foreign lands outside of the Americas, except in case of attack. We favor and shall rigorously enforce and defend the Monroe Doctrine.

Democratic Platform of 1940, p.382

The direction and aim of our foreign policy has been, and will continue to be, the security and defense of our own land and the maintenance of its peace.

Democratic Platform of 1940, p.382

For years our President has warned the nation that organized assaults against religion, democracy and international good faith threatened our own peace and security. Men blinded by partisanship brushed aside these warnings as war-mongering and officious intermeddling. The fall of twelve nations was necessary to bring their belated approval of legislative and executive action that the President had urged and undertaken with the full support of the people. It is a tribute to the President's foresight and action that our defense forces are today at the peak of their peacetime effectiveness.

Democratic Platform of 1940, p.382

Weakness and unpreparedness invite aggression. We must be so strong that no possible combination of powers would dare to attack us. We propose to provide America with an invincible air force, a navy strong enough to protect all our seacoasts and our national interests, and a fully-equipped and mechanized army. We shall continue to coordinate these implements of defense with the necessary expansion of industrial productive capacity and with the training of appropriate personnel. Outstanding leaders of industry and labor have already been enlisted by the Government to harness our mighty economic forces for national defense.

Democratic Platform of 1940, p.382

Experience of other nations gives warning that total defense is necessary to repel attack, and that partial defense is no defense.

Democratic Platform of 1940, p.382

We have seen the downfall of nations accomplished through internal dissension provoked from without. We denounce and will do all in our power to destroy the treasonable activities of disguised anti-democratic and un-American agencies which would sap our strength, paralyze our will to defend ourselves, and destroy our unity by inciting race against race, class against class, religion against religion and the people against their free institutions.

Democratic Platform of 1940, p.382

To make America strong, and to keep America free, every American must give of his talents and treasure in accordance with his ability and his country's needs. We must have democracy of sacrifice as well as democracy of opportunity.

Democratic Platform of 1940, p.382

To insure that our armaments shall be implements of peace rather than war, we shall continue our traditional policies of the good neighbor; observe and advocate international respect for the rights of others and for treaty obligations; cultivate foreign trade through desirable trade agreements; and foster economic collaboration with the Republics of the Western Hemisphere.

Democratic Platform of 1940, p.382

In self-defense and in good conscience, the world's greatest democracy cannot afford heartlessly or in a spirit of appeasement to ignore the peace-loving and liberty-loving peoples wantonly attacked by ruthless aggressors. We pledge to extend to these peoples all the material aid at our [p.383] command, consistent with law and not inconsistent with the interests of our own national self-defense—all to the end that peace and international good faith may yet emerge triumphant.

Democratic Platform of 1940, p.383

We do not regard the need for preparedness a warrant for infringement upon our civil liberties, but on the contrary we shall continue to protect them, in the keen realization that the vivid contrast between the freedom we enjoy and the dark repression which prevails in the lands where liberty is dead, affords warning and example to our people to confirm their faith in democracy.

We Must Strengthen Democracy By Increasing Our Economic Efficiency

Democratic Platform of 1940, p.383

The well being of the land and those who work upon it is basic to the real defense and security of America.

Democratic Platform of 1940, p.383

The Republican Party gives its promises to the farmer and its allegiance to those who exploit him.

Democratic Platform of 1940, p.383

Since 1932 farm income has been doubled; six million farmers, representing more than 80 percent of all farm families, have participated in an effective soil conservation program; the farm debt and the interest rate on farm debt have been reduced, and farm foreclosures have been drastically curtailed; rural highways and farm-to-market roads have been vastly improved and extended; the surpluses on the farms have been used to feed the needy; low cost electricity has been brought to five million farm people as a result of the rural electrification program; thousands of impoverished farm families have been rehabilitated; and steps have been taken to stop the alarming growth of farm tenancy, to increase land ownership, and to mitigate the hardships of migratory farm labor.

The Land and the Farmer

Democratic Platform of 1940, p.383

We pledge ourselves:

Democratic Platform of 1940, p.383

To make parity as well as soil conservation payments until such time as the goal of parity income for agriculture is realized.

Democratic Platform of 1940, p.383

To extend and enlarge the tenant-purchase program until every deserving tenant farmer has a real opportunity to have a firm of his own.

Democratic Platform of 1940, p.383

To refinance existing farm debts at lower interest rates and on longer and more flexible terms.

Democratic Platform of 1940, p.383

To continue to provide for adjustment of production through democratic processes to the extent that excess surpluses are capable of control.

Democratic Platform of 1940, p.383

To continue the program of rehabilitation of farmers who need and merit aid.

Democratic Platform of 1940, p.383

To preserve and strengthen the ever-normal granary on behalf of the national defense, the consumer at home and abroad, and the American farmer.

Democratic Platform of 1940, p.383

To continue to make commodity loans to maintain the ever-normal granary and to prevent destructively low prices.

Democratic Platform of 1940, p.383

To expand the domestic consumption of our surpluses by the food and cotton stamp plan, the free school lunch, low-cost milk and other plans for bringing surplus farm commodities to needy consumers.

Democratic Platform of 1940, p.383

To continue our substantially increased appropriations for research and extension work through the land-grant colleges, and for research laboratories established to develop new outlets for farm products.

Democratic Platform of 1940, p.383

To conserve the soil and water resources for the benefit of farmers and the nation. In such conservation programs we shall, so far as practicable, bring about that development in forests and other permanent crops as will not unduly expand livestock and dairy production.

Democratic Platform of 1940, p.383

To safeguard the farmer's foreign markets and expand his domestic market for all domestic crops. To enlarge the rural electrification [sic].

Democratic Platform of 1940, p.383

To encourage farmer-owned and controlled co-operatives.

Democratic Platform of 1940, p.383

To continue the broad program launched by this Administration for the coordinated development of our river basins through reclamation and irrigation, flood control, reforestation and soil conservation, stream purification, recreation, fish and game protection, low-cost power, and rural industry.

Democratic Platform of 1940, p.383

To encourage marketing agreements in aid of producers of dairy products, vegetables, fruits and specialty crops for the purpose of orderly marketing and the avoidance of unfair and wasteful practices.

Democratic Platform of 1940, p.383

To extend crop insurance from wheat to other crops as rapidly as experience justifies such extension.

Democratic Platform of 1940, p.383

To safeguard the family-sized farm in all our programs.

Democratic Platform of 1940, p.383

To finance these programs adequately in order that they may be effective.

Democratic Platform of 1940, p.383

In settling new lands reclaimed from desert by projects like Grand Coulee, we shall give [p.384] priority to homeless families who have lost their farms. As these new lands are brought into use, we shall continue by Federal purchase to retire from the plow submarginal lands so that an increased percentage of our farmers may he able to live and work on good land.

Democratic Platform of 1940, p.384

These programs will continue to be in the hands of locally-elected farmer committees to the largest extent possible. In this truly democratic way, we will continue to bring economic security to the farmer and his family, while recognizing the dignity and freedom of American farm life.

Industry and the Worker

Democratic Platform of 1940, p.384

Under Democratic auspices, more has been done in the last seven years to foster the essential freedom, dignity and opportunity of the American worker than in any other administration in the nation's history. In consequence, labor is today taking its rightful place as a partner of management in the common cause of higher earnings, industrial efficiency, national unity and national defense.

Democratic Platform of 1940, p.384

A far-flung system of employment exchanges has brought together millions of idle workers and available jobs. The workers' right to organize and bargain collectively through representatives of their own choosing is being enforced. We have enlarged the Federal machinery for the mediation of labor disputes. We have enacted an effective wage and hour law. Child labor in factories has been outlawed. Prevailing wages to workers employed on Government contracts have been assured.

Democratic Platform of 1940, p.384

We pledge to continue to enforce fair labor standards; to maintain the principles of the National Labor Relations Act; to expand employment training and opportunity for our youth, older workers, and workers displaced by technological changes; to strengthen the orderly processes of collective bargaining and peaceful settlement of labor disputes; and to work always for a just distribution of our national income among those who labor.

Democratic Platform of 1940, p.384

We will continue our efforts to achieve equality of opportunity for men and women without impairing the social legislation which promotes true equality by safeguarding the health, safety and economic welfare of women workers. The right to work for compensation in both public and private employment is an inalienable privilege of women as well as men, without distinction as to marital status.

Democratic Platform of 1940, p.384

The production of coal is one of our most important basic industries. Stability of production, employment, distribution and price are indispensable to the public welfare. We pledge continuation of the Federal Bituminous Coal Stabilization Act, and sympathetic consideration of the application of similar legislation to the anthracite coal industry, in order to provide additional protection for the owners, miners and consumers of hard coal.

Democratic Platform of 1940, p.384

We shall continue to emphasize the human element in industry and strive toward increasingly wholehearted cooperation between labor and industrial management.

Capital and the Business Man

Democratic Platform of 1940, p.384

To make democracy strong, our system of business enterprise and individual initiative must be free to gear its tremendous productive capacity to serve the greatest good of the greatest number.

Democratic Platform of 1940, p.384

We have defended and will continue to defend all legitimate business.

Democratic Platform of 1940, p.384

We have attacked and will continue to attack unbridled concentration of economic power and the exploitation of the consumer and the investor.

Democratic Platform of 1940, p.384

We have attacked the kind of banking which treated America as a colonial empire to exploit; the kind of securities business which regarded the Stock Exchange as a private gambling club for wagering other people's money; the kind of public utility holding companies which used consumers' and investors' money to suborn a free press, bludgeon legislatures and political conventions, and control elections against the interest of their customers and their security holders.

Democratic Platform of 1940, p.384

We have attacked the kind of business which levied tribute on all the rest of American business by the extortionate methods of monopoly.

Democratic Platform of 1940, p.384

We did not stop with attack—we followed through with the remedy. The American people found in themselves, through the democratic process, ability to meet the economic problems of the average American business where concentrated power had failed.

Democratic Platform of 1940, p.384

We found a broken and prostrate banking and financial system. We restored it to health by strengthening banks, insurance companies and other financial institutions. We have insured 62 million bank accounts, and protected millions of [p.385] small investors in the security and commodity markets. We have thus revived confidence, safeguarded thrift, and opened the road to all honorable business.

Democratic Platform of 1940, p.385

We have made credit at low interest rates available to small-business men, thus unfastening the oppressive yoke of a money monopoly, and giving the ordinary citizen a chance to go into business and stay in business.

Democratic Platform of 1940, p.385

We recognize the importance of small business concerns and new enterprises in our national economy, and favor the enactment of constructive legislation to safeguard the welfare of small business. Independent small-scale enterprise, no less than big business, should be adequately represented on appropriate governmental boards and commissions, and its interests should be examined and fostered by a continuous research program.

Democratic Platform of 1940, p.385

We have provided an important outlet for private capital by stimulating home building and low-rent housing projects. More new homes were built throughout the nation last year than in any year since 1929.

Democratic Platform of 1940, p.385

We have fostered a well-balanced American merchant marine and the world's finest system of civil aeronautics, to promote our commerce and our national defense.

Democratic Platform of 1940, p.385

We have steered a steady course between a bankruptcy-producing deflation and a thrift-destroying inflation, so that today the dollar is the most stable and sought-after currency in the world—a factor of immeasurable benefit in our foreign and domestic commerce.

Democratic Platform of 1940, p.385

We shall continue to oppose barriers which impede trade among the several states. We pledge our best efforts in strengthening our home markets, and to this end we favor the adjustment of freight rates so that no section or state will have undue advantage over any other.

Democratic Platform of 1940, p.385

To encourage investment in productive enterprise, the tax-exempt privileges of future Federal, state and local bonds should be removed.

Democratic Platform of 1940, p.385

We have enforced the anti-trust laws more vigorously than at any time in our history, thus affording the maximum protection to the competitive system.

Democratic Platform of 1940, p.385

We favor strict supervision of all forms of the insurance business by the several states for the protection of policyholders and the public.

Democratic Platform of 1940, p.385

The full force of our policies, by raising the national income by thirty billion dollars from the low of 1932, by encouraging vast reemployment, and by elevating the level of consumer demand, has quickened the flow of buying and selling through every artery of industry and trade.

Democratic Platform of 1940, p.385

With mass purchasing power restored and many abuses eliminated, American business stands at the threshold of a great new era, richer in promise than any we have witnessed—an era of pioneering and progress beyond the present frontiers of economic activity—in transportation, in housing, in industrial expansion, and in the new utilization of the products of the farm and the factory.

Democratic Platform of 1940, p.385

We shall aid business in redeeming America's promise.

Electric Power

Democratic Platform of 1940, p.385

During the past seven years the Democratic Party has won the first major victories for the people of the nation in their generation-old contest with the power monopoly.

Democratic Platform of 1940, p.385

These victories have resulted in the recognition of certain self evident principles and the realization of vast benefits by the people. These principles, long opposed by the Republican Party, are:

Democratic Platform of 1940, p.385

That the power of falling water is a gift from God, and consequently belongs not to a privileged few, but to all the people, who are entitled to enjoy its benefits;

Democratic Platform of 1940, p.385

That the people have the right through their government to develop their own power sites and bring low-cost electricity to their homes, farms and factories;

Democratic Platform of 1940, p.385

That public utility holding companies must not be permitted to serve as the means by which a few men can pyramid stocks upon stocks for the sole purpose of controlling vast power empires.

Democratic Platform of 1940, p.385

We condemn the Republican policies which permitted the victimizing of investors in the securities of private power corporations, and the exploitation of the people by unnecessarily high utility costs.

Democratic Platform of 1940, p.385

We condemn the opposition of utility power interests which delayed for years the development of national defense projects in the Tennessee Valley, and which obstructed river basin improvements and other public projects bringing low-cost electric power to the people. The successful power developments in the Tennessee and Columbia River basins show the wisdom of the Democratic Party in establishing government-owned and operated [p.386] hydro-electric plants in the interests of power and light consumers.

Democratic Platform of 1940, p.386

Through these Democratic victories, whole regions have been revived and restored to prosperous habitation. Production costs have been reduced. Industries have been established which employ men and capital. Cheaper electricity has brought vast economic benefits to thousands of homes and communities.

Democratic Platform of 1940, p.386

These victories of the people must be safeguarded. They will be turned to defeat if the Republican Party should be returned to power. We pledge our Party militantly to oppose every effort to encroach upon the inherent right of our people to be provided with this primary essential of life at the lowest possible cost.

Democratic Platform of 1940, p.386

The nomination of a utility executive by the Republican Party as its presidential candidate raises squarely the issue, whether the nation's water power shall be used for all the people or for the selfish interests of a few. We accept that issue.

Developments of Western Resources

Democratic Platform of 1940, p.386

We take satisfaction in pointing out the incomparable development of the public land states under the wise and constructive legislation of this Administration. Mining has been revived, agriculture fostered, reclamation extended and natural resources developed as never before in a similar period. We pledge the continuance of such policies, based primarily on the expansion of opportunity for the people, as will encourage the full development, free from financial exploitation, of the great resources—mineral, agricultural, livestock, fishing and lumber—which the West affords.

Radio

Democratic Platform of 1940, p.386

Radio has become an integral part of the democratically accepted doctrine of freedom of speech, press, assembly and religion. We urge such legislative steps as may be required to afford the same protection from censorship that is now afforded the press under the Constitution of the United States.

We Must Strengthen Democracy By Improving the Welfare of the People

Democratic Platform of 1940, p.386

We place human resources first among the assets of a democratic society.

Unemployment

Democratic Platform of 1940, p.386

The Democratic Party wages war on unemployment, one of the gravest problems of our times, inherited at its worst from the last Republican administration. Since we assumed office, nine million additional persons have gained regular employment in normal private enterprise. All our policies—financial, industrial and agricultural—will continue to accelerate the rate of this progress.

Democratic Platform of 1940, p.386

By public action, where necessary to supplement private reemployment, we have rescued millions from idleness that breeds weakness, and given them a real stake in their country's well being. We shall continue to recognize the obligation of Government to provide work for deserving workers who cannot be absorbed by private industry.

Democratic Platform of 1940, p.386

We are opposed to vesting in the states and local authorities the control of Federally-financed work relief. We believe that this Republican proposal is a thinly disguised plan to put the unemployed back on the dole.

Democratic Platform of 1940, p.386

We will continue energetically to direct our efforts toward the employment in private industry of all those willing to work, as well as the fullest employment of money and machines. This we pledge as our primary objective. To further implement this objective, we favor calling, under the direction of the President, a national unemployment conference of leaders of government, industry, labor and farm groups.

Democratic Platform of 1940, p.386

There is work in our factories, mines, fields, forests and river basins, on our coasts, highways, railroads and inland waterways. There are houses to be built to shelter our people. Building a better America means work and a higher standard of living for every family, and a richer and more secure heritage for every American.

Social Security

Democratic Platform of 1940, p.386

The Democratic Party, which established social security for the nation, is dedicated to its extension. We pledge to make the Social Security Act increasingly effective, by covering millions of persons not now protected under its terms; by strengthening our unemployment insurance system and establishing more adequate and uniform benefits, through the Federal equalization fund principle; by progressively extending and increasing the benefits of the old-age and survivors [p.387] insurance system, including protection of the permanently disabled; and by the early realization of a minimum pension for all who have reached the age of retirement and are not gainfully employed.

Health

Democratic Platform of 1940, p.387

Good health for all the people is a prime requisite of national preparedness in its broadest sense. We have advanced public health, industrial hygiene, and maternal and child care. We are coordinating the health functions of the Federal Government. We pledge to expand these efforts, and to provide more hospitals and health centers and better health protection wherever the need exists, in rural and urban areas, all through the co-operative efforts of the Federal, state and local governments, the medical, dental, nursing and other scientific professions, and the voluntary agencies.

Youth and Education

Democratic Platform of 1940, p.387

Today, when the youth of other lands is being sacrificed in war, this nation recognizes the full value of the sound youth program established by the Administration. The National Youth Administration and Civilian Conservation Corps have enabled our youth to complete their education, have maintained their health, trained them for useful citizenship, and aided them to secure employment.

Democratic Platform of 1940, p.387

Our public works have modernized and greatly expanded the nation's schools. We have increased Federal aid for vocational education and rehabilitation, and undertaken a comprehensive program of defense-industry training. We shall continue to bring to millions of children, youths and adults, the educational and economic opportunities otherwise beyond their reach.

Slum-Clearance and Low-Rent Housing

Democratic Platform of 1940, p.387

We have launched a soundly conceived plan of loans and contributions to rid America of overcrowded slum dwellings that breed disease and crime, and to replace them by low-cost housing projects within the means of low-income families. We will extend and accelerate this plan not only in the congested city districts, but also in the small towns and farm areas, and we will make it a powerful arm of national defense by supplying housing for the families of enlisted personnel and for workers in areas where industry is expanding to meet defense needs.

Consumers

Democratic Platform of 1940, p.387

We are taking effective steps to insure that, in this period of stress, the cost of living shall not be increased by speculation and unjustified price rises.

Negroes

Democratic Platform of 1940, p.387

Our Negro citizens have participated actively in the economic and social advances launched by this Administration, including fair labor standards, social security benefits, health protection, work relief projects, decent housing, aid to education, and the rehabilitation of low-income farm families. We have aided more than half a million Negro youths in vocational training, education and employment. We shall continue to strive for complete legislative safeguards against discrimination in government service and benefits, and in the national defense forces. We pledge to uphold due process and the equal protection of the laws for every citizen, regardless of race, creed or color.

Veterans

Democratic Platform of 1940, p.387

We pledge to continue our policy of fair treatment of America's war veterans and their dependents, in just tribute to their sacrifices and their devotion to the cause of liberty.

Indians

Democratic Platform of 1940, p.387

We favor and pledge the enactment of legislation creating an Indian Claims Commission for the special purpose of entertaining and investigating claims presented by Indian groups, bands and tribes, in order that our Indian citizens may have their claims against the Government considered, adjusted, and finally settled at the earliest possible date.

Civil Service

Democratic Platform of 1940, p.387

We pledge the immediate extension of a genuine system of merit to all positions in the executive branch of the Federal Government except actual bona fide policy-making positions. The competitive method of selecting employes shall be improved until experience and qualification shall be the sole test in determining fitness for employment in the Federal service. Promotion and tenure in Federal service shall likewise depend upon [p.388] fitness, experience and qualification. Arbitrary and unreasonable rules as to academic training shall be abolished, all to the end that a genuine system of efficiency and merit shall prevail throughout the entire Federal service.

Territories and District of Columbia

Democratic Platform of 1940, p.388

We favor a larger measure of self-government leading to statehood, for Alaska, Hawaii and Puerto Rico. We favor the appointment of residents to office, and equal treatment of the citizens of each of these three territories. We favor the prompt determination and payment of any just claims by Indian and Eskimo citizens of Alaska against the United States.

Democratic Platform of 1940, p.388

We also favor the extension of the right of suffrage to the people of the District of Columbia.

True First Line of Defense

Democratic Platform of 1940, p.388

We pledge to continue to stand guard on our true first line of defense—the security and welfare of the men, women and children of America.

Our Democratic Faith

Democratic Platform of 1940, p.388

Democracy is more than a political system for the government of a people. It is the expression of a people's faith in themselves as human beings. If this faith is permitted to die, human progress will die with it. We believe that a mechanized existence, lacking the spiritual quality of democracy, is intolerable to the free people of this country.

Democratic Platform of 1940, p.388

We therefore pledge ourselves to fight, as our fathers fought, for the right of every American to enjoy freedom of religion, speech, press, assembly, petition, and security in his home.

Democratic Platform of 1940, p.388

It is America's destiny, in these days of rampant despotism, to be the guardian of the world heritage of liberty and to hold aloft and aflame the torch of Western civilization.

Democratic Platform of 1940, p.388

The Democratic Party rededicates itself to this faith in democracy, to the defense of the American system of government, the only system under which men are masters of their own souls, the only system under which the American people, composed of many races and creeds, can live and work, play and worship in peace, security and freedom.

Democratic Platform of 1940, p.388

Firmly relying upon a continuation of the blessings of Divine Providence upon all our righteous endeavors to preserve forever the priceless heritage of American liberty and peace, we appeal to all the liberal-minded men and women of the nation to approve this platform and to go forward with us by wholeheartedly supporting the candidates who subscribe to the principles which it proclaims.

Republican Platform of 1940

Title: Republican Platform of 1940

Author: Republican Party

Date: 1940

Source: National Party Platforms, pp.389-394

Introduction

Republican Platform of 1940, p.389

The Republican party, in representative Convention assembled, submits to the people of the United States the following declaration of its principles and purposes:

Republican Platform of 1940, p.389

We state our general objectives in the simple and comprehensive words of the Preamble to the Constitution of the United States.

Republican Platform of 1940, p.389

Those objectives as there stated are these:

Republican Platform of 1940, p.389

"To form a more perfect Union; establish justice; insure domestic tranquility; provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity."

Republican Platform of 1940, p.389

Meeting within the shadow of Independence Hall where those words were written we solemnly reaffirm them as a perfect statement of the ends for which we as a party propose to plan and to labor.

Republican Platform of 1940, p.389

The record of the Roosevelt Administration is a record of failure to attain any one of those essential objectives.

Republican Platform of 1940, p.389

Instead of leading us into More Perfect Union the Administration has deliberately fanned the flames of class hatred.

Republican Platform of 1940, p.389

Instead of the Establishment of Justice the Administration has sought the subjection of the Judiciary to Executive discipline and domination.

Republican Platform of 1940, p.389

Instead of insuring Domestic Tranquility the Administration has made impossible the normal friendly relation between employers and employees and has even succeeded in alienating both the great divisions of Organized Labor.

Republican Platform of 1940, p.389

Instead of Providing for the Common Defense the Administration, notwithstanding the expenditure of billions of our dollars, has left the Nation unprepared to resist foreign attack.

Republican Platform of 1940, p.389

Instead of promoting the General Welfare the Administration has Domesticated the Deficit, Doubled the Debt, Imposed Taxes where they do the greatest economic harm, and used public money for partisan political advantage.

Republican Platform of 1940, p.389

Instead of the Blessings of Liberty the Administration has imposed upon us a Regime of Regimentation which has deprived the individual of his freedom and has made of America a shackled giant.

Republican Platform of 1940, p.389

Wholly ignoring these great objectives, as solemnly declared by the people of the United States, the New Deal Administration has for seven long years whirled in a turmoil of shifting, contradictory and overlapping administrations and policies. Confusion has reigned supreme. The only steady undeviating characteristic has been the relentless expansion of the power of the Federal government over the everyday life of the farmer, the industrial worker and the business man. The emergency demands organization—not confusion. It demands free and intelligent cooperation—not incompetent domination. It demands a change. [p.390] The New Deal Administration has failed America.

Republican Platform of 1940, p.390

It has failed by seducing our people to become continuously dependent upon government, thus weakening their morale and quenching the traditional American spirit.

Republican Platform of 1940, p.390

It has failed by viciously attacking our industrial system and sapping its strength and vigor.

Republican Platform of 1940, p.390

It has failed by attempting to send our Congress home during the world's most tragic hour, so that we might be eased into the war by word of deed during the absence of our elected representatives from Washington.

Republican Platform of 1940, p.390

It has failed by disclosing military details of our equipment to foreign powers over protests by the heads of our armed defense.

Republican Platform of 1940, p.390

It has failed by ignoring the lessons of fact concerning modern, mechanized, armed defense.

Republican Platform of 1940, p.390

In these and countless other ways the New Deal Administration has either deliberately deceived the American people or proved itself incompetent longer to handle the affairs of our government.

Republican Platform of 1940, p.390

The zero hour is here. America must prepare at once to defend our shores, our homes, our lives and our most cherished ideals.

Republican Platform of 1940, p.390

To establish a first line of defense we must place in official positions men of faith who put America first and who are determined that her governmental and economic system be kept unimpaired.

Republican Platform of 1940, p.390

Our national defense must be so strong that no unfriendly power shall ever set foot on American soil. To assure this strength our national economy, the true basis of America's defense, must be free of unwarranted government interference.

Republican Platform of 1940, p.390

Only a strong and sufficiently prepared America can speak words of reassurance and hope to the liberty-loving peoples of the world.

National Defense

Republican Platform of 1940, p.390

The Republican Party is firmly opposed to involving this Nation in foreign war.

Republican Platform of 1940, p.390

We are still suffering from the ill effects of the last World War: a war which cost us a twenty-four billion dollar increase in our national debt, billions of uncollectible foreign debts, and the complete upset of our economic system, in addition to the loss of human life and irreparable damage to the health of thousands of our boys.

Republican Platform of 1940, p.390

The present National Administration has already spent for all purposes more than fifty-four billion dollars;—has boosted the national debt and current federal taxes to an all-time high; and yet by the President's own admission we are still wholly unprepared to defend our country, its institutions and our individual liberties in a war that threatens to engulf the whole world; and this in spite of the fact that foreign wars have been in progress for two years or more and that military information concerning these wars and the re-armament programs of the warring nations has been at all times available to the National Administration through its diplomatic and other channels.

Republican Platform of 1940, p.390

The Republican Party stands for Americanism, preparedness and peace. We accordingly fasten upon the New Deal full responsibility for our un-preparedness and for the consequent danger of involvement in war.

Republican Platform of 1940, p.390

We declare for the prompt, orderly and realistic building of our national defense to the point at which we shall be able not only to defend the United States, its possessions, and essential outposts from foreign attack, but also efficiently to uphold in war the Monroe Doctrine. To this task the Republican party pledges itself when entrusted with national authority. In the meantime we shall support all necessary and proper defense measures proposed by the Administration in its belated effort to make up for lost time; but we deplore explosive utterances by the President directed at other governments which serve to imperil our peace; and we condemn all executive acts and proceedings which might lead to war without the authorization of the Congress of the United States.

Republican Platform of 1940, p.390

Our sympathies have been profoundly stirred by invasion of unoffending countries and by disaster to nations whole ideals most closely resemble our own. We favor the extension to all peoples fighting for liberty, or whose liberty is threatened, of such aid as shall not be in violation of international law or inconsistent with the requirements of our own national defense.

Republican Platform of 1940, p.390

We believe that the spirit which should animate our entire defensive policy is determination to preserve not our material interests merely, but those liberties which are the priceless heritage of America.

Re-Employment

Republican Platform of 1940, p.390

The New Deal's failure to solve the problem of unemployment and revive opportunity for our [p.391] youth presents a major challenge to representative government and free enterprise. We propose to recreate opportunity for the youth of America and put our idle millions back to work in private industry, business, and agriculture. We propose to eliminate needless administrative restrictions, thus restoring lost motion to the wheels of individual enterprise.

Relief

Republican Platform of 1940, p.391

We shall remove waste, discrimination, and politics from relief—through administration by the States with federal grants-in-aid on a fair and nonpolitical basis, thus giving the man and woman on relief a larger share of the funds appropriated.

Social Security

Republican Platform of 1940, p.391

We favor the extension of necessary old age benefits on an ear-marked pay-as-you-go basis to the extent that the revenues raised for this purpose will permit. We favor the extension of the unemployment compensation provisions of the Social Security Act, wherever practicable, to those groups and classes not now included. For such groups as may thus be covered we favor a system of unemployment compensation with experience rating provisions, aimed at protecting the worker in the regularity of his employment and providing adequate compensation for reasonable periods when that regularity of employment is interrupted. The administration should be left with the States with a minimum of Federal control.

Labor Relations

Republican Platform of 1940, p.391

The Republican party has always protected the American worker.

Republican Platform of 1940, p.391

We shall maintain labor's right of free organization and collective bargaining.

Republican Platform of 1940, p.391

We believe that peace and prosperity at home require harmony, teamwork, and understanding in all relations between worker and employer. When differences arise, they should be settled directly and voluntarily across the table.

Republican Platform of 1940, p.391

Recent disclosures respecting the administration of the National Labor Relations Act require that this Act be amended in fairness to employers and all groups of employees so as to provide true freedom for, and orderliness in self-organization and collective bargaining.

Agriculture

Republican Platform of 1940, p.391

A prosperous and stable agriculture is the foundation of our economic structure. Its preservation is a national and non-political social problem not yet solved, despite many attempts. The farmer is entitled to a profit-price for his products. The Republican party will put into effect such governmental policies, temporary and permanent, as will establish and maintain an equitable balance between labor, industry, and agriculture by expanding industrial and business activity, eliminating unemployment, lowering production costs, thereby creating increased consumer buying power for agricultural products.

Republican Platform of 1940, p.391

Until this balance has been attained, we propose to provide benefit payments, based upon a widely-applied, constructive soil conservation program free from government-dominated production control, but administered, as far as practicable, by farmers themselves; to restrict the major benefits of these payments to operators of family-type farms; to continue all present benefit payments until our program becomes operative; and to eliminate the present extensive and costly bureaucratic interference.

Republican Platform of 1940, p.391

We shall provide incentive payments, when necessary, to encourage increased production of agricultural commodities, adaptable to our soil and climate, not now produced in sufficient quantities for our home markets, and will stimulate the use and processing of all farm products in industry as raw materials.

Republican Platform of 1940, p.391

We shall promote a co-operative system of adequate farm credit, at lowest interest rates commensurate with the cost of money, supervised by an independent governmental agency, with ultimate farmer ownership and control; farm commodity loans to facilitate orderly marketing and stabilize farm income; the expansion of sound, farmer-owned and farmer-controlled co-operative associations; and the support of educational and extension programs to ,achieve more efficient production and marketing.

Republican Platform of 1940, p.391

We shall foster Government refinancing, where necessary, of the heavy Federal farm debt load through an agency segregated from co-operative credit.

Republican Platform of 1940, p.391

We shall promote a national land use program for Federal acquisition, without dislocation of local tax returns, of non-productive farm lands by voluntary sale or lease subject to approval of the States concerned; and the disposition of such lands to appropriate public uses including watershed protection and flood prevention, reforestation, [p.392] recreation, erosion control, and the conservation of wild life.

Republican Platform of 1940, p.392

We advocate a foreign trade policy which will end one-man tariff making, afford effective protection to farm products, regain our export markets, and assure an American price level for the domestically consumed portion of our export crops.

Republican Platform of 1940, p.392

We favor effective quarantine against imported livestock, dairy, and other farm products from countries which do not impose health and sanitary standards equal to our own domestic standards.

Republican Platform of 1940, p.392

We approve the orderly development of reclamation and irrigation, project by project and as conditions justify.

Republican Platform of 1940, p.392

We promise adequate assistance to rural communities suffering disasters from flood, drought, and other natural causes.

Republican Platform of 1940, p.392

We shall promote stabilization of agricultural income through intelligent management of accumulated surpluses, and through the development of outlets by supplying those in need at home and abroad.

Tariff and Reciprocal Trade

Republican Platform of 1940, p.392

We are threatened by unfair competition in world markets and by the invasion of our home markets, especially by the products of state-controlled foreign economies.

Republican Platform of 1940, p.392

We believe in tariff protection for Agriculture, Labor, and Industry, as essential to our American standard of living. The measure of the protection shall be determined by scientific methods with due regard to the interest of the consumer.

Republican Platform of 1940, p.392

We shall explore every possibility of reopening the channels of international trade through negotiations so conducted as to produce genuine reciprocity and expand our exports.

Republican Platform of 1940, p.392

We condemn the manner in which the so-called reciprocal trade agreements of the New Deal have been put into effect without adequate hearings, with undue haste, without proper consideration of our domestic producers, and without Congressional approval. These defects we shall correct.

Money

Republican Platform of 1940, p.392

The Congress should reclaim its constitutional powers over money, and withdraw the President's arbitrary authority to manipulate the currency, establish bimetallism, issue irredeemable paper money, and debase the gold and silver coinage. We shall repeal the Thomas Inflation Amendment of 1933 and the (foreign) Silver Purchase Act of 1934, and take all possible steps to preserve the value of the Government's huge holdings of gold and re-introduce gold into circulation.

Jobs and Idle Money

Republican Platform of 1940, p.392

Believing it possible to keep the securities market clean without paralyzing it, we endorse the principle of truth in securities in the Securities Act. To get billions of idle dollars and a multitude of idle men back to work and to promote national defense, these acts should be revised and the policies of the Commission changed to encourage the flow of private capital into industry.

Taxation

Republican Platform of 1940, p.392

Public spending has trebled under the New Deal, while tax burdens have doubled. Huge taxes are necessary to pay for New Deal waste and for neglected national defense. We shall revise the tax system and remove those practices which impede recovery and shall apply policies which stimulate enterprise. We shall not use the taxing power as an instrument of punishment or to secure objectives not otherwise obtainable under existing law.

Public Credit

Republican Platform of 1940, p.392

With urgent need for adequate defense, the people are burdened by a direct and contingent debt exceeding fifty billion dollars. Twenty-nine billion of this debt has been created by New Deal borrowings during the past seven years. We pledge ourselves to conserve the public credit for all essential purposes by levying taxation sufficient to cover necessary civil expenditure, a substantial part of the defense cost, and the interest and retirement of the national debt.

Public Spending

Republican Platform of 1940, p.392

Millions of men and women still out of work after seven years of excessive spending refute the New Deal theory that "deficit spending" is the way to prosperity and jobs. Our American system of private enterprise, if permitted to go to work, can rapidly increase the wealth, income, and standard of living of all the people. We solemnly pledge that public expenditures, other than those required for full national defense and relief, shall [p.393] be cut to levels necessary for the essential services of government.

Equal Rights

Republican Platform of 1940, p.393

We favor submission by Congress to the States of an amendment to the Constitution providing for equal rights for men and women.

Negro

Republican Platform of 1940, p.393

We pledge that our American citizens of Negro descent shall be given a square deal in the economic and political life of this nation. Discrimination in the civil service, the army, navy, and all other branches of the Government must cease. To enjoy the full benefits of life, liberty and pursuit of happiness universal suffrage must be made effective for the Negro citizen. Mob violence shocks the conscience of the nation and legislation to curb this evil should be enacted.

Un-American Activities

Republican Platform of 1940, p.393

We vigorously condemn the New Deal encouragement of various groups that seek to change the American form of government by means outside the Constitution. We condemn the appointment of members of such un-American groups to high positions of trust in the national Government. The development of the treacherous so-called Fifth Column, as it has operated in war-stricken countries, should be a solemn warning to America. We pledge the Republican Party to get rid of such borers from within.

Immigration

Republican Platform of 1940, p.393

We favor the strict enforcement of all laws controlling the entry of aliens. The activities of undesirable aliens should be investigated and those who seek to change by force and violence the American form of government should be deported.

Veterans

Republican Platform of 1940, p.393

We pledge adequate compensation and care for veterans disabled in the service of our country, and for their widows, orphans, and dependents.

Indians

Republican Platform of 1940, p.393

We pledge an immediate and final settlement of all Indian claims between the government and the Indian citizenship of the nation.

Hawaii

Republican Platform of 1940, p.393

Hawaii, sharing the nation's obligations equally with the several States, is entitled to the fullest measure of home rule; and to equality with the several States in the rights of her citizens and in the application of our national laws.

Puerto Rico

Republican Platform of 1940, p.393

Statehood is a logical aspiration of the people of Puerto Rico who were made citizens of the United States by Congress in 1917; legislation affecting Puerto Rico, in so far as feasible, should be in harmony with the realization of that aspiration.

Government and Business

Republican Platform of 1940, p.393

We shall encourage a healthy, confident, and growing private enterprise, confine Government activity to essential public services, and regulate business only so as to protect consumer, employee, and investor and without restricting the production of more and better goods at lower prices.

Monopoly

Republican Platform of 1940, p.393

Since the passage of the Sherman Anti-trust Act by the Republican party we have consistently fought to preserve free competition with regulation to prevent abuse. New Deal policy fosters Government monopoly, restricts production, and fixes prices. We shall enforce anti-trust legislation without prejudice or discrimination. We condemn the use or threatened use of criminal indictments to obtain through consent decrees objectives not contemplated by law.

Government Competition

Republican Platform of 1940, p.393

We promise to reduce to the minimum Federal competition with business. We pledge ourselves to establish honest accounting and reporting by every agency of the Federal Government and to continue only those enterprises whose maintenance is clearly in the public interest.

Free Speech

Republican Platform of 1940, p.393

The principles of a free press and free speech, as established by the Constitution, should apply to the radio. Federal regulation of radio is necessary in view of the natural limitations of wave lengths, but this gives no excuse for censorship. We oppose the use of licensing to establish arbitrary [p.394] controls. Licenses should be revocable only when, after public hearings, due cause for cancellation is shown.

Small Business

Republican Platform of 1940, p.394

The New Deal policy of interference and arbitrary regulation has injured all business, but especially small business. We promise to encourage the small business man by removing unnecessary bureaucratic regulation and interference.

Stock and Commodity Exchanges

Republican Platform of 1940, p.394

We favor regulation of stock and commodity exchanges. They should be accorded the fullest measure of self-control consistent with the discharge of their public trust and the prevention of abuse.

Insurance

Republican Platform of 1940, p.394

We condemn the New Deal attempts to destroy the confidence of our people in private insurance institutions. We favor continuance of regulation of insurance by the several States.

Government Reorganization

Republican Platform of 1940, p.394

We shall reestablish in the Federal Civil Service a real merit system on a truly competitive basis and extend it to all non-policy-forming positions.

Republican Platform of 1940, p.394

We pledge ourselves to enact legislation standardizing and simplifying quasi-judicial and administrative agencies to insure adequate notice and hearing, impartiality, adherence to the rules of evidence and full judicial review of all questions of law and fact.

Republican Platform of 1940, p.394

Our greatest protection against totalitarian government is the American system of checks and balances. The constitutional distribution of legislative, executive, and judicial functions is essential to the preservation of this system. We pledge ourselves to make it the basis of all our policies affecting the organization and operation of our Republican form of Government.

Third Term

Republican Platform of 1940, p.394

To insure against the overthrow of our American system of government we favor an amendment to the Constitution providing that no person shall be President of the United States for more than two terms.

A Pledge of Good Faith

Republican Platform of 1940, p.394

The acceptance of the nominations made by this Convention carries with it, as a matter of private honor and public faith, an undertaking by each candidate to be true to the principles and program herein set forth.

Republican Platform of 1940, p.394

We earnestly urge all patriotic men and women, regardless of former affiliations, to unite with us in the support of our declaration of principles to the end that "government of the people, by the people and for the people shall not perish from this earth."

President Roosevelt's Statement on a Joint Board for Defense of Canada and the United States, 1940

Title: President Roosevelt's Statement on a Joint Board for Defense of Canada and the United States

Author: Franklin D. Roosevelt

Date: August 18, 1940

Source: Public Papers of the Presidents, F. D. Roosevelt, 1940, Item 82

Public Papers of FDR, 1940, Item 82

The Prime Minister of Canada and the President have discussed the mutual problems of defense in relation to the safety of Canada and the United States.

Public Papers of FDR, 1940, Item 82

It has been agreed that a Permanent Joint Board on Defense shall be set up at once by the two countries.

Public Papers of FDR, 1940, Item 82

This Permanent Joint Board on Defense shall commence immediate studies relating to sea, land and air problems including personnel and materiel.

Public Papers of FDR, 1940, Item 82

It will consider in the broad sense the defense of the north half of the Western Hemisphere.

Public Papers of FDR, 1940, Item 82

The Permanent Joint Board on Defense will consist of four or five members from each country, most of them from the services. It will meet shortly.

President Roosevelt's Message to Congress on Exchanging Destroyers for British Naval and Air Bases, 1940

Title: President Roosevelt's Message to Congress on Exchanging Destroyers for British Naval and Air Bases

Author: Franklin D. Roosevelt

Date: September 3, 1940

Source: Public Papers of the Presidents, F. D. Roosevelt, 1940, Item 94

Public Papers of FDR, 1940, Item 94

To the Congress:

Public Papers of FDR, 1940, Item 94

I transmit herewith for the information of the Congress notes exchanged between the British Ambassador at Washington and the Secretary of State on September 2, 1940, under which this Government has acquired the right to lease naval and air bases in Newfoundland, and in the islands of Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and Antigua, and in British Guiana; also a copy of an opinion of the Attorney General dated August 27, 1940, regarding my authority to consummate this arrangement.

Public Papers of FDR, 1940, Item 94

The right to bases in Newfoundland and Bermuda are gifts-generously given and gladly received. The other bases mentioned have been acquired in exchange for 50 of our over-age destroyers.

Public Papers of FDR, 1940, Item 94

This is not inconsistent in any sense with our status of peace. Still less is it a threat against any nation. It is an epochal and far-reaching act of preparation for continental defense in the face of grave danger.

Public Papers of FDR, 1940, Item 94

Preparation for defense is an inalienable prerogative of a sovereign state. Under present circumstances this exercise of sovereign right is essential to the maintenance of our peace and safety. This is the most important action in the reinforcement of our national defense that has been taken since the Louisiana Purchase. Then as now, considerations of safety from overseas attack were fundamental.

Public Papers of FDR, 1940, Item 94

The value to the Western Hemisphere of these outposts of security is beyond calculation. Their need has long been recognized by our country, and especially by those primarily charged with the duty of charting and organizing our own naval and military defense. They are essential to the protection of the Panama Canal, Central America, the northern portion of South America, the Antilles, Canada, Mexico, and our own eastern and Gulf seaboards. Their consequent importance in hemispheric defense is obvious. For these reasons I have taken advantage of the present opportunity to acquire them.

BRITISH EMBASSY,

Washington, D.C., September 2, 1940.

The Honourable Cordell Hull,

Secretary of State of the United States,

Washington, D.C.

Public Papers of FDR, 1940, Item 94

SIR:

Public Papers of FDR, 1940, Item 94

I have the honour under instructions from His Majesty's Principal Secretary of State for Foreign Affairs to inform you that in view of the friendly and sympathetic interest of His Majesty's Government in the United Kingdom in the national security of the United States and their desire to strengthen the ability of the United States to cooperate effectively with the other nations of the Americas in the defence of the Western Hemisphere, His Majesty's Government will secure the grant to the Government of the United States, freely and without consideration, of the lease for immediate establishment and use of naval and air bases and facilities for entrance thereto and the operation and protection thereof, on the Avalon Peninsula and on the southern coast of Newfoundland, and on the east coast and on the Great Bay of Bermuda.

Public Papers of FDR, 1940, Item 94

Furthermore, in view of the above and in view of the desire of the United States to acquire additional air and naval bases in the Caribbean and in British Guiana, and without endeavouring to place a monetary or commercial value upon the many tangible and intangible rights and properties involved, His Majesty's Government will make available to the United States for immediate establishment and use naval and air bases and facilities for entrance thereto and the operation and protection thereof, on the eastern side of the Bahamas, the southern coast of Jamaica, the western coast of St. Lucia, the west coast of Trinidad in the Gulf of Paria, in the island of Antigua and in British Guiana within fifty miles of Georgetown, in exchange for naval and military equipment and material which the United States Government will transfer to His Majesty's Government.

Public Papers of FDR, 1940, Item 94

All the bases and facilities referred to in the preceding paragraphs will be leased to the United States for a period of ninety-nine years, free from all rent and charges other than such compensation to be mutually agreed on to be paid by the United States in order to compensate the owners of private property for loss by expropriation or damage arising out of the establishment of the bases and facilities in question.

Public Papers of FDR, 1940, Item 94

His Majesty's Government, in the leases to be agreed upon, will grant to the United States for the period of the leases all the rights, power, and authority within the bases leased, and within the limits of the territorial waters and air spaces adjacent to or in the vicinity of such bases, necessary to provide access to and defence of such bases, and appropriate provisions for their control.

Public Papers of FDR, 1940, Item 94

Without prejudice to the above-mentioned rights of the United States authorities and their jurisdiction within the leased areas, the adjustment and reconciliation between the jurisdiction of the authorities of the United States within these areas and the jurisdiction of the authorities of the territories in which these areas are situated, shall be determined by common agreement.

Public Papers of FDR, 1940, Item 94

The exact location and bounds of the aforesaid bases, the necessary seaward, coast and antiaircraft defences, the location of sufficient military garrisons, stores, and other necessary auxiliary facilities shall be determined by common agreement.

Public Papers of FDR, 1940, Item 94

His Majesty's Government are prepared to designate immediately experts to meet with experts of the United States for these purposes. Should these experts be unable to agree in any particular situation, except in the case of Newfoundland and Bermuda, the matter shall be settled by the Secretary of State of the United States and His Majesty's Secretary of State for Foreign Affairs.

I have the honour to be, with the highest consideration, Sir,

Your most obedient, humble servant,

 (Sgd.) LOTHIAN.

DEPARTMENT OF STATE,

Washington, September 2, 1940.

Public Papers of FDR, 1940, Item 94

HIS EXCELLENCY THE RIGHT HONORABLE

THE MARQUESS OF LOTHIAN, C. H.,

British Ambassador.

EXCELLENCY:

Public Papers of FDR, 1940, Item 94

I have received your note of September 2, 1940.

Public Papers of FDR, 1940, Item 94

I am directed by the President to reply to your note as follows: The Government of the United States appreciates the declarations and the generous action of His Majesty's Government as contained in your communication which are destined to enhance the national security of the United States and greatly to strengthen its ability. to cooperate effectively with the other nations of the Americas in the defense of the Western Hemisphere. It therefore gladly accepts the proposals.

Public Papers of FDR, 1940, Item 94

The Government of the United States will immediately designate experts to meet with experts designated by His Majesty's Government to determine upon the exact location of the naval and air bases mentioned in your communication under acknowledgment.

Public Papers of FDR, 1940, Item 94

In consideration of the declarations above quoted, the Government of the United States will immediately transfer to His Majesty's Government fifty United States Navy destroyers generally referred to as the twelve hundred-ton type.

Public Papers of FDR, 1940, Item 94

Accept, Excellency, the renewed assurances of my highest consideration.

CORDELL HULL.

OFFICE OF THE ATTORNEY GENERAL,

Washington, D.C., August 27, 1940.

Public Papers of FDR, 1940, Item 94

THE PRESIDENT,

The White House.

Public Papers of FDR, 1940, Item 94

MY DEAR MR. PRESIDENT: In accordance with your request I have considered your constitutional and statutory authority to proceed by Executive agreement with the British Government immediately to acquire for the United States certain off-shore naval and air bases in the Atlantic Ocean without awaiting the inevitable delays which would accompany the conclusion of a formal treaty.

Public Papers of FDR, 1940, Item 94

The essential characteristics of the proposal are:

Public Papers of FDR, 1940, Item 94

(a) The United States to acquire rights for immediate establishment and use of naval and air bases in Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, the British Guiana; such rights to endure for a period of 99 years and to include adequate provisions for access to, and defense of, such bases and appropriate provisions £or their control.

Public Papers of FDR, 1940, Item 94

(b) In consideration it is proposed to transfer to' Great Britain the title and possession of certain over-age ships and obsolescent military materials now the property of the United States, and certain other small patrol boats which though nearly completed are already obsolescent.

Public Papers of FDR, 1940, Item 94

(c) Upon such transfer all obligation of the United States is discharged. The acquisition consists only of rights, which the United States may exercise or not at its option, and if exercised may abandon without consent. The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use with the sovereignty retained by Great Britain. Our Government assumes no responsibility for civil administration of any territory. It makes no promise to erect structures, or maintain forces at any point. It undertakes no defense of the possessions of any country. In short it acquires optional bases which may be developed as Congress appropriates funds therefor, but the United States does not assume any continuing or future obligation, commitment, or alliance.

Public Papers of FDR, 1940, Item 94

The questions of constitutional and statutory authority, with which alone I am concerned, seem to be these:

Public Papers of FDR, 1940, Item 94

First. May such an acquisition be concluded by the President under an Executive agreement or must it be negotiated as a Treaty subject to ratification by the Senate?

Public Papers of FDR, 1940, Item 94

Second. Does authority exist in the President to alienate the title to such ships and obsolescent materials, and if so, on what conditions?

Public Papers of FDR, 1940, Item 94

Third. Do the statutes of the United States limit the right to deliver the so-called mosquito boats now under construction or the over-age destroyers by reason of the belligerent status of Great Britain?

I

Public Papers of FDR, 1940, Item 94

There is, of course, no doubt concerning the authority of the President to negotiate with the British Government for the proposed exchange. The only questions that might be raised in connection therewith are (1) whether the arrangement must be put in the form of a treaty and await ratification by the Senate or (2) whether there must be additional legislation by the Congress. Ordinarily (and assuming the absence of enabling legislation) the question whether such an agreement can be concluded under Presidential authority or whether it must await ratification by a two-thirds vote of the United States Senate involves consideration of two powers which the Constitution vests in the President.

Public Papers of FDR, 1940, Item 94

One of these is the power of the Commander in Chief of the Army and Navy of the United States, which is conferred upon the President by the Constitution but. is not defined or limited. Happily, there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief of the Army and Navy. I do not find it necessary to rest upon that power alone to sustain the present proposal. But it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense. It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable.

Public Papers of FDR, 1940, Item 94

The second power to be considered is that control of foreign relations which the Constitution vests in the President as a part of the Executive function. The nature and extent of this power has recently been explicitly and authoritatively defined by Mr. Justice Sutherland, writing for the Supreme Court. In 1936, in United States v. Curtiss-Wright Export Corp., et al. (299 U.S. 304), he said:

Public Papers of FDR, 1940, Item 94

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, much be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Public Papers of FDR, 1940, Item 94

The President's power over foreign relations while "delicate, plenary, and exclusive" is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. The consideration, which we later discuss, is completed upon transfer of the specified items. The Executive agreement obtains an opportunity to establish naval and air bases for the protection of our coast line but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation.

Public Papers of FDR, 1940, Item 94

There are precedents which might be cited, but not all strictly pertinent. The proposition falls far short in magnitude of the acquisition by President Jefferson of the Louisiana Territory from a belligerent during a European war, the Congress later appropriating the consideration and the Senate later ratifying a treaty embodying the agreement.

Public Papers of FDR, 1940, Item 94

I am also reminded that in 1850, Secretary of State Daniel Webster acquired Horse Shoe Reef, at the entrance of Buffalo Harbor, upon condition that the United States would engage to erect a lighthouse and maintain a light but would erect no fortification thereon. This was done without awaiting legislative authority. Subsequently, the Congress made appropriations for the lighthouse, which was erected in 1856. Malloy, Treaties and Conventions (vol. 1, p. 663).

Public Papers of FDR, 1940, Item 94

It is not believed, however, that it is necessary here to rely exclusively upon your constitutional power. As pointed out hereinafter (in discussing the second question), I think there is also ample statutory authority to support the acquisition of these bases, and the precedents perhaps most nearly in point are the numerous acquisitions of rights in foreign countries for sites of diplomatic and consular establishments-perhaps also the trade agreements recently negotiated under statutory authority and the acquisition in 1903 of the coaling and naval stations and rights in Cuba under the act of March 2, 1901 (h. 803, 31 Stat. 895, 898). In the last-mentioned case the agreement was subsequently embodied in a treaty but it was only one of a number of undertakings, some clearly of a nature to be dealt with ordinarily by treaty, and the statute had required "that by way of further assurance the Government of Cuba will embody the foregoing provisions in a permanent treaty with the United States."

Public Papers of FDR, 1940, Item 94

The transaction now proposed represents only an exchange with no statutory requirement for the embodiment thereof in any treaty and involving no promises or undertakings by the United States that might raise the question of the propriety of incorporation in a treaty. I therefore advise that acquisition by Executive agreement of the rights proposed to be conveyed to the United States by Great Britain will not require ratification by the Senate.

II

Public Papers of FDR, 1940, Item 94

The right of the President to dispose of vessels of the Navy and unneeded naval material finds clear recognition in at least two enactments of the Congress and a decision of the Supreme Court— and any who assert that the authority does not exist must assume the burden of establishing that both the Congress and the Supreme Court meant something less than the clear import of seemingly plain language.

Public Papers of FDR, 1940, Item 94

By section 5 of the act of March 3, 1883 (c. 141, 22 Stat. 582, 599600 (U.S. C., title 34, sec. 492)), the Congress placed restrictions upon the methods to be followed by the Secretary of the Navy in disposing of naval vessels, which have been found unfit for further use and stricken from the naval registry, but by the last clause of the section recognized and confirmed such a right in the President free from such limitations. It provides:

Public Papers of FDR, 1940, Item 94

But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing. [Italics supplied.]

Public Papers of FDR, 1940, Item 94

In Levinson v. United States (258 U.S. 198, 201), the Supreme Court said of this statute that "the power of the President to direct a departure from the statute is not confined to a sale for less than the appraised value but extends to the manner of the sale," and that "the word 'unless' qualifies both the requirements of the concluding clause."

Public Papers of FDR, 1940, Item 94

So far as concerns this statute, in my opinion it leaves the President as Commander-in-Chief of the Navy free to make such disposition of naval vessels as he finds necessary in the public interest, and I find nothing that would indicate that the Congress has tried to limit the President's plenary powers to vessels already stricken from the naval registry. The President, of course, would exercise his powers only under the high sense of responsibility which follows his rank as Commander-in-Chief of his Nation's defense forces.

Public Papers of FDR, 1940, Item 94

Furthermore, I find in no other statute or in the decisions any attempted limitations upon the plenary powers of the President as Commander-in-Chief of the Army and Navy and as the head of the state in its relations with foreign countries to enter into the proposed arrangements for the transfer to the British Government of certain over age destroyers and obsolescent military material except the limitations recently imposed by section 14 (a) of the act of June 28, 1940 (Public, No. 671). This section, it will be noted, clearly recognizes the authority to make transfers and seeks only to impose certain restrictions thereon. The section reads as follows:

Public Papers of FDR, 1940, Item 94

Sec. 14. (a) Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States.

Public Papers of FDR, 1940, Item 94

Thus to prohibit action by the constitutionally created Commander-in-Chief except upon authorization of a statutory officer subordinate in rank is of questionable constitutionality. However, since the statute requires certification only of matters as to which you would wish, irrespective of the statute, to be satisfied, and as the legislative history of the section indicates that no arbitrary restriction is intended, it seems unnecessary to raise the question of constitutionality which such a provision would otherwise invite.

Public Papers of FDR, 1940, Item 94

I am informed that the destroyers involved here are the survivors of a fleet of over 100 built at about the same time and under the same design. During the year 1930, 58 of these were decommissioned with a view toward scrapping and a corresponding number were recommissioned as replacements. Usable material and equipment from the 58 vessels removed from the service were transferred to the recommissioned vessels to recondition and modernize them, and other usable material and equipment were removed and the vessels stripped. They were then stricken from the Navy Register, and 50 of them were sold as scrap for prices ranging from $5,260 to $6,800 per vessel, and the remaining 8 were used for such purposes as target vessels,' experimental construction tests, and temporary barracks. The surviving destroyers now under consideration have been reconditioned and are in service, but all of them are over age, most of them by several years.

Public Papers of FDR, 1940, Item 94

In construing this statute in its application to such a situation it is important to note that this subsection as originally proposed in the Senate bill provided that the appropriate staff officer shall first certify that "such material is not essential to and cannot be used in the defense of the United States." Senator Barkley and others objected to the subsection as so worded on the ground that it would prevent the release and exchange of surplus or used planes and other supplies for sale to the British and that it would consequently nullify the provisions of the bill (see sec. 1 of the act of July 2, 1940, H. R. 9850, Public, No. 703) which the Senate had passed several days earlier for that very purpose. Although Senator Walsh stated that he did not think the proposed subsection had that effect, he agreed to strike out the words "and cannot be used." Senator Barkley observed that he thought the modified language provided "a much more elastic term." Senator Walsh further stated that he would bear in mind in conference the views of Senator Barkley and others, and that he had "no desire or purpose to go beyond the present law, but to have some certificate filed as to whether the property is Surplus or not" (Congressional Record, June 21, 1940, pp. 13370-13371).

Public Papers of FDR, 1940, Item 94

In view of this legislative history it is clear that the Congress did not intend to prevent the certification for transfer, exchange, sale, or disposition of property merely because it is still used or usable or of possible value for future use. The statute does not contemplate mere transactions in scrap, yet exchange or sale except as scrap would hardly be possible if confined to material whose usefulness is entirely gone. It need only be certified as not essential, and "essential," usually the equivalent of vital or indispensable, falls far short of "used" or "usable."

Public Papers of FDR, 1940, Item 94

Moreover, as has been indicated, the congressional authorization is not merely of a sale, which might imply only a cash transaction. It also authorizes equipment to be "transferred," "exchanged," or "otherwise disposed of"; and in connection with material of this kind for which there is no open market value is never absolute but only relative—and chiefly related to what may be had in exchange or replacement.

Public Papers of FDR, 1940, Item 94

In view of the character of the transactions contemplated, as well as the legislative history, the conclusion is inescapable that the Congress has not sought by section 14 (a) to impose an arbitrary limitation upon the judgment of the highest staff officers as to whether a transfer, exchange, or other disposition of specific items would impair our essential defenses. Specific items must be weighed in relation to our total defense position before and after an exchange or disposition. Any other construction would be a virtual prohibition of any sale, exchange, or disposition of material or supplies so long as they were capable of use, however ineffective, and such a prohibition obviously was not, and was not intended to be, written into the law.

Public Papers of FDR, 1940, Item 94

It is my opinion that in proceeding under section 14 (a) appropriate staff officers may and should consider remaining useful life, strategic importance, obsolescence, and all other factors affecting defense value, not only with respect to what the Government of the United States gives up in any exchange or transfer, but also with respect to what the Government receives. In this situation good business sense is good legal sense.

Public Papers of FDR, 1940, Item 94

I therefore advise that the appropriate staff officers may, and should, certify under section 14 (a) that ships and material involved in a sale or exchange are not essential to the defense of the United States if in their judgment the consummation of the transaction does not impair or weaken the total defense of the United States, and certainly so where the consummation of the arrangement will strengthen the total defensive position of the Nation.

Public Papers of FDR, 1940, Item 94

With specific reference to the proposed agreement with the Government of Great Britain for the acquisition of naval and air bases, it is my opinion that the Chief of Naval Operations may, and should, certify under section 14 (a) that the destroyers involved are not essential to the defense of the United States if in his judgment the exchange of such destroyers for such naval and air bases will strengthen rather than impair the total defense of the United States.

Public Papers of FDR, 1940, Item 94

I have previously indicated that in my opinion there is statutory authority for the acquisition of the naval and air bases in exchange for the. vessels and material. The question was not more fully discussed at that point because dependent upon the statutes above treated and which required consideration in this section of the opinion. It is to be borne in mind that these statutes clearly recognize and deal with the authority to make dispositions by sale, transfer, exchange, or otherwise; that they do not impose any limitations concerning individuals, corporations, or governments to which such dispositions may be made; and that they do not specify or limit in any manner the consideration which may enter into an exchange. There is no reason whatever for holding that sales may not be made to or exchanges made with a foreign government or that in such a case a treaty is contemplated. This is emphasized when we consider that the transactions in some cases may be quite unimportant, perhaps only dispositions of scrap, and that a domestic buyer (unless restrained by some authorized contract or embargo) would be quite free to dispose of his purchase as he pleased. Furthermore, section 14 (a) of the act of June 28, 1940, supra, was enacted by the Congress in full contemplation of transfers for ultimate delivery to foreign belligerent nations. Possibly it may be said that the authority for exchange of naval vessels and material presupposes the acquisition of something of value to the Navy or, at least, to the national defense. Certainly I can imply no narrower limitation when the law is wholly silent in this respect. Assuming that there is, however, at least the limitation which I have mentioned, it is fully met in the acquisition of rights to maintain needed bases. And if, as I hold, the statute law authorizes the exchange of vessels and material for other vessels and material or, equally, for the right to establish bases, it is an inescapable corollary that the statute law also authorizes the acquisition of the ships or material or bases which form the consideration for the exchange.

Public Papers of FDR, 1940, Item 94

Whether the statutes of the United States prevent the dispatch to Great Britain, a belligerent power, of the so-called "mosquito boats" now under construction or the over-age destroyers depends upon the interpretation to be placed on section 3 of title V of the act of June 15, 1917 (c. 30, 40 Stat. 217, 222). This section reads:

Public Papers of FDR, 1940, Item 94

During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel, built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

Public Papers of FDR, 1940, Item 94

This section must be read in the light of section 2 of the same act and the rules of international law which the Congress states that it was its intention to implement (H. Rept. No. 30, 65th Cong., 1st sess.,P. 9). So read, it is clear that it is inapplicable to vessels, like the overage destroyers, which were not built, armed, equipped as, or converted into, vessels of war with the intent that they should enter the service of a belligerent. If the section were not so construed, it would render meaningless section 2 of the act which authorizes the President to detain any armed vessel until he is satisfied that it will not engage in hostile operations before it reaches a neutral or belligerent port. The two sections are intelligible and reconcilable only if read in light of the traditional rules of international law. These are clearly stated by Oppenheim in his work on International Law (5th ed., vol. 2, sec. 334, PP. 574-576):

Public Papers of FDR, 1940, Item 94

Whereas a neutral is in nowise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adapted to warlike use. The difference between selling armed vessels to belligerents and building them to order is usually defined in the following way:

Public Papers of FDR, 1940, Item 94

An armed ship, being contraband of war, is in nowise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantman, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, to deliver them to belligerents, either in a neutral port or in a belligerent port….

Public Papers of FDR, 1940, Item 94

On the other hand, if a subject of a neutral builds armed ships to the order of a belligerent, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in a crew and ammunition, can at once commit hostilities. Thus, through the carrying out of the order of the belligerent, the neutral territory has been made the base of naval operations; and as the duty of impartiality includes an obligation to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war. This distinction, although of course logically correct, is hairsplitting. But as, according to the present law, neutral States need not prevent their subjects from supplying arms and ammunition to belligerents, it will probably continue to be drawn.

Public Papers of FDR, 1940, Item 94

Viewed in the light of the above, I am of the opinion that this statute does prohibit the release and transfer to the British Government of the so-called mosquito boats now under construction for the United States Navy. If these boats were released to the British Government, it would be legally impossible for that Government to take them out of this country after their completion, since to the extent of such completion at least they would have been built, armed, or equipped with the intent, or with reasonable cause to believe, that they would enter the service of a belligerent after being sent out of the jurisdiction of the United States.

Public Papers of FDR, 1940, Item 94

This will not be true, however, with respect to the overage destroyers, since they were clearly not built, armed, or equipped with any such intent or with reasonable cause to believe that they would ever enter the service of a belligerent.

Public Papers of FDR, 1940, Item 94

In this connection it has been noted that during the war between Russia and Japan in 1904 and 1905, the German Government permitted the sale to Russia of torpedo boats and also of ocean liners belonging to its auxiliary navy. See Wheaton's International Law, 6th ed. (Keith), vol. 2, p. 977.

IV

Public Papers of FDR, 1940, Item 94

Accordingly, you are respectfully advised:

(a) That the proposed arrangement may be concluded as an Executive agreement, effective without awaiting ratification.

Public Papers of FDR, 1940, Item 94

(b) That there is Presidential. power to transfer title and possession of the proposed considerations upon certification by appropriate staff officers.

Public Papers of FDR, 1940, Item 94

(c) That the dispatch of the so-called "mosquito boats" would constitute a violation of the statute law of the United States, but with that exception there is no legal obstacle to the consummation of the transaction, in accordance, of course, with the applicable provisions of the Neutrality Act as to delivery.

Respectfully submitted.

ROBERT H. JACKSON,

Attorney General.

Franklin D. Roosevelt, "Four Freedoms" Speech, 6 January 1941

President Roosevelt's Annual Message to Congress, 1941

Title: President Roosevelt's Annual Message to Congress

Author: Franklin D. Roosevelt

Date: January 6, 1941

Source: Public Papers of the Presidents, F. D. Roosevelt, 1940, Item 3

Public Papers of FDR, 1940, Item 3

Mr. President, Mr. Speaker, Members of the Seventy-seventh Congress:

Public Papers of FDR, 1940, Item 3

I address you, the Members of the Seventy-seventh Congress, at a moment unprecedented in the history of the Union. I use the word "unprecedented," because at no previous time has American security been as seriously threatened from without as it is today.

Public Papers of FDR, 1940, Item 3

Since the permanent formation of our Government under the Constitution, in 1789, most of the periods of crisis in our history have related to our domestic affairs. Fortunately, only one of these—the four-year War Between the States—ever threatened our national unity. Today, thank God, one hundred and thirty million Americans, in forty-eight States, have forgotten points of the compass in our national unity.

Public Papers of FDR, 1940, Item 3

It is true that prior to 1914 the United States often had been disturbed by events in other Continents. We had even engaged in two wars with European nations and in a number of undeclared wars in the West Indies, in the Mediterranean and in the Pacific for the maintenance of American rights and for the principles of peaceful commerce. But in no case had a serious threat been raised against our national safety or our continued independence.

Public Papers of FDR, 1940, Item 3

What I seek to convey is the historic truth that the United States as a nation has at all times maintained clear, definite opposition, to any attempt to lock us in behind an ancient Chinese wall while the procession of civilization went past. Today, thinking of our children and of their children, we oppose enforced isolation for ourselves or for any other part of the Americas.

Public Papers of FDR, 1940, Item 3

That determination of ours, extending over all these years, was proved, for example, during the quarter century of wars following the French Revolution.

Public Papers of FDR, 1940, Item 3

While the Napoleonic struggles did threaten interests of the United States because of the French foothold in the West Indies and in Louisiana, and while we engaged in the War of 1812 to vindicate our right to peaceful trade, it is nevertheless clear that neither France nor Great Britain, nor any other nation, was aiming at domination of the whole world.

Public Papers of FDR, 1940, Item 3

In like fashion from 1815 to 1914— ninety-nine years— no single war in Europe or in Asia constituted a real threat against our future or against the future of any other American nation.

Public Papers of FDR, 1940, Item 3

Except in the Maximilian interlude in Mexico, no foreign power sought to establish itself in this Hemisphere; and the strength of the British fleet in the Atlantic has been a friendly strength. It is still a friendly strength.

Public Papers of FDR, 1940, Item 3

Even when the World War broke out in 1914, it seemed to contain only small threat of danger to our own American future. But, as time went on, the American people began to visualize what the downfall of democratic nations might mean to our own democracy.

Public Papers of FDR, 1940, Item 3

We need not overemphasize imperfections in the Peace of Versailles. We need not harp on failure of the democracies to deal with problems of world reconstruction. We should remember that the Peace of 1919 was far less unjust than the kind of "pacification" which began even before Munich, and which is being carried on under the new order of tyranny that seeks to spread over every continent today. The American people have unalterably set their faces against that tyranny.

Public Papers of FDR, 1940, Item 3

Every realist knows that the democratic way of life is at this moment being' directly assailed in every part of the world—assailed either by arms, or by secret spreading of poisonous propaganda by those who seek to destroy unity and promote discord in nations that are still at peace.

Public Papers of FDR, 1940, Item 3

During sixteen long months this assault has blotted out the whole pattern of democratic life in an appalling number of independent nations, great and small. The assailants are still on the march, threatening other nations, great and small.

Public Papers of FDR, 1940, Item 3

Therefore, as your President, performing my constitutional duty to "give to the Congress information of the state of the Union," I find it, unhappily, necessary to report that the future and the safety of our country and of our democracy are overwhelmingly involved in events far beyond our borders.

Public Papers of FDR, 1940, Item 3

Armed defense of democratic existence is now being gallantly waged in four continents. If that defense fails, all the population and all the resources of Europe, Asia, Africa and Australasia will be dominated by the conquerors. Let us remember that the total of those populations and their resources in those four continents greatly exceeds the sum total of the population and the resources of the whole of the Western Hemisphere-many times over.

Public Papers of FDR, 1940, Item 3

In times like these it is immature—and incidentally, untrue—for anybody to brag that an unprepared America, single-handed, and with one hand tied behind its back, can hold off the whole world.

Public Papers of FDR, 1940, Item 3

No realistic American can expect from a dictator's peace international generosity, or return of true independence, or world disarmament, or freedom of expression, or freedom of religion—or even good business.

Public Papers of FDR, 1940, Item 3

Such a peace would bring no security for us or for our neighbors. "Those, who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety."

Public Papers of FDR, 1940, Item 3

As a nation, we may take pride in the fact that we are softhearted; but we cannot afford to be soft-headed.

Public Papers of FDR, 1940, Item 3

We must always be wary of those who with sounding brass and a tinkling cymbal preach the "ism" of appeasement.

Public Papers of FDR, 1940, Item 3

We must especially beware of that small group of selfish men who would clip the wings of the American eagle in order to feather their own nests.

Public Papers of FDR, 1940, Item 3

I have recently pointed out how quickly the tempo of modern warfare could bring into our very midst the physical attack which we must eventually expect if the dictator nations win this war.

Public Papers of FDR, 1940, Item 3

There is much loose talk of our immunity from immediate and direct invasion from across the seas. Obviously, as long as the British Navy retains its power, no such danger exists. Even if there were no British Navy, it is not probable that any enemy would be stupid enough to attack us by landing troops in the United States from across thousands of miles of ocean, until it had acquired strategic bases from which to operate.

Public Papers of FDR, 1940, Item 3

But we learn much from the lessons of the past years in Europe-particularly the lesson of Norway, whose essential seaports were captured by treachery and surprise built up over a series of years.

Public Papers of FDR, 1940, Item 3

The first phase of the invasion of this Hemisphere would not be the landing of regular troops. The necessary strategic points would be occupied by secret agents and their dupes—and great numbers of them are already here, and in Latin America.

Public Papers of FDR, 1940, Item 3

As long as the aggressor nations maintain the offensive, they-not we—will choose the time and the place and the method of their attack.

Public Papers of FDR, 1940, Item 3

That is why the future of all the American Republics is today in serious danger.

Public Papers of FDR, 1940, Item 3

That is why this Annual Message to the Congress is unique in our history.

Public Papers of FDR, 1940, Item 3

That is why every member of the Executive Branch of the Government and every member of the Congress faces great responsibility and great accountability.

Public Papers of FDR, 1940, Item 3

The need of the moment is that our actions and our policy should be devoted primarily-almost exclusively—to meeting this foreign peril. For all our domestic problems are now a part of the great emergency.

Public Papers of FDR, 1940, Item 3

Just as our national policy in internal affairs has been based upon a decent respect for the rights and the dignity of all our fellow men within our gates, so our national policy in foreign affairs has been based on a decent respect for the rights and dignity of all nations, large and small. And the justice of morality must and will win in the end.

Public Papers of FDR, 1940, Item 3

Our national policy is this:

Public Papers of FDR, 1940, Item 3

First, by an impressive expression of the public will and without regard to partisanship, we are committed to all-inclusive national defense.

Public Papers of FDR, 1940, Item 3

Second, by an impressive expression of the public will and without regard to partisanship, we are committed to full support of all those resolute peoples, everywhere, who are resisting aggression and are thereby keeping war away from our Hemisphere. By this support, we express our determination that the democratic cause shall prevail; and we strengthen the defense and the security of our own nation.

Public Papers of FDR, 1940, Item 3

Third, by an impressive expression of the public will and without regard to partisanship, we are committed to the proposition that principles of morality and considerations for our own security will never permit us to acquiesce in a peace dictated by aggressors and sponsored by appeasers. We know that enduring peace cannot be bought at the cost of other people's freedom.

Public Papers of FDR, 1940, Item 3

In the recent national election there was no substantial difference between the two great parties in respect to that national policy. No issue was fought out on this line before the American electorate. Today it is abundantly evident that American citizens everywhere are demanding and supporting speedy and complete action in recognition of obvious danger.

Public Papers of FDR, 1940, Item 3

Therefore, the immediate need is a swift and driving increase in our armament production.

Public Papers of FDR, 1940, Item 3

Leaders of industry and labor have responded to our summons. Goals of speed have been set. In some cases these goals are being reached ahead of time; in some cases we are on schedule; in other cases there are slight but not serious delays; and in some cases—and I am sorry to say very important cases—we are all concerned by the slowness of the accomplishment of our plans.

Public Papers of FDR, 1940, Item 3

The Army and Navy, however, have made substantial progress during the past year. Actual experience is improving and speeding up our methods of production with every passing day. And today's best is not good enough for tomorrow.

Public Papers of FDR, 1940, Item 3

I am not satisfied with the progress thus far made. The men in charge of the program represent the best in training, in ability, and in patriotism. They are not satisfied with the progress thus far made. None of us will be satisfied until the job is done.

Public Papers of FDR, 1940, Item 3

No matter whether the original goal was set too high or too low, our objective is quicker and better results. To give you two illustrations:

Public Papers of FDR, 1940, Item 3

We are behind schedule in turning out finished airplanes; we are working day and night to solve the innumerable problems and to catch up.

Public Papers of FDR, 1940, Item 3

We are ahead of schedule in building warships but we are working to get even further ahead of that schedule.

Public Papers of FDR, 1940, Item 3

To change a whole nation from a basis of peacetime production of implements of peace to a basis of wartime production of implements of war is no small task. And the greatest difficulty comes at the beginning of the program, when new tools, new plant facilities, new assembly lines, and new ship ways must first be constructed before the actual materiel begins to flow steadily and speedily from them.

Public Papers of FDR, 1940, Item 3

The Congress, of course, must rightly keep itself informed at all times of the progress of the program. However, there is certain information, as the Congress itself will readily recognize, which, in the interests of our own security and those of the nations that we are supporting, must of needs be kept in confidence.

Public Papers of FDR, 1940, Item 3

New circumstances are constantly begetting new needs for our safety. I shall ask this Congress for greatly increased new appropriations and authorizations to carry on what we have begun.

Public Papers of FDR, 1940, Item 3

I also ask this Congress for authority and for funds sufficient to manufacture additional munitions and war supplies of many kinds, to be turned over to those nations which are now in actual war with aggressor nations.

Public Papers of FDR, 1940, Item 3

Our most useful and immediate role is to act as an arsenal for them as well as for ourselves. They do not need man power, but they do need billions of dollars worth of the weapons of defense.

Public Papers of FDR, 1940, Item 3

The time is near when they will not be able to pay for them all in ready cash. We cannot, and we will not, tell them that they must surrender, merely because of present inability to pay for the weapons which we know they must have.

Public Papers of FDR, 1940, Item 3

I do not recommend that we make them a loan of dollars with which to pay for these weapons—a loan to be repaid in dollars.

Public Papers of FDR, 1940, Item 3

I recommend that we make it possible for those nations to continue to obtain war materials in the United States, fitting their orders into our own program. Nearly all their materiel would, if the time ever came, be useful for our own defense.

Public Papers of FDR, 1940, Item 3

Taking counsel of expert military and naval authorities, considering what is best for our own security, we are free to decide how much should be kept here and how much should be sent abroad to our friends who by their determined and heroic resistance are giving us time in which to make ready our own defense.

Public Papers of FDR, 1940, Item 3

For what we send abroad, we shall be repaid within a reasonable time following the close of hostilities, in similar materials, or, at our option, in other goods of many kinds, which they can produce and which we need.

Public Papers of FDR, 1940, Item 3

Let us say to the democracies: "We Americans are vitally concerned in your defense of freedom. We are putting forth our energies, our resources and our organizing powers to give you the strength to regain and maintain a free world. We shall send you, in ever-increasing numbers, ships, planes, tanks, guns. This is our purpose and our pledge."

Public Papers of FDR, 1940, Item 3

In fulfillment of this purpose we will not be intimidated by the threats of dictators that they will regard as a breach of international law or as an act of war our aid to the democracies which dare to resist their aggression. Such aid is not an act of war, even if a dictator should unilaterally proclaim it so to be.

Public Papers of FDR, 1940, Item 3

When the dictators, if the dictators, are ready to make war upon us, they will not wait for an act of war on our part. They did not wait for Norway or Belgium or the Netherlands to commit an act of war.

Public Papers of FDR, 1940, Item 3

Their only interest is in a new one-way international law, which lacks mutuality in its observance, and, therefore, becomes an instrument of oppression.

Public Papers of FDR, 1940, Item 3

The happiness of future generations of Americans may well depend upon how effective and how immediate we can make our aid felt. No one can tell the exact character of the emergency situations that we may be called upon to meet. The Nation's hands must not be tied when the Nation's life is in danger.

Public Papers of FDR, 1940, Item 3

We must all prepare to make the sacrifices that the emergency-almost as serious as war itself—demands. Whatever stands in the way of speed and efficiency in defense preparations must give way to the national need.

Public Papers of FDR, 1940, Item 3

A free nation has the right to expect full cooperation from all groups. A free nation has the right to look to the leaders of business, of labor, and of agriculture to take the lead in stimulating effort, not among other groups but within their own groups.

Public Papers of FDR, 1940, Item 3

The best way of dealing with the few slackers or trouble makers in our midst is, first, to shame them by patriotic example, and, if that fails, to use the sovereignty of Government to save Government.

Public Papers of FDR, 1940, Item 3

As men do not live by bread alone, they do not fight by armaments alone. Those who man our defenses, and those behind them who build our defenses, must have the stamina and the courage which come from unshakable belief in the manner of life which they are defending. The mighty action that we are calling for cannot be based on a disregard of all things worth fighting for.

Public Papers of FDR, 1940, Item 3

The Nation takes great satisfaction and much strength from the things which have been done to make its people conscious of their individual stake in the preservation of democratic life in America. Those things have toughened the fibre of our people, have renewed their faith and strengthened their devotion to the institutions we make ready to protect.

Public Papers of FDR, 1940, Item 3

Certainly this is no time for any of us to stop thinking about the social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world.

Public Papers of FDR, 1940, Item 3

For there is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are:

Equality of opportunity for youth and for others.

Jobs for those who can work.

Security for those who need it.

The ending of special privilege for the few.

The preservation of civil liberties for all.

Public Papers of FDR, 1940, Item 3

The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.

Public Papers of FDR, 1940, Item 3

These are the simple, basic things that must never be lost sight of in the turmoil and unbelievable complexity of our modern world. The inner and abiding strength of our economic and political systems is dependent upon the degree to which they fulfill these expectations.

Public Papers of FDR, 1940, Item 3

Many subjects connected with our social economy call for immediate improvement.

Public Papers of FDR, 1940, Item 3

As examples:

Public Papers of FDR, 1940, Item 3

We should bring more citizens under the coverage of old-age pensions and unemployment insurance.

Public Papers of FDR, 1940, Item 3

We should widen the opportunities for adequate medical care.

Public Papers of FDR, 1940, Item 3

We should plan a better system by which persons deserving or needing gainful employment may obtain it.

Public Papers of FDR, 1940, Item 3

I have called for personal sacrifice. I am assured of the willingness of almost all Americans to respond to that call.

Public Papers of FDR, 1940, Item 3

A part of the sacrifice means the payment of more money in taxes. In my Budget Message I shall recommend that a greater portion of this great defense program be paid for from taxation than we are paying today. No person should try, or be allowed, to get rich out of this program; and the principle of tax payments in accordance with ability to pay should be constantly before our eyes to guide our legislation.

Public Papers of FDR, 1940, Item 3

If the Congress maintains these principles, the voters, putting patriotism ahead of pocketbooks, will give you their applause.

Public Papers of FDR, 1940, Item 3

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

Public Papers of FDR, 1940, Item 3

The first is freedom of speech and expression—everywhere in the world.

Public Papers of FDR, 1940, Item 3

The second is freedom of every person to worship God in his own way—everywhere in the world.

Public Papers of FDR, 1940, Item 3

The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants-everywhere in the world.

Public Papers of FDR, 1940, Item 3

The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

Public Papers of FDR, 1940, Item 3

That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.

Public Papers of FDR, 1940, Item 3

To that new order we oppose the greater conception—the moral order. A good society is able to face schemes of world domination and foreign revolutions alike without fear.

Public Papers of FDR, 1940, Item 3

Since the beginning of our American history, we have been engaged in change—in a perpetual peaceful revolution—a revolution which goes on steadily, quietly adjusting itself to changing conditions—without the concentration camp or the quick-lime in the ditch. The world order which we seek is the cooperation of free countries, working together in a friendly, civilized society.

Public Papers of FDR, 1940, Item 3

This nation has placed its destiny in the hands and heads and hearts of its millions of free men and women; and its faith in freedom under the guidance of God. Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights or keep them. Our strength is our unity of purpose. To that high concept there can be no end save victory.

President Roosevelt's Statement on the Atlantic Charter Meeting with Prime Minister Churchill, 1941

Title: President Roosevelt's Statement on the Atlantic Charter Meeting with Prime Minister Churchill

Author: Franklin D. Roosevelt

Date: August 14, 1941

Source: Public Papers of the Presidents, F. D. Roosevelt, 1941, Item 86

Public Papers of FDR, 1941, Item 86

The President of the United States and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, have met at sea.

Public Papers of FDR, 1941, Item 86

They have been accompanied by officials of their two Governments, including high ranking officers of their military, naval, and air services.

Public Papers of FDR, 1941, Item 86

The whole problem of the supply of munitions of war, as provided by the Lease-Lend Act, for the armed forces of the United States and for those countries actively engaged in resisting aggression has been further examined.

Public Papers of FDR, 1941, Item 86

Lord Beaverbrook, the Minister of Supply of the British Government, has joined in these conferences. He is going to proceed to Washington to discuss further details with appropriate officials of the United States Government. These conferences will also cover the supply problems of the Soviet Union.

Public Papers of FDR, 1941, Item 86

The President and the Prime Minister have had several conferences. They have considered the dangers to world civilization arising from the policies of military domination by conquest upon which the Hitlerite Government of Germany and other Governments associated therewith have embarked, and have made clear the steps which their countries are respectively taking for their safety in the face of these dangers.

Public Papers of FDR, 1941, Item 86

They have agreed upon the following joint declaration:

Public Papers of FDR, 1941, Item 86

The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

Public Papers of FDR, 1941, Item 86

First, their countries seek no aggrandizement, territorial or other;

Public Papers of FDR, 1941, Item 86

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Public Papers of FDR, 1941, Item 86

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them;

Public Papers of FDR, 1941, Item 86

Fourth, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Public Papers of FDR, 1941, Item 86

Fifth, they desire to bring about the fullest collaboration between all Nations in the economic field with the object of securing, for all, improved labor standards, economic advancement, and social security;

Public Papers of FDR, 1941, Item 86

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all Nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;

Public Papers of FDR, 1941, Item 86

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance;

Public Papers of FDR, 1941, Item 86

Eighth, they believe that all of the Nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea, or air armaments continue to be employed by Nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such Nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

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