DULOCRACY IN AMERICA
VOLUME I

Compiled & Edited by
J.D. Sweeney

Finally a book, that reveals the true intent behind the New Deal legislation of President Franklin Delano Roosevelt. Sweeney shows what traditions, what precedents, what events forced the Supreme Court of the United States to expand its interpretation of the interstate commerce clause, in an attempt to bring all business activity under the clauses' jurisdictional umbrella. The story is one of subterfuge and apostasy. It illustrates how the opportunists in government are working diligently to create a scheme using Congress' exclusive control over interstate commerce, to relieve the citizenry of the federal Union of their inherent and Constitutionally secured rights. Sweeney reveals, how during the 1930's, the people themselves, by clearly abandoning their individual responsibilities to God, themselves, their posterity and ancestors, aided in the transformation of this nation from a constitutional democracy in republican form to a cleverly cloaked socialistic/communistic oligarchy. What was conceived as a nation of confederated sovereign states united by and under the federal Constitution, metamorphosed into a collective endeavor pointed to the management of a large population under principles legally associated with mass peonage. Both the labor and persons of the citizenry being converted into little more than commodities or "human" resources, to be consumed and controlled for the purpose of promoting a socialistic concept of utopia founded on a hopelessly insolvent welfare state. The saddest part of the story is that even today, as in the past, the people, by active counter-revolutionary endeavor, or by indolent acquiescence, are, with the rarest exceptions, both promoting and enforcing upon their neighbors, the values and norms of this usurpation system.

Sweeney clearly explains how virtually all of the statutes passed by Congress since the mid 1930's hinge upon the "interstate commerce clause" and the "necessary and proper" clauses of the federal Constitution. As is evidenced in this work, the citizenry at large have effectively connected themselves with Congressionally controlled privileges in exchange for what they perceived as promises of security in their individual lives. Clearly and easily, Sweeney ties up the whole economic and social history of the country and reveals how the Social Security number when introduced in 1936 became a federal license to engage in interstate commerce. Sweeney explains how, by the use of the number, the holder is presumed to be a "person" who is engaged in Congressionally controlled and regulated interstate business. Volumes II & III reveal how the Social Security number in 1939 was expanded from a simple license, into a pledge by the citizenry to exchange their future performance as surety for a non-existent federal debt. Through the use of this number the Federal Government controls and regulates all your activities for your own protection.

Here at last, then, is a book eminently readable and thoroughly documented. A brilliant book which will lead American citizens to see our greatest single domestic issue since the Civil War clearly and without bias, rather than through a hazy mass of accumulated prejudice.

DULOCRACY IN AMERICA

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INTRODUCTION

To preserve and to transmit the blessings of civil and religious freedom, is the declared object of the people of the United States of America, in establishing their present form of government. The question, Will our liberties endure? has ever been one of deep solicitude to every true American patriot; a question to which different answers have been formed by different minds.

It is generally conceded, that no other system of government ever devised, is so well adopted to secure the objects for which all just governments are instituted, as our own. Its excellence alone, however can not insure its duration. The grand element of its strength, is the public virtue and intelligence. Hence, the only well-founded hope of permanent political prosperity, lies in an efficient system of education.

Education is an interest of high importance to the people under any form of government; but it is more especially so in this country, where the people are not only in theory the source of power, but in practice are actually called upon to take an efficient part in constituting and administering the government. The exercise of political power ought to be directed by an enlightened judgment. The right of suffrage can scarcely be esteemed a privilege to him who is incapable of exercising it with discretion. While the Constitution gives as much weight to the vote of the uninformed and ignorant, as to that of the well-instructed and intelligent citizen, the sources of information should be as numerous and as widely extended as possible.

Every citizen inspired with a just degree of patriotic pride, must desire to qualify himself for the intelligent discharge of his duties and responsibilities, whether as an elector or private citizen only, or as one called to take a more direct part in the administration of the government. It is certainly to be lamented, that questions of public policy of vital interest, perhaps involving constitutional principles, and even liberty itself, are not infrequently decided at the ballot-box, by those who have never given the Constitution the slightest examination.

DULOCRACY IN AMERICA, VOLUME I is in no sense a biography of Franklin Delano Roosevelt. It rather sets out some of the legal history behind his New Deal legislation and how these programs were utilized in the United States, at both the State and Federal levels. The story is one of subterfuge and apostasy. It illustrates how the opportunists in government have worked diligently to create a scheme for relieving an uninformed citizenry of the federal union of their inherent and Constitutionally secured rights, through a process that has been evolving for over one hundred years. In the first half of the twentieth century, the people themselves, by clearly abandoning their individual responsibilities to God, themselves, their posterity and ancestors, aided in the transformation of this nation from a constitutional democracy in republican form to a cleverly cloaked socialistic/communistic oligarchy. What was conceived as a nation of confederated sovereign states united by and under the federal Constitution as the result of the

direct and deliberate act of the duly authorized representatives of a once free and self-regulating People, metamorphosed into a collective endeavor pointed to the management of a large population under principles legally associated with mass peonage. Both the labor and persons of the citizenry being converted into little more than commodities or resources, to be consumed and controlled for the purpose of promoting a socialistic concept of utopia founded on a hopelessly insolvent welfare state. The saddest part of the story is that the people, by active counter-revolutionary endeavor or by indolent acquiescence have, with the rarest exceptions, both promoted and enforced upon their neighbors, the values and norms of this usurpation system.

This work provides examples of the most important legal references illustrating the statutes and regulations that have been passed and promulgated by government, along with historical documentation and court decisions adjudicating and construing legal issues and constitutional relationships surrounding the commerce clause of the national Constitution.

In attempting to understand the relationships of the different materials presented, it is important to remember the following ideas.

1. The statutes of the various states of the federal Union, are passed under the sovereign authority of the several state legislatures. The state constitutions have been considered by both the federal judiciary and the courts of the various states to be declarations of "limitations of power" placed by a sovereign people upon the government they created as their own free and voluntary act. It is clear, to any legitimate thinker, that while the state may theoretically possess unlimited power to provide for its own self-preservation, it cannot, by any legally proper means, hold any greater power than any one of the people who comprise the least common denominator of the political power that created it. In other words, the state cannot properly exercise its "police powers" in excess of the limitations express, or of necessity implied, in its respective constitution. The Federal Government, on the other hand, is a creature constructed upon the basis of "granted powers." These powers are expressly stated in the Constitution of the United States of America, and are conclusive evidence of the extent of the power possessed by the federal organism. If the national Constitution does not evidence a power expressly, or by necessary implication, where such is allowed by the language of that instrument, then that power does not legally exist. The Bill of Rights is a statement, or perhaps a reminder in the form of a restatement, to the Federal Government, of the rights possessed and retained by the National Citizenry and all persons within the political and territorial jurisdiction of the United States. The rights alluded to, or expressly declared in the "Bill" were not created by either the federal Constitution, nor the Bill of Rights. The people (Citizenry) of the several States of America, declared their sovereign will by establishing the Constitution and thereby creating the national government of the States united thereunder, and which were previously united under the Articles of Confederation, also an instrument intended to be perpetual in nature. The shortcomings of that document, and the system of general government it provided, were meant to be supplemented by the Constitution, in order to form a "more perfect Union." There was no intent mentioned in the Constitution designed to lessen the powers of the free citizenry of the federal Union. The last two of the Articles in Amendment to the Constitution, declare for all to see, that the People intended to limit the powers of the newly formed Federal Government to those enumerated, and expressly reserved all others to the states of the Union, or to the People themselves. The Constitution formulated the National Common Law, and reduced its governing rules to written form, to be

seen and preserved as a hallmark and bastion of a free and moral society. But most important, it operated as a limit upon the Federal Government, not as a license to expand its scope of authority.

In order to understand the true import and intent of the federal Constitution, it is necessary to possess a knowledge of the English system of jurisprudence known as the "common law." The governing principles of this system were that of a fair trial by a jury of one's peers (neighbors), and a presumption that every man was responsible for his own acts in relation to his neighbor. In effect, a man was free to do as he would, even to the extent of making a fool of himself and his family, but his unqualified right of self regulation ended where his neighbors, or in England, the King's, began. When an excess occurred, it was considered a trespass, and would support a legal action at law for the purpose of redressing to the victim his grievance; or, stated another way, to restore him to a condition as nearly equal to that which he had enjoyed before the trespass as possible. The fundamental requirement for the common law to take notice of an action, be it "civil" or "criminal" in nature, was the availability of an injured body (corpus delecti) to be available for production before the court, or in the case of a statutory offense, witnesses available to testify of the factual elements constituting said offense, as well as to declare the fact of the defendant being the proper subject of the statute in question.

2. Today the laws passed by the U.S. Congress, are all policy declarations directed to administrators of federal departments or agencies. These officials are always clearly identified in a properly constructed statute. They are given the authority, by the Congress, to make binding regulations, which carry the force and effect of law, for the purpose of carrying into effect the expressed intent of the lawmaker. The true intent is to be found by the clear language of the statute and by resorting to the legislative history associated with it, if necessary.

The statutes passed by Congress are the law of the land and inasmuch as they are not repugnant to the principles of the Constitution, but are passed, or made, in pursuance thereto, are the supreme Law of the Land. So it is with treaties. But, no law or treaty may be of legal force if it operates in excess, or contravention of, the Constitution of the United States of America, for to do so would be to violate the National Common Law. Therefore, all statutes must pass the test of consistency with the Constitution. Typically, the Statutes of Congress, or "Statutes at Large," as they are commonly known, are evidenced by the various titles of the Code of the United States. Unless a specific "Title" (there are currently 50) has been declared to be positive law by Congress, it is only prima facie the law. In these cases, resort to the Statutes at Large and the legislative history behind the law are necessary. A title of the Code that has been declared positive law constitutes legal evidence of the law in the courts. However, it is still wise to research the history of the code section in question in order to make a proper determination as to the subject matter over which it was intended to operate. There is much of overextending the proper scope of federal laws in today's legal environment. Looking back at the regulations previously mentioned, these publications carry the effect of criminal penalties against offenders, generally not the statute or the corresponding section(s) of the U.S. Code. One stands in jeopardy for violating the regulation, not the statute, per se. And, it is the regulation which is promulgated under an empowering statute (grant of authority) that defines a department's power, through one of its agencies, to enforce the will of Congress. If no regulation exists which clearly defines one as a "person" described in the empowering statute, then one simply is not legally bound to

perform to the regulations demands, nor is he subject to the penalties described by the statute or regulation. The regulation can never exceed the empowering statute's scope of effect, either as to the subject matter dealt with, or with reference to the prescribed penalty for its violation.

3. Among the powers granted Congress, perhaps the greatest of all is the power to control interstate commerce. The nature of this power is, however, for the purpose of maintaining open channels of commerce throughout the States, by not allowing the States to exercise dominion over those channels in a fashion which disturbs the capacity of the People to effectively engage in lawful business and commerce with their fellow Citizens in their own State, as well as in a sister State. A narrowly defined area relative to control of interstate commerce is also properly used in conjunction with the power to provide for the general welfare and allow activities designed to identify and seize various items which, by their nature (contaminated milk, cream, meat, etc.), pose an eminent threat to the health and well-being of the People. The phrase "provide for the general welfare," never included the socialistic concepts of the currently operating "welfare state," wherein the government seizes, by one means or another, the property of the private Citizen, and "redistributes" it to others. The only way such a process can be "legally" carried on is by first converting the Citizenry from their private and individual capacities into that of collective/commercial agents of government. Voluntarily participating in schemes which effectively constitute the government as one's owner/guardian, provides the needed "legal magic" to allow the regulatory laws of the government to directly affect you. In the vast majority of cases, such a situation provided the means for which the government can take the erstwhile private Citizen and make them to answer before a court of "law" for failure to measure up to the terms of some statute which, were it not for the grant of privilege which the Citizen had first sought from government, would never have had any more than a directory effect upon such Citizen.

Virtually all of the statutes passed by Congress since the mid 1930's hinge upon the "interstate commerce clause" and the "necessary and proper" clauses of the federal Constitution. As is evidenced in this work, the citizenry at large have effectively connected themselves with congressionally controlled privileges in exchange for what they perceived as promises of security in their individual lives. Unfortunately, they apparently never seriously considered the cunning of Congress, nor the declarations of the Supreme Court of the United States when it, on several occasions, has stated that no vested rights exist in these programs, including the Social Security program. So we see liberty under God traded for the bowl of sour pottage. Sweet in the mouth, yet bitter in the belly.

CHAPTER 1

LET'S MAKE A DEAL!

"Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap - let it be taught in schools, in seminaries, and in colleges; - let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation." Abraham Lincoln, January 27, 1838.

SO LET IT BE SAID!

This country has had its share of depressions. Both the people and the government weathered these economic storms without resorting to extraordinary remedies. Somehow, the "great depression" of the 1930's was perceived differently than the others this nation had endured.

During the early 1930's, factories, mines, and mills throughout the country had to be shut down. Railroads and steamship companies lost a considerable part of their business and many of them were forced into bankruptcy. Stock brokerage and investment houses, some of good standing, closed or failed, causing serious losses to their customers. Farmers were unable to sell their products. Homes and farms were being foreclosed. Unemployment and misery became widespread. Inaction by the Federal Government and the Hoover administration added to the discontent of the people. Strikes were reported from all parts of the country. The Capitol became the Mecca of thousands of "marchers" who came to Washington to voice their discontent with the government. In agricultural states the temperament of the farmer was indicated by rioting against foreclosures and forced sales. In the business centers of many states loss of confidence in the government causes many people to convert credit into cash and put it in hiding. Heavy withdrawals brought about the closing of many banks with the consequent results that in addition to scarcity of a flowing currency there was also a lack of credit.

The governors and legislatures of many states took drastic steps to remedy the situation existing in their respective states, but the people were not satisfied with the results and instead demanded a "savior." Thus emerged Franklin Delano Roosevelt, to fulfill this role. Roosevelt offered the people peace and prosperity and the people offered themselves and their posterity as payment. Such was the state of affairs of the country when on Saturday, March 4, 1933, at 1:08 P.M., a day that was cloudy and chill, Franklin Delano Roosevelt became the thirty-second President of the United States.

Crowded on the grounds of the Capitol, 100,000 people saw Roosevelt take his oath of office just as thirty-one previous presidents had sworn that sacred oath to cherish and defend the Constitution of this country. Over the vast throngs there hung another cloud - a cloud of worry and despair, because of the economic and business outlook for the country.

Roosevelt stood on the main steps of the Capitol building before Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, Footnote1 who held out to him the 300 year-old Roosevelt Family Bible. Roosevelt placed his left hand on it as Chief Justice Hughes read the oath of office as mandated under Article II, Section 1 of the Constitution of the United States of America which reads:

I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

As the Chief Justice finished Roosevelt answered in a clear voice "I DO." Then facing the great throng, the new President of the United States delivered his inaugural address:

"President Hoover, Mr. Chief Justice, my friends:

"This is a day of national consecration, and I am certain that my fellow-Americans expect that on the induction into the Presidency I will address them with a candor and a decision which the present situation of our nation impels.

"This is pre-eminently the time to speak the truth, the whole truth, frankly and boldly. Nor need we shirk from honestly facing conditions in our country today. This great nation endure as it has endured, will revive and 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.

"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.

"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.

"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 the rulers of the exchange of mankind's goods have failed through their own stubbornness and their own incompetence, have admitted their failure and abdicated. Practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men.

"True, they have tried, but their efforts have been cast in the pattern on 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.

"The money changers have fled 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.

"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 our fellow-men.

"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 positions 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 obligation, 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.

"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.

"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, uneconomic 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.

"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; there must be an end to speculation with other people's money, and there must be provision for an adequate but sound currency.

"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.

"Through this program of action we address ourselves to putting our own national house in order and making income balance outgo.

"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.

"The basic thought that guides these specific means of national recovery is not narrowly nationalistic.

"It is the insistence, as a first consideration, 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.

"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 purpose will bind upon us all as a sacred obligation with a unity of duty hitherto evoked only in time of armed strife.

"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.

"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.

"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.

"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 speedy adoption.

"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 war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe.

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

"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.

"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.

"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!"

Roosevelt departed from the Capitol and went to his new home, the White House, where a luncheon was served to 500 guests. The members of his cabinet which included nine men and one woman were sworn in before their relatives and friends in the Oval Rooms by Supreme Court Justice Benjamin Cardozo. Footnote2 This was the first time this had been done. Never before had a Cabinet been sworn in at the same time and in the same place and by the same official administering the oaths. Never before was the White House the scene of the swearing in of the cabinet. Roosevelt told the gathering that he was breaking a precedent. "It is my intention to inaugurate precedents like this from time to time," he laughed. The streets outside were given over to the crowds which had become quite merry and milled around until late into the night. At the inaugural ball, the guests danced, sang and laughed while the crowds outside applauded at the arrival of the invited guests.

It can be truly said that the nation responded to the ringing utterance of the inaugural address. Congress was prepared to go along in an extraordinary effort. Everywhere Roosevelt was hailed with unprecedented applause. In spots the acclaim rose to almost hysterical strains. Newspapers began to refer to him as, the darling of destiny, the Messiah of American's tomorrow. However, four years later with growing criticism to his programs and growing power, Roosevelt would deliver in May, 1937, his famous midnight radio address, in an attempt to quiet his critics and to debunk their claims that he (Roosevelt) was becoming an American dictator.

SO LET IT BE DONE!

Roosevelt's inaugural address was merely a prologue uttered before the curtain rose upon the stirring drama of his first months in office.

On March 5, 1933, Roosevelt summoned a special session of Congress beginning March 9. At 11 o'clock that same night Roosevelt issued a proclamation declaring a national emergency to exist, closing the banks and prohibiting the hoarding and exporting of gold bullion and currency. Footnote3

On March 9, 1933, Congress, gathering in special session, passed the National Banking Emergency Relief Act, Footnote4 which, after approving the actions taken by Roosevelt prior to March 9, gave the government, among other things, the power to authorize the reopening of the closed banks which were ascertained to be in sound condition and to reorganize and reopen such other banks as may be found to require reorganization to put them on a sound basis, and authorized national banks to issue preferred stock in order to secure additional capital.

On March 10, 1933, Roosevelt sent his economy message to Congress. "For three long years," he said, "the Federal Government has been on the road toward bankruptcy. For the fiscal year of 1931 the deficit was $462,000,000. For the fiscal year of 1932 it was $2,472,000,000. For the fiscal year 1933 it will probably exceed $1,200,000,000. For the fiscal year 1934 based on appropriation bills passed by the last Congress and the estimated revenues, the deficit will probably exceed $1 billion unless immediate action is taken. Thus we shall have piled up an accumulated deficit of $5 billion." Then Roosevelt warned: "Too often in recent history liberal governments have been wrecked on the rocks of loose fiscal policy. We must avoid this danger."

Supposedly, here at last was the man to put an end to the deficits. Roosevelt declared these deficits had:

"contributed to the recent collapse of our banking structure. It has accentuated the stagnation of the economic life of our people. It has added to the ranks of the unemployed. Our government's house is not in order, and for many reasons no effective action has been taken to restore it to order."

Roosevelt declared "the credit of the national government is imperiled." And then he asserted, "the first step is to save it. National recovery depends upon it." The first step was a measure to cut payroll expenditures 25 percent. The second step, was to authorize a bill providing for the biggest deficit of all - $3,300,000,000. In order to reduce government costs, Congress on March 20, 1933, passed the Veterans and Federal Employees Economy Act, Footnote5 which reduced federal salaries and discontinued "bonus" payments to ex-soldiers whose disabilities had no direct connection with war service. To provide immediate employment for about 500,000 people, Congress on March 31, 1933, passed the Civilian Conservation Corps Act, Footnote6 establishing forest camps for the unemployed. Because of widespread unemployment, Congress passed the Federal Emergency Relief Act, Footnote7 creating a Federal Emergency Relief

Administration to cooperate with similar state agencies, the funds, about $500 million to be made available by the Reconstruction Finance Corporation.

Farmers received special attention when on March 16, 1933, Roosevelt sent a message to Congress calling for the passage of the Agricultural Adjustment Act. The Act was approved by Congress on May 12, 1933. Footnote8 The Agricultural Adjustment Act or AAA as it was called, was intended to establish and maintain a proper balance between the production and consumption of agricultural commodities, increase the agricultural purchasing power, provide emergency relief with respect to agricultural indebtedness and to provide for the orderly liquidation of joint-stock land banks. The Farm Credit Act of 1933, Footnote9 approved by Congress on June 16, 1933, created a revolving fund of $120 million for the establishment of twelve Production Credit Corporations and twelve banks for cooperatives in the same cities as the federal farm loan bank are situated to aid in financing the production and distribution of farm products.

Mortgage debtors found relief in the Home Owner's Loan Act, Footnote10 intended to provide emergency relief with respect to home-mortgage indebtedness by refinancing home mortgages and giving financial aid to the owners of homes occupied by them and unable to amortize their debt.

To protect bank depositors, Congress passed the Banking Act of 1933, Footnote11 which required commercial banks to divorce the security affiliates organized by them and to segregate the functions of investment banking from those of deposit banking. This Act also provided a system whereby bank deposits were to be insured. The investor who invested his savings in spurious securities came up for consideration when Congress passed the Federal Securities Act. Footnote12 This Act establishes supervision over the sale of investment securities and gave investors grounds for legal action in case of omission or misrepresentation of material facts by those connected with the issue.

The actions taken by Roosevelt and Congress affecting the currency of the nation were equally important. On April 20, 1933, the gold standard was suspended when Roosevelt by executive order imposed an embargo on all gold exports. Footnote13 Then on May 12, 1933, both houses adopted the Thomas amendment to the farm bill. Footnote14 The amendment gave Roosevelt power to (a) provide for an expansion of credit by arranging for the purchase of $3 billion of Government bonds by the Federal Reserve Banks; (b) to issue $3 billion in paper currency; (c) to authorize an unlimited coinage of silver at the ratio of gold to be fixed by Roosevelt in his own discretion; and (d) to reduce the gold content of the dollar by not more than fifty per cent.

On June 5, 1933, Public Resolution No. 10 was approved. This resolution in substance provided that: (a) it is the declared policy of Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in markets and in the payment of debt; (b) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; (c) every obligation, heretofore or hereafter incurred, whether or not such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or

currency which at the time of payment is legal tender for public and private debt; and (d) all coins and currencies of the United States (including Federal Reserve notes and circulating notes of the Federal Reserve banks and national banking associations), heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties and dues.

Then came the "Great Charter of Free Business," the National Industrial Recovery Act Footnote15 or NRA. It was rushed through Congress with little or no debate. Few members of Congress had even the foggiest idea what it was, save that it was what Roosevelt wanted. The National Industrial Recovery Act was approved June 16, 1933. The purpose of the Act was contained in Section 1 of Title I of the Act itself, which reads as follows:

A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and conserve national resources.

The NRA authorized the expenditure of $3.3 billion for public works. The purpose of this expenditure was to increase employment and particularly to stimulate activity in the major industries, such as those producing steel, cement, brick, lumber, machinery and other capital needs.

Upon signing the National Industrial Recovery Act, Roosevelt said:

"History probably will record the National Industrial Recovery Act as the most important and far-reaching legislation ever enacted by the American Congress. It represents a supreme effort to stabilize for all time the many factors which make for the posterity of the nation, and the preservation of American standards."

In a radio address delivered July 31, 1933, the chief of the legal division of the recovery administration said:

"I wonder how many of the fortunate people of this country understand that the long-discussed revolution Footnote16 is actually under way in the United States. There is no need to prophesy. It is here. It is in progress. In this favored land of ours we are attempting possibly the greatest experiment in history."

On July 8, 1933, Roosevelt created the Public Works Administration (PWA) for the administration and allocation of the fund provided by and authorized to be expended under the NRA. Footnote17 Originally using part of the same fund, the Federal Civil Works Administration (CWA) was organized on November 9, 1933, as a branch of the Public Works Administration. Footnote18 The function of the CWA was to create emergency employment and thereby supplement the relief measures already adopted by Congress earlier in its session. As part of the same program which included the NRA, and PWA and the CWA, the Reconstruction Finance Corporation on August 1, 1933, was authorized to invest $1 billion in the preferred stock of national banks, in order to strengthen the banks and make it possible for them to respond to the credit needs of the country.

On August 28, 1933, Roosevelt issued an executive order prohibiting the hoarding, exporting and earmarking of gold coin and currency, Footnote19 and on December 28, 1933, the Secretary of the Treasury issued an order requiring the delivery to the Treasury of the United States of all gold coin and gold certificates.

On January 15, 1934, the Secretary of the Treasury fixed midnight of Wednesday, January 17, as the final date before which time gold coin and currency had to be delivered to the Treasury of the United States. Finally, the Gold Reserve Act Footnote20 was passed, which authorized Roosevelt to (a) fix the limits for the valuation of the dollar at from fifty to sixty per cent. in terms of its old gold content, (b) manage the dollar within these limits, by making such changes in its value as were deemed necessary, (c) impound in the treasury the stocks of gold held by the Federal Reserve Banks, (d) assure to the Government whatever profit might result from the increase in the value of gold, and (e) use part of this profit to create a fund of $2 billion with which to "stabilize" the dollar. Pursuant to authority vested in him by the Gold Reserve Act, Roosevelt by proclamation, dated January 31, 1934, Footnote21 declared and fixed the weight of the dollar to be fifteen 5.21 grains, 9/10th fine, or 59.06 cents in terms of its old parity.

On June 27, 1934, in order to aid those employed by rail carriers, Congress passed the Railroad Retirement Act. Footnote22 This Act established a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act.

Finally, Roosevelt's New Deal program was complete. The banks were open. Business was moving back into activity, the country was saved.

People everywhere were talking about the coming Roosevelt boom. Roosevelt was calling everybody by their first names. People were saying: "Whata man!" Several times a week, the White House press corps gathered around Roosevelt's desk, to hear his lectures on economic theory. The whole nation sat quietly around their radios several evenings a week to hear the voice of Roosevelt explain to them in simple terms the meaning of all the great measures he was driving through Congress.

Praise for Franklin Delano Roosevelt came from every quarter as the country settled down to the happiest times it had seen in some years. The New York Times said editorially:

The President seized upon a wonderful opportunity in a way that was at once sagacious and dynamic. With insistent determination and great boldness he sought to render the very emergency of the nation, the wreck of business and the fears for the future, the means of establishing his authority and leading both Congress and the country into a more hopeful and resolute temper. In a true sense the public disaster was transmuted into an official triumph for him. But that was because he appeared to the American people to be riding the whirlwind and directing the storm. The country was ready and even anxious to accept new leadership. From President Roosevelt it got a rapid succession of courageous speeches and effort and achievement which included multitudes of his fellow citizens to acclaim him as the Heaven-sent man of the hour.

All that was now left to do was to let the people settle down to assimilate themselves into this new order of things. Congress had put vast emergency powers into the hands of Roosevelt and had put a fabulous sum of money ($3,300,000,000) in addition to all the other specific appropriations for government, into his hands to be spent in any way he desired. Meanwhile, the "spendthrift" Hoover as Roosevelt referred to him during the 1932 presidential election was in California at his Palo Alto home putting his own affairs in order, while the great Economizer who had denounced Hoover's deficits during the 1932 presidential election, had produced in his first 100 days in office, a deficit larger than Hoover had produced in two years. Footnote23

Footnote1

The members of the Supreme Court when Roosevelt took office included the following Justices: Chief Justice Charles Evans Hughes; Willis J. Van Devanter; Pierce Butler; James Clark McReynolds; George Sutherland; Harlan Fiske Stone; Louis Dembitz Brandeis; Benjamin N. Cardozo; Owen J. Roberts.

Footnote2

Roosevelt's cabinet included the following: Timothy Hull - Secretary of State; William Woodlin - Secretary of the Treasury; George Dern - Secretary of War; Homer Cummings - Attorney General; James Farley - Postmaster General; Claude Swanson - Secretary of the Navy; Harold Ickes - Secretary of the Interior; Henry Wallace - Secretary of Agriculture; Daniel Roper - Secretary of Commerce; and Frances Perkins - Secretary of Labor, the nation's first woman Cabinet officer.

Footnote3

Proclamation 2039.

Footnote4

48 Stat. 1.

Footnote5

48 Stat. 8.

Footnote6

48 Stat. 22.

Footnote7

48 Stat. 55.

Footnote8

48 Stat. 31.

Footnote9

48 Stat. 257.

Footnote10

Act of June 13, 1933, c. 64, 48 Stat. 128.

Footnote11

Act of June 16, 1933, c. 89, 48 Stat. 162.

Footnote12

Act of May 27, 1933, c. 38, 48 Stat. 74.

Footnote13

Executive Order 6111.

Footnote14

48 Stat. 51.

Footnote15

Act of June 16, 1933, c. 90, 48 Stat. 195.

Footnote16

The correct term used by the chief of the recovery administration should be "counter-revolution." This government is a revolutionary government, born while under a condition of war. Roosevelt through his counter-revolutionary ideas and so-called economic and social experiments, sought to destroy the very foundation of our revolutionary government.

Footnote17

Executive Order 6198.

Footnote18

Executive Order 6420.

Footnote19

Executive Order 6260.

Footnote20

Act of January 30, 1934, c. 6, 48 Stat. 337.

Footnote21

Proclamation 2072.

Footnote22

48 Stat. 1283.

Footnote23

It is interesting to note the very last Act passed by the Congress and signed by Roosevelt before the summer adjournment of the Congress was the Act of June 16, 1934, entitled, "An Act to establish a uniform system of bankruptcy throughout the United States."

CHAPTER 2

THE NEW DEAL

AND THE COMMERCE CLAUSE

"We hold that our loyalty is due solely to the American Republic, and to all our public servants exactly in proportion as they efficiently serve the Republic. Every man who parrots the cry of 'stand by the President' without adding the proviso 'so far as he serves the Republic' takes an attitude as essentially unmanly as that of any Stuart royalist who championed the doctrine that the king could do no wrong. No self-respecting and intelligent freeman could take such an attitude." Theodore Roosevelt, 1918.

The Roosevelt administration came into power "confronted with an emergency more serious than war" and convinced that "there must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs." If the Administration was going to adopt their social and economic programs, it was forced to utilize the commerce clause contained in the Constitution. No other constitutional sanction was available for such New Deal acts as the National Industrial Recovery Act, the Agricultural Adjustment Act and the Social Security Act, for they could not be enforced without valid law to support and sustain them.

In 1930, Franklin Roosevelt, as governor of New York, expressing his view of the Constitution and the economic condition of the country said:

"The Constitution of the United States gives Congress no power to legislate in the matter of a great number of vital problems of government, such as the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and a dozen other important features. Washington must never be permitted to interfere in these avenues of our affairs."

Three years later, Roosevelt as the newly-elected President of the United States was presented with a catchy slogan and the blueprint of a program which in the succeeding years would transform the nation into a socialistic/communistic oligarchy. Roosevelt accepted this program, deserting the principles he enunciated so clearly three years earlier.

The program came from a book published by Stuart Chase in 1932, entitled, A New Deal, outlining the ideal government. He said:

"Best of all, the new regime would have the clearest idea of what an economic system was for. The sixteen methods of becoming wealthy would be proscribed - by firing squad if necessary - ceasing to plague and disrupt the orderly processes of production and distribution. The whole vicious pecuniary complex would collapse as it has in Russia. Money making as a career would no more occur to a respectable young man than burglary, forgery or embezzlement." Footnote1

In order that we may visualize the elastic interpretation that was given the commerce clause by the strategists behind Roosevelt's New Deal legislation in their attempt to adopt the programs outlined in Chase's book, we must by way of contrast refer to the well known statement by Mr. Justice Lamar in Kidd v. Pearson, Footnote2 a case that was utilized by critics of the New Deal:

"Manufacturing 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 (commerce) 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 manufacture, 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?"

Although this statement was uttered in a case involving state power, the New Deal strategists conception of the commerce clause was in their minds a far cry from the doctrine of the Supreme Court laid down in the Kidd case.

Looking into the minds of these strategists and analyzing the chief techniques and economic theories utilized by the Roosevelt administration in its attempt to justify the validity of the New Deal legislation, six theories were advanced by the Administration in 1933 in finding the power needed for Roosevelt to implement his so-called economic and social reforms under the commerce clause of the Constitution. This chapter will examine these six theories.

THEORY ONE

Whether a certain activity is subject to the commerce clause is a question of economics.

To Roosevelt, the term "commerce" did not have a precise and static meaning. The authors of the New Deal insisted that any constitutional opinion as to the scope of the commerce clause in a particular situation, must run the gauntlet of an economic justification on the basis of the factual background.

Congress, in passing the Agricultural Adjustment Act Footnote3 and the National Industrial Recovery Act, Footnote4 incorporated into these statutes a Declaration of Emergency and a Declaration of Policy in an attempt to connect the economic depression in agriculture and business with the interstate commerce clause. These declarations follow the enacting clause and were an integral part of the statute.

The Declaration of Emergency in the Agricultural Adjustment Act reads:

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities it is hereby declared that these conditions in the basic industry of agriculture have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of Title I of this Act.

The Declaration of Policy of the National Industrial Relief Act declares:

A national emergency, productive of widespread unemployment and disorganization of industry, which burdens interstate commerce is hereby declared to exist.

In these acts, nothing was left to conjecture or implication. It was assumed by the Administration that this change in legislative technique afforded a much more effective device than the old-fashioned preamble. However, it should be noted, preambles are not properly speaking, parts of acts. They do not exproprio vigore (make the law) and in themselves have no constraining force upon the citizen. Footnote5

THEORY TWO

The Courts should accord every possible presumption in favor of the correctness of the legislative declaration where a declaration of emergency is incorporated into an act.

In Block v. Hirsch, Footnote6 the Supreme Court examined a congressional act regulating rents in the District of Columbia which contained a declaration of emergency statement. Mr. Justice Homes speaking for the Court said:

"A declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact: That the emergency declared by the statute did exist must be assumed."

In Nebbia v. People of the State of New York, Footnote7 the New York Legislature incorporated a declaration of emergency into the Agricultural and Markets Act setting forth the reasons for the enactment. The Court declared:

"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. 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 Ins. Co., 282 U.S. 251, 257, 258; Grant v. Oklahoma City, 289 U.S. 98, 102."

In the Minnesota Moratorium Act, the Minnesota legislature utilized a declaration of emergency in the first section of the Act. The Supreme Court of the United States held this legislation valid in Home Building and Loan Association v. Blaisdell. Footnote8 The Court said:

"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. The economic emergency which threatened the loss of homes and lands which furnished those in possession the necessary shelter and means of subsistence was a potent cause for the enactment of the statute."

THEORY THREE

The legal effect of the emergency.

The New Deal strategists did not contend that Congress had an "emergency" power over commerce in the sense that constitutional limitations are suspended or that by virtue of the emergency the Federal Government has a true police power over all business activity. They reasoned the only effect of an "emergency," in the sense that the so-called economic depression was an emergency, is that it presented a situation in which interstate commerce was endangered by activities which in normal times would not seriously affect it. The Administration reasoned Congress, with Roosevelt leading the way, could then reach out and control those activities under its commerce power because of their effect on interstate commerce, and for no other reason.

In Wilson v. New, Footnote9 the Supreme Court declared:

"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."

In In Re Debs, Footnote10 the Court said:

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary each succeeding generation."

THEORY FOUR

Whether the economic reasoning behind the legislation is sound or unsound is not open to judicial inquiry.

In Stafford v. Wallace, Footnote11 the Supreme Court declared:

"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. This Court will certainly not substitute its judgment for that of Congress in such a matter, unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent." (emphasis added).

At the time of the adoption of the Anti-Trust Laws, Footnote12 it was the opinion of Congress that free and unrestricted competition was a wise and wholesome situation for all commerce, and that the national prosperity required that such free competition be maintained. The courts did not then inquire into the soundness of the economic theory thus adopted by Congress but upheld the Anti-Trust Laws as a proper exercise of the commerce power. Thus, in Northern Securities Co. v. United States, Footnote13 the Supreme Court said:

"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. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best served when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men." (emphasis added).

In these cases, Congress found that the forces of free competition are, if unrestricted, not in the interest of the national prosperity, but it is not for the courts to pass (declared the Roosevelt administration) on the wisdom of the economic philosophy underlying the New Deal legislation. To the Roosevelt administration, a new concept of commerce power began to emerge in 1933.

THEORY FIVE

The commerce clause is not limited to the regulation of the movement of commodities or persons or information across state lines, but extends to the regulation of intrastate activities whenever such regulation is necessary for the effective control of interstate activity.

The New Deal strategists felt that when intrastate commerce is intermingled with interstate commerce (over which Congress exercises its regulatory power) the effective regulation of the latter requires regulation of the former. To justify this reasoning the New Deal strategists relied on as support for this claim the following cases.

In United States v. New York Central R.R., Footnote14 which held the recapture clause valid though it reduced income from intrastate as well as interstate rates, the Supreme Court said:

"Where, as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce."

In the Minnesota Rate Cases, Footnote15 the Supreme Court, in discussing the power of the Federal Government to fix intrastate railroad rates, said:

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subject committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." (emphasis added).

The New Deal strategists reasoned that intrastate commerce must also be regulated where the regulation of interstate commerce alone would give to intrastate commerce of the same character an unfair competitive advantage.

In the Houston East & West Texas Railway Co. v. United States, Footnote16 the Supreme Court sustained the power of the Interstate Commerce Commission to fix intrastate rates where it was shown that, unless such power was sustained, interstate shippers would be forced to pay rates disproportionately high as compared with the rates paid by intrastate shippers. In holding so, the Court said:

"The power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." (emphasis added).

The strategists insisted that when intrastate commerce affects or burdens interstate commerce, Congress has the power to regulate both intrastate and interstate commerce. The New Deal strategists emphasized the depression caused businesses of the nation to become a single integrated whole. The prosperity of basic industry was dependent on every other industry if the nation was to pull free from its economic and social problems. Before the nation became an economic unit, commercial activities in one state concerned other states only through actual movements of goods across state lines. But by virtue of the unity of the national business structure in 1933, emphasis was now placed not on movement, but on the fact that business in one state does effect business in other states, even though the business might confine itself to the territorial boundaries of the state. The effort under the New Deal to fix prices, control output, regulate wages and hours, relieve unemployment, define trade practices and increase purchasing power claimed to have for its chief object the increasing of the flow of interstate commerce which the New Deal strategists claimed reached an alarmingly low level when the Roosevelt administration came into power.

The Administration recognized that Congress could regulate purely intrastate activities which might burden and affect interstate commerce by exerting an adverse influence on the price of commodities which move in interstate commerce. The Administration illustrated this point in the cases arising under the Anti Trust Laws.

In United Mine Workers v. Coronado Coal Company, Footnote17 the Supreme Court was concerned with the effect of purely local activities of striking coal miners upon interstate commerce. Having conceded that "coal mining is not interstate commerce, and that the power of Congress does not extend to its regulation as such," the Court after citing many cases said:

"It is clear from these cases that 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."

In Local 167, International Brotherhood of Teamsters v. United States, Footnote18 the Court stated:

"But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. United States v. Brims, 272 U.S. 549; Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310; United States v. Swift & Co., 122 Fed.

529, 532-533. Cf. Swift & Co. v. United States, 196 U.S. 375, 398. The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions." (emphasis added).

In United States v. Ferger, Footnote19 the question at issue was the validity of an act of Congress punishing the issuance and the utterance of a fictitious bill of lading. It was argued that as there was and could be no commerce in a fraudulent and fictitious bill of lading, for the reason that there was no actual consignee and no shipment intended, therefore, the power of Congress could not embrace such pretended bill. The Supreme Court said:

"But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it. Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills, which, in and of themselves, involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate."

The Administration reasoned since the depression seriously obstructed the flow of commodities in interstate commerce, measures could be initiated in order to free business from the burdens of the depression and regulations could be adopted which would protect and foster interstate commerce.

THEORY SIX

The "current of commerce" doctrine.

The Administration felt the dicta contained in Swift & Co. v. United States, Footnote20 had a new significance under the so-called "emergency" conditions of 1933, which enabled them to adopt an expanded interpretation of the commerce clause. In the Swift case the Supreme Court declared:

"Commerce among the states is not a technical legal conception, but a practical one drawn for the course of business. The plan may make the parts unlawful and bring the constituent acts, although not in themselves interstate commerce, within the commerce clause."

In 1922, Chief Justice Taft in Board of Trade of Chicago v. Olsen, Footnote21 characterized the Swift case as:

“a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country, and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such. The Swift case merely fitted the commerce clause to real and practical essence of modern business growth." Footnote22

This "current" or "stream of commerce" doctrine looks to the subject of the regulation as a whole, and not to the individual transgressor's separate acts. In Stafford v. Wallace, Footnote23 the Court said of the Swift case:

"It was the inevitable recognition of the great central fact that such 'streams of commerce' from one part of the country to another which are ever flowing are in their very essence the commerce among the states and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect to such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilitates when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." Footnote24

In the Swift case the Court said:

"But we do not mean to imply that the rule which marks the point at which state taxation or regulation become permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states." Footnote25

There are many transactions that may be subject both to state and federal regulations, the Administration declared. Thus intrastate railroad rates may be regulated by the states but when intrastate rates affect interstate commerce, Congress may regulate them. Footnote26 Sales of grain or grain exchanges are intrastate sales. The states may both regulate such sales and tax the grain which is the subject of the sale, and yet detailed regulation by Congress of all transactions on the grain exchange had been upheld. The states may still exercise their police power over intrastate acts which have an interstate effect so long as their regulations are not inconsistent with those of the Federal Government or contrary to the commerce clause. In this connection the New Deal strategists, believed the statement by Mr. Justice Holmes in the Galveston case Footnote27 was equally important:

"It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."

The commerce clause was the only clear power granted to Congress to regulate trade or business. Because of the so-called severe economic conditions which existed in the nation during the 1930's, the Administration felt Congress under the commerce clause would have ample power to combat the play of destructive economic forces, that "have broken down the orderly exchange of commodities" or have affected, burdened or obstructed the "normal currents of commerce."

Footnote1

Stuart Chase was named to the National Resources Commission in 1933 where he is credited with authoring Roosevelt's order banning ownership of gold by U.S. citizens. Chase moved steadily upward in the New Deal hierarchy. He served successively on the Securities and Exchanged Commission, the Tennessee Valley Authority, and finally settled in UNESCO, the United Nations Educational, Scientific, and Cultural Organization.

Footnote2

128 U.S. 1 (1888).

Footnote3

48 Stat. 31.

Footnote4

48 Stat. 195.

Footnote5

BLACK, INTERPRETATION OF LAWS,

pg. 254.

Footnote6

256 U.S. 526 (1920).

Footnote7

281 U.S. 502 (1933).

Footnote8

290 U.S. 398 (1934).

Footnote9

243 U.S. 332 (1932).

Footnote10

158 U.S. 564, 519 (1894).

Footnote11

258 U.S. 495, 521 (1921).

Footnote12

Act of July 2, 1890, c. 647, 26 Stat. 209.

Footnote13

193 U.S. 197, 337 (1903).

Footnote14

272 U.S. 457, 464 (1926).

Footnote15

230 U.S. 352, 399 (1912).

Footnote16

234 U.S. 342 (1913).

Footnote17

259 U.S. 344 (1922).

Footnote18

291 U.S. 293 (1933).

Footnote19

250 U.S. 199 (1919).

Footnote20

196 U.S. 375 (1905).

Footnote21

262 U.S. 1 (1922).

Footnote22

Id. at 35.

Footnote23

258 U.S. 495 (1921).

Footnote24

Id. at 518-519.

Footnote25

196 U.S. 375, 400 (1905).

Footnote26

The Shreveport Case, 234 U.S. 342 (1914).

Footnote27

Galveston, Harrisburg & San Antonio R.R. Co. v. Texas, 210 U.S. 217, 225 (1908).

CHAPTER 3

THE SUPREME COURT

AND THE NEW DEAL

"The honor and safety of our bleeding country, and every other motive that can influence the brave and heroic patriot, call loudly upon us, to acquit ourselves with spirit. In short, we must now determine to be enslaved or free. If we make freedom our choice, we must obtain it by the blessing of Heaven on our united and vigorous efforts" George Washington, August 8, 1776.

Having concluded that the Congress had full authority under the commerce clause to regulate all business activity, it is little wonder that on January 3, 1934, during his State of the Union address, Roosevelt told a jubilant Congress that the New Deal was here to stay. Roosevelt's message was greeted with enthusiasm both in Congress and in the public. Crowds eager to see and hear Roosevelt address Congress congregated inside and outside the Capitol early in the morning. By noon they had swelled to thousands, and when Roosevelt entered the gallery they cheered for two minutes. After the applause died down Roosevelt delivered his address to Congress:

"I come before you at the opening of the Regular session of the Seventy-third Congress, not to make requests for special or detailed items of legislation; I come, rather to counsel with you, who, like myself, have been selected to carry out a mandate of the whole people, in order that without partisanship you and I may cooperate to continue the restoration of our national well-being and, equally important, to build on the ruins of the past a new structure designed better to meet the present problems of modern civilization.

"Such a structure includes not only the relations of industry and agriculture and finance to each other, but also the effect which all of these have on our individual citizens and on the whole people as a nation.

"Now that we are definitely in the process of recovery, lines have been rightly drawn between those to whom this recovery means a return to old methods - and the number of these people is small - and those for whom recovery means a reform of many old methods, a permanent readjustment of many of our ways of thinking and therefore of many of our social and economic arrangements.

"Civilizations cannot go back; civilizations must not stand still. We have undertaken new methods. It is our task to perfect, to improve, to alter when necessary, but in all cases to go forward. To consolidate what we are doing, to make our economic and social structure capable of dealing with modern life is the joint task of the Legislative, the Judicial and the Executive Branches of the National Government.

"Without regard to party, the overwhelming majority of our people seek a greater opportunity for humanity to prosper and find happiness. They recognize that human welfare has not increased and does not increase through mere materialism and luxury, but that it does progress through integrity, unselfishness, responsibility and justice.

"In the past few months, as a result of our action, we have demanded of many citizens that they surrender certain licenses to do as they pleased in their business relationships; but we have asked this in exchange for the protection which the State can give against exploitation by their fellow-men or by combinations of their fellow-men.

"I congratulate this Congress upon the courage, the earnestness and the efficiency with which you met the crisis at the Special Session. It was your fine understanding of the national problem that furnished the example which the country has so splendidly followed. I venture to say that the task confronting the First Congress of 1789 was no greater than your own.

"I shall not attempt to set forth either the many phases of this crisis which we experienced last March, nor the many measures which you and I undertook during the Special Session that we might initiate recovery and reform.

"The credit of the government has been fortified by drastic reduction in the cost of its permanent agencies through the Economic Act.

"With the two-fold purpose of strengthening the whole financial structure and of arriving eventually at a medium of exchange which will have over the years less variable purchasing and debt paying power for our people than that of the past, I have used the authority granted me to purchase all American-produced gold and silver and to buy additional gold in the world markets.

"The overwhelming majority of the banks, both national and State, which reopened last Spring, are in sound condition and have been brought within the protection of Federal Insurance.

"We have made great strides toward the objectives of the National Industrial Recovery Act, for not only have several millions of our unemployed been restored to work, but industry is organizing itself with a greater understanding that reasonable profits can be earned while at the same time protection can be assured to guarantee to labor adequate pay and proper conditions of work. Child labor is abolished. Uniform standards of hours and wages apply today to 95 per cent of industrial employment within the field of the National Industrial Recovery Act. We seek the definite end of preventing combinations in furtherance of monopoly and in restraint of trade, while at the same time we seek to prevent ruinous rivalries within industrial groups which in many cases resemble the gang wars of the underworld and in which the real victim in every case is the public itself.

"Under the authority of this Congress, we have brought the component parts of each industry together around a common table, just as we have brought problems affecting labor to a common meeting ground. Though the machinery, hurriedly devised, may need readjustment from time to time, nevertheless I think you will agree with me that we have created a permanent feature of our modernized industrial structure and that it will continue under the supervision but not the arbitrary dictation of government itself.

"I shall continue to regard it as my duty to use whatever means may be necessary to supplement State, local and private agencies for the relief of suffering caused by unemployment. We shall, in the process of recovery, seek to move as rapidly as possible from direct relief to publicly supported work and from that to the rapid restoration of private employment.

"It is the eternal credit of the American people that this tremendous readjustment of our national life is being accomplished peacefully, without serious dislocation, with only a minimum of injustice and with a great, willing spirit of cooperation throughout the country.

"Disorder is not an American habit. Self-help and self-control are the essence of the American tradition-not of necessity the form of that tradition, but its spirit. The program itself comes from the American people.

"It is an integrated program, national in scope. Viewed in the large, it is designed to save from destruction and to keep for the future, the genuinely important values created by modern society. The vicious and wasteful parts of that society we could not save if we wished; they have chosen the way of self-destruction. We would save and encourage the slowly growing impulse among consumers to enter the industrial market place equipped with sufficient organization to insist upon fair prices and honest sales.

"We have ploughed the furrow and planted the good seed; the hard beginning is over. If we would reap the full harvest we must cultivate the soil where this good seed is sprouting and the plant is reaching up to mature growth.

"A final personal word. I know that each of you will appreciate that I am speaking no mere politeness when I assure you how much I value the fine relationship that we have shared during these months of hard and incessant work. Out of these friendly contacts we are, fortunately, building a strong and permanent tie between the legislative and executive branches of the government. The letter of the Constitution wisely declared a separation, but the impulse of common purpose declares a union. In this spirit we join once more in serving the American people."

It was apparent to both parties in Congress that Roosevelt's State of the Union address would greatly strengthen his prestige and his hold on Congress, allowing him to continue without question his so-called economic, social and monetary reforms.

The Democrats declared Roosevelt had won the country by his speech. The reaction of the people to Roosevelt's legislative programs to be presented later, leaders of the party asserted, would be most powerful, assuring quick congressional approval.

Across the Atlantic ocean, British press reaction to Roosevelt's message painted a somewhat different view of the events unfolding in America. Leading newspapers interpreted his message to Congress as proof of Roosevelt's desire to embark upon a long-term policy of reconstructing the American economic, social and industrial systems.

Some British papers expressed doubt as to whether Roosevelt could attain these objectives along the lines indicated in his speech. All agree, however, that Roosevelt still had a practically unanimous country backing him.

The Times of London closed their reaction to Roosevelt's message to Congress by concluding:

In short, can America, with its traditions of highly individualistic, not to say lawless, private enterprise in industry and its great lack of a trained and professional civil service, be induced to accept the degree of State control over the social and economic structure which President Roosevelt clearly proposes without the risk of paralyzing its capacity to achieve recovery on the existing capitalistic lines?

In the light of this message, his long-run policy seems likely to carry his administration much further in the direction of socialism than most Americans have yet begun to realize.

Before continuing, let's examine the object and purpose of civil government and see if it agrees with Roosevelt's interpretation of the purpose of government as indicated in his speech before Congress in January 1934.

The object of civil government, is to secure to the members of a community the free enjoyment of their rights. A right is the just claim or lawful title which we have to anything. Hence we say, a person has a right to what he has earned by his labor, or bought with his money. Having thus acquired it, it is lawfully and justly his own, and no other person has a right to it. We have also a right to do as we please, and to go where we please, if in so doing we do not trespass upon the rights of others: for all men in society have the same rights; and no one has a right to disturb others in the enjoyment of their rights.

Being free to enjoy what belongs to us, or to do as we please, is called liberty. The words right and liberty, however, do not have the same meaning. We may have a right to a thing when we have not the liberty of enjoying or using it. John has a pencil which is justly his own; but James takes it from him by force. John's liberty to enjoy the use of his pencil is lost, but his right to it remains. James has no right to the pencil, though he enjoys the use of it.

All laws ought to be so made as to secure to men the liberty to enjoy and exercise their natural rights. Natural rights are those to which we are entitled by nature; rights which we are born. Every individual is born with a right to live, and freely to enjoy the fruits of his labor, and whatsoever is justly his own. Hence liberty itself is a natural right; that is, it is ours by nature, or by birth, and can not be rightfully taken from us.

Some rights are called inalienable. The term is often applied to natural rights in general. But in its strict and proper sense, it means only rights which a person can not lawfully or justly alienate

and transfer to another; that is, rights which can not be parted with and passed over to another, by one's own act. But natural and inalienable rights may be forfeited by crime. By stealing, a man loses his right to liberty, and is justly imprisoned. If he commits murder, he forfeits his right to life, and lawfully suffers death.

Rights and liberty are sometimes called civil rights and civil liberty. It may be asked, Wherein do these differ from natural rights and liberty? Rights and liberty may, at the same time, be both natural and civil. Speaking of them as being ours by nature, or by birth, we call them natural; when they are spoken of as being secured to us by civil government and laws, they are called civil. John's right to his pencil, being secured to him by the laws of civil society, is a civil right. It is at the same time a natural right, because, by the law of nature, he is born with a right to the free use of his property.

Some consider natural liberty to consist in the freedom to do in all things as we please, without regard to the interests of our fellow-men; and that, on entering into civil society, we agree to give up a portion of our natural rights to secure the remainder, and for the good of other members of the society. But if mankind are by nature fitted and designed for the social state, and are all entitled to equal rights, then natural liberty does not consist in being free to say or to do whatever our evil passions may prompt us to do. To rob and to plunder may be the natural right of a tiger; but it is not the natural right of men. Natural rights and natural liberty are such only as are conferred by the law of nature, which forbids our doing whatever is inconsistent with the rights of others.

The law of nature is the will of the Creator. It is called the law of nature, because it is a perfect rule of conduct for all moral and social beings; a rule which is right in itself, right in the nature of things, and which would be right and ought to be obeyed, if no other law or positive command had ever been given. It is right in itself that all men should have the liberty of enjoying the use of what is their own; and it would be right that we should give to every one his due, if we had never been commanded to do so.

The law of nature is the rule of conduct which we are bound to observe toward our Maker and our fellow-men, by reason of our natural relations to them. Mankind being dependent upon their Creator, they own him duties which they ought to perform, though he had never positively enjoined these duties. To serve our Creator is a duty which arises out of the relation we sustain to him. So the relation between parent and child renders it fit and proper that children obey their parents, on whom they are dependent for protection and support. And from our relations to our fellow-men, on whom also we are in a measure dependent, and who have the same rights as ourselves, it is our duty to promote their happiness as well as our own, by doing to them as we would that they should do to us. This is required by the law of nature.

But if the law of nature is the rule by which mankind ought to regulate their conduct, it may be asked, Of what use are written laws? Mankind are not capable of discovering, in all cases, what the law of nature requires. It has therefore pleased Divine Providence to reveal his will to mankind, to instruct them in their duties to himself and to each other. This will is revealed personally to us and in the Holy Scriptures, and is called the law of revelation, and the Divine law.

But although men have the Divine law for their guide, human laws are also necessary. The Divine law is broad, and comprehends rules to teach men their whole duty; but it does not specify every particular act of duty; much of it consists of general principles to which particular acts must be made to conform. God has commanded men to do right, and to deal justly with each other; but men do not always agree as to what is right: human laws are therefore necessary to regulate the conduct of men. And these laws are written that it may always be known what they are.

Again, it may be asked, What must be done when a human law does not agree with divine law? Must the human law be obeyed? A law clearly contrary to the law of God, we are not bound to obey. It is sometimes difficult to determine whether human laws and the Divine law agree. Hence the importance of having the laws made by wise and good men.

The posterity of a people depends as much upon a good form of government as upon its being administered by good men; and experience has proved, that the objects of civil government may be best secured by a written constitution, founded upon the will or consent of the people.

The form of the government in the United States is expressed in a written constitution. A constitution is a form of rules by which the members of a society agree to be governed. The persons forming an association, draft a set of rules setting forth the objects of the association, declaring what officers it shall have, and prescribing the powers and duties of each, and the manner of conducting its operations. So the rules adopted by the people of a state or nation for their government, are called the constitution. They are in the nature of articles of agreement by which the people mutually agree to be governed.

The object of a constitution is two-fold. It is intended, first to guard the rights and liberties of the people against infringement by those entrusted with the powers of government. It points out the rights and privileges of the people, and prescribes the powers and duties of the principal officers of the government; so that it may be known when they transcend their powers, or neglect their duties: and, by limiting their terms of office, it secures to the people the right of displacing, at stated periods, those who are unfaithful to their trust, by electing others in their stead.

Keeping with the true purpose of civil government and its protection of natural and civil rights, on January 8, 1934, the Supreme Court had before it its first test of New Deal legislation for consideration in the form of the Minnesota Moratorium Law. Footnote1 True, it was a state enactment, but it embodied the spirit of the New Deal as heretofore defined. This case presented a challenge to a law where the right of foreclosure of mortgages was suspended for a period of the emergency, not to exceed 2 years. The Court received the commendation of all "New Dealers" when it sustained the act, and Chief Justice Hughes, who wrote the opinion for the Court, was acclaimed the humanitarian jurist par excellence. The Supreme Court held that the State, in entering the Union, or Federal State, did so with the implied reservation of the power of self-preservation; that although it surrendered the power to impair the obligation of a contract, yet it reserved the power to suspend the remedies thereunder during the period of the emergency. But such reserved power was held to abate as the emergency disappeared, and that contractual rights could not under the act be arbitrarily suspended for any period of time, not even for a day.

Then on March 5, 1934, the popularity of the Supreme Court was further enhanced by the decision in the Nebbia case, Footnote2 better known as the New York Milk case. Mr. Justice Roberts wrote the opinion for the Court, and he held that 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.

The "New Dealers" confidence in the Court was enhanced further by the decision of April 2, 1934, Footnote3 upholding the State of Washington statute imposing an excise tax of 15 cents per pound on all sales of butter substitutes by distributors, which the State had enacted for the benefit of the dairying industry of the State; and the decision of December 3, 1934, Footnote4 upholding an emergency statute of Maryland limiting and charging the rights of mortgages with respect to foreclosure proceedings, was regarded as further evidence that the Court had gone decidedly pro New Deal.

To many observers, it appeared that the Supreme Court was willing to validate Roosevelt's New Deal programs and because of this stamp of approval, Roosevelt's public popularity soared, giving him more and more power to continue on this path toward his new socio-economic order.

On June 8, 1934, Roosevelt delivered to Congress a message outlining his threefold attack on the problems of human security. In this speech to Congress Roosevelt said:

"You are completing a work begun in March, 1933, which will be regarded for a long time as a splendid justification of the vitality of representative government. I greet you and express once more my appreciation of the cooperation which has proved so effective.

"Only a small number of the items of our program remain to be enacted and I am confident that you will pass on them before adjournment. Many other pending measures are sound in conception, but must, for lack of time or of adequate information, be deferred to the session of the next Congress. In the meantime, we can well seek to adjust many of these measures into certain larger plans of government policy for the future of the nation.

"On the side of relief we have extended material aid to millions of our fellow citizens.

"On the side of recovery we have helped to lift agriculture and industry from a condition of utter prostration.

"But, in addition to these immediate tasks of relief and recovery we have properly, necessarily and with overwhelming approval determined to safeguard these tasks by rebuilding many of the structures of our economic life and of reorganizing it in order to prevent a recurrence of collapse.

"It is childish to speak of recovery first and reconstruction afterward. In the very nature of the processes of recovery we must avoid the destructive influences of the past. We have shown the world that democracy has within it the elements necessary to its own salvation.

"Less hopeful countries where the ways of democracy are very new may revert to the autocracy of yesterday. The American people can be trusted to decide wisely upon the measures to be taken

by the government to eliminate the abuses of the past and to proceed in the direction of the greater good for the greater number.

"Our task of reconstruction does not require the creation of new and strange values. It is rather the finding of the way once more to known, but to some degree forgotten, ideals and values. If the means and details are in some instances new, the objectives are as permanent as human nature.

"Among our objectives I place the security of the men, women and children of our nation first.

"This security for the individual and for the family concerns itself primarily with three factors. People want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safeguard against the misfortunes which cannot be wholly eliminated in this man-made world of ours.

"In a simple and primitive civilization, homes were to be had for the building. The bounties of nature in a new land provided crude but adequate food and shelter. When the land failed, our ancestors moved on to better land. It was always possible to push back the frontier, but the frontier has now disappeared. Our task involves the making of a better living out of the lands that we have.

"So also, security was attained in the earlier days through the interdependence of members of families upon each other and of the families within a small community upon each other. The complexities of great communities and of organized industry make less real these simple means of security. Therefore, we are compelled to employ the active interest of the nation as a whole through government in order to encourage a greater security for each individual who composes it.

"With the full cooperation of the Congress we have already made a serious attack upon the problem of housing in our great cities. Millions of dollars have been appropriated for housing projects by Federal and local authorities, often with the generous assistance of private owners. The task thus begun must be pursued for many years to come. There is ample private money for sound housing projects; and the Congress, in a measure now before you, can stimulate the lending of money for the modernization of existing homes and the building of new homes. In pursuing this policy we are working toward the ultimate objective of making it possible for American families to live as Americans should.

"In regard to the second factor, economic circumstances and the forces of nature themselves dictate the need of constant thought as to the means by which a wise government may help the necessary readjustment of the population. We cannot fail to act when hundreds of thousands of families live where there is no reasonable prospect of a living in the years to come. This is especially a national problem. Unlike most of the leading nations of the world, we have failed to create a national policy for the development of our land and water resources and for their better use by those people who cannot make a living in their present positions. Only thus can we permanently eliminate many millions of people from the relief rolls on which their names are now found.

"The third factor relates to security against the hazards and vicissitudes of life. Fear and worry based on unknown danger contribute to social unrest and economic demoralization. If, as our Constitution tells us, our Federal Government was established among other things "to promote the general welfare," it is our plain duty to provide for that security upon which welfare depends.

"Next Winter we may well undertake the great task of furthering the security of the citizen and his family through social insurance.

"This is not an untried experiment. Lessons of experience are available from States, from industries and from many nations of the civilized world. The various types of social insurance are interrelated; and I think it is difficult to attempt to solve them piecemeal. Hence, I am looking for a sound means which I can recommend to provide at once security against several of the great disturbing factors in life - especially those which relate to unemployment and old age. I believe there should be a maximum of cooperation between States and the Federal Government. I believe that the funds necessary to provide this insurance should be raised by contribution rather than by an increase in general taxation. Above all, I am convinced that social insurance should be national in scope, although the several States should meet at least a large portion of the cost of management, leaving to the Federal Government the responsibility of investing, maintaining and safeguarding the funds constituting the necessary insurance reserves.

"I have commenced to make, with the greatest care, the necessary actuarial and other studies for the formulation of plans for the consideration of the Seventy-fourth Congress.

"These three great objectives - the security of the home; the security of livelihood and the security of social insurance - are, it seems to me, a minimum of the promise that we can offer to the American people. They constitute a right which belongs to every individual and every family willing to work. They are the essential fulfillment of measures already taken toward relief, recovery and reconstruction.

"This seeking for a greater measure of welfare and happiness does not indicate a change in values. It is rather a return to the values lost in the course of our economic development and expansion.

"Ample scope is left for the exercise of private initiative. In fact, in the process of recovery, I am greatly hoping that repeated promises that private investment and private initiative to relieve the government in the immediate future of much of the burden it has assumed will be fulfilled. We have not imposed undue restrictions upon business. We have not opposed the incentive of reasonable and legitimate private profit. We have sought rather to enable certain aspects of business to regain the confidence of the public. We have sought to put forward the rule of fair play in finance and industry.

"It is true that there are a few among us who would still go back. These few offer no substitute for the gains already made, nor any hope for making future gains for human happiness. They loudly assert that individual liberty is being restricted by government, but when they are asked what individual liberties they have lost, they are put to it to answer.

"We must dedicate ourselves anew to a recovery of the old and sacred possessive rights for which mankind has constantly struggled - homes, livelihood and individual security. The road to these values is the way of progress. Neither you nor I will rest content until we have done our utmost to move further on that road."

During the latter part of 1934, the Roosevelt administration worked diligently to enlarge the social and economic order which these three great objectives sought to bring to pass. With the blessing and approval of the people behind every proposal which came out of the Roosevelt administration and with a willing Congress passing these proposals with little or no debate, it was little wonder that the administration embarked on the next step in their New Deal legislation in 1935 with renewed confidence and zeal. This confidence was expressed by Roosevelt in his State of the Union address delivered January 4, 1935, which he declared:

"Throughout the world change is the order of the day. In every nation economic problems, long in the making, have brought crises of many kinds for which the masters of old practice and theory were unprepared. In most nations social justice, no longer a distant ideal, has become a definite goal, and ancient governments are beginning to heed the call.

"Thus, the American people do not stand alone in the world in their desire for change. We seek it through tested liberal traditions, through processes which retain all of the deep essentials of that republican form of representative government first given to a troubled world by the United States.

"As the various parts in the program began in the extraordinary session of the seventy-third Congress shape themselves in practical administration, the unity of our program reveals itself to the nation. The outlines of the new economic order, raising from the disintegration of the old, are apparent. We test what we have done as our measures take root in the living texture of life. We see where we have built wisely and where we can do still better.

"The attempt to make a distinction between recovery and reform is a narrowly conceived effort to substitute the appearance of reality for reality itself. When a man is convalescing from illness wisdom dictates not only cure of the symptoms but also removal of their causes.

"We find our population suffering from old inequalities, little changed by past sporadic remedies. In spite of our efforts and in spite of our talk, we have not weeded out the over privileged and we have not effectively lifted up the under privileged. Both of these manifestations of injustice have retarded happiness. No wise man has any intention of destroying what is known as the profit motive: because by the profit motive we mean the rights by work to earn a decent livelihood for ourselves and for our families.

"We have , however, a clear mandate from the people, that Americans, must forswear that conception of the acquisition of wealth which, through excessive profits, creates undue private power over private affairs and, to our misfortune, over public affairs as well. In building toward this end we do not destroy the ambition nor do we seek to divide our wealth into equal shares on stated occasions. We continue to recognize the greater ability of some to earn more than others. But we do assert that the ambition of the individual to obtain for him and his a proper security, a

reasonable leisure, and a decent living throughout life, is an ambition to be preferred to the appetite for great wealth and great power.

"I recall to your attention my message to the Congress last June in which I said: "Among our objectives I place the security of the men, women and children of the nation first." That remains our first and continuing task; and in a very real sense every major legislative enactment of this Congress should be a component part of it.

"In defining immediate factors which enter into our quest, I have spoken to the Congress and the people of three great divisions:

1. The security of a livelihood through the better use of the natural resources of the land in which we live. 2. The security against the major hazards and vicissitudes of life. 3. The security of decent homes.

"I am now ready to submit to the Congress a broad program designed ultimately to establish all three of these factors of security - a program which because of many lost years will take many future years to fulfill. "

In the years 1933 and 1934 Congress and the people rallied around Roosevelt's New Deal legislation. They were willing participants with him in his efforts to completely destroy and overthrow the system of Government which our forefathers established under divine authority of God. The Supreme Court declared the early new deal legislation as valid; as within the power of Congress. Fortunately, when the main parts of Roosevelt's New Deal legislation came before the Supreme Court, the Court could see that many of the acts did not protect the natural and civil rights of the people of the nation, therefore, the Judicial Branch was not willing to quietly surrender under the great weight of Roosevelt's power and popularity. It would take more than the President of the United States or the Congress to force them to relinquish their power to the executive branch, it would take the increasing anger and hostility of the people against the Supreme Court, to finally achieve the "great surrender" of our Judicial Branch.

Footnote1

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

Footnote2

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

Footnote3

Magnano Company v. Hamilton, 292 U.S. 40 (1934).

Footnote4

United States Mortgage Company v. Matthews, 293 U.S. 232 (1934).

CHAPTER 4

THE COURT'S INTERPRETATION OF THE COMMERCE CLAUSE BEFORE 1937

"The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam in the whole volume of human nature by the hand of the Divinity itself, and can never be erased or obscured by mortal power." Alexander Hamilton, 1775.

Before we continue further, and before the definition of the commerce clause as interpreted by the Roosevelt administration and eventually adopted by the courts can be fully understandable, a brief review of the interpretation by the courts of the commerce clause prior to Roosevelt's arrival in office seems to be not only proper but essential. To fully understand how we were led willingly, under the guiding hand of Roosevelt, into a condition where all our activities would be regulated under the interstate commerce clause, we must understand how things were before we grasped the hand stretched out to us.

The commerce clause of the Constitution of the United States reads:

The Congress shall have power ... to regulate commerce with foreign nations, among the several States, and with the Indian tribes. Constitution of the United States, Article I, Section 8, para. 3.

The section concludes:

The Congress shall have power ... to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department, or any officer thereof. Article I, Section 8, para. 18.

The Commerce Clause in the Constitution

The commerce clause in the federal Constitution illustrates more pointedly than any other the circumstances which forced the adoption of the Constitution and the formation of the government of the Union, and its judicial history is the clearest example of the adaptation of a written Constitution by construction to conditions and emergencies never contemplated by its framers. It was the necessity for national control over foreign commerce which was the immediate occasion for calling the convention of 1787, as the defect of the articles of confederation in failing to provide for the control of this commerce was universally recognized.

Under the articles of confederation adopted during the revolutionary war, Congress had power to regulate trade with the Indians, but the control of foreign and interstate commerce remained with the states. The compact between Virginia and Maryland relative to the navigation of the Potomac river and the Chesapeake Bay, and the report of the commissioners thereon led the Virginia legislature to call a conference at Annapolis in 1786 to take into consideration the "trade of the United States, to examine the relative situation in the trade of the states, to consider how far a uniform system in their commercial relations may be necessary to the common interests and their permanent harmony." From the Annapolis conference came the call for the Philadelphia convention of 1787, which framed the Constitution.

Commerce among the states however was in 1787 very simple, and other than that carried on in teams and wagons was carried on by navigation. There was comparatively little discussion in the debates of the convention or in the Federalist Papers concerning the federal control over interstate commerce, and no consideration seems to have been given to the question of the effect of this grant of the federal power upon the police or taxing power of the states. It was regarded as essentially supplemental to the control over foreign commerce, and was granted so as to make the control over foreign commerce effective. It was said by Mr. Madison,Footnote1 that without this supplemental provision the great and essential power of regulating foreign commerce would have been incomplete and ineffectual, and that with state control of interstate commerce, ways would be found to load the articles of import and export during the passage through their jurisdictions with duties, which would fall on the makers of the latter and the consumers of the former.

The far-reaching importance of this federal control over commerce among the states was not and could not be foreseen. It only came to be realized in the course of years, as the commercial development of the country demanded a judicial construction of the federal power in harmony with the requirements of such commerce. The basis of this construction for all time was made by the far-sighted and masterful reasoning in the broad and comprehensive opinions of Chief Justice Marshall.

The Supreme Court in 1895Footnote2 in affirming the supremacy of the federal power in interstate commerce, said:

"Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad trains and steamships. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce, unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Federal Sovereignty in Interstate Commerce

The federal authority in interstate commerce is enforced not only by the power of regulation granted to Congress by the Constitution, but also by the exercise of other expressly enumerated powers of Congress, more or less directly relating to interstate commercial intercourse. Thus the power to establish post offices and post roads, to coin money, to establish uniform systems of bankruptcy, to grant patents for discoveries, and most important of all the taxing power, are closely associated with commercial relations and activities. There is also what has been termed the "co-efficient power," the power to make all laws necessary and proper to carry into effect the foregoing powers, and all other powers vested by the Constitution, in the government of the United States or in any department or office thereof.

The broad and comprehensive construction given to this co-efficient power, of selecting measures for carrying into execution the constitutional powers of the government has made academic rather than practical the long debated distinction between the express and implied powers of Congress.Footnote3 The words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution, but they include all proper means which are conductive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect such end.Footnote4

The federal authority in interstate commerce, as in other matters, does not rest on a mere aggregation of the enumerated powers. Although the government of the United States is one of enumerated powers, and under the Tenth Amendment 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, it is also true that there is a national sovereignty - a national Federal State - within the scope of the enumerated powers, and the Constitution and laws of the United States are the supreme Law of the Land. Upon this broad principle of the sovereignty growing out of the aggregation of enumerated power was based the power to charter a national bank, the power to exercise the right of eminent domain, the power to issue legal tender notes, and the power to exclude aliens. The power to issue legal tender notes, which was strongly controverted, was based upon two enumerated powers, that of coining money and thereby establishing a national

currency, and also upon the commerce power. It was also declared to be a power inherent in sovereignty, as exercised by other sovereignties at the time of the adoption of the Constitution, and not expressly withheld by the Constitution from Congress.

As a political sovereignty the government of the United States may by physical force, through its official agents in the enforcement of its powers, exercise complete sovereignty over every part of American soil which belongs to it. There is a "Peace in the United States," and this peace can be enforced by the executiveFootnote5 in the protection of the judicial officers of the United States throughout the United States and within the limits of any State. These fundamental principles were very strongly asserted in the Debs case,Footnote6 where the Court said that the government of the United States, in the exercise of its power over the mails and in protecting interstate commerce, had jurisdiction over every foot of soil in its territory and acted directly upon every citizen. The decision was expressly based upon the sovereign power of the United States within the limits of its enumerated powers, and on the power of the government to enforce that sovereignty through the executive or through the courts, acting directly through the citizens and not through the agencies of a state, when the federal authority is resisted.

The complexity of our federal governmental system includes this distinct sovereign power in the federal government with sovereign powers in the states. In the language of Chief Justice Marshall,Footnote7 the powers of a sovereign are divided between the government officers of the Union and those of the states. They are each sovereign with respect to the rights committed to the other. The Supreme Court of MassachusettsFootnote8 said that it was a bold, wise and successful attempt to place the people under two distinct governments, each sovereign and independent within its own sphere of action, dividing the jurisdiction between them, not by territorial limits nor by the relation of superior or subordinate, but classifying the subjects of jurisdiction and designing those over which each had entire and independent jurisdiction.

The federal government therefore, though sovereign within the sphere of its enumerated powers, has not what has been termed inherent sovereignty, nor has it any general police powers; but with its wide scope of selection of the means for the execution of its enumerated powers the distinction is hardly a practical one in the actual working of our dual political system.

The Case of

Gibbons v. Ogden

The judicial construction of the commerce clause begins in 1824 with the great opinion of Chief Justice Marshall in Gibbons vs. Ogden,Footnote9 wherein a grant of the state of New York for the exclusive right to navigate the waters of New York with boats propelled by fire or steam was held void as repugnant to the commerce clause of the Constitution, so far as the act prohibited vessels licensed by the laws of the United States from carrying on the coast trade by navigating the said waters by fire or steam.

The broad and comprehensive construction of the term "commerce" in this opinion is the basis of all subsequent decisions construing the commerce clause, and is the recognized source of authority. Commerce is more than traffic; it includes intercourse. The power to regulate is the power to prescribe the rules by which commerce is to be governed. This power like all others vested in Congress is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than as prescribed in the Constitution. The power over commerce with foreign nations and among the several States, said the Court, is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as is found in the Constitution of the United States. The power comprehended navigation within the limits of every state, so far as navigation may be in any manner connected with commerce with foreign nations or among the several States, or with the Indian tribes, and therefore it passed beyond the jurisdictional line of New York and included the public waters of the state which were connected with such foreign or interstate commerce.

The most important and far-reaching declaration in the opinion was that of the supremacy of the federal power, so that in any case of conflict the act of Congress was supreme, and state laws must yield thereto, though enacted in the exercise of powers which are not controverted.

What is Commerce?

The term "commerce" is not defined in the Constitution, but its meaning has been determined by the process of judicial inclusion and exclusion on the broad and comprehensive basis laid down in Gibbons v. Ogden. Commerce, it was there said, is not traffic alone, it is intercourse. "It described the commercial intercourse between nations, and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the Passenger CasesFootnote10 the rule declared in Gibbons v. OgdenFootnote11 was applied in holding invalid certain state statutes imposing taxes upon alien passengers. It was said that commerce included navigation and intercourse and the transportation of passengers.

In the Pensacola Telegraph Company caseFootnote12 the Court said that since the case of Gibbons v. OgdenFootnote13 it had never been doubted that commercial intercourse was an element which comes within the power of regulation by Congress, and that the power thus granted was not confined to the instrumentalities of commerce known or in use when the Constitution was adopted, but kept pace with the progress of the country, adapting themselves to the new developments of time and circumstances. In the language of the Court:

"They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances."

In a later caseFootnote14 it was said that the commerce which Congress could regulate included not only the interchange and transportation of commodities or visible and tangible things, but the carriage of persons and the transmission by telegraph of ideas, orders and intelligence.

The electrically transmitting of articulate speech by telephone between states is interstate commerce. This was assumed by the Supreme Court in holding that the Act of July 24, 1866 did not apply to the telephone business, telephone communication being unknown at the time of the passage of that act. The Court therefore said that when the act of 1866 spoke of telegraph companies it could have meant only such companies as employed the means then in use or embraced by existing inventions for the purposes of transmitting messages merely by sounds of instruments or by signs and writing.Footnote15

While a bridge is not a common carrier, it affords a highway for such carriage, and a state enactment prescribing the rate of toll on the interstate bridge is an unauthorized regulation of interstate commerce.Footnote16 Commerce among the states, therefore, embraces navigation, transportation, of passengers and freight traffic and the communication of messages by telegraph and by telephone.

The carrying of lottery tickets from one state to another by corporations or companies whose business it is to carry tangible property from one state to another, constitutes interstate commerce which may be properly prohibited by Congress under its power of regulation.Footnote17

Interstate commerce as distinguished from domestic commerce, includes traffic between points in the same state, but which in transit is carried through another state. It follows that the railroad commission of a state cannot, without violating the commerce clause, fix and enforce rates for the continuous transportation of goods between such terminal points. A tax on an interstate railroad can be apportioned according to mileage in a state, but when a freight rate is established it must be established as a whole.

Commerce includes navigation, and the power to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all the rivers of the United States which are accessible from a state other than those in which they lie.Footnote18 The right to regulate navigation carries with it the right to regulate and improve navigable rivers and the ports on such

rivers, and the power to close one of several channels in a navigable stream, if in the judgment of Congress the navigation of the river will be thereby improved. Thus the power of Congress over the Savannah river was not affected by the compact between South Carolina and Georgia in 1787, before the adoption of the Constitution.Footnote19

To constitute interstate commerce, it must be so in fact and not only in intention. The intention to ship manufactured goods to other states does not make a contract for the operation of a factory for their manufacture relate to interstate commerce in a Constitutional sense so as to exempt it from the operation of state laws,Footnote20 nor does such intention to export property from the state constitute a ground for the exemption from the power of State taxation.

What is Not Commerce?

While commerce is more than traffic and includes commercial intercourse and the transmission of intelligence, it does not include the contractual relations between citizens of different states, which are incidental or even in one sense are essential to interstate commercial intercourse.

The business of a manufacturing company, although the manufactured product is sold by the company in other states and in foreign countries, is not interstate commerce.Footnote21 Commerce succeeds manufacture and is not part of it, and the relation of the manufacturer, in such a case, to interstate and foreign commerce is incidental and indirect, and the business therefore is subject only to state control.

Trademarks, though useful and valuable aids of commerce, are not subject to Congressional regulation, unless limited to their use in commerce with foreign nations and among the several states and with Indian tribes.Footnote22

What are the Subjects of Commerce?

Commerce between the states includes only the subjects, which are properly and lawfully articles of commerce. The regulating power of Congress does not deprive the states of their inherent police power in protecting the lives and property of their citizens, although the line is oftentimes difficult to draw, as the dissents in the Supreme Court show, between reasonable police regulation which only indirectly or incidentally effects interstate commerce, and legislation which invades the prerogatives of Congress.

Thus the states may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with

contagious diseases. A state may protect the moral as well as the physical health of its people. A corpse is not the subject of commerce. This power of the state includes the right to protect the people against fraud and deception in the sale of food products. The principle was applied by the Court in sustaining a Massachusetts statute,Footnote23 which prohibited the manufacture and sale of imitation butter, oleomargarine, artificially colored so as to cause it to look like butter.

This principle does not extend to the exclusion of any commodity which is generally recognized as a legitimate article of commerce, though condemned and sought to be excluded by the legislation of a particular state. A state cannot determine for itself upon its own standards of public opinion what are and what are not lawful subjects of commerce, against the generally accepted opinion of the commercial world.

Tobacco is also a legitimate article of commerce and the Supreme Court said that it could not take judicial notice of the fact that it was more noxious in the form of cigarettes than in other forms.Footnote24 It was therefore subject to the same extent as intoxicating liquors to the police power of the state, that is, the state could declare how far cigarettes should be sold or prohibit their sale entirely after they had been taken from the original packages or had left the hands of the importer, providing no discrimination was used as against those imported from other states, but could not prohibit their importation.

The lawful police power of the state also extends to the reasonable inspection of articles brought in from the other states, this right of inspection being expressly recognized by the Constitution in the case of foreign importation. But this inspection must be reasonable, and is invalid if burdened with such conditions as would wholly prevent the introduction of the sound article from other states.Footnote25

State Corporations in Interstate Commerce

The right of a state corporation to engage in business in another state by locating therein, without permission of that state, must depend upon whether the corporation is engaged in carrying on interstate commerce. In this connection the term "carrying on interstate commerce" is limited to the corporations actually engaged in carrying on interstate commerce, that is, common carriers and others who afford the facilities whereby commerce is carried on among the states or actually carry on such commerce and does not include manufacturing and trading companies making interstate shipments.

In one sense, all commercial business between citizens of different states is interstate commerce, and the manufacturer who ships his goods to the purchasers in another state is engaged in interstate commerce. This commerce is protected by the federal power against discriminating or interfering state legislation, and in such protection, there is no distinction between non-resident individuals and corporations. Corporations, it is true, are not citizens within the meaning of the Constitution,Footnote26 which provides that citizens of each state shall be entitled to all the

privileges and immunities of the citizens of the several States. But they are persons within the meaning of the Fourteenth Amendment and are therefore entitled to due process of law and the equal protection of the laws. The right to engage in interstate commerce does not depend upon citizenship, and the capacity of the foreign corporation to carry on such business must be determined by its own charter, granted by the state of its creation, and by the law of the state in which it is carrying on business. The manufacturing or trading company incorporated and doing business under the laws of one state can send its commercial travelers soliciting sales through other states, and may ship its goods to the purchasers, and such business cannot be interfered with by the states in the exercise of either their taxing or police powers. Such interstate commerce does not constitute a "doing of business" within the state. But while the foreign manufacturing or trading corporation may sell its goods in the state, or solicit sales in the transaction of interstate commerce, it cannot establish a business office in the state without the consent of the state. As a state has the right to exclude foreign corporations, it necessarily has involved therein the right to impose conditions upon their admission into the state.Footnote27

A State Cannot Tax

Interstate Commerce

Although the necessity for the regulation of commerce was the great moving force in the adoption of the Constitution, and was thoroughly discussed in the proceedings of the convention and in the Federalist Papers, there is in neither any reference to any possible interference with the taxing power of the state growing out of such regulation. The law of federal restraints upon state taxation has been developed upon the fundamental principle of the supremacy of the federal authority. The exemption from state taxation of the means employed by the federal government for carrying on its functions was first declared in 1819, in McCulloch v. Maryland,Footnote28 and the principle was later extended in 1827, in Brown v. Maryland,Footnote29 to the limitation of the state taxing authority by reason of the national control over foreign commerce.

Under the rule declared by the Supreme Court for the first time in 1886,Footnote30 which was consistently adhered to by the Supreme Court prior to 1937, the business of carrying on interstate commerce cannot be taxed at all, as the right to bring goods from other states includes the right to sell them and to solicit sales therefor, as well as to deliver the property sold, the state cannot tax the right to right to sell or deliver, or to solicit sales, whether in the form of license tax or otherwise. It is immaterial that the tax is without discrimination, as between domestic and foreign drummers, as interstate commerce cannot be taxed at all by the state.Footnote31

But a State can Tax the Property Employed in Interstate Commerce

While a state could not tax interstate commerce prior to 1937, that is, the privilege of carrying on such commerce, it could tax the property in its jurisdiction employed in carrying on such commerce. The difficulty of defining the line where the state and federal powers meet in such cases was illustrated by the not infrequent dissents of members of the Supreme Court in cases involving these questions of conflict between the state and federal power.Footnote32 No question was made as to the power of a state to tax the tangible property within its jurisdiction of a railroad, telegraph or other company engaged in interstate commerce, but the difficulty has been found in determining what portion of the intangible property of such corporations can be located within a state so as to be subject to its taxing power. Thus, has been formulated the so-called "unit rule" whereunder the entire value of an interstate railroad, tangible as well as intangible, may be apportioned upon a mileage basis as a means, prima facie, of arriving at the value of the property within the state, that is, the state's proportionate part of the value of the entire property.Footnote33

The rule of the "average habitual use" has also been formulated in the taxation of railroad cars, so that a state may tax its proportionate part of the property actually employed in its jurisdiction.Footnote34

Thus also, while the receipts from interstate commerce cannot be taxed as such, the tax may be levied upon the corporation, as an excise or franchise tax, which may be apportioned on the basis of the proportion of the mileage within the state to the total mileage.Footnote35

These rules, however, are only admissible in determining the actual value of the property in the state for the purpose of taxation, and will not authorize the taxing by a state of the privilege of carrying on interstate commerce among the states, nor the taxation of property permanently outside of its jurisdiction.Footnote36

State Power of Taxation of Corporations Engaged in Interstate Commerce Summarized

In 1896,Footnote37 the Supreme Court, holding that a city could recover from an interstate telegraph company a reasonable license fee for the occupation of its streets by telegraph poles, subject however to the determination by a jury of the reasonableness of the charge, said that there were few questions more important or more embarrassing than those arising from the efforts of the states or municipalities to increase their revenues by collections from corporations engaged in interstate commerce, but that the following propositions had been so often adjudicated as to be no longer open to discussion: First: The Constitution of the United States having given to Congress the power to regulate commerce not only with foreign nations but among the several States, that power is necessarily exclusive whenever the subjects of it are

national in their character or admit of only one uniform system or plan of regulation. Second: No state can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce. Third: Immunity does not prevent a state from imposing ordinary property taxes upon property having a situs in its territory and employed in interstate commerce. Fourth: The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided the franchise is not derived from the United States. Fifth: No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor.

Freedom of Interstate Commerce

The right of interstate commerce, that is, the right of conducting traffic and commercial intercourse between the states, is independent of state control, and where freedom of commerce between the states is directly involved, the non-action of Congress indicates its will that the commerce should be free and untrammeled, and the states cannot interfere therewith either through their police power or their taxing power.

This freedom of interstate commerce from state control was definitely established as to the taxing power of the state in the case of the State Freight Tax,Footnote38 in 1833, and later, in 1887, in the case of Robbins v. Shelby County Taxing District.Footnote39 The freedom of interstate commerce with respect to the police power of the state was also declared in the cases relating to the liquor traffic.Footnote40 Finally, in 1886, in the Wabash Railroad case,Footnote41 the Supreme Court held that a statute of a state, intended to regulate or to tax or to impose any other restrictions upon the transmission of persons and property or telegraph messages from one state to another, was not within that class of legislation which the states could enact in the absence of legislation by Congress, and that such statutes are void even as to that part of such transmission which may be within the state. The statute of Illinois, regulating railroad charges was, therefore, held to have no application as to an interstate shipment even as to the part of the distance which lay within the state of Illinois, and this regulation of interstate commerce from the beginning to the end of the shipment was confided to Congress exclusively under the power to regulate commerce among the states.

In 1894 this principle was extended to an interstate bridge, and it was held that the bridge was an instrument of interstate commerce whereon Congress alone possessed the power to enact a uniform schedule of charges, and that the authority of the state was limited to fixing tolls of such channels of commerce as were exclusively within its territory.Footnote42 The Court, in reviewing the cases, said that in none of the subsequent cases had any disposition been shown to limit or qualify the doctrine laid down in the Wabash case.

The same principle was later applied in holding invalid the dispensary laws of South Carolina regulating the sale of intoxicating liquors and prohibiting their importation.Footnote43 The Court

held that as the state recognized the sale, manufacture and use of intoxicating liquors as lawful, it could not discriminate against their being imported from other states.

The right to carry on commerce among the states is subject only to the regulation of Congress, and as to this fundamental right to conduct such commerce, it is not the exercise but the existence of the power in Congress which excludes all state control and interference whether under the taxing or the police power.

This freedom from state control in the carrying on of interstate commerce must however be reconciled with the general police power of the state in regulating persons, corporations and property within its jurisdiction, and in determining their relative rights and obligations. Thus while a state cannot impose any tax upon interstate commerce as such, nor restrict the persons or things to be carried therein, nor regulate the rate of tolls, fares or freight, or interfere with trains, or exclude any lawful subjects of commerce, it can prescribe rules for the construction of railroads and their management and operation for the protection of persons and property. Such rules are not in themselves regulations of interstate commerce, although they may control in some degree that conduct and liability of those engaged in such commerce.Footnote44 While the line of distinction is not always clear between what is a lawful regulation of persons and property within the jurisdiction and what is a regulation of interstate commerce conducted by such persons or with such property, the rule remains as declared in the Wabash case, that it is not the exercise but the existence of the power in Congress which makes void any action by the state regulating such commerce.

The Beginning of Federal Regulation

Although the recognized necessity for the national control of interstate commerce was the immediate occasion and moving purpose in the adoption of the Constitution and the formation of the federal Union, and the broad and comprehensive construction of the commerce clause by the Supreme Court under Chief Justice Marshall has laid the foundation of all subsequent decisions, the direct federal regulations of such commerce, at least as to land transportation, did not begin until the close of the first century of the republic's existence. The far-reaching importance of national control over interstate as well as over foreign commerce was not and could not be foreseen at the time of the adoption of the Constitution. It was not until twenty years after the close of the civil war that changed economic conditions of the country made intolerable the discriminating legislation of the states and led to the judicial declaration by the supreme Court in 1866,Footnote45 that in the matter of interstate commerce the United States were but one country and are and must be subject to but one system of regulations, and not to a multitude of systems. Soon after this, in 1888 and in 1890,Footnote46 the Court extended the same principle of the freedom of interstate commerce to the police power of the states in the liquor traffic decisions. In 1886 it was also definitely decidedFootnote47 that the state power of regulation of railway traffic did not and could not extend to interstate traffic in any form, and that such shipments were national in their character, and their regulation confined to Congress exclusively.

Thus it was for the first time decided that this right of interstate commerce was so essentially national in its character that the inaction of Congress was equivalent to its determination that commerce must be free, and that therefore, any state regulation of the right to carry on such commerce was inoperative and void. The principle of concurrent state powers during the inaction of Congress and the invalidation of state action by reason, not the existence, but of the exercise of the federal power had no application to the regulation of the right to carry on commerce between the states.

Thus the close of the first one hundred years of the government was marked by the distinct judicial declaration on the freedom of interstate commerce from any control or regulation by the states, either by police or taxing power, and the way was logically opened for the direct exercise by Congress of the power of regulation conferred by the Constitution.

The Railroad Act of 1866

Although Congress had frequently legislated on the subject of water transportation, its first legislation in regard to railroad transportation, other than the incorporation of the land grant and government aided Pacific railroads in 1862, was the Act of June 15, 1866. This act was entitled in its preamble:

Whereas the Constitution of the United States confers upon Congress in express terms, the power to regulate commerce among the several states, to establish post-roads, and to raise and support armies, etc.

Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination.

This section shall not be construed to authorize any railroad company to build any new road, or any connection with another road, without authority from the state in which such railroad or connection shall be proposed.

The purpose of this act, as declared by the Supreme Court was to remove trammels upon transportation which had previously existed, and to prevent the creation of such trammels in the future,Footnote48 and also to be a declaration by Congress in favor of the great policy of continuous lines, and, therefore, as favoring such business arrangements between companies as would make such connections effective,Footnote49 and indicating that interstate commercial intercourse should be free.Footnote50

The statute, however, imposes no duties upon carriers so as to compel specific routing of interstate traffic, and merely permits or authorizes the carriage of freight or traffic from one state to another and the formation of continuous lines by mutual agreement.Footnote51 The act was only intended to remove trammels upon transportation between different states imposed by state enactment's or the then existing laws of Congress, and did not prevent the operation of police laws of the states affecting interstate railways.Footnote52

The statute did not interfere with the laws of the states having for their object the personal security of passengers, nor did it interfere with such state enactment's as the regulating of the running of trains on Sunday,Footnote53 or excluding diseased cattle. This statute, however, in its declaration of the national public policy in favoring continuous interstate transportation, was invoked by certain state Courts in holding that railroad cars employed in interstate transportation are not subject to levy under attachment process against the owning company when in the possession of a connecting company in another state.

Genesis of the Interstate Commerce Act

The recognition of the governmental power in controlling interstate commerce immediately preceded that judicial declaration that interstate railway transportation was beyond state control. The question of interference with interstate commerce had been raised in the Granger cases, and the Court had heldFootnote54 that the act regulating fares was valid in the absence of regulation by Congress, and until Congress undertook to legislate for those who were without the state, the state could provide for those within, even though those without might be indirectly affected.

The Supreme Court of IllinoisFootnote55 cited these cases in sustaining a state statute regulating interstate transportation within the limits of the state of Illinois. But the Supreme Court in the same case, said that in the Granger cases the importance of the question of the governmental power of regulation and of the company's contract right of exemption therefrom overshadowed all others, so that the question of freedom of interstate commerce received but little attention at the hands of the Court. This decision of the Supreme Court reversing the Supreme Court of Illinois, was rendered in 1886, in the same year that the freedom of interstate commerce from the state taxing power was declared in the Tennessee drummer case, and broadly affirmed that the statute of a state enacted to regulate and tax, or to impose any other restrictions upon the transmission of persons or property or telegraph messages from one state to another, was not within the class of legislation which the state, in the absence of legislation of Congress, could enact, and that the state statute was void as to all interstate shipments which was within the state.

Passage of the Interstate Commerce Act

The decision in the Wabash case demonstrated the lack of power in the states to regulate interstate shipments and the demand for the exercise of this power by Congress becoming irresistible, the interstate commerce bill which had been pending in Congress for several years became a law February 4, 1887.

The discussion in the two houses of Congress and in the public press was mainly directed to the long and short haul clauses contained in the fourth section, and the prohibition of pooling contained in the fifth section of the act. Differences of opinion developed between the House and the Senate, the former insisting on the prohibition of pooling and on a qualified long and short haul clause. The bill was finally enacted in the form reported by the conference committee of the two houses of Congress. Frequent references were made in the debates to the then recent decision of the Supreme Court in the Wabash case denying to the states any power for the regulation of interstate traffic. A very wide difference of opinion was developed in the discussion as to the proper construction of the act, particularly as to what were the "substantially similar circumstances and conditions" in the fourth section, and one of the members of the house in the final debate described the bill as "one which nobody understands, nobody wants, and everybody is going to vote for."Footnote56

Since the passage of the act, several amendments have been passed by Congress. Some well known amendments were the Expedition Act of 1903, which materially expedited the procedure in suits brought by the United States, or suits prosecuted by direction of the attorney-general in the name of the Interstate Commerce commission, and the Elkins Act, which made important changes and materially enforced the provisions against discriminations, in that it made the published rates conclusive against the carrier, every deviation therefrom being punishable. The scope of the Elkins Act was also materially extended as to the parties subject to the provisions. Fine was substituted for imprisonment in the penal provisions of the act.

The Department of Commerce and Labor

In 1903 Congress established the Department of Commerce and Labor, the Secretary at the head being made one of the executive officers of the government and as such one of the President's advisers within the Cabinet.

This department included several of the bureaus theretofore included in other departments, and among others the Department of Labor, which had been established by Congress in 1888.

Section 5 of this act establishes a Bureau of Manufactures, and section 6 a Bureau of Corporations, which is vested with the same power and authority of investigation in respect to

corporations and combinations engaged in interstate commerce as is conferred on the Interstate Commerce Commission in respect to railroads. The commissioner of corporations is given powers of investigation, with the right to summon witnesses and call for the production of books and papers, subject to the same immunities against the enforcement of self-incriminating testimony, as is contained in the act of 1893 concerning the Interstate Commerce Act.

Prior to 1937, the federal government had no visitorial power over corporations which it did not create, and the power of the commissioner to make investigations or to compel reports would be clearly limited to transactions in interstate commerce, to the same extent as the powers of the interstate commerce commission were limited to transactions in interstate as distinguished from domestic commerce. This changed when the States entered into interstate compacts with one another and the federal government.Footnote57

The Unexercised Federal Power

In determining the possible limits of the unexercised federal power in the regulation of commerce, there is comparatively little in the way of direct judicial authority. The Supreme Court has frequently been called upon to decide, and has decided, what the states cannot do, and it is from the expressions in these negative opinions that we are compelled to rely in determining what Congress can do, that is, what are the limits of the regulating power of Congress. The law of interstate commerce is essentially judge made law, supplemented in comparatively recent years by the exercise of the regulating power of Congress. The Supreme Court has repeatedly declined to formulate a general rule as to the precise line where the power of Congress begins and the power of the state ends.Footnote58 It was on this question of the conflict between the admitted powers of the state and of the federal government, that Chief Justice Marshall said that the power and the restriction on it, though quite distinguishable when they did not approach each other, may well, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them.Footnote59

In the Lottery case the extent of the federal regulating power was directly presented and exhaustively discussed, and by a bare majority of the Court the federal power to prohibit interstate traffic in lottery tickets was sustained, but it was said in the prevailing opinion that the whole subject was too important and the question suggested by its consideration too difficult for solution, to justify any attempt to lay down a rule for determining in advance what could be enacted by Congress under the commerce clause.

The power of Congress in the regulation of interstate commerce has been impliedly declared by the Supreme Court with reference to the Interstate Commerce Act in several cases decided, involving the construction of that act. Thus the Court has pointed out the possible limits of the power which Congress could have delegated to the railway commission, saying that Congress could itself have prescribed the rates, or could have committed to some subordinate tribunal this

duty; but it held as a matter of construction of this act that Congress had not taken either of these permissible courses in the commerce act.Footnote60

This unexercised federal power has been discussed in connection with the proposed amendment of the Interstate Commerce Act. While it seems to be conceded that Congress has the power to regulate rates or to delegate that legislative power to a commission, this power must be exercised subject to the guarantees of the "due process of law," and against the taking of private property for public use without compensation. In the exercise of this power, Congress, or any commission under the authority of Congress, is restrained by the provision that "no preference shall be given to any regulation of commerce or revenue to the ports of one state over those of another." "Ports" of entry are now not only on the seaboard, but are scattered through the interior, and the application of this provision to the federal regulation of carrier's charges in the recognition of "differentials" between competing "ports" is yet to be determined.

A wide field for the possible exercise of the federal power of regulation is found in the class of cases wherein the Court has adjudged that the states have a concurrent power of legislation in the non-action of Congress. In other words, Congress can act in cases wherein it has heretofore exercised its power of regulation by its non-action. These are cases where Congress has heretofore allowed local regulations to control, and also in the class of cases where the Court has sustained state statutes or state laws regulating the relations of interstate carriers to their patrons. In such cases the Court has said that as long as Congress has not legislated in aid of interstate commerce, they are to be regarded as a rightful exercise of the police power of the state in regulating the lawful duties of persons and corporations within their limitations.Footnote61

There is therefore a wide legislative discretion in Congress to determine when a subject is capable of uniform regulation in interstate commerce, and when it is so determined, all local or state legislation in respect to such matters and covering the same ground cease to have the same force whether formally abrogated or not, and the regulations prescribed by Congress will then alone control. It is for the Supreme Court to determine, when a question arises, as to whether a state law is thus abrogated by the exercise of the power of Congress. The power which the states can exercise, will in this way be suspended, until the national control is abolished and the subject thereby is again left under the control of the states.Footnote62

Regulation of Commerce Through the Taxing Power

Interstate commerce may also be regulated through the exercise of the taxing power by Congress. While Congress has not an unlimited power as to the purpose of taxation and can levy taxes in order to pay debts and provide for the common defense and general welfare of the United States,Footnote63 it is also true that under the permanent revenue system of the government, taxes are levied, not for specific purposes, but by continuing laws establishing the rate of customs duties and internal revenue taxes, and questions relating to the lawful purpose of

taxation do not arise in levying revenue taxes but in the appropriation of public funds for public needs.

It is well recognized that the power of taxation is sometimes invoked with no purpose of revenue in view, but solely to destroy the interest or business upon which the tax is levied by taxing it out of existence. Thus the notes of the state banks were taxed out of existence in order to open the means for circulating the notes of the national banks. This act was sustained by the supreme Court.Footnote64 The Court said that it was immaterial that the tax destroyed the business or franchise exercised under state authority. While the only lawful purpose of taxation is revenue, the amount of the tax on any subject within the scope of the taxing power is for the legislative discretion to determine. In the words of Chief Justice Marshall in McCulloch v. Maryland,Footnote65 "it is a perplexing inquiry unfit for the judicial department, what degree of taxation is a legitimate use and what degree may amount to an abuse of the power?" A tax on oleomargarine was imposed for the avowed purpose of destroying the business. It therefore follows that Congress, subject to the Constitutional requirement of geographical uniformityFootnote66 and to the limitations of direct taxation,Footnote67 could impose indirect taxes and excises on subjects and facilities of commerce or upon the privilege of carrying on such commerce, whether by individuals or corporations, and that the amount of such taxes would be determined by the discretion of Congress.

The Demand for Federal Regulation of Business Combinations

As the demonstrated incapacity of the states to regulate interstate commerce was the direct occasion for the enactment of the Interstate Commerce Law in 1887, so the anti-trust agitation following thereafter caused the demand for the exercise of the federal power in dealing with business combinations in commerce which the states were powerless to control. The distinct economic trend in industrial development, which was then manifested in the effort to save economic waste in the protection and distribution by the concentration of capital in business enterprises, resulted in different forms of combinations for the restriction of competition in business, which aroused public hostility and lead to the enactment by many states of ant-trust laws more or less drastic, prohibiting all combinations in restraint of competition. Such laws, however, proved inadequate, as they could have no extra-territorial operation beyond state lines, and the freedom of commerce secured under the Constitution of the United States precluded the states from excluding "trust-made" goods imported from other states. Public opinions, which finds frequent expression in judicial opinions, was firmly convinced that the repression of competition tended to monopoly, and that the control of production and prices by the elimination of competition in any industry was dangerous to the public welfare. It was recognized that the control of prices could be exercised not merely in raising, but also at certain times in certain localities in unduly depressing them so as to crush competitors by underselling. The evil aimed at was the unregulated power of control over industries resulting from the successful elimination of competition through the extension of the principle of business association.

This agitation within and without Congress resulted in the passage of the so-called Sherman Anti-trust Act, which was approved July 2, 1890.Footnote68 While the occasion of the act was clearly the popular outcry against business combinations, it will be seen that in its judicial construction and practical workings its main effectiveness has been in its application to interstate railroads and labor combinations.

The Anti-Trust Act of 1890

This act, which was entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," declared illegal and criminal, punishable by fine or imprisonment or both, every contract or combination in the form or trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations. The act provided penalties for its violation, included contracts made in any territory or the District of Columbia, and provided for seizure and condemnation of property in the course of transportation owned under any contract made in violation of the act, gave an action to private persons injured by such combinations with threefold damages, and a summary procedure in equity at the suit of the United States to prevent and restrain violations of the act.

Construction of the Act by

the Supreme Court

The construction of the Act by the Supreme Court disappointed many of the anticipation's of its effectiveness, as it was held in the Sugar Trust caseFootnote69 that the statute did not reach a state manufacturing company which was acquiring by purchase of the stock of other refining companies through shares of its own stock, nearly complete control of the manufacture of refined sugar in the United States. The reasoning of the opinion went beyond the construction of the act, and indicated that the power of Congress was exhausted in its designation of the contracts and combinations which were made illegal. Manufacture precedes commerce but is not a part of it, and sale as an incident to manufacture, therefore, was distinguished from commerce. The monopolies denounced by the act are those in interstate and foreign commerce, and not those in the manufacture of the necessaries of life or anything manufactured. The Court said that if the term "commerce" were held to include the regulation of all such manufactures as were intended to be subject to commercial transactions in the future, the results would be that Congress would be invested to the exclusion of the states with power to regulate, not only manufactures, but all domestic industries, as they all contemplated more or less clearly interstate or foreign markets.

The Labor Legislation of Congress

The labor legislation of Congress has not been limited to the relations of labor in interstate commerce. Certain features of this legislation are distinctly related to the interstate commerce relations of labor, and the provisions of both the Interstate Commerce and the Anti-Trust Acts relating to unlawful combinations in interstate commerce have been construed as applicable to labor as well as to business combinations. The general labor legislation of Congress is therefore properly considered in this connection.

The Bureau of Labor created under the Act of June 27, 1884,Footnote70 was made a Department of Labor under the Act of June 13, 1888.Footnote71 The general design and duties of the Commissioner of Labor as declared by the act were "to acquire and diffuse among the people of the United States useful information on subjects connected with labor in general in the most comprehensive sense of the word, and especially upon its relation to capital, the hours of labor, the earnings of laboring men and women, and the general means of promoting their social, intellectual and moral prosperity."

The commissioner was charged to investigate conditions of labor, wages, cost of living, effect of customs laws, what articles were controlled by trusts, combinations of capital, and what effect trusts and other combinations of capital had on production and prices. The commissioner was also charged to investigate the cases of disputes between employees and employers.

By the Act of February 14, 1903,Footnote72 the Department of Commerce and Labor was established, and the Department of Labor made part of this department.

Regulation of Interstate Commerce in Relation to Labor

Congress also exercised its power of regulation in the effort to harmonize the relations of capital and labor in interstate railroads. The first legislation of this character was the Act of June 29, 1886.Footnote73 This act was not limited to the employees of carriers, but authorized the incorporation of any association of working people having two or more branches in the states or territories of the Union, and the incorporation was affected by filing articles in the office of the recorder for the District of Columbia. Provision was made for the establishment of branches and sub-unions in any territory of the United States.

The Adoption of the

Fourteenth Amendment

Prior to the adoption of the Fourteenth Amendment in 1868, there was no appeal to the federal Courts against any violation by state power of due process of law or of the equal protection of the laws, which did not involve an interference with national authority or a violation of some provision of the federal Constitution. The federal courts administered the state laws and followed, as they still do, the decision given by the state courts as to the construction of the state statutes.

The Fourteenth Amendment provided in its first clause that no state should deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Corporations are persons under this amendment and are therefore entitled to due process of law and to the equal protection of the laws,Footnote74 and a state has no more power to deny the equal protection of the laws to a corporation than it has to individual citizens.Footnote75

This far-reaching change in our judicial system, wherein the fundamental rights of property are protected by the federal power against state invasion, was adopted about the same time that the judicial declaration of the freedom of interstate commerce against the state interference had opened the way for the direct exercise of the federal regulating power.

Power of Congress to Regulate Intrastate Commerce and Matters that are not Commerce

The interstate commerce power of Congress is not confined to prohibiting or regulating affairs that are in themselves interstate commerce. It may regulate intrastate commerce or other intrastate activities which burden interstate commerce, provided the burdensome character of the activities upon interstate commerce is sufficiently clear and direct. It was upon this principle that the Supreme Court sustained the Safety Appliance Act, which required interstate carriers to use safety appliances on cars used in intrastate carriage as well as on those used in interstate traffic.Footnote76 The matter regulated need not be interstate commerce. It is not "the source of the injury but rather its effect upon interstate commerce" that determines the extent of Congressional power.Footnote77 Intrastate passenger rates fixed by state boards may be increased by the Interstate Commerce Commission if the rates fixed by the state board create a discrimination against interstate passengers. The operation of a branch line of the Colorado and Southern Railway, wholly in the State of Colorado and physically detached from the company's interstate line, was subject to the control of the Interstate Commerce Commission by reason of the effect of its operation on the interstate business of the company to the extent that the commission's certificate of abandonment to the company was sustained.Footnote78 The Packers

and Stockyards Act of 1921Footnote79, giving the Secretary of Agriculture supervision over the commission men and livestock dealers in the stockyards of the country, thus enabling him to regulate prices and practices in matters wholly intrastate, was upheld,Footnote80 where the object of the Act was to "free and unburden the flow of live stock from the ranges of the West and the Southwest through the great stockyards and slaughtering centers on the border of that region and thence in the form of meat products in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the markets."Footnote81 On the same basis, buying and selling of grain on boards of trade, though made wholly within the State of Illinois, were successfully made subject to the interstate power of CongressFootnote82 in the Grain Futures Act of 1922.Footnote83

In the light of the foregoing review of the elements and interpretation of the commerce clause of the Constitution by the United States Supreme Court, the task facing Franklin Roosevelt during the 1930's was how a partnership could be established between the National Government and business in which the federal government would be the senior and, to the extent that it thinks best, the dominating and controlling partner? Unless previous court decisions were overruled or judicial interpretation expanded, Congress in the 1930's was constitutionally powerless to fix maximum hours or minimum wages, to protect child labor, or otherwise to prescribe labor conditions, whether on farms, in mines, in manufacturing, in wholesaling or in retailing. Even if Congress could regulate all activities of interstate commerce, Congress cannot deprive any person of liberty or property without due process of law, unless that "person" voluntarily waived this right. Now the right to fix the price of one's goods or labor is a part of one's liberty of contract.Footnote84 One cannot be deprived of this liberty, says the Court - that is, have his prices fixed by governmental authority-unless his business or activity is "affected with a public interest."

It seems unmistakable, then, that, despite the effort by the Roosevelt administration to circumvent the plain prescriptions of the Constitution as expounded by the Supreme Court, no fundamental change in the economic or social system of the 1930's, no far-reaching alteration in the relations of government to business or to individual citizens, could be brought about without a fundamental change in the Constitution.

Footnote1

THE FEDERALIST, No. 42.

Footnote2

In re Debs, 158 U.S. 564 (1895).

Footnote3

McCulloch v. Maryland, 4 Wheat. 316, 438 (1820).

Footnote4

Legal Tender Cases, 110 U.S. 421 (1884).

Footnote5

In re Nagel, 135 U.S. 1 (1890).

Footnote6

Note 2, supra.

Footnote7

Note 3, supra.

Footnote8

Opinion of Justices, 14 Gray. 615.

Footnote9

Wheat. 1 (1824).

Footnote10

7 How. 283 (1849).

Footnote11

Note 9, supra.

Footnote12

96 U.S. 1 (1877).

Footnote13

Note 9, supra.

Footnote14

Western Union Tel. Co. v. Pendleton, 122 U.S. 347 (1887).

Footnote15

Richmond v. Southern Bell Telephone Co., 174 U.S. 761 (1899).

Footnote16

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

Footnote17

Lottery Cases, 188 U.S. 321 (1903).

Footnote18

Gilman v. Philadelphia, 3 Wall. 713, 724 (1865).

Footnote19

South Carolina v. Georgia, 93 U.S. 4 (1876).

Footnote20

Diamond Glue Co. v. United States Glue Co., 103 Fed.Rep. 838 (1900).

Footnote21

Kidd v. Pearson, 128 U.S. 1 (1888).

Footnote22

Trade Mark Cases, 100 U.S. 82 (1879).

Footnote23

Plumley v. Massachusetts, 155 U.S. 461 (1895).

Footnote24

Austin v. Tennessee, 179 U.S. 343 (1900).

Footnote25

Minnesota v. Barber, 136 U.S. 313 (1890).

Footnote26

Art. IV, sec. 2; Crutcher v. Kentucky, 141 U.S. 47 (1901).

Footnote27

Waters Pierce Oil Co. v. Texas, 177 U.S. 28 (1900).

Footnote28

Note 3, supra.

Footnote29

12 Wheat. 419 (1827).

Footnote30

Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887).

Footnote31

Asher v. Texas, 128 U.S. 129 (1888).

Footnote32

Erie R.R. Co. v. Pennsylvania, 158 U.S. 431 (1895).

Footnote33

State Railroad Tax Cases, 92 U.S. 575 (1875).

Footnote34

Pullman Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

Footnote35

Maine v. Grand Trunk R. Co., 142 U.S. 217 (1891).

Footnote36

Fargo v. Hart, 193 U.S. 490 (1904).

Footnote37

Atlantic, etc. Tel. Co. v. Philadelphia, 190 U.S. 160 (1896).

Footnote38

15 Wall. 232 (1872).

Footnote39

Note 30, supra.

Footnote40

5 How. 504 (1847).

Footnote41

Wabash Railroad Company v. Illinois, 118 U.S. 557 (1886).

Footnote42

Covington, etc., Bridge Co., v. Kentucky, 154 U.S. 294 (1894).

Footnote43

Scott v. Donald, 165 U.S. 53 (1897).

Footnote44

Chicago, etc., Railroad Co., v. Solan, 169 U.S. 133 (1898).

Footnote45

Robbins v. Shelby County Taxing District, supra.

Footnote46

Bowman v. Railway Co., supra.

Footnote47

Wabash, St. L. & P.R. Co. v. Illinois, supra.

Footnote48

Railroad Co. v. Richmond, 19 Wall. 584 (1873).

Footnote49

Union Pacific Railroad Co. v. Chicago, etc. Railroad Co., 163 U.S. 589 (1896).

Footnote50

Bowman v. C & N.W. R.R., 125 U.S. 465 (1888).

Footnote51

Kentucky & Indiana Bridge Co. v. L. & N. R. Co., 37 Fed.Rep. 567 (1889).

Footnote52

R.R. Co. v. Fuller, 17 Wall 560 (1873).

Footnote53

Hennington v. Georgia, supra.

Footnote54

Pike v. Chicago, etc. R. Co., 94 U.S. 1 (1876).

Footnote55

Wabash, St. L. & P. R. Co. v. Illinois, 104 Ill. 476.

Footnote56

Senate Report No. 307, 43rd Congress, 1st Session.

Footnote57

See Volume II of this work.

Footnote58

Welton v. Missouri, 91 U.S. 275 (1875).

Footnote59

Note 29, supra.

Footnote60

Interstate Commerce Commission v. Railroad Co., 167 U.S. 479 (1897).

Footnote61

Pennsylvania R. Co. v. Hughes, 191 U.S. 477 (1903).

Footnote62

Reid v. Colorado, 187 U.S. 137 (1902).

Footnote63

STORY ON THE CONSTITUTION, 907.

Footnote64

Veazie Bank v. Fenno, 8 Wall. 533 (1869).

Footnote65

Note 3, supra.

Footnote66

Knowlton v. Moore, 178 U.S. 41 (1900).

Footnote67

Pollock v. Farmers Loan & Trust Company, 158 U.S. 601 (1895).

Footnote68

26 Stat. 209.

Footnote69

United States v. Knight Company, 156 U.S. 1 (1895).

Footnote70

23 Stat. 60.

Footnote71

25 Stat. 182.

Footnote72

32 Stat. 825.

Footnote73

24 Stat. 86.

Footnote74

Santa Clara County v. Southern Pacific R. Co., 118 U.S. 394 (1886).

Footnote75

Railroad Co. v. Ellis, 165 U.S. 1 (1897).

Footnote76

Southern Ry. v. United States, 222 U.S. 20 (1911).

Footnote77

Second Employers Liability Cases, 223 U.S. 1 (1912).

Footnote78

Colorado v. United States, 271 U.S. 153 (1926).

Footnote79

Act of August 15, 1921, C. 64, 42 Stat. 59.

Footnote80

Stafford v. Wallace, 258 U.S. 495 (1922).

Footnote81

Id. at 514.

Footnote82

Board of Trade of the City of Chicago v. Olsen, 262 U.S. 1 (1923).

Footnote83

Act of September 21, 1922, c. 369, 42 Stat. 998.

Footnote84

For a discussion on Liberty of Contract see volume II of this work.

CHAPTER 5

EMERGENCY

FEDERAL LEGISLATION

"For nobody can transfer to another more power than he has in himself, and nobody has an absolute power over himself, or over any other, to destroy his own life, or take away the life or property of another." John Locke.

During the 1930's, it was a well settled principle of American Constitutional Law that an emergency does not create a power to legislate on a given subject, but may furnish an occasion for the exercise of already existing power, as Chief Justice Hughes said in the Blaisdell case: Footnote1

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.

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

If we again examine the theory promulgated by the New Deal strategists, in support of their claim that Roosevelt had authority to act under an emergency power, and Congress in passing Roosevelt's New Deal legislation, had the power to legislate all social and economic issues of the nation, because of the so-called emergency which existed in the country, we begin to see that this theory was not a valid one. Let's examine several decisions from the Supreme Court.

The Block case Footnote2 and the Levy Co. case Footnote3 involved the constitutionality of the so-called Emergency Housing Laws, growing out of the post-war housing condition. The latter case involved a New York law and the former case a District of Columbia statute. The New York law was sustained on the ground that there was a valid exercise of the State "police power," the Court saying:

"In terms the acts involved are 'emergency' statutes, and, designed as they were by the Legislature to promote the health, morality, comfort and peace of the people of the State, they are obviously a resort to the police power to promote the public welfare.

"The warrant for this legislative resort to the police power was the conviction on the part of the State legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual basis and justification, for exercise of that power." Footnote4

The District of Columbia statute was sustained on the grounds that the letting of buildings within the District was clothed with a public interest, and affected the workings of the Federal Government.

The so-called Railroad Emergency legislation was passed by Congress at the insistence of President Wilson to correct the imminent danger of a tie-up of the railroads of the country. The railroad employees were demanding an eight hour day with additional wages for overtime. The employers rejected the demand and the employees threatened a general strike at a time when the country was about to engage in war. Congress passed a law substantially embodying the demands of the employees. The Supreme Court in Wilson v. New, Footnote5 declared this act constitutional, holding that; (1) Congress has the undoubted power to regulate interstate commerce, and (2) the business of a common carrier is one affected with a public interest which may be regulated by Congress. Chief Justice White said:

"Nor is it an answer to this view to suggest that the situation was one of emergency, and that the emergency cannot be made the source of a power. The proposition begs the question, since 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." Footnote6

But perhaps the most important case on the question of whether an emergency creates executive or legislative power, is the Blaisdell case. Footnote7 It is important for two reasons; first, it definitely determines that an emergency creates no power to legislate; second, the holding of the case caused the popular impression that Congress had the power in an emergency to pass legislation to protect the health, safety, property and morals of the people, an impression which was erroneous, as will be shown hereafter.

Let's examine the case involving the validity of the Minnesota Mortgage Moratorium Law, which was attacked on the grounds that it was repugnant to the contract clause of the Federal Constitution (Art. I, Sec. 10), and the due process and equal protection of the laws' clauses of the Fourteenth Amendment. The Minnesota State Courts and the United States Supreme Court upheld the statute as one within the "police Power" of the legislature, in an emergency which the legislature had found to exist. Chief Justice Hughes, who delivered the majority opinion, said:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.

"While emergency does not create power, emergency may furnish the occasion for the exercise of power." Footnote8

The New Deal strategists reliance on the Braisdell case was obviously misplaced. These strategists rationalized that the Blaisdell case gave Roosevelt authority under the emergency power contained in the Constitution to regulate all business activity during this so-called economic and social emergency facing the nation. These strategists failed to study the basic principles of our Federal dual form of Government. They either did not realize or they refused to accept a simple fact of constitutional law known by most attorneys at the time, that a state law may be sustained under the State's "police power," but the Federal Government has no "police power," Congress could not constitutionally pass the same legislation.

It seems clear from the above that the New Deal legislation could not be sustained solely because it was "emergency legislation."

IS THERE A FEDERAL POLICE POWER?

If any principle can be stated unequivocally in American Constitutional Law it is that the Federal Government has no "police powers," but that the "police power" is reserved to the States under our theory of government, and by the Tenth Amendment to the Federal Constitution. This was true in 1933 and it is true today.

The Federal Government is one of special and enumerated powers, and those powers necessarily implied from the granted powers. Footnote9 And the implied power must have a reasonable and substantial connection with the enumerated power upon which it is based. Footnote10

Even the strongly partisan Alexander Hamilton conceded that the Federal Government was one of enumerated powers Footnote11 and an eminent writer on constitutional laws, said:

"The Constitution was, from its very origin, contemplated to be the frame of a National Government, of special and enumerated powers. This is apparent, as will presently be seen from the history of the proceedings of the convention which framed it; and it has formed the admitted basis of all legislative and judicial reasoning upon it ever since it was put in operation, by all those who have been its enemies and opponents." Footnote12

And the Tenth Amendment to the Federal Constitution provides:

The powers not delegated to the United States by the constitution, nor prohibited by the other States, are reserved to the States respectively, or to the people.

At the constitutional convention the question arose as to whether the proposed Federal Government should be granted the "police power." Mr. Gunning Bedford, a delegate from Delaware, moved a resolution to give Congress the power "to legislate in all cases for the general interests of the Union and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," but the resolution was defeated by an overwhelming majority.

Ever since that time the Supreme Court of the United States has consistently held that the Federal Government has no "police power." Footnote13

In the case of Wilkerson v. Rahrer, Footnote14 the Supreme Court said:

"The power of a State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

"In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government, and in that respect it is not interfered with by the Fourteenth Amendment."

And in United States v. E.C. Knight Co., Footnote15 Chief Justice Fuller said:

"It cannot be denied that the power of a State to protect the life, health, and property of its citizens and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominions,' is a power originally and always belonging to the States, nor surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

"It is vital that the independence of the commercial power of the police power, and the delineation 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 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 expedient of even doubtful constitutionality."

And in Kansas v. Colorado, Footnote16 counsel urged upon the Supreme Court that Congress had the right to control the whole system of reclaiming arid lands in the State whether owned by the Federal Government or not, on the theory that "all powers which are national in scope must be found vested in the Congress of the United States." But the Court held that the National government is one of enumerated powers and that the above doctrine was in conflict with the Tenth Amendment. The Court said:

"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 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 be granted by the people in the manner they had provided for amending that act. Its (the Tenth Amendment) principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all the powers not granted." Footnote17

It cannot be doubted that Congress acting within the proper scope of its granted powers may reach the same end in some cases as if they were empowered to legislate by a "police power," and it is no valid objection that the exercise by Congress of its expressly granted powers may be attended by the same consequences as would attend the exercise of a "police power" by a state. Footnote18

And the instances are innumerable wherein Congress has reached the same results under its granted powers as the State might reach under its "police power." But since "police power" is a "term of act" which has a definite meaning in constitutional law there seems no justification for intimating that the Federal Government has a "police power." It seems clear from the above that the Federal Government has no "police power." During the 1930's, the average person was in no mood to study carefully the theory of our Federal form of Government, but the Blaisdell case, upholding the validity of the Minnesota Mortgage Moratorium Act on the ground of the State's "police power," was given great publicity by the press and later used by Roosevelt to mislead the public into believing that the Federal Government had the "police power" to regulate all matters, public and private. Fortunately the Supreme Court in 1935 ruled otherwise.

Footnote1

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

Footnote2

Block v. Hurst, 256 U.S. 135 (1921).

Footnote3

Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

Footnote4

Id. at 245.

Footnote5

243 U.S. 332 (1917).

Footnote6

Id. at 348.

Footnote7

Note 1, supra.

Footnote8

290 U.S. at 235.

Footnote9

Martin v. Hunter's Lessee, 1 Wheat. 304, 326 (1816); McCulloch v. Maryland, 4 Wheat. 316 (1819).

Footnote10

Keller v. United States, 213 U.S. 138 (1909); Adair v. United States, 208 U.S. 161 (1908).

Footnote11

THE FEDERALIST, No. 84.

Footnote12

I STORY, THE CONSTITUTION (5th ed. 1905) sec 909.

Footnote13

There are many cases which support this statement. Some of the most notable ones are: United States v. De Witt, 9 Wall. 41 (1870); Kansas v. Colorado, 206 U.S. (1907); Hammer v. Dagenhart, 247 U.S. 251 (1918).

Footnote14

140 U.S. 545, 554, 555 (1894).

Footnote15

156 U.S. 1, 11 (1894).

Footnote16

206 U.S. 46 (1907).

Footnote17

Id. at 90.

Footnote18

Hamilton v. Kentucky Distillery & Warehouse Co., 251 U.S. 146 (1919).

CHAPTER 6

RAILROAD RETIREMENT ACT CASE

Railroad Retirement Board v. Alton Railroad Company et al.

295 U.S. 330 (1935)

The first significant New Deal Act to come before the Supreme Court was the Railroad Retirement Act of 1934. Footnote1 The Act, strictly speaking, was not a New Deal measure as it had not been originally proposed by the Roosevelt administration. However, after the bill had passed the Congress, the President signed it with enthusiasm because it was in line with the social policy of the Administration. The Railroad Retirement Act was passed by the Congress, to promote economy and improve employee morale and promote the efficiency and safety of interstate transportation. The Congress believed that legislation was necessary because morale was low in the railroad industry as a consequence of financial insecurity. The voluntary pension programs of the railroad companies did not alleviate the anxiety as they were inadequate. The company scheme did not provide, according to Congress, their employees with a sense of security. Therefore, the Congress passed the Railroad Retirement Act which imposed a compulsory pension scheme on the entire industry. The Act established a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. The Act provided for the creation of a fund into which contributions from employers and employees were paid. These funds were raised by compulsory contributions, in specific amounts, of both employers and employees, each carrier to pay double the total payable by its employees. The contributions were based on percentages of current compensation, the amount of the percentage to be fixed by the Board. This fund was administered by a Retirement Board who were required to award pensions to, (1) employees of any carrier on the date of passage of the Act; (2) those who subsequently become employees of any carrier; and (3) those who within one year prior to the date of enactment were in the service of any carrier. Every such person became entitled to an annuity, (a) when he reached the age of 65 years, whether then in carrier service or not; if in such service, he and his employer may agree that he shall remain in service until he is 70, at which age he must retire; (b) at the option of the employee, at any time between the ages of 51 and 65, if he has served a total of 30 years in the employ of one or more carriers, whether continuously or not.

The compulsory retirement provision was not applicable to those in official positions until 5 years after the effective date of the Act.

The pension was payable monthly. Its amount was determined by multiplying the number of years, not exceeding 30, before as well as subsequent to the date the Act was adopted, whether for a single carrier or a number of carriers, and whether continuous or not, by graduated percentages of the average monthly compensation (excluding all over $300 per month). If any one who had completed 30 years of service elected to retire before he was 65 years of age, the annuity was reduced by 1/15th for each year he lacks of that age, unless retirement was due to physical or mental disability.

On the death of an employee, before or after retirement, his estate was repaid all that he contributed to the fund, with 3% compounded annually, less any annuity payments received by him.

The Retirement Act's constitutionality was challenged by 137 railroad companies on the grounds that it violated the due process clause of the Fifth Amendment and that it breached the restrictions imposed by the Commerce Clause. The companies sought an injunction against the Act's enforcement which was awarded. The Retirement Board appealed against the injunction and also applied for a writ of certiorari from the Supreme Court which was awarded.

On May 6, 1935, the Supreme Court of the United States handed down its judgment in Railroad Retirement Board et al. V. Alton Railroad Company et al. Footnote2 The Court by a majority of one, held the Act unconstitutional, on two grounds; first, that certain of its provisions violate the due process clause of the Fifth Amendment, and being inseparable, condemn the whole Act; and, second, that the Act was not in purpose or effect a regulation of interstate commerce, under the Constitution. Mr. Justice Roberts delivered the majority opinion for the Court, while Chief Justice Hughes presented the views of the minority.

The majority opinion discusses various aspects of the case in the following order; the contention that the Act is arbitrary in that it makes certain persons eligible for pensions on the basis of prior service, and includes prior service in determining the amount of pensions of persons previously in carrier service in the event that they later return to such service; certain special features alleged to be violative of due process; certain general features, such as that the Act violates due process because it sets up a unitary pension system, and that it imposes an unconscionable burden; and, finally, that the Act is not a regulation of commerce.

The first feature of the Act which was considered by Mr. Justice Roberts was the provision affecting former employees. The Act made eligible for pensions all employees who were in carrier service within one year prior to its passage, irrespective of future employment. About 146,000 persons fell within this class, including those discharged for cause, those retired, those who resigned for other employment, those whose positions were abolished, those temporarily employed, and those who left the service for other reasons. It was agreed in both the majority and dissenting opinions that this provision was arbitrary. As to it, Mr. Justice Roberts said:

"It is arbitrary in the last degree to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or who have elected to pursue some other calling or who have retired from the business, or have been for other reasons lawfully dismissed. And the claim that such largess will promote efficiency or safety in the future operation of the railroads is without support in reason or common sense." Footnote3

In addition to this class, there were over 1,000,000 persons who had previously been in carrier service. The railroads challenged the statute as arbitrary to the extent that it made their prior service the basis for computing their pensions in the event that they ever return to carrier service. This objection was likewise sustained by the Court. With respect to it Mr. Justice Roberts states:

"Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier. The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking property of one and bestowing it upon the another." Footnote4

The railroads further challenged the provision allowing pensions to those 65 years old, who were in carrier service but a limited time. They contended that such a provision was not an aid to economy, efficiency or safety. Sustaining this contention, and rejecting the Retirement Board's answer thereto that the provision improves the morale of employees while they are in the service, Mr. Justice Roberts said:

"Assurance of security it truly gives, but, quite as truly, if 'morale' is intended to connote efficiency, loyalty and continuity of service, the surest way to destroy it in any privately owned business is to substitute legislative largess for private bounty and thus transfer the drive for pensions to the Halls of Congress and transmute loyalty to employer into gratitude to the Legislature." Footnote5

General features, in relation to the Fifth Amendment, were also considered by the Court. First among these, was the unitary nature of the system, which treated all railroad as a single carrier. This provision of the Act if found valid, would result in the solvent carriers furnishing the money necessary to meet the demands of the system upon insolvent carriers. In other words, all the future employees of any railroad which discontinues operation must be paid their pensions by the surviving railroads. This underlying basis of the system, through its imposition of unequal burdens on various carriers, was also thought to be unconstitutional. As to this the opinion declared:

"This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees." Footnote6

Further developing this line of thought, Mr. Justice Roberts went on to distinguish cases relied on by the Board for their support of this pooling principle, and stated:

"We conclude that the provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process." Footnote7

Finally, as to the whole case considered in the light of the due process clause, the majority concluded that the invalid provisions were so inseparable from its other terms as to render the Act invalid in its entirety.

The case was then considered from the standpoint of the power of Congress to regulate interstate commerce. Mr. Justice Roberts said:

"It results from what has now been said that the Act is invalid because several of its inseparable provisions contravene the due-process-of-law clause of the Fifth Amendment. We are of opinion that it is also bad for another reason which goes to the heart of the law, even if it could survive the loss of the unconstitutional features which we have discussed. The Act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution." Footnote8

The Court finally concluded that the Act in its fundamental purpose and effect was a measure designed to promote the social security of retired employees, which is not included within the powers delegated to Congress to regulate interstate commerce.

"In final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale, and morale in turn upon assurance of security for the worker's old age. Thus pensions are sought to be related to efficiency of transportation, and brought within the commerce power. In supporting the Act the petitioners constantly recur to such phrases as 'old age security,' 'assurance of old age security,' 'improvement of employee morale and efficiency through providing definite assurance of old age security,' 'assurance of old age support,' 'mind at ease,' and 'fear of old age dependency.' These expressions are frequently connected with assertions that the removal of the fear of old age dependency will tend to create a better morale throughout the ranks of employees. The theory is that one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently. The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of

means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement." Footnote9

Mr. Justice Roberts finally concludes:

"We think it cannot be denied, and, indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the Act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation." Footnote10

Chief Justice Hughes in his dissenting opinion, emphasized the far-reaching effect of the decision, especially as it erects a barrier to all legislative action bearing on the subject matter.

The Chief Justice made reference to the wide scope of the power of Congress to regulate interstate commerce, as determined by previous decisions of the Court, and to various acts of Congress which had been upheld governing the conditions of employment and the relations between employers and employees in interstate commerce. The Chief Justice said:

"The power committed to Congress to govern interstate commerce does not require that its government should be wise, much less that it should be perfect. The power implies a broad discretion and thus permits a wide range even of mistakes. Expert discussion of pension plans reveals different views of the manner in which they should be set up, and a close study of advisable methods is in progress. It is not our province to enter that field, and I am not persuaded that Congress in entering it for the purpose of regulating interstate carriers has transcended the limits of the authority which the Constitution confers." Footnote11

WHAT AFFECT DID THE RAILROAD RETIREMENT ACT CASE HAVE ON ROOSEVELT, CONGRESS, AND THE PUBLIC?

After the Supreme Court declared the Railroad Retirement Act unconstitutional, it raised serious doubts in the Roosevelt administration and Congress as to the validity of the Social Security Bill Footnote12 pending in Congress at the time.

The anxiety of administration leaders in the Senate over the implications in the decision was reflected in a request by Senator Robinson, for a thorough re-examination of the Social Security Bill by the Finance Committee.

In other quarters, particularly the House, there was more confidence that the decision in no way endangered Roosevelt's Social Security Bill. The bill, it was contended, relied more upon the taxing power of Congress and the general welfare clause of the Constitution than upon the power to regulate interstate commerce. Footnote13

In the light of the Supreme Court's decision on the Railroad Retirement Act, President Roosevelt on May 8, 1935, ordered a thorough re-examination of the social security legislation.

Legal advisers of the Finance Committee, reported to Roosevelt, that they interpreted the Railroad Retirement Act decision by the Supreme Court as a "danger signal" involving not only social security but also the National Industrial Recovery Act, the Agricultural Adjustment Act, and other New Deal legislation.

Senator Wagner, the author of the social security legislation, declared in the Senate that social welfare legislation could be enacted that would meet the test of the federal courts. Senator Wagner remarked:

"Of course, the word of the Court is the law, and as such is entitled to respect and obedience, but the United States Senate has never regarded it improper to inspect and comment upon the intrinsic validity of the decisions of the Supreme Court - whether they are consonant with a living law responsive to social needs and whether they are forced upon the court by the weight of existing precedent.

"I am sure there are some members of the Senate, familiar with the divisions of the Court in other cases of great social significance, who will at the outset be inclined to agree with the reasoning of Chief Justice Hughes and Justices Brandies, Stone and Cardozo, the dissenters in this pension case.

"As I read the majority opinion, it holds merely that under the interstate commerce clause, Congress has not the power to provide pensions for railway employees, the theory being that the retirement of superannuated workers has no effect upon the efficiency and flow of interstate commerce.

"The Court has never indicated that a tax for old-age pensions does not fall within the category of a public purpose; in fact, cases involving State systems have held that contrary. And no

substantial limitations have ever been placed upon the spending power of Congress. Thus is seems clear that the old age pension plan contemplated by the Economic Security Bill is constitutional.

"Certainly no showing can be made that it is affected in any way by the recent decision of the Court. And the unemployment insurance features of the Economic Security Bill, which are based upon Federal subsidies, are clearly in line with past acts of Congress that have not been subjected to challenge."

On May 8, 1935, the American Federation of Labor's executive council issued a statement, calling on Congress to propose a constitutional amendment, if necessary, to get through the railroad pension retirement plan and the pending social security legislation. William Green president of the American Federation of Labor, in delivering the statement said:

"The council was bitterly disappointed over the Supreme Court's decision that the railroad pension plan was unconstitutional.

"The minority opinion presents the situation in a constructive way.

"If the majority opinion is to control and we are faced with a situation where Congress is impotent to enact this type of legislation, then we'll have to get behind a constitutional amendment."

George Harrision, chairman of the Railway Labor executives Association and president of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Expressman and Station Employees, said:

"The decision represents one of the most reactionary decisions handed down by the Court and shows a total disregard of the social obligations of industry to its workers. It will be most difficult for Congress to enact any social legislation that requires employers contributions and, therefore, it is a serious obstacle to the consummation of the whole New Deal program.

"Organized railway labor has long sought recognition for those workers who have contributed their lives in furnishing essential transportation service, and now, since it appears that this question is beyond the power of Congress, they will therefore of necessity be compelled to rely upon their economic strength to compel a fair and decent system of retirement benefits.

"In other words, if they won't give us what we want, we'll have to take it away from them."

Phil Ziegler, editor of The Journal of the Brotherhood of Railway Mail Clerks, declared:

"The Supreme Court's decision throws the railroad pension plan out of the window and with it probably goes the entire social security program of President Roosevelt. It is a tragedy that five aged gentleman can block the will of the people."

Footnote1

48 Stat. 1283.

Footnote2

295 U.S. 330 (1935)

Footnote3

Id. at 349.

Footnote4

Id. at 349-50.

Footnote5

Id. at 351.

Footnote6

Id. at 357.

Footnote7

Id. at 360.

Footnote8

Id. at 362.

Footnote9

Id. at 367-68.

Footnote10

Id. at 374.

Footnote11

Id. at 391-2.

Footnote12

The Social Security Bill was introduced in Congress by Senator Wagner on January 18, 1935. The bill was titled "The Economic Security Bill of 1935." The bill went through many revisions before it was finally enacted into law on August 14, 1935. Several sections of the bill needed to be changed in order for it to comply with the restrictions laid down by the Supreme Court in their interpretation of the commerce clause and the general welfare clause in the Constitution. One substantial change is found in Title IX of the Act. The original bill submitted by Senator Wagner on January 18th states "... there shall be levied and assessed upon every employe ... an earnings tax, to be collected ..." In the Act adopted and passed by the Congress the word "earnings tax" was changed to "income tax." This change was essential in order for the tax in Title IX to conform to the privilege (excise) tax levied upon those engaged in interstate commerce. An in depth discussion of the two bills and the changes needed to conform the Social Security Act to the interstate commerce clause is given in Volume II of this work.

Footnote13

When the Supreme Court declared unconstitutional the Agricultural Adjustment Act in the *Butler* case, and adopted the Hamiltonian view of the general welfare clause of the Constitution, it was reported to Roosevelt that because of this interpretation of the general welfare clause by the Supreme Court, the Social Security Act which had been enacted into law five months before the *Butler* case, would be in danger of being invalidated if the act was properly challenged. In an effort to prevent the invalidation of the Act, Title 28 of the United States Code, was amended to allow the government to intervene in any action which sought to challenge the constitutionality of any statute, which obviously included the Social Security Act.

CHAPTER 7

NATIONAL INDUSTRIAL RECOVERY ACT CASE

A.L.A. Schechter Poultry Corporation et al. v. United States

295 U.S. 495 (1935)

When President Roosevelt took office on March 4, 1933 he and his advisers had no plans for major industrial reforms, but by June 16th of the same year the National Industrial Recovery Act was law. What had occurred in the intervening months? On April 6th the Senate had approved a thirty-hour week bill sponsored by Senator Hugo Black and this had goaded the Administration into doing something. Black's bill was not only inadequate and required replacement by a more suitable measure; Footnote1 it also convinced the administration of the need for more general legislative action on industrial matters. For the next two months there was feverish activity in the Administration. A number of different groups were organized to develop ideas and draft bills. There was a group under Frances Perkins, the Secretary of Labor; there was another chaired by Raymond Moley, Assistant Secretary of State, and Hugh Johnson; and there was a further one organized by John Dickinson, Under-Secretary of Commerce, which had links with Senator Robert Wagner who was contemplating an industrial reform measure. Inevitably these various groups provided different answers and indeed identified different problems and it was no minor achievement that by early May there were only two major drafts of an industrial reform bill, although there were striking differences between them. Roosevelt himself did not appear to mind which of the two drafts was finally adopted as long as there was agreement between all the participants. He suggested that they lock themselves in a room until they were in broad agreement. As Hugh Johnson recalled in his memoirs, "we met in Lew Douglas's office. Lew, Senator Wagner, John Dickinson, Mr. Richberg and myself." And they sat there until they had a mutually satisfactory draft. It was this draft that emerged as the National Industrial Recovery Act.

The National Industrial Recovery Act was the outgrowth of a belief by many that in order to save our capitalistic system there was need for a unified governmental control to limit unrestrained competition and lend direction and form to our national effort to create and distribute the things

of life. This control had to be exerted by the Federal Government, because the states had shown their innate incapability to deal with such a problem.

The House of Representatives left the Administration's proposal untouched and although the Senate did give the bill a rough passage, the Act was in essence the same as the Administration's bill. The National Industrial Recovery Act had three titles. Titles II and III dealt with public works and Title I with the nation's industrial structure. It was Title I that took the course of controversy, both political and legal. Under this Title, the President had the authority to approve codes of behavior drawn up by trade or industrial groups, but in the event that there was no agreement within an industry over a code, the President was empowered to impose one. In Section 1, the Congress issued a declaration of principles which established certain general goals, such as the elimination of unfair practices and the reduction of unemployment, to guide the code makers, although in Section 7 which dealt with labor standards the Act did give more precise instructions as to how the codes should be formulated in this respect. These codes were exempt from the anti-trust laws. Apart from the codes, Title I gave the President the power to license industries if he established that destructive wage-and-price cutting practices were taking place. The Act also granted the President the authority to approve collective bargaining agreements between unions and business organizations and give these agreements legal effect. The President was additionally empowered to limit imports, and finally in Section 9, he was given the power to regulate pipeline companies and prohibit the shipment of 'hot oil.' In summary, Title I was a break with the past on two fronts. Firstly, it delegated an extraordinary grant of power to the executive branch. Secondly, it involved the Federal Government in an unprecedented manner in the nation's peace-time economy.

It was the Supreme Court's task in Schechter v. U.S. to decide whether the National Industrial Recovery Act was constitutional.

The decision to use Schechter as the test case for the constitutionality of the National Industrial Recovery Act was to a certain extent forced on the government. It had been assumed until April 1, 1935 that the fate of the Act would be decided in United States v. Belcher Footnote2 which involved the code promulgated for the lumber industry. However, the Justice Department discovered an error in the government's brief which had been submitted before a lower court and consequently the Solicitor General, Stanley Reed, felt obligated to request a dismissal of the case, which was granted. This was a misfortune for the government for the facts in Schechter were particularly unfavorable to its cause. Nevertheless the Administration decided to press ahead as it was becoming increasingly concerned with the popular view that was gaining in the newspaper:

There can be but one inference, from this extraordinary conduct, that the Justice Department felt sure that the NRA was in its fundamentals unconstitutional, and that the Supreme Court was about to hold so. Footnote3

In order to avoid any further charges of bad faith or cowardice, the Administration decided to use the 'sick chicken' case as a test for the National Industrial Recovery Act. And so A.L.A. Schechter Poultry Corporation et al. v. United States Footnote4 was argued before the Supreme Court in early May 1935.

On May 27, 1935, the Supreme Court in an unanimous decision decided that Title I of the National Industrial Recovery Act Footnote5 was unconstitutional in that it was an unlawful delegation to the President of legislative power and the control of wages and hours in New York poultry slaughter-houses was an attempted invasion of the field of intrastate commerce.

The case had arrived before the Supreme Court on a writ of certiorari. It was on the attempted enforcement of the code provisions of Section 1 that the Act came before the Court.

The Schechter brothers and the A.L.A. Schechter Poultry Corporation were convicted in the Federal Court for the Eastern District of New York on 18 counts of an indictment charging violations of the "Live Poultry Code," and on an additional count for conspiracy to commit such violations. The defendants were charged in part with violations of such trade practice provisions as "straight killing" by permitting selections of individual chickens taken from particular coops and half coops, the sale of sick chickens, failure to comply with poultry inspection ordinances of the city, failure to make proper reports, sales to dealers who were without licenses required by the city, failure to comply with minimum wage and maximum hour provisions, and conspiracy to do the same. The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the Code, but reversed on two counts charging violation as to minimum wages and maximum hours of labor, on the ground that the latter were not within the regulatory power of Congress. On appeal to the Supreme Court the defendants contended (1) that the code had been adopted pursuant to an unconstitutional delegation of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the power of Congress; (3) that in certain provisions it was repugnant to the "due process" clause of the Fourteenth Amendment.

The Supreme Court reversed the judgment so far as the Code had been upheld, and affirmed so far as the Code had been held invalid by the Circuit Court of Appeals. The opinion of the Court, was written by Chief Justice Hughes. Mr. Justice Cardozo delivered a concurring opinion, in which Mr. Justice Stone joined.

The facts in Schechter were that a code, the "Live Poultry Code," had been approved in an executive order by President Roosevelt on April 13, 1934, Footnote6 pursuant to authority conferred on him by Section 3 of Title I of the National Industrial Recovery Act. The Act authorized the President to approve "codes of fair competition" on application of one or more trade or industrial associations or groups, if the President finds (1) that they "impose no inequitable restrictions on membership therein and are truly representative," and (2) that such 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 Title I. As a condition of approval, the President may "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." Violation of any provision of a code "in any transaction in or affecting interstate or foreign commerce" was made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day of continued violation is to be deemed a separate offense.

The "Live Poultry Code" established a code of fair competition and had eight articles which were applicable to the live poultry industry of the metropolitan area in and about New York City. These articles were entitled: (1) purposes, (2) definitions, (3) hours, (4) wages, (5) general labor provisions, (6) administration, (7) trade practice provisions, and (8) general.

The "industry" was defined to include "every person engaged in the business of selling, purchasing for resale, transporting, or handling and for slaughtering live poultry, from the time such poultry come into the New York metropolitan area to the time it is first sold in slaughtered form," and such "related branches" as may be included by amendment.

The Code fixed the number of hours for workdays. It provided that no employee, with certain exceptions, shall be permitted to work in excess of 40 hours of week, and that no employee, save as stated, shall be paid in any pay period less than at the rate of 50 cents per hour. The labor provisions prohibit employment of any one under 16 years of age, and declared that employees shall have the right of "collective bargaining," and freedom of choice as to labor organizations, in the terms of Section 7(a) of the Act. The minimum number of employees, who would be employed by slaughter-house operators, was fixed, the number being graduated according to the average volume of weekly sales.

In dealing with the questions raised as to the constitutional validity of the Code, Chief Justice Hughes first considered the Government's contention as to the appropriate approach to the important questions presented. As to this the opinion states:

"We are told that the provisions of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment, - 'The powers not delegated to the United Stated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" Footnote7

Consideration was given also to the point that the national crisis demanded a broad and intensive cooperative effort in industry, which was to be fostered by permitting the initiation of codes. But this was answered by pointing out that the codes are not merely the embodiment of voluntary cooperation, but have the force of law, binding on all belonging to the industry affected:

"The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes." Footnote8

The Court then addressed itself directly to the contention of the defendants that the codes were adopted pursuant to an unconstitutional delegation of legislative power. Discussing this principle, and referring to the recent decision in the Panama Company case, the Chief Justice states:

"We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. Panama Refining Company v. Ryan, 293 U.S. 388. The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, Sec. 1. And the Congress is authorized 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, Sec. 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which, the national legislature cannot deal directly. We pointed out in the Panama Company case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. Id., p. 421.

"Accordingly, we look to the statute to see whether Congress has overstepped these limitations, - whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." Footnote9

In searching the statute for the requisite standards, the term "fair competition" was scrutinized, to determine whether it refers to a category established in law, or is a convenient designation for whatever set of laws the formulators of a code and the President may prescribe as wise for the accomplishment of the board purposes of rehabilitation, correction and expansion referred to in Section 1 of Title I. It was pointed out in this connection that the Act did not define "unfair competition," and that although that is a limited concept defined in the law, nevertheless, "fair competition" cannot be regarded as antithetical to the "unfair methods of competition" condemned by the Federal Trade Commission Act. "The 'fair competition' of the codes had a much broader range and a new significance."

Furthermore, it was pointed out, that even if the establishment of codes is for the purpose of effectuating the general purpose of Section 1, including the elimination of "unfair methods of competition," and although that term is defined by law, it remains, however, only one of many objectives which the codes were intended to accomplish. Consequently, it was not accepted as a sufficient standard. With reference to this contention, the Court added:

"We think the conclusion is inescapable that the authority sought to be conferred by Section 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly discloses to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve, or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about the general declaration of policy in section one. Codes of laws of this sort are styled 'codes of fair competition.'" Footnote10

The Government argued that the Codes would "consist of rules of competition deemed fair for each industry by representative members of that industry - by the persons most vitally concerned and most familiar with its problems." Instances were cited of cases in which Congress has availed itself of such assistance, as in the exercise of authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims. This contention was answered with the following comment by the Chief Justice:

"But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in Section 1 of Title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." Footnote11

The Act was then examined to determine what limits were set to the exercise of the President's discretion. It was noted first that the Act required a finding that the groups proposing a code "impose no inequitable restrictions on admission to membership," and are "truly representative." These requirements, however, relate to the status of those initiating a code, and not to the scope of its provisions. The provisions against monopolies and monopolistic practices were also mentioned. "But," said the Court, "these restrictions leave virtually untouched the field of policy envisaged by section one, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit."

After referring to the findings which the President must make in approving a code, and observing that he may add his own conditions "in his discretion," the Court said:

"Such a sweeping delegation of legislative power finds no support in the decisions upon which the Government especially relies. By the Interstate Commerce Act, Congress has itself provided a code of laws regulating the activities of the common carriers subject to the Act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the Act,

Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation." Footnote12

The powers delegated to the Federal Radio Commission and the "flexible tariff" provision of the Act of 1922 were both referred to and distinguished.

Concluding his discussion of this aspect of the case, the Chief Justice said:

"To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, Section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power." Footnote13

Attention was then turned to the question whether the transactions in question were in interstate commerce. As to this, it was emphasized that the fact that almost all of the poultry coming into New York was sent from other states did not make the character of the defendant's transactions interstate commerce.

"Defendants held that poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived as has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce has ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce - where goods come to rest within a State temporarily and

are later to go forward in interstate commerce - and with the regulations of transactions involved in that practical continuity of movement, are not applicable here." Footnote14

Next was considered the question whether the transactions "directly affect" interstate commerce so as to be subject to federal regulation, and it was observed that:

"The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations." Footnote15

It was noted also that combinations in restraint of interstate commerce, or to monopolize any part of it, are within the reach of the federal Anti-Trust Act, although the parties seek to attain their end by means of intrastate activities. Local 167 v. United States, 291 U.S. 293, was cited as an illustration of this principle, where the subject of the conspiracy was the live poultry business in New York City. There it appeared that various classes of persons in the business had conspired to burden the free movement of live poultry in the area in and around New York City. Marketmen had organized an Association, had allocated retailers among themselves and had agreed to increase prices. To accomplish their purposes levies were made on poultrymen, men were employed to obstruct the business of dealers who resisted, wholesalers and retailers were spied upon, and by violence and intimidation were prevented from freely purchasing live poultry. The intrastate acts of the conspirators were enjoined to give effective protection to interstate commerce. Distinguishing that case, Chief Justice Hughes said:

"The instant case is not of that sort. This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions-as to hours and wages of employees and local sales- 'affected' interstate commerce.

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect on intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed 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." Footnote16

Other cases under the Anti-Trust Act were also cited as marking the distinction between direct and indirect effects on interstate commerce.

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Company v. United Mine Workers, 268 U.S. 295, 310. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes." Footnote17

Particular stress was placed on the fact that the wages and hours of those employed in the slaughter-house markets had no direct relation to interstate commerce. With respect to this the opinion states:

"The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce. This appears from an examination of the conditions in the poultry trade. Thus, the Government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work, translates his savings into lower prices; that this results in demands for cheaper grade of goods; and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing 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." Footnote18

In conclusion, the Court emphasized the limits of its province when it stated:

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power over the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But

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. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act, - the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting 'the cumulative forces making for expanding commercial activity.' Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

"We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power.

"On both the grounds we have discussed, the attempted delegation of legislative power, and the attempted regulation of intrastate transactions which affect interstate commerce, only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed." Footnote19

Mr. Justice Cardozo, in his concurring opinion, also discussed separately the two principal questions, the delegation of legislative power, and the scope of federal regulatory power over commerce.

Agreeing that the delegation of power was without adequate standards, he said:

"The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion.

"Here, in this case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.

"I have said that there is no standard, definite or even approximate, to which legislation must conform. Let me make my meaning more precise. If codes of fair competition are codes eliminating 'unfair' methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions. Delegation in such circumstances is born of the necessities of the occasion. The industries of the country are too many and diverse to make it possible for Congress, in respect of matters such as these, to legislate directly with adequate appreciation of varying conditions. Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory;

it is the imprunctur of the President that begets the quality of law. When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers.

"But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny." Footnote20

Mr. Justice Cardozo also expressed the opinion that there was no grant of power to Congress to regulate the wages and hours of labor in the intrastate transactions that made up the defendants' business. This objection to the code he termed "far-reaching and incurable." Dealing with this aspect, he said, in part:

"As to this feature of the case little can be added to the opinion of the Court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors through its territory; the only question is of their size.' The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system." Footnote21

WHAT WAS ROOSEVELT'S AND THE CONGRESSIONAL REACTION TO THE SCHECHTER DECISION?

On May 31, 1935, three days after the Supreme Court invalidated the National Industrial Recovery Act, Roosevelt held a White House press conference, to address his concern over the Court's refusal to allow the government to regulate nation-wide economic and social conditions in the United States. At this press conference Roosevelt stated the Schechter decision raised grave doubts as to the constitutionality of the Agricultural Adjustment Act, the Securities and Exchange Act, as well as the pending Social Security Bill.

Roosevelt termed serious the Supreme Court's expressed view on the delegation of Congressional powers to the Executive, but said the greatest question revolved around its interpretation of governmental powers over interstate commerce. Those powers, he emphasized, constituted the only weapon in the government's hands to fight conditions not even dreamed about 150 years ago.

Turning again and again to the implications of the decision, which quoted a previous decision designating building construction, manufacturing, mining and the growing of crops as local occupations, Roosevelt drew the deduction that not only business recovery efforts, but social security, including unemployment insurance and pending labor legislation, had been jeopardized by the Schechter decision.

When asked if he had a plan, Roosevelt declined to answer, but stated if the Constitution made his Federal program for regulating economic conditions impossible, the Constitution must be changed.

Roosevelt pleaded for public understanding of this dilemma of the government, which, he said, had attempted to cope with an economic problem only to have its action thrown back in its face because this was the only national government on earth that did not have clear authority to deal with such national situations.

Taking from his desk a sheaf of some twenty telegrams, Roosevelt said that he had been greatly impressed by the pathetic appeals addressed to him from all sections of the country, asking him to do something.

These were selected from 2,000 or 3,000 telegrams and letters which Roosevelt stated he himself had read, and these he interpreted as sincere in showing the people's faith in their government and an equally sincere feeling that in the long run something new must be done.

Roosevelt said he considered the decision more important than any laid down in the lifetimes of those present. He compared the Schechter decision with the Dred Scott decision, Footnote22 an important factor in the events that precipitated the Civil War. Footnote23

The decision on the National Industrial Recovery Act, Roosevelt added, might be deplored or otherwise considered, but he stated emphatically that if it resulted in future decisions carrying

out the implications contained therein, without change in viewpoint or procedure, the government would be stripped of all authority in behalf of human welfare.

Roosevelt then picked up a copy of the text of the Schechter decision, and proceeded to analyze it part by part.

He briefed the first part of the decision by saying that it simply stated the facts of the case, and the contention that the chickens sold by the Schechter company ceased to figure in interstate commerce once they had been delivered to a Brooklyn warehouse.

At its next point, Roosevelt went on, the decision took up the question of the code governing this industry, pointing out that the code was the result of an act of Congress, passed in a great emergency, which sought to improve conditions immediately through the establishment of fair trade practices.

Roosevelt began emphasizing the points in the decision when he reached the statement to the effect that, even though an emergency existed, this made no difference because the law authorizing the code did not set forth in detail definitions covering the broad plan of the NRA.

Roosevelt emphasized also the Court's finding that the act was unconstitutional because it delegated powers that should have been written into the act by Congress itself.

The most important phrase of the decision, said Roosevelt, was that relating to interstate commerce and the dictum that the government could not deal with any problem not directly interstate commerce.

The Supreme Court, Roosevelt said, had gone back to the Knight case, Footnote24 which in 1895 set forth a thesis which in effect limited federal control over interstate commerce to goods in transit, with only a few minor exceptions.

Roosevelt told the gathered news reporters Congress was of the opinion, when it enacted the National Industrial Recovery Act, that interstate commerce and control over such commerce, invested in the government by the interstate commerce clause of the Constitution, applied not only to actual shipments of goods but to many things that affected commerce.

The whole tendency over many years, Roosevelt stated, had been to view the interstate commerce clause in light of present day civilization, although it was written into the Constitution in the horse-and-buggy days of the eighteenth century.

There was hardly any interstate commerce in that period, Roosevelt pointed out, and virtually all communities were self-supporting to a degree impossible in modern civilization. All that the government feared was the possible growth of discrimination between States.

The clause was written in a day when there was no problem relating to unemployment, no wage problem as in the current differential between textile mills operating in New England and those

in the South; when no social questions disturbed the United States and when care of public health on a national basis had never even been thought about, let alone discussed.

Ethics too, were different in the early post-revolution days, Roosevelt observed, saying that if one man could skin another in a business deal it was perfectly all right.

However, the intervening 150 years had developed a completely different philosophy and practice in which the prospects of the farmer in the West directly affected the business of the manufacturer in Pittsburgh. The whole country had become completely interdependent.

Roosevelt declared that the country was facing a great national nonpartisan issue; that over the next five years or ten years it must decide whether it would relegate to the States control over national economic conditions and over social and working conditions, regardless of whether those conditions had a definite bearing on conditions outside of the different States.

The other side of the picture was whether we should restore to the government the right, held by all other national governments in the world, to legislate and administer laws having bearing on and control over national economic problems.

That was the biggest question ever faced by this country, outside of war itself, Roosevelt declared.

It was common knowledge to Roosevelt and to several key members in Congress that the Schechter decision jeopardized the passage of the Social Security Bill pending in the Senate at the time of Roosevelt's press conference. Those bent on seeing the passage of the bill felt that unless a major redraft of the social security legislation occurred, it would be likely that the legislation if enacted into law, would be found unconstitutional by the Supreme Court, if the right challenges were presented. Roosevelt's social legislation must conform to the interstate commerce clause of the constitution, since Congress had no power to regulate directly activities which are intrastate in nature. Several groups outside the government who supported the Social Security Bill also recognized the danger of an adverse court decision, if the legislation was not redrafted to conform to the standards set down by the Supreme Court in the Schechter case. One group The American Association for Social Security, declared on June 1, 1935, that unless the Social Security measure was altered considerably in its unemployment insurance and old age contributory insurance provisions to meet objections of unconstitutionality, it was in danger of being nullified.

Many in Congress also expressed their anger with the Supreme Court and its decision in Schechter. Representative O'Connor, Democrat, of New York, said:

"The course is for Congress to enact a law extending the NRA for interstate business and to authorize States to make compacts on regulation of business within State borders."

Other Democratic members of Congress suggested a constitutional amendment in order to validate Roosevelt's New Deal legislation. Republicans were inclined to believe that the only concrete implication in Roosevelt's discussion of the NRA decision was that he might favor an amendment of the Constitution. Some Republicans said that they would gladly accept the issue and fight for keeping the Constitution as it is.

Representative Bacon, a member of the Republican Congressional Committee, said:

"If the Democrats, as was intimated by the President today, wish to write the New Deal legislation into the Constitution through a constitutional amendment, I feel sure that the Republican party will accept the issue.

"I am strongly convinced that the President is wrong if he feels he can get his plan adopted through a constitutional amendment.

"I think the real issue for the people to decide is whether it is not time to stop the New Deal and not whether we should set up a dictator to carry out the program decided as contrary to law."

Mr. Shouse, in speaking for the Liberty League, proposed that the issues related by Roosevelt be brought immediately before the country. In his statement he said:

"In his very remarkable statement to newspaper men today the President has renounced entirely the theory of States' rights to which the Democratic party is traditionally committed and takes the view that all economic and social problems should be controlled by the Federal Government, regardless of the clear limitations of the Constitution. Otherwise, according to the President, we are relegated 'to the horse and buggy days.'

"Thus there is presented a clear issue. On the one side those who believe in the Constitution, who believe in orderly government, who believe in American institutions, who believe that the nine members of the Supreme Court who unanimously rendered their decision performed courageously and patriotically the clear duty assigned them.

"On the other side, a President who condemns that decision which upset one of his pet plans to assume unwarranted power and who would seek to abolish our dual form of government and the system of checks and balances between the legislative, executive and judicial branches.

"The President says that the American people must make an important decision. But it is not one that can wait, as he suggests, for five or ten years. It should be made at the earliest opportunity."

Former Governor Joseph B. Ely of Massachusetts declared that a constitutional amendment was necessary if New Deal policies were to be carried out and that such an amendment would "spell the doom of American representative government." Speaking at a quarterly meeting of the New England council he said:

"No American statesman of any earlier age, would for one moment undertake to transform the whole theory of this government in any other way than by submitting to the people this question of fundamental change. If the New Deal policies are to be supported and sustained, Mr. Roosevelt must ask a constitutional amendment. Not otherwise can Federal domination of business and agriculture be placed in the hands of the executive authority.

"It is too apparent to be controversial that such an amendment to the Constitution furnishes the self perpetuating power of a monarch and a dictator and in the course of events spells the doom of American representative government."

The Supreme Court decision emasculating the NRA ended the last hope of economic reforms in the United States without revolutionary changes in the basic law of the land, Dean Howard Lee McBain of Columbia University said in an address before the conference on Canadian-American affairs at the St. Lawrence University on June 22, 1935.

Dean McBain intimated that only a constitutional amendment could validate the reform aspects of the New Deal. As a means of winning support for such an amendment, he said, it would be shrewd strategy for President Roosevelt to drive through Congress as many bills of "doubtful constitutionality" as possible and "hasten these laws to an early judicial decision."

"The more toes that are trod upon by the firm but gentle feet of the Supreme Court," said the authority on constitutional law, "the larger will be the number of those who will be prepared for constitutional amendment."

Dean McBain conveyed the impression that he believed the reform phases of the New Deal were plainly unconstitutional. Without saying so directly, he intimated that he thought the Wagner-Connery Labor Disputes Bill was as vulnerable as the National Industrial Recovery Act and that the Agricultural Adjustment Act and the Securities Control Commission could be toppled over by any one who cared to make a legal assault upon them.

Under the present Constitution, in view of the Supreme Court's interpretation of interstate commerce, Dean McBain said, the Federal government was powerless to regulate capitalism. To look to the several States to do this, he said was futile. At the same time, he asserted it was "arrant nonsense" to confuse the issue with that of States' rights.

"The real issue," he asserted, "is an issue of national power versus the power of relatively unrestricted capitalism."

In the discussion that followed the delivery of Dean McBain's formal paper, Professor S. F. Bemis of Yale suggested an amendment to the Constitution to nullify the Tenth Amendment and give the Federal Government the power without which, the Columbia professor held, the New Deal was powerless.

"Suppose," asked Professor Bemis, "that we had an amendment to the Constitution reading roughly that the Tenth Amendment is hereby repealed and all powers not specifically reserved to the States shall reside in the Federal Government?"

Dean McBain indicated that he would regard this as an effective means of meeting the problem but he expressed doubt that such a repealer would be adopted by the people. The Tenth Amendment to the Constitution, which would be nullified if Professor Bemis's idea was adopted, reads:

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.

Georgia Governor Eugene Talmadge in a message celebrating the 4th of July, termed the Roosevelt administration policies "pure communism" and predicted that the "real Americans" will rise up in the polls in 1936 against "bureaucratic control."

"The government can't give you anything," Talmadge said. "The government can't support the people. The people have to support the government. The government can and is robbing Peter to pay Paul."

Asserting that Washington bureaus by assuming the functions of State government are dragging the Constitution in the dust, Governor Talmadge said:

"When the time ever comes for us to placidly obey the orders of seventy-two bureaucracies in Washington that override the Constitution of the United States, we forfeit our rights to be a free and independent American citizens.

"When the time ever comes for the sovereignties of the several States of this Union to be ignored and forgotten, then this Union is ready for dissolution.

"Get back to the Constitution. The Supreme Court of the United States is our greatest friend -our greatest protector."

Perhaps the best statement which typified the attitude felt by those who were disciples of the Roosevelt vision, came from Democratic Senator Pope of Idaho. Senator Pope criticizing the Supreme Court and the Constitution declared:

"The public welfare is first. If the Constitution gets in the way it must yield. If the Supreme Court gets in the way, it must yield."

The battle lines were drawn, Roosevelt was not going to let the Supreme Court or any other court stand in his way. Three options were opened to him. First, convince the courts to see the errors of their ways; second, Change the makeup of the courts; third, change the Constitution. Roosevelt knew that if he could get the majority of the people on his side this battle would be swift and glorious.

Footnote1

See Chapter 11

Footnote2

300 Ct.Cl 400.

Footnote3

New York Herald Tribune, April 3, 1935.

Footnote4

295 U.S. 495 (1235).

Footnote5

Act of June 16, 1933, c. 90, 48 Stat. 195, 196.

Footnote6

U.S. Statutes at Large

Footnote7

295 U.S. 485, 528, 529.

Footnote8

Id. at 529.

Footnote9

Id. at 529-30.

Footnote10

Id. at 535.

Footnote11

Id. at 537.

Footnote12

Id. at 539-40.

Footnote13

Id. at 541-2.

Footnote14

Id. at 543.

Footnote15

Id. at 544.

Footnote16

Id. at 545-6.

Footnote17

Id. at 547.

Footnote18

Id. at 548-9.

Footnote19

Id. at 549-51.

Footnote20

Id. at 551-53.

Footnote21

Id. at 554.

Footnote22

19 How. 393 (1857).

Footnote23

In 1937, Roosevelt led the charge in another war, his war against the Supreme Court.

Footnote24

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

CHAPTER 8

AGRICULTURAL ADJUSTMENT ACT CASE

United States v. Butler et al., Receivers of Hoosac Mills Corporation

297 U.S. 1 (1936)

The Agricultural Adjustment Act was supposed to be one of the political success stories of the New Deal, for the Act sought to bring about a considerable transfer of income from the non-agricultural sector into farming. Farmers' and the political representatives of the farm states had attempted to achieve this transfer in the 1920's but had limited success. Farmers were anxious for government involvement in agriculture during the 1920's because the economic depression that struck industrial America at the end of the 1920's had reached the agricultural economy a decade earlier. In 1919, gross farm income was $16.9 billion but by 1921 the sum was almost halved. Farm income rose in the mid 1920's but then fell sharply in 1929. Increased productivity of the farmer or 'over-abundance,' led to lower prices.

The response of the farmers through their political representatives, to the depressed prices for agricultural commodities was to involve the Federal Government in a program to raise prices. The vehicle they adopted in the 1920's to achieve their objective became known as McNary-Haugenism. Four McNary-Haugen bills were introduced during this decade, two of which were passed by the Congress only to be vetoed by President Coolidge. The idea behind the bills was to restore and maintain ratio-price for basic farm commodities by establishing a government corporation with power to buy and dispose of surpluses. After the government had established the ratio-price for each of the specific farm commodities cover by the bill, and the number of commodities varies between the four McNary-Haugen bills, the Federal Government would guarantee that the market price never fell below the designated ratio-price, by purchasing the requisite amount of the designated commodities to ensure the objective. The government would then sell the commodities it had purchased on the world market.

Clearly if the Federal Government was going to guarantee a minimum price for a range of farm commodities, it also has to have a measure of control over production. Otherwise its financial commitment to ensure that the market price never fell below the guarantee price would be

defined not by the government, but by the individual farmers when they made their decisions over the levels of their own production. Since the mechanisms to control production were not easy to devise or control, few plans were implemented until the development of Domestic Allotment in 1927. The fundamental objective behind Domestic Allotment was that if a farmer voluntarily accepted to reduce the number of acres he cultivated, then he would receive a benefit payment from the Federal Government. The government would raise the revenue for this benefit payment by imposing an excise tax on the processing of the commodity. The Domestic Allotment idea was simple, and was central to the Agricultural Adjustment Act.

In passing the Agricultural Adjustment Act in May 1933, Congress sought to raise the market price for corn, cotton, wheat, tobacco and rice to the McNary-Haugen ratio-price, also known as the parity price or parity. The parity price would be the equivalent of the price that these commodities had fetched between August 1909 and July 1914, which in the Act's opinion was a period when a 'fair exchange value' existed between farm and non-farm products. In order to achieve this objective, an Agricultural Adjustment Administration was established and its task was to enter into voluntary agreements with farmers to reduce the acreage they cultivated on a basis related to the average acreage that had been under cultivation in the previous five years. In return for their co-operation farmers received a benefit payment. These payments were to be funded by a tax on the first domestic processing of the commodity. The Act also contained a tax on floor stocks, which applied to commodities which had been processed before the imposition of a processing tax, and a tax on competing products both domestic and foreign. Under the Act, the Secretary of Agriculture was authorized to enter into marketing agreements with processors, associations of producers and others engaged in the handling of any agricultural commodity or product. Furthermore, the Secretary had the authority to issue licenses to them, and without these licenses they could not handle agricultural commodities.

In the two-and-a-half years after the passage of the agricultural adjustment Act, over 1,700 injunctions had been requested from the courts to restrain the collection of the processing tax and the tax was also the bone of contention in United States v. Butler et al. Footnote1 The facts in Butler were as follows: The Hoosac Mills Corporation, which was in the hands of a receiver, had received a claim for processing and floor taxes on cotton, and resisted the enforcement of the tax, whereupon they were sued by the government. The District Court found the tax valid and ordered it paid. When the receivers appealed the Circuit Court of Appeals for the First Circuit reversed the order. The case arrived at the Supreme Court on a writ of certiorari. On December 9, 1935 oral arguments commenced before the Court and over 2,000 people tried to attend. Those that did get in saw, according to Newsweek, the Solicitor General, Stanley Reed, 'blanch and sway' from the questions that the Justices threw at him. They also heard George Pepper, counsel for the receivers of Hoosac Mills Corporation, offer his prayer:

"I pray Almighty God that not in my time may the land of the regimented be accepted as a worthy substitute for the land of the free."

On January 6, 1936, in a six-to-three decision, the Supreme Court declared the Agricultural Adjustment Act of 1933, Footnote2 unconstitutional. Mr. Justice Roberts delivered the opinion of the Court and opened his discussion with the following words:

"In this case we must determine whether certain provisions of the Agricultural Adjustment Act of 1933, conflict with the Federal Constitution." Footnote3

On August 24, 1935, the Agricultural Adjustment Act was amended by Congress, but since the appeals court decision was entered prior to this amending act, it was declared in Roberts' opinion, "we are therefore concerned only with the original act."

Mr. Justice Roberts' opinion hinged on a determination of fact. Was the processing tax a tax? Was it like any other general revenue measure or was it, in fact, part of a regulation of an activity, i.e. agriculture, which was not necessarily within the jurisdiction of the Federal Government?

In their brief, the government had argued that under the doctrine enunciated in Massachusetts v. Mellon, 262 U.S. 447, the receivers of the Hoosac Mills Corporation had no standing in the Butler case. For in Massachusetts the Supreme Court, through an opinion by Mr. Justice Sutherland, had declared that the constitutionality of an Act of Congress could only be challenged if there was a:

"direct injury suffered or threatened, presenting a justifiable issue. The party must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

But, Justice Sutherland continued, with reference to revenue laws, the interest in the individual taxpayer 'in the moneys of the Treasury is shared with millions of others and is comparatively minute and indeterminable and remote, that no basis is afforded for an appeal to a court. Thus if the processing tax was a revenue measure then the respondents had no standing in Butler.

If the processing tax was not a tax and the Court perceived it along with the benefit payments to farmers as the inextricably linked elements of one and the same regulation to control agricultural production, then there were doubts over the constitutionality of the Agricultural Adjustment Act, because the Federal Government was then using its taxing and spending power to regulate an industry which it perhaps was not constitutionally entitled to regulate. But if the processing tax was indeed a revenue measure, then the Court could legitimately treat it, and the benefit payments, as separate entities, which would almost certainly lead to the conclusion that the Act was constitutional.

In dealing with the Governments' contention that the taxpayer has no standing to question the validity of a tax by challenging the intended use of the money after it reaches the Treasury, the Court rejected this argument by the government. In discussing Massachusetts v. Mellon, Mr. Justice Roberts declared that this case was distinguished from the case at bar, upon the ground that in Massachusetts the taxpayer's position was that the challenged expenditure of public moneys would deplete the public funds and increase the burden of future taxation. That argument in Massachusetts was rejected, because the taxpayer's interest in the funds and the supposed increase in his tax burden were minute and indeterminable. Here, on the other hand, the taxpayer directly resists payment of the tax, on the ground that it is a step in an unconstitutional plan.

In regard to the character of the processing tax, Mr. Justice Roberts declared:

"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." Footnote4

The Court's conclusion as to the nature of the exaction and the taxpayer's right to challenge it were stated as follows:

"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." Footnote5

Turning from the discussion of the character of the tax to consideration of its validity, Mr. Justice Roberts said:

"It does not follow that as the act is not an exaction of the taxing power and the exaction not a true tax, the statute is void or the exaction uncollectible." Footnote6

Passing from the question thus declared not controlling to what was called "the great and controlling question in the case" Mr. Justice Roberts said:

"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, Section 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. 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." Footnote7

As to the nature of the judicial function in such a case he said:

"There should not be any 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. 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." Footnote8

The government in their brief did not attempt to justify the Act under the commerce clause of the Constitution. An attempt to do so would have been vain. The tax and the method of spending the money raised by the tax was in furtherance of a plan to regulate agricultural production. It was a simple proposition of constitutional law that mere production is not commerce, let alone commerce among the states. Justification however, was sought under the "general welfare" clause, not that this clause is a grant of power to regulate agricultural production, but that it does justify the tax which had this result of regulation. Until 1936 the Supreme Court had never passed squarely on the construction of the term "general welfare" as used in the Constitution.

"General welfare" is found twice in the Constitution. First, in the Preamble,

We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. (emphasis added).

and second, in Section 8 of Article I,

The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States. (emphasis added).

The Preamble, although it indicates that the promotion of the general welfare of the United States was one of the ends of the proposed government, is not, of course, a source of substantive power, but section 8 of Article I is very much a source of power, and it was the construction of these words in this section that the Court attempted to answer. What did the words, provide for the general welfare mean? Did the words known as the general welfare clause, imply a limitation on the taxing and spending power, and how extensive was the limitation? The government briefly attempted to provide an answer. It suggested that there were two broad streams of interpretation. One was suggested by James Madison, the other by Alexander Hamilton.

It is said that the general welfare clause is a limitation on the taxing power; that the clause itself has reference to and is limited by subsequently enumerated powers; that is, that Congress can tax only to carry out one or more of these latter powers. This is known as the Madisonian theory. It is said that while the clause is a limitation on the taxing and spending power, it was intended to embrace objects beyond those included in the subsequently enumerated powers; that is that although Congress may not accomplish the general welfare independently of the taxing power, nevertheless it may tax (and spend) in order to promote the national welfare by means which may not be within the scope of other Congressional powers. This is commonly known as the Hamiltonian theory.

The strategy of the government brief was clear. It wished to demonstrate that the Hamiltonian interpretation was correct, for if the Court adopted the conception put forth by Madison, that the taxing and spending power was limited by the general welfare clause to those enumerated powers listed in the subsequent clauses in Article 1 section 8, then the powers of the Federal Government to tax and to appropriate would be severely restricted.

It was asserted by counsel for Hoosac Mills that it was never intended that the words found in Section 8 were an independent grant of power to provide for the general welfare as argued by the government. If they had been intended to be such, the enumeration of powers which follows this clause would have assumed all authority that a government might take unto itself. Under this theory the listing of specified powers would have been unnecessary, for the general welfare power would have been authority to act not only in the matters specially listed, but in all other proper governmental matters. Under this theory there would have been no sovereign states with a central government of limited powers, and this the Federal Government was meant to be. It should be repeated that after the failure of the states to function satisfactorily under the Articles of Confederation, each state gave up some of their powers to the new national government. While the powers surrendered were tremendous powers, still they were few in numbers. They could be grouped in eighteen short clauses of one section of a short Constitution. This new government was to have, as was made clear to some of the many who were to adopt this government in the Federalist Papers and other publications, only the powers expressly granted to it, and those necessary by reasonable implication to exercise fully the expressly granted powers. If the clause containing the words "general welfare" should confer the broad power upon Congress to legislate for the general welfare of the United States, not only is the following enumeration of federal powers rendered meaningless, but historians and students of American history have been long in error as to the very theory of the dual system of government; it is not a central government with only the powers the sovereign states have surrendered, it is a government of limitless power, leaving to the "sovereign" states such matters as the Federal Government does not care to consider. Again, if the term was such a grant of wide authority, why was it necessary to provide at the end of the list of powers of the new government that the Congress should have power "to make all laws necessary and proper for carrying into execution the foregoing powers." If the general welfare power was all this view contended it was, this "necessary and proper" clause was itself most unnecessary. The power to provide for the general welfare would have carried the same wide authority and more.

The conclusion is inescapable that this broad meaning was never intended to be attached to these words. Whatever interpretation may finally be given to them the view that they contain an independent grant of power can never be adopted. The long written words of Justice Story sounds the death knell to any such doctrine,

"The words 'to provide for the general welfare' have a definite, safe, useful meaning. The idea of their forming an original grant, with unlimited power, superseding every other grant is abandoned." Footnote9

One may question the statement that the meaning of the words is definite, but there must be agreement with Justices Story's conclusion that these words are no original grant of power.

Opposed to the view that the words were a sweeping grant of power was the view expressed by Madison that they were nothing more than a reference to the following enumerated powers. The history of the Constitutional Convention shows that these words in question were adopted only after extended deliberation and argument. Courts from the beginning have consistently held that every word in the Constitution, or in any Constitution, or indeed, in any statute, must be presumed to have been inserted for a purpose. In Madison's view these words might just as well

have been omitted. They added nothing. If the words "general welfare" do no more that refer to the subsequent specified grants of power as an indication of how the power to tax might be exercised, then they are the only words in the Constitution with no meaning or reason.

Hamilton contended that "general welfare" was a grant of comprehensive power to tax for the general welfare. A study of the Constitutional Convention discloses that in the original draft of the Constitution, the Congress was given power to tax, subject to no limitation. "The Congress shall have power to lay and collect taxes, duties, imposts, and excises." After committee meetings and recommendations, conferences and argument, the words "to pay the debts and provide for the common defence and general welfare of the United States" were added. Rather than a general grant of power to provide for the general welfare, rather than a mere reference to the other enumerated powers, and rather than a bare grant of power to tax, the form of this clause, together with a knowledge of its formation and of the temper of the people of the nation at the time the Constitution was adopted, shows that the true meaning of the clause is: The Congress shall have power to tax for the purpose of paying the debts and providing for the common defence and general welfare of the United States.

In other words, there is no absolute, unlimited power to legislate for the general welfare, neither is there absolute power to tax for any purpose. This construction is in harmony with the national temper of the early days of the nation, with the history of the construction of the Constitution, and conforms with the principle of judicial construction that every word is presumed to have a proper meaning, there is a limited power to tax, a power to tax for the general welfare.

This view, first notably expressed by Hamilton and later adopted by Story, was accepted by the Supreme Court in Butler. In passing to a consideration of the proper construction to be given to the General Welfare Clause, Mr. Justice Roberts pointed out that it has never been necessary heretofore to decide which is the correct construction of the provision invoked. The contention of the Government as to the interpretation of the General Welfare Clause was stated as follows:

"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 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." Footnote10

Discussion then followed on the two principal views as to the meaning of the clause, quoting Madison, Hamilton, Monroe and Story:

"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 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, 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. We shall not review the writing 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 section 8 which bestow and define the legislative powers of 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." Footnote11

Adoption of the broader interpretation of the general welfare clause by the Supreme Court did not leave the power to spend free from all limitations, however, even Story and Hamilton believed that the general welfare clause imposed limitations on the taxing and spending power, but their definition of the clause provided the Congress with a greater latitude. Having in mind the relation between the taxing power and the power to spend, the Court continued:

"Story says that if the tax be not proposed for the common defense or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare." Footnote12

So far as the scope of the General Welfare Clause is concerned, the Court found it was not necessary to decide whether an appropriation to aid agriculture falls within it, because the Act challenged is a plan for regulation of agriculture, and as such invades the powers reserved to the states. This point is referred to in the dissenting opinion as the pivot on which the decision is made to turn. The operation of the Act as an invasion of the reserved powers of the states was the subject of the following exposition:

"We are not 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 the 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." Footnote13

Having concluded that the taxing power may not be exercised to enforce regulation of matters which are concerns of the state, the Court considered the question whether Congress might exercise the power of taxation to raise funds to compel or to purchase compliance with such regulation. After indicating his belief that the plan is not in fact voluntary, because it operates through economic coercion Mr. Justice Roberts continued:

"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.

"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 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.

"Congress has no power to enforce its commands on the farmers to the ends sought by the Agricultural Adjustment Act. It must follow that it may not directly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negate 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 is but to say that wherever there is a widespread similarity of local concerns, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states." Footnote14

The Court then cited illustrations as to how the Federal Government could, on the theory that it may raise funds through taxation and could use the funds to induce compliance with its regulations, control and regulate industry throughout the United States, and thus convert them into a central government with uncontrolled police power. Thus it might supersede the control and regulation now exercised by the states.

In summary, Mr. Justice Roberts accepted the Hamiltonian theory of the taxing power and the general welfare clause. Therefore he accepted that the Congress could levy an excise tax on the processing of agricultural products as long as it was a revenue measure. But Justice Roberts claimed that the tax was not a revenue measure, and along with the benefit payments was a federal attempt to regulate agricultural production, which was not within the jurisdiction of the Federal Government.

In conclusion, Mr. Justice Roberts said:

"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 to 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 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 to 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.

"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 has done in that regard." Footnote15

Mr. Justice Stone delivered the dissenting opinion in which Mr. Justice Brandeis and Mr. Justice Cardozo concurred.

WHAT WAS THE PUBLIC REACTION TO THE BUTLER DECISION?

The Supreme Court's decision in United States v. Butler prompted several verbal attacks on the Supreme Court both inside and outside the administration. Edward A. O'Neal, head of the American Farm Bureau Federation, termed the ruling "a stunning blow to national economic recovery," while Stanley F. Morse, vice president of the Farmers Independence Council, welcomed it as a blow to "bureaucrats masquerading as benefactors."

Said Mr. O'Neal:

"The fight is on. At this time all gloves are off. Those who believe the American farmer is going to stand idly by and watch his program for economic equality and parity, for which he has fought for more than a decade, swept into the discard, will be badly mistaken.

"I consider this decision a stunning blow to national economic recovery.

"The program launched by organized agriculture must go forward. The American farmer will continue to fight for economic parity.

"We are going to look to Congress to take specific steps which will provide by legislation the mechanism by which agricultural parity is to be continued.

"It's up to Congress to provide that legislation within the provisions of the Constitution.

"If the Constitution in its present form makes it impossible for all groups to enjoy economic equality, steps will be taken immediately to amend the Constitution so that the rights of all groups and of all citizens will no longer be jeopardized.

"The laws of this country must protect equally all groups and classes. The day of special privilege for certain groups is over. The program which has just been overthrown by the court's finding is the farmers' own program. It was written by the farmers, and by no one else.

"Those who attack this program, in preliminary hearings before Congressional committees, and in suits against the United States Department of Agriculture and the Agricultural Adjustment Administration, are enemies of the Republic.

"By their selfish attitude and their un-American spirit they have left no stone unturned to keep the farmer impoverished, to reduce him to a state of peasantry, and to retard the whole program of national economic recovery."

Harper Sibley, president of the United States Chamber of Commerce, said of the decision:

"This important decision involves principles under which a number of other important congressional acts such as the Labor Relations Board, the Gruffey Act and the Social Security Act Footnote16 have been based.

"This ruling seems to make it clear that the Federal Government does not have the right to attempt to control the conduct of people through the use of taxing power. Taxation should be for revenue only."

Governor Talmadge of Georgia, a critic of Roosevelt's New Deal legislation, hailed the Butler decision by saying:

"The United States is returning to sanity. I congratulate the American people on having a real Supreme Court."

Senator Frazier is reported to have said:

"I never could satisfy myself that the Supreme Court had the power to declare laws unconstitutional. Listen to what the President said in his message last Friday night: 'The Congress has the right and the means to protect its own prerogatives.' This means Congress has the authority to pass legislation curbing the power of the Supreme Court. If the President means what he says, such a bill will be introduced and I will be glad to vote for it. If we pass a law taking from the Supreme Court its assumed power to declare laws unconstitutional, and the court should hold that act invalid, we have perfect grounds for impeaching the entire court."

When Roosevelt received word of the Supreme Court's decision against the Agricultural Adjustment Act, he was in his White House office chatting with Secretary Dern. When the news bulletin of the decision was laid before him, according to Secretary Dern, Roosevelt held the sheet of newsprint before him and "smiled."

"He seemed to take it all right," the Secretary said. Within five minutes, Steven T. Early of the White House Secretariat announced that there would be "no comment today" by the President on the decision. Footnote17

Footnote1

297 U.S. 1 (1936).

Footnote2

Act of May 12, 1933, c. 25, 48 Stat. 31.

Footnote3

297 U.S. at 53.

Footnote4

Id. at 61.

Footnote5

Id. at 61.

Footnote6

Id. at 61.

Footnote7

Id. at 62.

Footnote8

Id. at 62-3.

Footnote9

STORY, COMMENTARIES ON THE CONSTITUTION, Vol. I, 989.

Footnote10

Id. at 64-5.

Footnote11

Id. at 65-6.

Footnote12

Id. at 67.

Footnote13

Id. at 68.

Footnote14

Id. at 74-5.

Footnote15

Id. at 77-8.

Footnote16

The Social Security Act was enacted into law on August 14, 1935.

Footnote17

Editor's Note: Perhaps Roosevelt's "court packing plan" unveiled in 1937 can be classified as his official comment to the *Butler* case.

CHAPTER 9

CRITICISM OF THE SUPREME COURT IN 1935-36

"Don't interfere with anything in the Constitution. That must be maintained, for it is the only safeguard of our liberties. And not to Democrats alone do I made this appeal, but to all who love these great and true principles." Abraham Lincoln, August 30, 1856.

The decision of the Supreme Court on May 6, 1935 Footnote1 declaring the Railroad Retirement Act unconstitutional and the Court's subsequent decision in the Schechter case Footnote2 which declared the National Industrial Recovery Act unconstitutional was an unexpected blow to Roosevelt's New Deal legislation. The invalidation of several New Deal acts by the Supreme Court, resulted in the introduction of a number of new bills and resolutions in Congress during 1935 and 1936, to curb the powers of the Supreme Court.

Bills and resolutions ranging from simple measures to prohibit the Court, by legislative enactment, from passing on the constitutionality of acts of Congress, to resolutions calling for constitutional amendments were introduced in 1935 and 1936. Some bills sought to make Congress the sole judge of the constitutionality of its acts, others would have the Supreme Court render immediate advisory opinions on acts whose constitutionality was in doubt, and still others would require a two-thirds or a three-fourths vote of the Court to declare an Act unconstitutional.

On May 8, 1935, two days after the Supreme Court's decision invalidating the Railroad Retirement Act, Footnote3 Representative Monagham, of Montana, in a speech to the House of Representatives, urged his colleagues to curb the power of the Supreme Court. He advocated "packing" the Supreme Court, and suggested that Congress provide for advisory opinions, require unanimous decisions, or deprive the Court of its power to review acts of Congress. Footnote4 His speech was typical of many which were to follow. As the members of Congress saw one after another of their efforts to lift the country out of depression cast aside by the Supreme Court, their feeling of frustration grew.

Senator La Follette, and Representatives Cross of Texas, Tolan of California, and Hobbs of Alabama introduced resolutions for a constitutional amendment providing that the President, through the Attorney General, when in doubt as to the constitutionality of an Act of Congress, may call upon the Supreme Court for an immediate written opinion. Representative Tolan's resolution provided that Congress, as well as the President, may call for immediate advisory opinions.

Representatives Crosser and Young introduced bills providing that three-fourths of the members of the Supreme Court shall concur before the Court may declare an act of Congress unconstitutional.

Representative Ramsay of West Virginia introduced a bill requiring that seven of the nine members of the Supreme Court must concur before the Court may declare an act unconstitutional, and a joint resolution for a constitutional amendment providing that the inferior federal courts shall not pass on the constitutionality of an Act of Congress and that three-fourths of the judges of the Supreme Court must concur in such declaration.

Senator Norris of Nebraska offered a resolution for a constitutional amendment giving the Supreme Court exclusive jurisdiction to declare Acts of Congress unconstitutional and then only by a two-thirds majority of the Court and provided the action is begun within six months after the passage of the Act.

Senator Norris' constitutional amendment provided that:

The Supreme Court shall have original and exclusive jurisdiction to render judgment declaring that any law enacted by Congress in whole or in part is invalid because it conflicts with the Constitution; but no such judgment shall be rendered unless concurred in by more than two-thirds of the members of the Court, and unless the action praying for such judgment shall have been commenced within six months after the enactment of the law. Footnote5

A similar amendment, but without the six months proviso, was proposed in the House. Footnote6 All of these proposed amendments deprive inferior federal courts and state courts of all power to pass on the constitutionality of federal statutes and all would apply only to acts of Congress.

Representative Sisson of New York introduced a resolution calling upon the House Committee on the Judiciary to make a study of the right of the Supreme Court to declare an Act of Congress unconstitutional and make a written report to the House.

No one in Congress really contemplated that serious action would be taken on any of the bills introduced. They, as well as the comment on them in the Congressional Record, are analogous to the obiter ditca Footnote7 of a judicial decision. They contained nothing definitive, but they did evine an attitude; one of outrage and brought to the attention of the public the helplessness of Roosevelt, caused by an adversarial Supreme Court in fulfilling his mandate to the people in their time of need. After the Butler case Footnote8 decided by the Supreme Court in January 1936, invalidating the Agricultural Adjustment Act, the attitude in Congress became crystallized in more imperative form and many thought that some reform of the Supreme Court, whether by resolution or constitutional amendment was needed.

During the Seventy-fourth Congress, over forty proposals to curb the court's power were introduced. In addition there were also a number of proposals for constitutional amendments enlarging the federal power by granting to the Congress the authority to legislate concerning industrial disputes, and production control, agriculture, and social welfare. The majority view

seemed to be that the end sought can best be attained by directly limiting the Supreme Court's power to review. It is proposals of this type which this chapter will attempt to summarize.

All of the bills introduced on this subject for change by statute applied to state laws as well as to acts of Congress. They would not, however, attempt to interfere with the Supreme Court's original jurisdiction. One proposal required concurrence of seven members of the Supreme Court to declare laws unconstitutional, and would prohibit inferior federal courts, but not state courts, from passing on questions of constitutionality. Footnote9 The federal courts would be required to certify them to the Supreme Court for determination. Several other bills introduced in Congress, were designed to enlarge the majority necessary to pronounce a law unconstitutional. Three-fourths was the minimum in two bills, Footnote10 a third required a unanimous decision. Footnote11

Decisions of a bare majority of the Court invalidating acts of Congress have long been focal points of controversy. Such decisions are almost unanimously deplored. The first arose in the 1820's. At that time resentment had been caused by the decisions nullifying state laws by a bare majority of a quorum of the Court, or a minority of the full membership. Martin Van Buren and Henry Clay supported resolutions which contemplated requiring by act of Congress - not by constitutional amendment an extraordinary majority of the Court to concur on decisions adverse to constitutionality of state statutes. Daniel Webster, opposing such measures, proposed to require concurrence of only a majority of the justices competent to sit in the cause involved. The criticism of the Supreme Court at this time may have influenced Chief Justice Marshall to announce in 1834 that judgment in cases when constitutional questions were involved would not be rendered unless enough justices concurred to make the decision that of a majority of the Court.

Criticism was then quieted until just before the Civil War, when the Dred Scott decision Footnote12 revived it. It appeared again in the Reconstruction days and once more during the Bull Moose campaign in 1912.

Two amendments in 1935 were proposed to abolish the Court's power to review legislation. One provided that:

The Supreme and inferior courts of the United States shall have no jurisdiction to declare any acts of Congress unconstitutional. Footnote13

The other proposal was broader. Its provisions were:

No court in the United States or any State, shall declare unconstitutional or void any law enacted by the Congress of the United States. All laws of the United States shall remain in full force and effect throughout the United States until repealed by the Congress of the United States, or until vetoed or repudiated by the actions of the legislatures of three-fourths of the States. Footnote14

In addition to the proposed amendments, an act of Congress was suggested which would provide:

That from and after the passage of this act, Federal judges are forbidden to declare any act of Congress unconstitutional. No appeal shall be permitted in any case in which the constitutionality of the act of Congress is challenged, the passage by Congress of any act being deemed conclusive presumption of the constitutionality of such act. Any Federal judge who declares any act passed by the Congress of the United States to be unconstitutional is hereby declared to be guilty of violating the constitutional requirement of 'good behavior' upon which his tenure of office rests and shall be held by such decision ipso facto to have vacated his office. Footnote15

Two proposals were made for amendments which would require the Supreme Court to render an advisory opinion upon any act by Congress, where requested to do so by the President or by the Congress. Footnote16 Under another proposed amendment, an act passed by Congress and approved by the President, would not become law unless presented by the President to the Supreme Court of the United States for its decision on the constitutionality thereof and not until sixty days after it has been so presented. This amendment also stipulated that, "it shall be the duty of the Supreme Court to render such decision within sixty days."

In addition to the extra burden these amendments would place upon the Supreme Court, they would be impractical in still another way, in that it would require the Court to pass on laws before their operation has been observed. Many believed that the adoption of this type of proposal would result in more decisions of unconstitutionality than the system of judicial review.

Opponents to these amendments argued that, whether or not amendments of this type would be wise, an act of Congress having the same effect would undoubtedly be unconstitutional. Early in its history the Supreme Court refused to vouchsafe an advisory opinion to President Washington, feeling that this duty belonged under the Constitution to the Attorney General and did not comport with true judicial functions. This precedent has been regarded as settling the question.

Nevertheless in 1935, a bill was introduced in Congress which would direct the Attorney General to submit legislation to the Supreme Court, "and the Court shall furnish him its written opinion within ninety days." Footnote17

For instance, a bill which provided for direct review by and advancement on the docket of the Supreme Court of any decision of a district court involving a constitutional question when the Attorney General certifies that the national public interest justifies such a direct review was introduced in the Senate. Footnote18

In 1935, a resolution was introduced in the House which called for no amendment or statute but provided for an investigation of the problems and of methods for solving it. It instructed the House Judiciary Committee to investigate whether the "general welfare" clause was a grant of power to Congress; whether the Supreme Court was authorized to annul acts of Congress; and, if the House should determine that the Constitution has been misconstrued, what measures it should take "to restore it to its necessary intended, and rightful place as the supreme legislative authority of the people of the United States." Footnote19

Two rather unusual proposals submitted during the 1935-36 congressional session, remain to be mentioned. One sought to take from the lower federal courts the authority to decide the constitutionality of federal laws and vest it in a single court, to be created, from which an appeal could be taken directly to the Supreme Court. Footnote20 The other proposal sought to increase the membership of the Supreme Court from nine to eleven. Footnote21

In 1935-36, the prevailing sentiment in the Congress was that the Court had "usurped" powers which constitutionally belong to the legislative branch. A speech by Representative Lewis, of Maryland, was typical of the attitude of many members of the House. He expresses the belief that the Court had written into the Constitution its power to invalidate acts of Congress, the judge's private theories of right and wrong (added under the "due process" clause), and limitations on the "general welfare " clause. To restore the Constitution to its original state he suggested that the following remedies be adopted: Under the "exceptions and regulations" clause, a statute would be enacted providing that only a state, and never a private litigant, would be heard to complain of an invasion of its sovereign rights by Congress; jurisdiction would be denied to nullify revenue laws at the instance of a private litigant; jurisdiction would be left with the courts to review the constitutionality of statutes violative of provisions as to specific subjects, such as right of petition, habeas corpus, trial by jury, freedom of press, etc.; jurisdiction would be denied to annul statutes on such nonspecific titles as general welfare, commerce among the states, taxation, due process of law, and money; any decision that an act of Congress is void should be subject to reversal by Congress.

On February 17, 1936 Footnote22 in direct response to the massive criticism being leveled at the Supreme Court, the Court by a majority of eight-to-one reaffirmed the principle 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." Footnote23

This doctrine known as the "Ashwander Doctrine" was used by the Supreme Court when they refused to pass on the constitutionality of Title VIII of the Social Security Act of 1935, in Steward Machine Company v. Davis Footnote24 decided May 24, 1937. The Ashwander doctrine is used today by the courts as the wall which bars the citizenry from bringing certain constitutional issues before the courts. Footnote25 It was hoped by the Supreme Court in 1936 that the Ashwander v. Tennessee Valley Authority decision would alleviate much of the criticism building against the judiciary branch by finding a vehicle in which certain parts of Roosevelt's New Deal legislation could find acceptance by the courts.

Footnote1

Railroad Retirement Board v. Alton, 295 U.S. 330 (1935).

Footnote2

295 U.S. 495 (1935).

Footnote3

Note 1, *supra.*

Footnote4

79 Congressional Record, pg. 7149 (1935).

Footnote5

S.J. Res. 149.

Footnote6

H.J. Res. 287.

Footnote7

Words of an opinion entirely unnecessary for the decision of the case.

Footnote8

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

Footnote9

H.R. 7997.

Footnote10

H.R. 8100 and H.R. 8123.

Footnote11

H.R. 8118.

Footnote12

Scott v. Sandford, 19 Howard 393 (1856).

Footnote13

H.R. 296.

Footnote14

H.J. Res. 329.

Footnote15

H.J. Res. 301.

Footnote16

H.R. 374; H.R. Res. 317.

Footnote17

H.R. 8309.

Footnote18

S. Bill 3211.

Footnote19

H.R.. 234.

Footnote20

79 Congressional Record, pg. 10975, 15336 (1935).

Footnote21

H.R. 10362.

Footnote22

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

Footnote23

Id. at 323.

Footnote24

301 U.S. 548.

Footnote25

The doctrine of estoppel is examined in volumes II and III of this work.

CHAPTER 10

THE COURT BILL OF 1937

"The contest, for ages, has been to rescue Liberty from the grasp of executive power. Through all this history of the contest for liberty, executive power has been regarded as a lion which must be caged. So far from being considered the natural protector of popular right, it has been dreaded, uniformly, always dreaded, as the great source of its danger." Daniel Webster, May 7, 1834.

Suppose a President with the help of a willing Congress was bent on doing something which the Supreme Court deems contrary to the Constitution. They pass a statute. A case arises under it. The Supreme Court on the hearing of the case unanimously declares the statute too be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of the justices on the high Court. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the Court. The new justices outvote the old ones. The statute is held valid: The security provided for the protection of the Constitution is gone like a morning dew.

What prevents such assaults on the fundamental law - assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms.

If evidence were lacking that Roosevelt's massive re-election victory at the polls in November, 1936, had done something to him, he lost no time in supplying the proof. In his message to Congress on January 3, 1937, Roosevelt declared:

"The carrying out of the laws of the land as enacted by the Congress requires protection until the final adjudication by the highest tribunal of the land. The Congress has the right and can find the means to protect its own prerogatives."

Thus began Roosevelt's plan to reorganize and recreate the United States Supreme Court in his own image by waging one of the greatest battles against the judicial branch of our government. Unfortunately, little if any of this battle is taught in our great institutions of learning. This chapter retraces this battle, it will detail how our Supreme Court almost fell in the year 1937. Historians will record that Roosevelt lost this battle, but as we will see, Roosevelt won the war!

The drama's prologue begins eighteen months earlier in the White House on May 31, 1935, four days after the Supreme Court had unanimously invalidated the National Industrial Recovery Act.Footnote1 The four days had given Roosevelt's temper time to reach the boiling point, and Senator Felix Frankfurter and General Hugh S. Johnson who conferred with him in the oval room, found him in a fighting mood. Roosevelt told them that he wouldn't take the Court's action lying down, that he wouldn't stand for it. The country was with him, not with the Supreme Court, Roosevelt said, and he promised angrily to bring the Court into line, if he had to "pack it" or even "deny it appellate jurisdiction." It was here that Roosevelt first announced his decision to give battle to the Supreme Court. The famous "horse-and-buggy" press conference took place a little later.

To Franklin Delano Roosevelt, unlike most politicians, precedents were made to be broken. His insistence on having his own way without interference, and after so much success with handling the Congress and the public, he was not about to let the Supreme Court stand in the way of his new order.

Add to such a personality the theory of the courts function which Roosevelt expressed to a doubtful senator during the court fight, and you have an understandable pattern of character and action. Roosevelt was explaining to the senator that the fault was not his but the Supreme Court's. Roosevelt said he had wanted to play ball with the Court, and at the very start of his term he had suggested to Chief Justice Hughes a sort of consultative relation between them. He had intimated to the Chief Justice that he would like to discuss his important economic and social plans, to get the Court's slant on them before he acted. But the Chief Justice was chilled to the idea. Hughes made it clear to Roosevelt that the strictest separation between the Supreme Court and the White House was not only advisable but necessary.

"You see," said Roosevelt to the senator, "he wouldn't cooperate."

No wonder, then, that through the remaining year and a half of his first term, as the Court's decisions against the New Deal piled up, Roosevelt kept his determination to force the Court into line. Long before the 1936 presidential election, it was known in the inner White House circle that the Supreme Court would probably be dealt with if the election went well. With the campaign to be got through, the strictest secrecy was maintained. Yet the determination was unquestionably there. The best proof of this is the fact that legal experts in the Department of Justice were hard at work studying approaches to the Court problem during a good part of the campaign.

Then came the election itself. If anything was needed to persuade Roosevelt to act, it was his majority on November 3, 1936. He took the 27,000,000 votes cast for him as an endorsement as personal as appointment to be trustee and guardian of a friend's children. He believed that the people had given him carte blanche to go forward, in whatever direction and by whatever means seemed best to him. Therefore, it was only a few days after the votes had been counted that Roosevelt called Attorney General Homer Cummings to the White House and told him that it was time to work out a scheme for dealing with the Supreme Court. Roosevelt enjoined the secrecy on Cummings and observed it himself. Cummings and a few trusted subordinates went to work on a series of elaborate studies of the different alternatives, both amendments and legislative acts to deal with the Court. All through November and December they worked. But no definite plan was produced. They merely arrived at a set of general conclusions as to what they wanted. The amendment approach was discarded, as being too slow and too uncertain. Moreover, as they interpreted it, the federal Constitution needed no amendment. They reasoned, the Court personnel needed to be changed, and one obvious way for the required change in personnel was to pack it. But how could it be done constitutionally.

The "court packing plan" was born late in December by Cummings while he was in his Justice Department office one evening, mulling over this problem. Previously, he and Roosevelt decided that reform of the lower courts, with more judges to speed up procedure there, was also desirable, and they wanted a general system on which the Supreme Court could be increased and the new lower court judges provided. Yet how to pack a court by principle? Cummings desk was piled high with papers, all dealing with the subject. He picked up one after another, glanced at them and put them down again. Then Cummings remembered that in his book, Federal Justice, he had quoted from a memorandum prepared for President Wilson in 1913 by Associate Justice James McReynolds, then Attorney General. The paper was an argument for insuring a young, vigorous judiciary by appointing an extra judge for every judge who had served ten years, had reached the age of seventy and had failed to resign or retire. The germinal idea was borrowed from a radical Republican bill which passed the House in 1869. McReynolds had limited it to the lower courts, but Cummings thought to himself, why not extend it to include the Supreme Court also? Thus the whole problem would be met. Cummings roughed in his plan and hurried to the White House. After Roosevelt glanced at the plan, his face lit up.

"That's the one, Homer," he said excitedly.

Roosevelt was completely delighted with the plan. Knowing that the plan came from the mind of Justice McReynolds, the Supreme Court's most die-hard conservative, enchanted him. All that remained was to draw up and put the finishing touches on the plan. This was done entirely in secret. Now, all that remained was the right opportunity for Roosevelt to present the plan, which came in February, 1937.

On February 4, 1937, just two weeks after his inauguration, Roosevelt communicated with Joe Robinson, his Senate leader, and Speaker Bankhead of the House. He told them that there would be an important announcement at the Cabinet meeting the next morning and to bring with them Hatton Sumners and Senator Henry Ashurst, chairmen respectively of the House and Senate Judiciary Committees as well as Sam Rayburn, House Majority Leader. The cabinet and the

invited legislators were present shortly before noon, assembled around the large table in the cabinet room, and wondering what was in the air.

Roosevelt came in hurriedly, followed by a secretary with a sheaf of papers - the same mimeographed copies of Roosevelt's message to Congress, the Attorney General's letter and the Court Bill which was later distributed to Congress and the press. Roosevelt looked at his watch and said he would not have very much time. Roosevelt had sent for them to inform them that he was sending to congress a message and the draft of a bill which proposed a reorganization of the Supreme Court. The bill would give him power to appoint a justice for every member of the Supreme Court who had reached the age of 70 and refused to retire, and he could appoint as many as six additional judges. He explained that this was necessary because, due to the age of the justices the Court was behind in its work, that the method of administering the Supreme Court's docket was defective and that the bill would apply to district and circuit judges and would enable him to provide enough judges to keep up with the court's lagging business.

Roosevelt made a few more brief explanations, looked at his watch again and explained that he had a press conference in a few minutes, could wait no longer and went out of the room.

The President of the United States had just acquainted the cabinet and the democratic congressional leaders with a plan, the boldest and most revolutionary any president had ever suggested to his party colleagues. Not a soul present, save Attorney General Cummings, had any inkling of what was coming. No one was asked to comment or give an opinion. It was an imperial order by a man who had become confused about his true place in the general scheme of things.

This was one show that was being managed by Franklin Delano Roosevelt himself. Up until now Roosevelt had received advice and direction on political matters from James Farley, Vice President Garner, Joe Robinson in the Senate, Bankhead, Rayburn and others in the House. But all of these men had been carefully excluded from any knowledge of this step.

At noon Roosevelt gave his press conference. In it he declared:

"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.

"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.

"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.

"Since the earliest days of the republic, the problem of the personnel of the courts had needed the attention of the Congress. 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 in 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 10 in 1863; it was reduced to 7 in 1866; it was increased to 9 in 1869.

"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.

"Delay in any court results in injustice. 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.

"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.

"In the Federal courts there are in all 237 life tenure permanent judgeships. Twenty-five of them are now held by judges over 70 years of age and eligible to leave the bench on full pay. Originally no pension or retirement allowance was provided by Congress.

"When after eighty years of our national history the Congress made provision for pensions, it made a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity. 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.

"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.

"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 courts.

"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 resign.

"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.

"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.

"These proposals do not raise any issue of constitutional law. They do not suggest any form of compulsory retirement for incumbent judges. Instead, 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 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.

"One further matter requires immediate attention. We have witnessed the spectacle of conflicting decisions in both trail and appellate Courts on the constitutionality of every form of important legislation. 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.

"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.

"Moreover, during the long processes of preliminary motions, original trials, petitions for rehearing, 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 lake of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice-certainty.

"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 previsions 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 constitutionally 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.

"I also earnestly recommend that in cases in which any court of first instance determines a question of constitutionality, the Congress provide that there shall be a direct and immediate appeal to the Supreme Court, and that such cases take precedence over all other matters pending in that Court.

"This message has dealt with four present needs: 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; 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.

"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."

Roosevelt's news conference, of course, created a sensation. Republican opposition was up in arms. But more serious, a large section of the huge Democratic majority was dismayed. The court bill was referred to the Judiciary Committees of both houses for hearings. Judge Hatton Sumners of Texas was chairman of the House committee. He had been at the cabinet meeting when Roosevelt tossed his plan before the leaders at the White House. As Sumners left the White House that morning, several newspapermen asked him what it was all about. He told them. Then he said: "This is where I cash in my chips."

The house leaders, angry though they were, reported to Roosevelt that he had a majority for the court bill of 100 in the House. History records that the House of Representatives, elected in the landslide of 1936 reached the lowest level in character and intelligence of any House since the Civil War. Its members and its leaders were the compliant tools of Roosevelt and the hungry beggars for his bounties. Nevertheless, this bill was a little too much and while they dutifully expressed in the private polls taken by the leaders their readiness to go along, they muttered among themselves and they did not complain when Hatton Sumners determined that the House Judiciary Committee would not even hold hearings on the bill. Roosevelt and his subalterns considered taking a vote of the House to compel the Judiciary Committee to report on the court bill. They had the votes, but for some reason decided not to act, but instead decided to start hearings on the court bill in the Senate.

Not only did Roosevelt rely on his democratic resources in Congress to push the court bill through, there was another resource which Roosevelt felt he could rely on - his golden radio voice. As the opposition strengthened, Roosevelt grew more and more anxious to enter the fight, and soon he was working on two speeches. The first, with its plea for party loyalty, was made at the Democratic Victory Dinner on March 4, 1937. The second, delivered five days later, was a fireside chat in which Roosevelt asked the nation to trust him, to have faith in him and his motives. A careful examination of these two speeches sheds light on Roosevelt's true motives behind the court bill. Let's examine them at this time.

In his speeches of March 4, 1937 and March 9, 1937, Roosevelt clearly raises the issue of whether we ought not, henceforth, have a legislative, rather than a constitutional form of government.

In reference to Roosevelt's speech of March 4, 1937, Roosevelt explains why he wanted the Supreme Court increased by six members. On at least two occasions he referred, without its context, to a remark of Chief Justice Hughes:

"We are under the Constitution, but the Constitution is what the judges say it is."

Thereupon Roosevelt added, speaking of the charge that he proposes to pack the Supreme Court:

"But if by that phrase the charge is made that I will appoint justices who understand those modern conditions - that I will appoint justices who will not undertake to over-ride the judgment of the Congress on legislative policy if the appointment of such justices can be called 'packing the Court,' I say that I, and with me the vast majority of the American people, favor doing just that thing-now."

It is not the function of the courts to pass on the wisdom or unwisdom of legislative acts and the Supreme Court has repeatedly stated that its decisions are not rendered on this basis. But Roosevelt thought any opinion by the courts declaring any part of his New Deal program unconstitutional was directed against "the judgment of the Congress on its legislative policy" rather than a decision on whether such act was within the powers granted to Congress by the Constitution. Can there be much doubt from this statement that what Roosevelt was really saying is that we should change to a legislative form of government? Roosevelt obviously was not satisfied with the slow process incident to procedure under the checks of the Constitution. Roosevelt believed it to be the best policy: that when a majority of the people, under whatever stress, either of war or economic depression, or even in normal times, want particular laws, they are entitled to them - to experiment with what may happen. If the results are ill, they will still be satisfactory; for what the majority wishes, it should have. Roosevelt firmly believed he was chosen to lead the American people to a better land and a happier life; but he knew that he could only lead them into this land and life of milk and honey only if he was unhampered, by Congress, the Judiciary and the Constitution.

In this same speech, Roosevelt spoke of the Preamble to the Constitution in this fashion:

"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 there 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."

Roosevelt then adverted to the clause with reference to the laying of taxes. He said:

"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 Congress the ample, broad powers to levy taxes and provide for the common defense and general welfare of the United States."

It is a well established principle under American Constitutional Law that the preamble and the taxing clauses, with reference to "general welfare," have been limited by other provisions of the Constitution. Roosevelt as President and Chief Executive, must have known this principle too. Are we then to conclude from his remarks that what Roosevelt wished for was a legislative form of government, uncontrolled by the checks of the Constitution; that the majorities in Congress shall be regarded as having, with the Executive, the final word as to what laws the people shall have? With a popular and forceful President, the Legislative branch would have less influence than he; with a less influential executive, power would be centered in Congress. Roosevelt preferred this type of government power (legislative) rather than a constant check of power by the Supreme Court. The necessary consequences, of course, would be an all powerful central government with the rights of the states subordinated to Congress and the Executive, or to one of them, as circumstances at the moment would decree. We would then have government from Washington with exclusive jurisdiction over all the people of the Union. We would inevitably become a government by bureaucracy.

What further confirmation can we find for Roosevelt's desire for a purely legislative form of government? Again referring to his speech of March 4th, Roosevelt declared:

"Economic freedom for the wage earner, the farmer, and small businessman, will not wait for four years. It will not wait at all."

That declaration should be clear enough. It was a statement of what a legislative form of government can do. Roosevelt assumes the absolute necessity for what he calls "economic freedom"; an economic freedom of a kind legislated by Congress. If the Legislature was all-powerful and can pass any law without fear of reversal by the judicial branch, then their laws and decrees would be the final declaration of the rights, duties, and liabilities of all citizens.

Roosevelt, still confirming this theory, offered his analogy of the three-horse team. He declared:

"For as yet there is no definite assurance that the three-horse team of the American system of government will pull together."

Roosevelt's analogy would be sound under a legislative form of government; but it is utterly contrary to the theory of a constitutional form of government. The founding fathers seeing the danger in a centralized government, divided the powers of government between three distinct branches. They wrote:

"To have a country and a civilization, to protect ourselves within and from foes without, we must give to the Federal Government certain powers; but even if the government we are creating is a republic, we are well aware that majorities are as autocratic, unfair, and unreasonable as kings. Therefore, we must protect minorities. We, therefore, divide the powers of government between three distinct branches, none of which may control the others. We write these laws in this Constitution, setting up three guardians of our liberties, each to watch and protect against the other two. We are not harnessing a three-horse team to work in unison; we are giving to each horse a different task, and if one does a bad job, the others will repair the negligent work."

It is clear enough that when the going is heavy, three horses might do more quickly any one particular job working in unison; but what the forefathers saw was that; if the three branches worked absolutely together, it was very likely that one would, from time to time, control the action of the others. That way danger lay, and they avoided it. Roosevelt referred again to this three-horse metaphor in his March 9th speech saying:

"Two of the horses are pulling in unison today; the third is not."

Again Roosevelt knew American history and the theory of our constitutional government. He knew perfectly well that, far from unity of action being intended, the Constitution provides for the opposite results. In his speech on March 4th Roosevelt said:

"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."

Could there be a declaration of desire for a non-constitutional form of government any clearer than is contained in those words? Roosevelt believed that Congress and the Executive alone must have the power, by legislation considered desirable at the moment, to meet current economic and social conditions. The founders of the government believed, on the contrary, that Congress may often adopt ill-advised legislation; that what may seem desirable at the moment may, in the long run, aggravate our ills and deprive us of our liberties. For that reason, the checks provided by the courts were insisted upon.

The conclusion of Roosevelt's March 9th speech confirms all the other statements. He declared:

"I am in favor of action through legislation: first, because I believe that it can be passed at this session of the Congress."

It was all summed up there. What Roosevelt wanted was a legislative form of government, without power in the courts to restrain legislation under the provisions of the Constitution.

Roosevelt in his message of March 9, 1937, repeated what he had said before that "we have only just begun to fight." Fight against whom? Against a coordinate branch of the government, the judiciary? Against the people themselves? The court bill involved a change in governmental policy and construction, a lessening of the duties of the Supreme Court, a restriction upon the control over legislation.

After analysis of the two speeches given by Roosevelt and finding the real purpose and intention behind Roosevelt's "court packing" bill, it is little wonder that the Republican leaders decided that it would be wise for them to leave this bone for the Democrats. From his sickbed in Virginia, Carter Glass began hurling whole streams of epithets at the plan which, he said, was "completely destitute of all moral understanding." Harry Bird, Millard Tydings and above all, Burton Wheeler sounded off and at a later meeting of the Democratic critics of the plan it was decided that Burton Wheeler should take the leadership of the opposition.

Wheeler had had a long and distinguished career as a courageous and honest champion of liberal causes. Like most liberals, he had been critical of the Supreme Court, but he was a believer in the Constitution and the American system, and everything in his soul rose up in rebellion against Roosevelt's audacious plan to destroy the independence of the judiciary.

Wheeler knew when he took the leadership of the opposition movement for the democrats, he was putting under Roosevelt's hand his own political death warrant which Roosevelt would not hesitate to sign. He delivered a terrific blow to the plan on the first day of the Senate hearings. The reasons given by Roosevelt for his plan publicly were wholly lacking in frankness. Since Roosevelt did not want to declare outright that he wanted to pack the Supreme Court with a batch of judges who would vote as he wished, his strategists suggested Roosevelt declare publicly the arguments for his plan were (1) that the work of the Supreme Court was too heavy for nine men to handle, (2) that the advanced age of some of the justices made it difficult for them to do the arduous work required of them, (3) that there should be an infusion of "new blood" in the Supreme Court so that the judges would be more alive to changing conditions.

On Point No. 1, Roosevelt made a ghastly mistake because, at the time Roosevelt's message was delivered to Congress, there was available a clean cut and comprehensive report on the status of the Supreme Court docket, made by Stanley Read, Solicitor-General of the Department of Justice, showing that the Supreme Court was well up with its work and that whatever delay there was, was caused by the lawyers and not by the justices.

On Point No. 2, the opponents of Roosevelt's court bill promptly pointed out that not one of the nine justices was accustomed to being absent from Court for any appreciable periods and that all were attending to their duties without suffering any great inconvenience.

Point No. 3 involved the question of whether different justices were "liberal" or "conservative" the inference being that the older justices were too conservative or "reactionary" and should be replaced by younger men who would be more "liberal."

The opponents called attention to the fact that the most liberal member of the Supreme Court, the man most quoted by the 'New Dealers', was Mr. Justice Brandeis, who happened to be the oldest member on the Court.

They also recalled the fact that side by side with Mr. Justice Brandeis in the rendering of "liberal" opinions for years was the late Mr. Justice Oliver Wendell Holmes, who was 90 years old when he resigned in 1932.

On the first day of the open hearings, which began March 10, 1937, Senator Wheeler rose and read a letter from Chief Justice Hughes, blowing to bits further Roosevelt's argument that new justices were needed to keep up with the Courts work. In the letter Chief Justice Hughes called attention to the fact that the Supreme Court's docket for the first time in many years was absolutely up to date. There were no cases lagging behind for any reason. Justice Hughes had been not merely the presiding judge, but a competent and exacting administrator of the Court's affairs. This letter completely punctured the whole pretense on which Roosevelt's court plan was based.

The Hughes letter produced consternation in the White House. Roosevelt called in his immediate White House advisers. He was angry with the strategists who had invented this shabby excuse which had now been completely deflated, and he poured out his wrath on their heads. One Roosevelt advisor suggested to him that there was nothing to do but to come out boldly and frankly with the real reason. "This," he said, "is a plan to pack the court. You have to say so frankly to the people. Until you do that you cannot advance the real arguments which you have for the plan."

Roosevelt was forced to reveal his true position that he desired the Supreme Court changed in order that he might appoint justices who would support his New Deal legislation.

It was at this point that the battle began in earnest. Roosevelt made a speech in support of his position, backed up by several members of his Cabinet and several administration Senators.

The opposition likewise went on the radio and, for a few weeks, hardly a day passed when neither was not presenting its arguments. Several Senators on the Senate Judiciary Committee issued a signed statement containing several reasons for rejecting the court bill. This statement read:

We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle.

It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose.

It would not banish age from the bench nor abolish divided decisions.

It would not affect the power of any court to hold laws unconstitutional nor withdraw from any judge the authority to issue injunctions.

It would not reduce the expense of litigation nor speed the decision of cases.

It is a proposal without precedent and without justification.

It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights.

It contains the germ of a system of centralized administration of law that would enable an executive so minded to send his judges into every judicial district in the land to sit in judgment on controversies between the Government and the citizen.

It points the way to the evasion of the Constitution and establishes the method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law.

It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy.

Under the form of the Constitution it seeks to do that which is unconstitutional.

Its ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is - an interpretation to be changed with each change of administration.

It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.

It can be said that past presidents have appointed to the Supreme Court men of their political party and known to be in sympathy with their views. But it is one thing for a president to appoint to the bench a man of the same general political and social outlook as himself and another thing to announce in advance to the man appointed that he is appointed for the purpose of having him vote, when he is once seated on the bench, in a particular way.

Roosevelt's proposal to "pack the court" had one objective; to destroy the independence of the United States Supreme Court. And if Roosevelt was successful at destroying that independence, the independence of the other courts of the country would not survive.

The struggle for human liberty has revolved around the struggle for independent courts. The most important concession wrung from the British King by the Magna Charta was that all men should be equal before the law and the rights of every man should be protected by courts that were not mere appendages of the King. The Court of Star Chamber, infamous for its tyranny, was overthrown because it was made up of puppets of the King that did his will. When the American Constitution was presented for adoption, the memory of the tyranny to which the people had been subjected was still fresh in their minds. The People insisted that there be included in the new Constitution a bill of rights that would guarantee them freedom from

arbitrary arrest, freedom of speech, freedom of the press, freedom of religious worship, freedom of assemblage, freedom from unreasonable search and seizure, freedom from conviction of crime except on a fair trial by jury, freedom, in short, to exercise all those rights which made up, in the burning words of the Declaration of Independence, the "inalienable rights to life, liberty and the pursuit of happiness."

And why did the people insist upon a guaranty of these rights being inserted in the Constitution? It was that they should become a part of the "Supreme Law of the Land" and as such, be protected by the courts against violation by either the executive or legislative branches of the Government. Thomas Jefferson writing a friend said:

"In the argument in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the Judiciary. This is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity."

Patrick Henry said:

"The Judiciary are the sole protection against a tyrannical execution of the laws. They (Congress) cannot depart from the Constitution; and their laws in opposition would be void."

James Madison, presenting to the First Congress the amendments incorporating the Bill of Rights in the Constitution said:

"If they (the rights specified in the Bill of Rights) were incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution by the declaration of rights."

To those opposed to Roosevelt's court bill, it was more than a battle for an independent judiciary, but a battle against a centralized government and a return to tyranny.

On March 29, 1937, the Supreme Court drove another death nail into Roosevelt's court bill when they upheld the Railroad Labor Act;Footnote2 it upheld the reversed the Frazier Lemke Farm Mortgage Moratorium Law,Footnote3 both with unanimous opinions. More important still, in a five-to-four decision, with Justice Roberts now joining with the liberal members of the Supreme Court in these opinions, the Court upheld the Washington state minimum wage statuteFootnote4 by distinguishing it from its decision of a few months before on the New York Minimum Wage Law.Footnote5 Justice Roberts had moved over to the other side of the Court. The liberals were in ascendancy, and at last there appeared to be a good chance that Roosevelt would get what he wanted from the Court - the interpretation of the laws by Brandeis, Stone and Cardozo.

Then on Monday, April 12, 1937, the tide of battle turned once and for all when the Supreme Court upheld the National Labor Relations Act. At his press conference the same afternoon, Roosevelt smiled and said it had been "a pretty good day for us," but it was the death blow to his

court bill. The decisions of the Supreme Court on April 12th, ended Roosevelt's second and most powerful argument - that the Supreme Court stood in the way of progress. Roosevelt now had to abandon this argument.

For two years Roosevelt had been demanding a liberal Supreme Court. Two months before, he had taken radical steps to get a liberal court by introducing the court bill. Now with these new decisions by the Supreme Court he had a liberal court. Even though Roosevelt looked pleased and happy at the press conference following the National Labor Relations Act case, the truth was that the news, with all its implications of danger to the court plan on which Roosevelt had gambled so much, came as a severe shock to him.

Roosevelt and his strategists had been expecting the Supreme Court to commit a sort of judicial hara-kiri. Roosevelt was counting on the justices for a series of conservative decisions, decisions which would surely have put a very different face on Roosevelt's fight to packing the court. Instead, the Supreme Court astonished Roosevelt, his advisors and most of the competent lawyers in the country.

Roosevelt was indeed astonished. His legal experts informed him that, in view of the Supreme Court's past decisions, adverse holdings on the National Labor Relations Act, the Social Security ActFootnote6 and other New Deal measures were foregone conclusions.

Angry as he was, Roosevelt was faced with the necessity for a prompt decision. There were three alternatives before him. He could announce that, since the Supreme Court had liberalized itself, he would abandon his plan to pack it. Or Roosevelt could intimate that, under the circumstances, he would be pleased to compromise on a smaller number of additional justices. Or he could call the Court's move "political" and press on with his original court bill.

The men closest to Roosevelt in managing the court fight began to talk of compromises. One was to limit the number of new justices to two. Another was to allow the President to appoint a justice for every man reaching the age of 75, but limiting him to one appointment a year. Roosevelt rejected the idea of compromise in spite of the advice of almost everybody around him and chose the third option, to continue the fight.

During a meeting with his strategists, Roosevelt informed them of his decision to continue by declaring "the fight must go on." He declared that the Supreme Court's change of front was a political move, that the justices could not be depended on to stay liberal, and that, in any case, the whole reversal of the Court's direction hung on one man's whim - Mr. Justice Roberts.

As previously examined, Roosevelt wanted something more than a liberal court; like Johnny Rocko in the movie, "Key Largo", he "wanted it all." He disclosed this desire to Professor William Ripley and Senator O'Mahoney. Both men had been summoned to the White House to have their fears about the court bill soothed away. Upon meeting Roosevelt both men asked why he would not compromise when he had got the liberal majority he desired on the bench. For proof they pointed to the National Labor Relations Act decisions.

Roosevelt's reply was to explain that a 5-to-4 majority was not good enough for him. He said he wanted a Supreme Court which would "co-operate" with the White House. He needed six new justices who would be friendly and approachable, men with whom he could confer, as man to man, on his great plans for social and economic reform and experiment. In his days as governor of New York, Roosevelt recalled, he had a close relationship with several members of the New York Court of Appeals, and it had worked very well. He thought that where great questions were involved, it was in the public interest to have the Supreme Court and the executive work things out together, rather than to have a long interval of uncertainty between the executive's action and the Court's reaction. As they listened to Roosevelt calmly explaining what he wanted, they could not forget the doctrine of separation of powers. They answered him the best they could, but they were so astonished that when they left Roosevelt's office, they took the trouble to compare notes on what they had heard.

Then on May 8, 1937 Justice Van Devanter one of the conservative members of the Supreme Court announced his retirement, giving Roosevelt the opportunity to appoint a judge of his own political complexion.

This presented Roosevelt with another dilemma. The Senate leaders wanted Joe Robinson appointed to the bench. But the appointment never came to Robinson, who resented this, and a coolness developed between him and the White House.Footnote7 When Justice Van Devanter announced his retirement from the bench, and with Roosevelt's unwillingness to appoint Robinson to the bench or to now compromise on the court bill, anger soon developed among his own supporters who were being forced to carry this unpopular cause. In the end he had to assure Robinson that he would have the appointment, but Robinson was stricken with a heart attack in the Senate and died shortly after, alone in his apartment.

Vice-president Garner, disgusted at the labor troubles which he attributed to Roosevelt,Footnote8 had packed up his duds and left for Texas. Roosevelt complained that Garner had left him in the lurch on the court fight. But he really had no right to complain. Roosevelt had not taken Garner or any other leader into his confidence on the court bill. He had set out to manage it himself. He had made an appalling mess of it and he now complained bitterly that Garner had deserted him. When Garner got back to Washington, he was informed by those who were still fighting his battle that it was now no longer possible to get any kind of face-saving compromise.

Following this, Garner went to the White House. He was brutally frank with Roosevelt. He told him he was licked and suggested that the best course for him was to leave the matter in Garner's hands to make the best settlement he could. Roosevelt wearily agreed. Garner went to Wheeler and asked on what terms he would settle. Wheeler replied: "Unconditional surrender."

On July 22nd, in the afternoon, Senator Logan rose on the floor of the Senate. It had been agreed that the court bill would be recommitted to the committee with the Supreme Court provisions left out of it. Senator Logan now made the motion to recommit. Hiram Johnson of California rose. He asked: "Is the Supreme Court out of this?" Senator Logan replied with an element of sadness in his voice: "The Supreme Court is out of it." Senator Johnson lifted up his hands and said: "Glory be to God!" as the galleries broke into wild applause. The court bill was dead.

Following the apparent liberalization of the Supreme Court and after defeat of the court bill, Roosevelt in a public address said: "We lost the battle [the court bill], but we won the war." Historians of our times will differ with respect to the reasons why sufficient opposition was present in Roosevelt's own political party to defeat the court bill, and also whether this opposition was able to obtain assurances that the Supreme Court, or at least a majority, in order to protect and preserve its integrity as a tribunal of justice against the court bill becoming law, decided to "cooperate" with certain New Deal policies where public interest was vitally concerned. Moreover, since this apparent compromise, the Supreme Court has rarely overthrown an act either of Congress or the States, and has cooperated with subsequent administrations in decisions opening up new fields of taxation, while thus declaring judicial neutrality in cases raising troublesome constitutional problems. As a consequence we now have a Central Government controlled and directed largely by Congress and the Chief Executive, with judicial restraint at a minimum in those fields where the people desire, through legislation, to aid themselves with federal funds or through higher wages, shorter hours, price controls of all sorts, industrial output, unionization activities, etc. In other words, State Socialism and Fascism appear to be the directions the American people took in the 1930's and are now following. It appears we now have a Federal Government with powers similar to those of the British Parliament, acting within the forms and symbols of the Constitution due to its elasticity in various of its parts, but with freedom and liberty as heretofore known in America steadily disappearing. Probably only the American people themselves can change their own direction. If they gradually swing to the right, perhaps their Supreme Court will go with them, and then we may again prefer the "old Constitutional model." But as was once said by Justice Story long ago:

"Our constitutions were all framed for man as he should be, not for man as he is and ever will be."

CONCLUSION

There were many people besides Roosevelt who believed that the Supreme Court should not have the power to nullify any act of Congress. They believe that when a majority of the Congress and the President have approved a law, it represents the will of the people and should not be set aside by "nine men," forgetting that the Constitution is intended for the protection of minorities against the usurpation's of the majority.

Much of the unconstitutional New Deal legislation enacted by Congress attempted to create additional Federal power by further restricting or entirely usurping the powers of the separate states over the matters involved. There were those among the supporters of the court bill who based their criticism of the Supreme Court upon the fact that the Court had declared a so-called "twilight zone" in which both the State and the Federal Government are powerless to act. We should be eternally grateful that the Constitution does create a twilight zone which protects the

rights of the humblest citizen against invasion by either Federal or State government. The right of trial by jury, religious liberty, personal freedom and security, freedom of speech and the press are all in the twilight zone; also the right to private property. This latter was the right to which objection was most frequently made by Roosevelt.

It is substantially clear that the real purpose behind the court bill was not to compensate for the infirmities of age, but to secure the appointment of a sufficient number of new Justices to the Supreme Court to insure that the New Deal legislation desired by Roosevelt would be sustained as to its constitutionality.

Failing in this attempt to "pack to court", the Congress on August 24, 1937 passed an act entitled "An Act to provide for intervention by the United States, by direct appeals to the Supreme Court, ... and for other purposes. Section 1 of the Act reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, ... is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence ... and argument upon the question of the constitutionality of such Act. In any suit or proceeding the United States shall,...have all rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act.Footnote9

If Roosevelt could not prevent the Supreme Court from declaring any act of Congress unconstitutional, perhaps this Act would prevent or make it harder for an individual to challenge the constitutionality of any act passed by Congress.

Footnote1

See Chapter 7.

Footnote2

Virginia Railway Co. v. system Federation No. 40, 300 U.S. 515 (1937).

Footnote3

Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U.S. 440 (1937).

Footnote4

West Coast Hotel v. Parrish, 300 U.S. 379 (1937). *See:* Chapter 11.

Footnote5

Morehead v. People ex rel. Tipaldo, 298 U.S. 587 (1936). *See:* Chapter 11.

Footnote6

The Supreme Court's decision on the social security act is examined in volume II of this work.

Footnote7

Hugo Black was appointed to the Supreme Court August 17, 1937.

Footnote8

During the later part of 1936, a new strategy was developed by the national labor unions which was secretly endorsed by Roosevelt. This strategy was the now famous "sit-down" technique used during a strike. These union leaders and Roosevelt adopted this technique as a way to create enough labor strife in the country, whereby, forcing the Supreme Court into a position of adopting an expanded interpretation of the commerce clause, giving the Federal government exclusive jurisdiction over all parties involved in the strike, under the government's claim that the strike or threat of strike would cause a burden to the "flow" or "stream" of commerce. All of the decisions of the Supreme Court in the *National Labor Relations Act* cases (reviewed in Chapter 12) involved striking employees or a threat by the employees to go on strike if the employer refused to adopt the collective bargaining features of the National Labor Relations Act.

Footnote9

50 Stat. 751.

CHAPTER 11

THE SUPREME COURT

AND

MINIMUM WAGE CASES

"The first object of a free people is the preservation of their liberty. This spirit of liberty, is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of men. It demands checks; it seeks for guards; it insists on securities; it intrenches itself behind strong defenses, and fortifies with passion. It does not trust the amiable weakness of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it."

Daniel Webster, May 7, 1834.

INTRODUCTION

The right to labor and to its protection from unlawful interference is a constitutional as well as a common-law right. Every man has a natural right to the fruits of his own industry.

Labor is deemed to be property, especially within the meaning of constitutional guaranties. Thus, the right to acquire property includes the right to acquire property by labor, enabling him to possess the necessities of life. For most individuals in today's modern society direct production of the necessities of life is out of the question. Each of us is dependent on gaining access to a variety of goods, whether by direct production or by acquiring these goods by some other means, by the payment of money. But to obtain money, anyone without an independent "income" must sell his labor. No other access to a livelihood is left open to him but to exchange his labor for remuneration, or wages. The right to earn wages is just as much property and within the protection of the due process clauses of the Constitution as earned wages.

Since the right to labor is protected by the Constitution and numerous guaranties of state constitutions, one cannot be deprived of such right by arbitrary mandate of the state legislatures and/or by the Federal government.

As a general principle, every member of a community has a right to enjoy a free labor market, to have a free flow of labor for the purpose of carrying on the business in which he has chosen to embark. This right is not merely an abstract one; it is one recognized as the basis of a cause of action where there is an unlawful interference therewith. Specifically, laborers have a right to a free and open market in which to dispose of their labor, or a right to a free access to the labor market for the purpose of maintaining or increasing the incorporeal value of their capacity to labor. A laborer has the same right to sell his labor as any other property owner.

When an individual cannot obtain a decent livelihood through the sale of his labor, it is either because the market value of what he has to sell is too low, or because he cannot in fact sell his services for as much as they are worth on the market - that is, either because he holds low cards, or because he lacks the skill, knowledge or time to play his cards well. In the early twentieth century, it was decided by several state legislatures, that, notoriously, women without independent means were apt to suffer from one or the other of the handicaps mentioned above. To help prevent such events from happening these states adopted minimum wage laws pertaining to women and minors.

STATE CONTROL OVER WAGES AND HOURS

The first attempt at general regulation of working conditions of employees in private industry was the Minimum Wages for Women Law of the State of Washington,Footnote1 authorizing the establishment of minimum wages for women and minors.

Many other states followed Washington's lead in enacting similar legislation. In 1918 Congress, as the local legislative body for the District of Columbia, enacted, under its police power, a minimum wage law for women and minors employed in the district.Footnote2 The law was similar to that of the State of Washington under which a wage board was empowered to inquire into and fix wages for women and minors with the objectives of meeting "the necessary cost of living and maintaining good health."

The advocates of the District of Columbia Act, before a committee of Congress, conceded that the liberty of men to contract for sub-living wages, could not be taken away because men were free and able to attack and resist unfair practices and abuses by employers, but contended that women were physically inferior and mentally different, yield easily to the duress of necessity; that they were susceptible to wage oppression by unscrupulous employers was proved by the commonly known fact that great numbers who work did not receive a living wage. Even if women, married or single, may vote, sit on juries and on judicial benches, hold public office, acquire and dispose of property, carry on business and incur obligations, nevertheless women,

married or single, who work for wages that did not exclusively sustain them in physical and moral health were not legally competent and should have the guardianship of the law against their employers and against themselves in their own and the public interest. The committee reported this bill without dissent, and Congress all but unanimously passed the law and President Wilson promptly signed it on September 19, 1918.Footnote3

Minimum wage and maximum hour legislation for women and minors were also enacted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, Rhode Island, Arizona, Arkansas and Oregon.

FEDERAL CONTROL OVER WAGES AND HOURS

The first federal legislation relating to this subject pertained only to hours of work. The earliest enactment by Congress provided for an eight-hour work day for laborers and mechanics engaged in public works, either by the government itself or private contractors engaged by the Government.Footnote4 Several other acts followed which regulated in the field of interstate transportation, relating to railway employees. As a part of this general regulation, establishing a maximum 16-hour workday for railway employees, a 13-hour workday for railway employees directly concerned with the movement of trains in places of work operated only in the daytime, and a maximum nine-hour day for employees of railways operating on a basis of 24 hours per day, was provided for.

In the field of federal legislation pertaining to wages, hours and child labor, the most important was the National Industrial Recovery Act which was struck down by the United States Supreme Court as an unconstitutional exercise of the right to regulate hours of work, wages and child labor provided in section 7(a) of the act. The National Industrial Recovery Act as previously discussed in Chapter 7, attempted general regulation of wages, hours and child labor in all industries. But the Supreme Court found the Act as beyond the power of Congress to legislate in the field of intrastate commerce.

JUDICIAL HISTORY OF MINIMUM WAGE STATUTES

The constitutional question as to the validity of minimum wage laws first came before the courts in 1914, when, in two decisions,Footnote5 the Supreme Court of Oregon held that minimum wage legislation for women and minors was valid. Seven judges favored the state legislation and none opposed it. One of these cases was appealed to the United States Supreme Court.Footnote6 The Court on April 13,1917, per curiam, affirmed that judgment, by a four to four vote. Mr. Justice Brandeis, having been of counsel, did not sit. The tie vote settled nothing. No opinions

were written, no authorities cited, no rule laid down, no precedent established. The appellants were assessed the costs, and it was settled that in Oregon such a law was valid. The constitutional question was left without a final answer. In 1918, a minimum wage statute covering the employment of women and minors was passed for the District of Columbia.Footnote7 This gave rise to the Adkins case, which was decided in 1921 by the Court of Appeals of the District of Columbia in favor of the statute as constitutional. The vote was two in favor and one opposed. But one of the justices favoring the legislation was sitting pro tempore. When the regular justice returned, he, with the previously dissenting judge, granted a rehearing. On this occasion, the former favorable decision was reversed by a two to one vote. This left that tribunal divided two to two.

THE DISTRICT OF COLUMBIA MINIMUM WAGE ACT CASE

Adkins v. Children's Hospital, 261 U.S. 525 (1923)

The District of Columbia's adverse decision was appealed to the United States Supreme Court, where it was affirmed on April 9, 1923 by a five to three vote. Mr. Justice Brandeis did not participate. Mr. Justice Sutherland wrote the majority opinion. Essentially the facts were that the Children's Hospital of the District of Columbia, a corporation and Miss Willie Lyons an adult woman employee of a hotel sought to enjoin the enforcement of the District of Columbia's minimum wage law, because it would throw her out of employment. Miss Lyons averred that she had had satisfactory employment as an elevator operator at the Congress Square Hotel where she earned $35 a month and two meals a day, that because of the minimum wage law she lost her job, that she couldn't possibly get another as good, if at all, that the board established by the Act to set minimum wage standards, had unlawfully interfered with her employment contract and caused her employer to discharge her. The Hospital averred that its women employees who received less than the board minimum were satisfied with their pay, and it had the right to employ them at the pay they were willing to accept in spite of the Act. The prevailing opinion by Mr. Justice Sutherland said that it was no longer open to question that the right to contract about one's affairs is part of the liberty of the individual protected by the due process clause of the Fifth Amendment.

Just what was decided in the Adkins case was that an adult woman in the District of Columbia, could not be deprived by an Act of Congress of the liberty to earn money merely because she was not able to earn, or does not choose to work hard enough to earn, a wage sufficient of itself to maintain the average woman in health and morals, and that an employer could not be deprived of the correlative right to employ adult women at free contract wages. The belief of Congress that to penalize employers for paying sub-standard wages to women who were willing to accept them, would improve the wages and so the health and morals of many underpaid women, was held not to invest the Act with the quality of due process of law.

Within this liberty, declared Mr. Justice Sutherland, are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as a result of private bargaining.

The Supreme Court recognized that while legislation fixing hours of work conditions may bring into account the physical differences between men and women, it flatly rejected the doctrine that women were required or may be subjected to restrictions upon their liberty of contract, which could not be imposed on men under similar circumstances. Said Mr. Justice Sutherland, this law is "simply and exclusively a price fixing law confined to adult women who are legally as capable of contracting for themselves as men."

After a brief summary of the statute, the opinion passed to the constitutional consideration. As a preface, Mr. Justice Sutherland said:

"This law is not at all like any of those which have been sustained. It forbids two lawful persons, under penalties to one, to contract freely with one another in respect to the price for which one will render service to the other in a purely private employment, where both are willing or anxious to agree. It compels the one to surrender a desirable engagement and the other to discharge or dispense with a desirable employee. The wage standard fixed by the Act is vague and impractical. It ignores personal habits of thrift and unthrift, and family cooperation, and other differences between individuals as well as any independent resources she may have. The relations between morals and earnings is incapable of standardization. In an attempt to regulate morals the law is without reasonable basis. As well raise men's pay by statute to make them honest. The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours that may constitute a day's work, the character of the work, the character of the place, the circumstances of the employment. The law applies to every occupation in the district, but to some occupations it grants $16.50 a week, to others $15, and to beginners in one $9. 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 in effect arbitrarily shifts to his shoulders a burden which if it belongs to anybody belongs to society as a whole. 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. In principle there is no difference between the case of selling labor and the case of selling goods. To sustain the individual freedom contemplated by the constitution is not to strike down the common good but to exalt it; the good of society cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."

Chief Justice Taft, dissenting with the majority opinion, conceding that the boundary of the police power was difficult to mark, and that it was a disputable question whether maximum hours or minimum wage laws did not make the case of the oppressed employee worse than it was before, said that legislatures believe that such laws did ensure to the benefit of the employee and so to that of the community. If the boundary of the police power may include maximum hours, as it was settled that it may, it should not, on the basis of reason, experience or authority, exclude a minimum wage because the Congress has the right to believe that long hours and low wages were equally harmful to the worker. The wage term has been regulated repeatedly, and in Bunting v. OregonFootnote8 it was settled that a worker must accept no less than 50% more than his usual wage for overtime. The Chief Justice said he was not expressing an opinion that a minimum wage limitation could be enacted for men, but it was enough to say that this law applied only to women.Footnote9

Speaking of the freedom of contract, the Chief Justice said:

"In absolute freedom of contract the term is as important as the other, for both enter equally into the consideration given or received, a restriction as to one is not any greater in essence than the other, and is of the same kind."Footnote10

And Mr. Justice Holmes in his dissenting opinion added:

"I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. The bargain is equally affected whichever half you regulate."Footnote11

The fact remains that a majority in the Supreme Court did hold the act unconstitutional. However, this holding was rather narrow. It was limited in terms to the case of an adult; and further, it was limited to a statute which used only the amount necessary to maintain the employee in health and good morals as the basis for setting the wage. But when, in 1925 and 1927, ArizonaFootnote12 and ArkansasFootnote13 minimum wage laws were appealed to the Supreme Court, they were held invalid in memorandum opinions "on the authority of Adkins v. Children's Hospital." Mr. Justice Brandeis dissented in each opinion.

After the Adkins decision the Supreme Court steadfastly affirmed the views of liberty and due process there expressed. The Arizona law requiring payment of at least $16 a week for women workers, and the Arkansas law requiring minimum wages of $1.25 a day for all female workers with six months experience and $1.00 a day for those with less than six months experience, were rejected as repugnant to the due process clause of the Fifth Amendment. Both decisions were per curiam,Footnote14 as is the custom when the question has been clearly foreclosed by prior decision. Chief Justice, Taft, concurred. Mr. Justice Brandeis noted a dissent. Mr. Justice Holmes made a note that he was concurring because he felt bound by the Adkins decision. The courts of Kansas and Minnesota overruled similar enactment's of their own states.Footnote15

THE NEW YORK MINIMUM WAGE ACT CASE

Morehead v. People ex rel. Tipaldo,

298 U.S. 587 (1936)

Needless to say, the Adkins case did not change the popular economic thought which had given rise to minimum wage legislation, regardless of the reasoning. As Mr. Justice Sutherland said in the Adkins decision:

"But a statute which prescribes payment 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."Footnote16

Note that he did not say that need could not be considered. But he did not give any clue as to what he would consider a valid basis than the statement:

"A statute requiring the employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with a fair relation to the extent of the benefit obtained from the service, would be understandable."Footnote17

Obviously with these thoughts in mind, the New York Legislature in 1933 framed a statute whereby the minimum wage of women was to be determined by a consideration of both "the fair and reasonable value of the services rendered," and an amount "sufficient to meet the minimum cost of living necessary for health."Footnote18 Thus a patent attempt was made to frame such a standard as would pass the scrutiny of the Supreme Court. In fact, the New York legislature passed two minimum wage measures and contemporaneously submitted them to the governor. One was approved; the act regulating minimum wages for women. The other was vetoed and did not become law because it applied to men as well as women employees.

On June 1, 1936, the Supreme Court of the United States declared the New York Minimum Wage Act invalid as an interference with the rights of freedom of contract, in violation of the Fourteenth Amendment of the Federal Constitution.

The case was brought by way of habeas corpus originating in the Supreme Court of New York. Relator, Tipaldo, as owner of a laundry, was jailed for failing to obey a mandatory order of the state industrial commissioner prescribing minimum wages for women employees. It was contended by the relator that the statute, under which the commissioner made the order, which purports to authorize the commissioner to fix women's wages, was violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The contention was grounded upon the claim that the statute in question was substantially identical with that enacted by Congress for the District of Columbia, which in 1923 was declared unconstitutional as repugnant to the due process clause of the Fifth Amendment in the Adkins case. The Supreme Court, adhering to the principles laid down in the Adkins case, upheld the relator's contention, and declared the New York statute unconstitutional.

The New York Minimum Wage Act encompassed women and minors in any "occupation" which "shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm." The Act was not an emergency law. It did not regulate hours or any conditions affecting safety or protection of employees.

Mr. Justice Butler delivered the majority opinion. His opinion was devoted in large measure to the question of whether the case is controlled by Adkins v. Children's Hospital,Footnote19 or whether the statute so differs from that involved in that case as to require a different decision.

To emphasize this aspect of the case, Mr. Justice Butler said:

"The Adkins case, unless distinguishable, requires affirmance of the judgment below. The petition for the writ sought review upon the ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests are 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."Footnote20

The principal difference between the statute covered by the Adkins case and that involved here was that the former (a statute of Congress relating to the District of Columbia) condemned wages inadequate to maintain women workers in good health and to protect their morals, whereas the New York Act prescribed an additional standard that the wage would be commensurate with the value of the service rendered. The majority opinion then outlined the statutory provisions as to the method of determining the minimum wage. As the fairness of such procedure was not in controversy, it will suffice to point out that the Act declares, for administrative guidance, that the commissioner and the wage board, without being bound by any technical rules of evidence or procedure, may consider all relevant circumstances affecting the value of the service, may be guided by considerations like those guiding a court in a suit to determine wages to be paid where the contract fails to provide the compensation, and may consider wages paid in the State for work of comparable character by employers who voluntarily maintain minimum fair wage standards. After proceedings before a wage board and before the industrial commissioner, the latter may make a directory order defining minimum fair wage rates, and such order, after nine months and a further hearing, may be made mandatory.

Summing up the principal differences between the two Acts, the opinion states:

"Thus it appears: The minimum wage provided for in the District Act was one not less than adequate 'to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals.' The New York Act defines an oppressive and unreasonable wage as containing two elements. The one first mentioned is: 'less than the fair and reasonable value of the services rendered.' The other is: 'less than sufficient to meet the minimum cost of living necessary for health.' The basis last mentioned is not to be distinguished from the living wage defined in the District act. The exertion of the granted power to prescribe minimum wages is by the State act conditioned upon a finding by the commissioner or other administrative agency that a substantial number of women in any occupation are receiving wages that are oppressive and unreasonable, i.e., less than value of the service and less than a living wage. That finding is essential to jurisdiction of the commissioner."Footnote21

Attention was then given to the construction placed upon the New York Act by the Court of Appeals of that State, and emphasis was placed upon its construction that the statute imposed both the standard of a living wage and of a wage commensurate with the value of the services rendered. Quoting from the opinion of the Court of Appeals, Mr. Justice Butler said:

"The opinion continues: 'This is a difference in phraseology and not in principle. The New York act, as above states, prohibits an oppressive and unreasonable wage, which means both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the Adkins case. The distinctions between this case and the Adkins case are differences in details, methods and time; the exercise of legislative power to fix wages in any employment is the same.'"Footnote22

The petitioner's contention that the Court of Appeals had erroneously construed the Act was then considered. As to this contention Mr. Justice Butler stated that the construction of the state court, that the prescribed standard includes the cost of living, was binding on the Supreme Court, and said:

"There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. Exclusive authority to enact carries with it final authority to say what the measure means. The standard of 'minimum fair wage rates' for women workers to be prescribed must be considered as if both elements - value of service and living wage - were embodied in the statutory definition itself. As our construction of an Act of Congress must be deemed by state courts to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purpose of her lawmakers.

"The state court rightly held that the Adkins case controls this one and requires that relator be discharged upon the ground that the legislation under which he was indicted and imprisoned is repugnant to the due process clause of the Fourteenth Amendment."Footnote23

Attention was then given to the scope and effect of the Adkins decision. In this connection it was observed that the Act here extends to nearly all private employers of women, but does not extend to men.

"Upon the face of the act the question arises whether the State may impose upon the employers state-made minimum wage rates for all competent experienced women workers whom they may have in their service. That question involves another one. It is: Whether the State has power similarly to subject to state-made wages all adult women employed in trade, industry or business, other than house and farm work. These were the questions decided in the Adkins case. So far at least as concerns the validity of the enactment under consideration, the restraint imposed by the due process clause of the Fourteenth Amendment upon legislative powers of the State is the

same as that imposed by the corresponding provision of the Fifth Amendment upon the legislative power of the United States."Footnote24

A summary then followed as to the matters considered in the Adkins case. Chief among these was the protection of freedom of contract under the due process clause. While recognizing that the right is in some respects subject to limitation, it was expressly stated there that though the physical differences between men and women may be recognized in fixing the hours and conditions of work, women "may not be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances," and that the Court has been careful, in its consideration of laws relating to the hours of labor "to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two."

Then follows what is perhaps the most significant statement in the opinion:

"The decision and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."Footnote25

The condemnation, as stated in the Adkins case, of the vagueness and impracticability of the living wage standard was also referred to, and emphasis placed on the fact that the standard remains in the New York Act, despite the addition of another standard, the fair value of the services. Finally, the opinion turns to the question whether the Adkins case was based primarily on considerations as to the standard to be made controlling as to wages or as to the power to regulate wages of adult women. Concluding that the latter was the dominant factor, Mr. Justice Butler said:

"Petitioner does not attempt to support the Act as construed by the state court. His claim is that it is to be tested here as if it did not include the cost of living and as if value of service was the sole standard. Plainly that position is untenable. If the State has power to single out for regulation the amount of wages to be paid women, the value of their services would be a material consideration. But that fact has not relevancy upon the question whether the State has any such power. And utterly without significance upon the question of power is the suggestion that the New York prescribed standard includes value of service with cost of living whereas the District of Columbia standard was based upon the latter alone. As shown above, the dominant issue in the Adkins case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate consequence."Footnote26

The opinion discusses the "factual background" of the Act also, and compares it with the factual background set forth in an act concurrently passed as an emergency measure applicable to men as well as to women. The latter act was vetoed and did not become law. The two factual backgrounds were thought, however, to illustrate the arbitrary character of the Act in force, since women are placed under restrictions from which their male competitors are free. In regard to this Mr. Justice Butler said:

"It is significant that their 'factual backgrounds' are much alike. They are indicated in the margin. 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 apply 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 then can get and that without regard to the value of the service and even though the pay is less than minimum 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 in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work."Footnote27

In conclusion, the doctrine of the Adkins case was reaffirmed:

"The New York court's decision conforms to ours in the Adkins case, and the later rulings that we have made on the authority of that case. That decision was deliberately made upon careful consideration of the oral arguments and briefs of the respective parties and also of briefs submitted on behalf of States and others as amici curiae. In the Arizona case the attorney general sought to distinguish the District of Columbia from the legislation then before us and insisted that the latter was a valid exertion of the police power of the State. Counsel for the California commission submitted a brief amicus curiae in which he elaborately argued that our decision in the Adkins case was erroneous and ought to be overruled. In the Arkansas case the state officers, appellants there, by painstaking and thorough brief presented arguments in favor of the same contention. But this court, after thoughtful attention to all that was suggested against that decision, adhered to it as sound. And in each case, being clearly of opinion that no discussion was required to show that, having regard to the principles applied in the Adkins case, the state legislation fixing wages for women was repugnant to the due process clause of the Fourteenth Amendment, we so held and upon the authority of that case affirmed per curiam the decree enjoining its enforcement. It is equally plain that the judgment in the case now before us must also be affirmed."Footnote28

Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo dissented, the Chief Justice and Mr. Justice Stone delivered separate dissenting opinions.

In his opinion, Chief Justice Hughes urged that the Adkins case is not controlling, and that the addition of the requirement that the minimum wage fixed shall be commensurate with the service rendered created a material distinction between the District Act and the New York Act. At the outset of his opinion Chief Justice Hughes said:

"I am unable to concur in the opinion in this case. In view of the difference between the statutes involved, I cannot agree that the case should be regarded as controlled by Adkins v. Children's Hospital, 261 U. S. 525. And I can find nothing in the Federal Constitution which denies to the State the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority.

"First. - Relator in his petition for habeas corpus raises no question as to the fairness of the minimum wage he was required to pay. He does not challenge the regularity of the proceedings by which the amount of that wage was determined. We must assume that none of the safeguards of the statute was ignored and that its provisions for careful and deliberate procedure were followed in all respects.

"The statute states its objectives. It defines an 'oppressive and unreasonable wage' as one which 'is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.' It defines a 'fair wage' as one 'fairly and reasonably commensurate with the value of the service or class of service rendered."Footnote29

After outlining the procedure for determining minimum wages attention was turned to the view taken by the Court of Appeals, and the opinion was expressed that the conclusion of that Court was concerned more directly with the meaning of the Adkins case, rather than with the effect of the New York Act. Consequently, its ruling was thought not binding on the Supreme Court, because it dealt with a federal question rather than with the state statute. Referring to the requirement that the wage was to be commensurate with the value of the service rendered, the opinion adds:

"I find nothing in the opinion of the state court which can be taken to mean that this definite provision of the statute is not obligatory upon the authorities fixing a fair wage. Certainly, the court has not said so, and I think that we must assume that the standard thus described is set up by the New York Act. And there is no suggestion that the 'fair wage' as prescribed in the instant case was not commensurate with the reasonable value of the service rendered by the employees.

"When the opinion of the state court goes beyond the statement of the provisions of the act, and says that the setting up of such a standard does not create a material distinction when compared with the Act of Congress in the Adkins case, the state court is not construing the state statute. It is passing upon the effect of the difference between the two acts from the standpoint of the Federal Constitution. It is putting aside an admitted difference as not controlling. It is holding, as the state court says, that 'Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the Adkins case.'

"That, it seems to me, is clearly a federal and not a state question, and I pass to its consideration."Footnote30

Dealing with the federal question, the Chief Justice stated that the Court has not heretofore passed on a minimum wage statute like the New York Act, and emphasized that the District Act had been condemned in the Adkins case particularly for its failure to take into account any relationship between the value of service and the wage fixed therefor. The New York Act required that such relationship would be taken into account. Commenting on the importance of this, the opinion continues:

"That the difference is a material one, I think is shown by the opinion in the Adkins case. That opinion contained a broad discussion of state power, but it singled out as an adequate ground for the finding the invalidity that the statute gave no regard to the situation of the employer and to the reasonable value of the service for which the wage was paid."Footnote31

Moreover, the opinion in the Adkins case had stated that "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, was completely ignored. 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." (emphasis added).

Marking that the New York Act was free of the vice thus condemned in the District Act, the Chief Justice urged that the Adkins case is not a controlling authority:

"As the New York Act is free of that feature, so strongly denounced, the question comes before us in a new aspect. The Court was closely divided in the Adkins case, and the decision followed an equal division of the Court, after reargument, in Stettler v. O'Hara, 243 U. S. 629, with respect to the validity of the minimum wage law of Oregon. Such divisions are at times unavoidable, but they point to the desirability of fresh consideration when there are material differences in the cases presented. The fact that in the Adkins cases there were dissenting opinions maintaining the validity of the federal statute, despite the nature of the standard it set up, brings out in stronger relief the ground which was taken most emphatically by the majority in that case, and that there would have been a majority for the decision in the absence of that ground must be a matter of conjecture. With that ground absent, the Adkins case ceases to be a precise authority.

"We have here a question of constitutional law of grave importance, applying to the statutes of several States in a matter of profound public interest. I think that we should deal with that question upon its merits, without feeling that we are bound by a decision which on its facts is not strictly in point."Footnote32

Review was then had of the considerations and conditions which evoked the New York legislation. These included facts as to the large number of women employed at wages inadequate for their support, their unorganized condition, and the necessity of providing them with relief. These and other facts mentioned were thought sufficient to justify the legislative limitation on the freedom of contract. The Chief Justice explains the real reason for his conclusion that women are brought under the statute when he states:

"Inquiries by the New York State Department of Labor in cooperation with the Emergency Relief Bureau of New York City disclosed that large number of women employed in industry whose wages where insufficient for the support of themselves and those dependent upon them. For that reason they had been accepted for relief and their wages were being supplemented by payments from the Emergency Relief Bureau. Thus the failure of over-reaching employers to pay to women the wages commensurated with the value of services rendered has imposed a direct and heavy burden upon the taxpayers. The weight of this burden and the necessity for taking reasonable measures to reduce it, in the light of the enormous annual budgetary appropriation for the Department of Public Welfare of New York City, is strikingly exhibited in the brief filed by the Corporation Counsel of the City as an amicus curiae.Footnote33

Dealing with this evidence presented in the case, the Chief Justice said:

"We are not at liberty to disregard these facts. We must assume that they exist and examine respondent's argument from that standpoint. That argument is addressed to the fundamental postulate of liberty of contract. I think that the argument fails to take account of established principles and ignores the historic relation of the State to the protection of women.

"We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.

"If liberty of contract were viewed from the standpoint of absolute right, there would be as much to be said against a regulation of the hours of labor of women as against the fixing of a minimum wage. Restriction upon hours is a restriction upon the making of contracts and upon earning power. But the right being a qualified one, we must apply in each case the test of reasonableness in the circumstances disclosed. Here, the special conditions calling for the protection of women, and for the protection of society itself, are abundantly shown. The legislation is not less in the interest of the community as a whole than in the interest of the women employees who are paid less than the value of their services. That lack must be made good out of the public purse. Granted that the burden of support of women who do not receive a living wage cannot be transferred to employers who pay the equivalent of the service they obtain, there is no reason why the burden caused by the failure to pay that equivalent should not be placed upon those who create it. The fact that the State cannot secure the benefit to society of a living wage for women employees by any enactment which bears unreasonably upon employers does not preclude the State from seeking its objective by means entirely fair both to employers and the women employed.

"In the statute before us, no unreasonableness appears. The end is legitimate and the means appropriate. I think that the act should be upheld."Footnote34

Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo concurred with the Chief Justice.

Mr. Justice Stone delivered a separate opinion in which, while expressing agreement with the opinion of the Chief Justice, he added that the differences in the two statutes should not be made the sole basis for the decision. In this opinion Mr. Justice Stone urged that the Fourteenth Amendment does not protect freedom of contract from restraint of all law, and that there was no basis for excepting employment contracts from regulatory power.

WHAT WAS ROOSEVELT'S REACTION TO THE MOREHEAD CASE?

The decision of the Supreme Court in the New York Minimum Wage Act case created intense anger in Roosevelt. One day after the Court's decision, he held a press conference to discuss the decision. During this conference Roosevelt described the decision by the Supreme Court holding unconstitutional New York State's minimum Wage Law, as creating a "No Man's Land" where neither States nor the Federal Government had the right to legislate in the contractual affairs of the parties.Footnote35

He made this observation in reply to a question at the press conference as to whether he had any statement to make on how the New Deal's objectives could be brought within the framework of the Supreme Court's decisions nullifying the National Recovery Act, the Agricultural Adjustment Act, the Guffey Coal Act and, finally, the New York Minimum Wage case holding that not even the States could impose schedules of minimum wages.

Roosevelt said the question should be redrafted to ask whether he cared to comment on the Supreme Court's decision. He then said that the answer was no. He thereafter declined on four distinct occasions in the press conference to discuss possible methods of meeting the situation.

This was his first comment of any kind on decisions by the Supreme Court since his press conference on the Schechter decision, in which the Court invalidated the National Industrial Recovery Act. Remember that during this conference Roosevelt blamed the Supreme Court for putting the United States back in the horse-and-buggy days with their interpretation of the commerce clause.

When asked about the dissenting decision in the case Roosevelt remarked that it will be of great interest to practically everybody in the United States if they will read the three opinions in the Morehead case - those of Justice Butler, Chief Justice Hughes and Justice Stone - because the combination of the three seems to indicate that at the present time a majority of the Court have made clear a fact that aroused special interest in Roosevelt because the law under consideration was discussed in his administration as Governor of New York and enacted soon afterward. It seems to be fairly clear after this decision, using the minimum wage law as an example, that the No Man's Land, where no government can function is being more clearly defined. The State cannot interfere with contractual rights and the Federal Government cannot either.

"Do you see a danger in the No Man's Land? Roosevelt was asked.

He replied that there was nothing to be said.

While Roosevelt was making his own mild comment on the decision in the Morehead case, Representative Fish, Republican of New York, was using far stronger language in the House.

"The most recent decision is worth 1,000,000 votes to the Democrats," he declared.

On the Senate side, Senator Schwellenbach introduced a bill designed to eliminate child labor while adhering to decisions by the Supreme Court outlawing attempts to regulate interstate commerce shipments of goods manufactured by children.

He proposed that States have the right to halt at their boundaries goods manufactured by child labor in other States.

In his speech in the House, Mr. Fish, who said that he had always defended the Supreme Court, offered a constitutional amendment providing that each State have the power to fix minimum wages for workers.

"I am not criticizing the Supreme Court, but I was fairly shocked at the decision," he said.

He said that Republicans freed 3,000,000 Negro slaves and he called upon both parties now to "emancipate 3,000,000 women and children workers."

It should not be a party issue, he told the House, but a problem for every civilized person to work out in harmony, "to defend the women and children from chisels and human rats who fatten on the blood of the unprotected workers."

He said he knew his resolution would not be adopted, but he begged "any Democrat to introduce it and fight for it," because if that were done it would mean 1,000,000 votes for the Democratic party this fall.

While members on both sides of the aisle applauded, Mr. Fish said that he was going to the Republican National Convention with the purpose of urging that the constitutional amendment be written into the Republican platform.

Anger and frustration over the Court's decision did not stop with Roosevelt or members of Congress. Secretary Perkins stated that more than 3,000,000 women, or half of those engaged in industry in this country, were directly or indirectly affected by the Supreme Court's decision. "Public welfare demands that women workers shall be prohibited from accepting wages so low that their health is impaired or is maintained only by contributions from the taxpayers," Secretary Perkins stated.

George Meany, president of the State Federation of Labor, in an address over the radio declared that the nullification of the Supreme Court of the New York Minimum Wage Act "has brought joy to the heart of those who believe in a labor market unhampered by standards of decency." He then stated, "only those will be satisfied with the decision of the court "who construe our boasted

American freedom to mean freedom to exploit, freedom to chisel and freedom to starve workers into submission. This law has been very carefully drawn in order to avoid an adverse ruling because of the previous decisions of the Supreme Court on the District of Columbia Act back in 1923. Despite all the work done by hard-working, conscientious legislators of our State who worked for months on this law, despite the careful administration of this law by the industrial commissioner, despite the fact that investigation after investigation showed that women and minors were being exploited day in and day out in certain industries, despite the fact that seven other States have similar legislation, despite the expressed wish of millions of citizens through their Representatives that they believed in giving this type of protection to women and minors, we now find that by a majority of one vote the Supreme Court has denied women and minors that which is absolutely essential in our modern industrial life, namely a basic wage below which no employer can pay."

During this radio address, Mr. Meany suggested the possibility of a constitutional amendment to curb the power of the Supreme Court in passing upon social and labor legislation.

Remember that Roosevelt's criticism of the Supreme Court did not stop after his press conference. In 1937 he introduced the "court bill"Footnote36 which called for a complete reorganization of the courts. Several amendments to the Constitution were also offered but rejected which if adopted would have given the federal government complete control over wages, labor, etc. both in interstate and intrastate commerce.

The proposed Costigan amendment to the Constitution, drawn up January 1935 in anticipation of possible adverse decisions in the Supreme Court, would legalize the New Deal agencies and activities. The proposed amendment read:

Section 1. The Congress shall have power to regulate hours and conditions of labor and to establish minimum wages in any employment and to regulate production, industry, business, trade and commerce to prevent unfair methods and practices therein.

Section 2. The due-process-of-law clauses of the Fifth and Fourteenth Amendments shall not be construed to impose no limitations upon legislation by the Congress or by the several States with respect to any of the subjects referred to in Section 1, except as to the methods or procedure for the enforcement of such legislation.

Section 3. Nothing in this article shall be construed to impair the regulatory power of the several States with respect to any of the subjects referred to in Section 1, except to the extent that the exercise of such powers by a State is in conflict with legislation enacted by the congress pursuant to this article.

Through the Fall of 1936, Roosevelt and his strategists worked on various plans and counter-plans which would validate Roosevelt's New Deal legislation without need of a constitutional amendment. One plan was a proposal to resurrect the now invalidated National Industrial Recovery Act, adopt it with new powers in interstate commerce and incorporate national labor and wages into the new act. To overcome any constitutional issues which might be presented, the act would provide for a federal licensing of all "persons" who wished to engage in interstate

commerce. One major newspaper upon receiving details of this plan from an unnamed White House source printed the following:

NRA LICENSING PLAN STUDIED.

GOAL IS TO SAVE REFORMS

President Roosevelt has ordered certain agencies of the administration to make independent studies of the possibility of achieving the principal goals of the outlawed National Industrial Recovery Act - abolition of child labor, protection of the rights of workers to organize and bargain collectively, and maintenance of standard labor conditions - through a sweeping Federal Incorporation and Licensing Law.

These studies have been set in motion with a view to enable the President to decide within the next few weeks his future course with reference to revival of reforms he undertook on a spectacular scale through the NRA in 1933 and 1934.

He has asked for advice on the economic advisability of such a plan, as well as upon its administrative practicability, its efficacy in achieving the ends he desires, and its constitutionality.

The president has not indicated to any of his advisers as yet what he proposes to do specifically toward reviving the main tenets of the old NRA. Whether he intends to proceed definitely along the idea of a Federal Incorporation Law or other laws to be enacted in accordance with the existing constitutional framework, or merely to explore the possibilities of such laws, or then ask later for amendments to the organic law, are questions which Mr. Roosevelt evidently has left posed before his own administrative associates.

In fact, he appears to be pursuing an extremely cautious attitude both in formulating and discussing his plans for the future.

Meanwhile, any number of experts, both within and without the government, are secretly working and advancing schemes of their own, just as they did in the first days of the administration.

At least two and possibly more reports on the Federal incorporation and licensing plan are expected to be ready for the President soon after he returns from his prospective southern cruise and in ample time for him to make some decision on the subject for early transmission to the new Congress.

He is expected by his friends to thresh out the whole question with representatives of business, however, before he submits to Congress any new regulatory measure affecting their interests.

It is also the view of some of those closely associated with the President that he may seek counsel from leaders other than those identified with business organizations.

While none of the new studies on a possible incorporation law has proceeded very far, the understanding here is that each study is being made on the basis of the O'Mahoney bill, which was introduced in the Senate in July, 1935, but since has reposed in a subcommittee of the Committee on Interstate Commerce.

The main provisions of the bill specify a system of compulsory licenses for companies doing business in interstate commerce, permit incorporation of business under Federal as well as State charters, and provide administration of this entire setup by an enlarged Federal Trade Commission.

The bill provides, for instance, that "it shall be unlawful for any corporation of any State, Territory, or possession of the United States, or of any foreign country, or for any corporation heretofore organized under the District of Columbia, or for any business, to engage directly or indirectly in commerce without first having obtained a license therefor from the commission. (Federal Trade Commission).

It specifies that every license shall contain stipulations against discrimination against women workers in rates of pay or working privileges; a definite provision against child labor, and a guarantee of collective bargaining and protection of workers in their rights to organize and bargain through representatives of their own choosing.

These license requirements might be used as the vehicle for any other regulations that Congress might from time to time deem proper to impose upon business, such as maximum hours of labor and minimum rates of pay.

The bill's approach to the problem is along the theory that Congress has the undisputed power to regulate interstate commerce, and its provisions relate only to those companies doing business among the States.

In a separate title the bill provides for Federal incorporation of business enterprises. In still another it picks up the structure of the present State corporate system, with restrictions aimed obviously at abolition or curtailment of interstate holding companies.

The idea of Federal incorporation and licensing act is not an entirely new scheme for promulgation of the principles of the NRA. There was considerable agitation for it soon after the original Recovery Act was invalidated. The new development is that the President apparently has decided to look seriously into its possibilities for accomplishing the reforms he still thinks necessary in the business field in the interest of increased employment and eradication of unfair labor practices and cutthroat competition.

THE WASHINGTON MINIMUM WAGE ACT CASE

West Coast Hotel Co. v. Parrish et al.,

300 U.S. 379 (1937)

To say the least, the opinions in Morehead v. Tipaldo amounted to a challenge to present a case where the question of the validity of the Adkins decision was squarely involved. The Washington Minimum Wage Act case was such. It arrived at the very next term of the Supreme Court. This case was decided during the great battle between Roosevelt with his court bill and the Supreme Court. Whether the ruling in the case was on its merits and constitutional validity or was decided to quiet Roosevelt and the public outcry against the Court, thereby defeating the court bill, only those sitting on the Supreme Court when the case was decided can answer this question. In reviewing the dissenting opinion of Justice Sutherland, one might conclude that the majority opinion was "politically" motivated.Footnote37

On March 29, 1937, the Supreme Court, by a divided bench, sustained the statute of the State of Washington authorizing the fixing of wages for women and minors.Footnote38 The Act as originally passed in 1913 recited that the welfare of the State demands the protection of women and minors from conditions of labor having a pernicious effect on their health and morals. It provided that it shall be unlawful to employ women or minors in any industry or occupation in the State under conditions of labor detrimental to their health and morals; and that it shall be unlawful to employ women in any industry at wages which are not adequate for their maintenance. The Act created an Industrial Welfare Commission to establish such standards of wages and conditions of labor for women and minors as shall be held under the Act to be reasonable and not detrimental to health and morals, and shall be sufficient for the decent maintenance of women.

Other provisions prescribed procedure for the fixing of wages and empowered the Commission, after hearing and finding that in any occupation the wages paid to women "are inadequate to supply them necessary cost of living and to maintain the workers in health," to call a conference of representatives of employers, employees and disinterested persons representing the public. It was provided that the conference was to recommend to the Commission, on its request, an estimate of the minimum wage adequate for the purpose above stated and on the approval of such recommendation it became the duty of the Commission to issue an obligatory order fixing minimum wages.

By a later Act the Commission was abolished and its duties were assigned to the Industrial Welfare Committee.

As to the case involved, the appellant operated a hotel and employed the appellee, Elise Parrish, as a chambermaid. She and her husband brought suit to recover the difference between the wages paid her and the minimum wage fixed by the Washington Minimum Wage Act. The minimum wage was fixed by the Act. The minimum wage was $14.50 for a week of 48 hours. The

appellant challenged the statute as violative of the due process clause of the Fourteenth Amendment, but the State Supreme Court sustained the Act. On appeal the decision was affirmed by the Supreme Court by an opinion by Chief Justice Hughes, with four Justices dissenting.

The Hotel Company relied on the case of Adkins v. Children's Hospital, 261 U.S. 525, which struck down the Minimum Wage Act of the District of Columbia as repugnant to the due process clause of the Fifth Amendment. The appellees sought to distinguish the Adkins case on the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. But the opinion dismissed this attempted distinction by calling attention to the fact that in one of the cases ruled by the Adkins opinion the employee was a woman employed to operate an elevator in a hotel. Next referred to was the recent case of Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, in which the Supreme Court by divided bench declared unconstitutional the New York Minimum Wage Act for Women, the majority of the Court being unable to distinguish the New York Minimum Wage Act from that passed on in the Adkins case. Attention was called particularly to the fact that in the Morehead case the petition for certiorari sought merely to distinguish the Adkins case rather than a fresh consideration of the principles on which it rested; and that consequently the majority of the Court had not considered whether the Adkins case should have been overruled.

In this case, however, the decision in the Adkins case was re-examined. As to the reasons for this the Chief Justice states:

"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 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."Footnote39

Then followed a brief review of the history of litigation on this question. It was pointed out that the Washington Act was enacted over 23 years ago; that it had twice been held valid by the State Supreme Court; that it was essentially the same as an act passed in Oregon the same year; and that the Oregon act, after reargument, was affirmed by the Supreme Court by an equally divided bench in 1917. The District of Columbia act was passed in 1918, was sustained by the Supreme Court of the District in the Adkins case, was affirmed by the Court of the District in the Adkins case, was affirmed by the Court of Appeals of the District, then reversed on rehearing and finally held invalid by the Supreme Court with Chief Justice Taft, Mr. Justice Holmes and Mr. Justice

Sanford dissenting, and Mr. Justice Brandies taking no part. Later, similar acts of Arizona and Arkansas were held invalid under the Adkins case.

Consideration was then given to the principles which should control the decision of the case. Noting that the due process clauses of the Fifth and Fourteenth Amendments were invoked against legislation of this type, on the ground that such legislation deprived women of freedom of contract, Chief Justice Hughes said:

"What is that 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."Footnote40

and quoting from Chicago, B. & Q. R.R. Co. v. McGuire, 219 U.S. 549, 567, the Chief Justice continued:

"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."Footnote41

Numerous illustrations of restrictions on freedom of contract were then cited. Among these, special emphasis was placed on the opinion in Holden v. Hardy, 169 U.S. 366, wherein the Supreme Court pointed out the inequality existing between employer and employees which may occasion legislation for the protection of the health and welfare of the latter.

The principle thus referred to was thought peculiarly applicable to the employment of women. In elaboration of this the opinion states:

"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 phrase of the subject received elaborate consideration in Muller v. Oregon , 208 U.S. 412 (1908), 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 substance and that her physical well being 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 'though limitations upon personal and contractual rights may be removed by legislation, there is that in her 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.' Hence she was '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.' 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.'"Footnote42

In addition, decisions upholding the regulation of the hours of employment of women were also cited. These precedents had been relied on by the dissenting justices in the Adkins case, and the validity of the distinction there made between a minimum wage and a maximum of hours in limiting liberty of contract was challenged in the dissent.

"That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: '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 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.' And Mr. Justice Holmes, while recognizing that 'the distinctions of the law are distinctions of degree,' could '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.'"Footnote43

The Chief Justice recalled also that the majority opinion in the Adkins case condemned the District of Columbia law for failure to take into account the value of the services rendered, and that in the Morehead case the minority thought that the New York statute amply met this objection. It was noted, however, that the Washington statute was similar to the District of Columbia Act in this respect. But this was thought insufficient to condemn the statute, in view of the fact that the minimum wage was fixed after conference by representatives of employers, employees and public, so that it may be assumed that the minimum wage is fixed in relation to the service performed. The view was then expressed that the decision in the Adkins case was a departure from the true principles governing the regulation by the State of the relation of the employer and employee. After reference to later authorities, particularly Nebbia v. New York, 291 U.S. 502, sustaining a New York law providing for minimum prices for milk, the Chief Justice added:

"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,' 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."Footnote44

In conclusion the majority opinion observed that recent economic experience had demonstrated the necessity for protecting a class of workers who were in an unequal position with respect to bargaining power. In this connection it was pointed out that what the workers lose in wages the taxpayers are called upon to pay in relief. In elaboration of this the opinion stated:

"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 defenseless against the denial of a living wage is not only detrimental to their health and well being 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 community may direct its law-making 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." (Emphasis added).Footnote45

In affirming the judgment of the State Court, the Adkins case was expressly overruled.

Mr. Justice Sutherland delivered a dissenting opinion in which Mr. Justice Van Devanter, Mr. Justice McReynolds and Mr. Justice Butler concurred.

Mr. Justice Sutherland's opinion opens with a discussion of the duty of the judiciary in cases involving constitutional questions, in which it was emphasized that each justice is bound by oath to exercise his own deliberate judgment:

"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 decisions of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it."Footnote46

As to the view that supervening economic conditions require a reconsideration of the question involved Mr. Justice Sutherland said, in part:

"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 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."Footnote47

Mr. Justice Sutherland continues:

"Constitutions can not 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.

"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."Footnote48

In elaboration of this view various authorities were cited including Cooley on "Constitutional Limitations" wherein the author states that:

"'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."Footnote49

It was observed further that the Adkins case dealt with an act of Congress which had been passed upon and approved by both the executive and legislative branches of the government, but notwithstanding had been overturned by the Court. This observation led to a discussion of the interrelationship of the Three branches of government created by the Constitution, in which Mr. Justice Sutherland said:

"The people by the 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."Footnote50

Attention was then given specifically to the validity of the Washington statute and it was noted that it was identical in all substantial respects with that involved in the Adkins case. It was pointed out, moreover, that it is well established that the due process clause protects freedom of contract and that contracts of employment are within the rule. It was recognized in the Adkins case also that freedom of contract is not absolute but subject to a great variety of restraints. The restraints, however, are the exception and not the rule. The classes of cases in which restraints of freedom of contract have been recognized as set forth in the Adkins case included statutes fixing the hours of labor, but emphasis was placed on the distinction between such statutes and those fixing minimum wages. As to validity of this distinction, the opinion in the Adkins case was cited and Mr. Justice Sutherland then added:

"What is there said need not be repeated. It is enough for present purposes to say that the statues 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."Footnote51

The failure of the law to take into consideration the value of the services rendered in fixing the wage was again urged as it was in the Adkins case. In this connection, the following, among other portions of the Adkins opinion, was quoted:

"'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 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."Footnote52

The statute was thought to be repugnant to the Constitution also as an arbitrary discrimination because it leaves men free to bargain for wages lower than the minimum fixed for women. As to this feature the dissenting opinion states in part:

"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 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 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.

"An appeal to the principles 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 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."Footnote53

In conclusion, the question as to the power to fix a maximum wage was suggested:

"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 become substantially the same, the right to make any contract in respect of wages will have been completely abrogated."Footnote54

In dealing with the minimum wage and maximum hours by interstate compacts the states have constitutional limitations, both state and federal, to consider. However, if the purpose of the compact, actual, as well as expressed, should be to banish conditions oppressive to labor such as hours of work so long to promote inefficiency and stifle intelligence, or a wage so low as to induce standards of living noxious to morals and bodily vigor, it would probably be sustained as not in conflict with constitutional guarantees of "liberty of person and freedom of contract." The police powers of the states exercised jointly to effect a joint purpose for the public good would not be set aside by the courts unless it was apparent from the compact that the primary purpose was to restrict freedom of contract rather than to promote the public welfare.

CONCLUSION

Two cases were involved in the Adkins decision. In one of them it appeared that a woman 21 years of age, 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 to 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 Supreme Court found the Act violated the woman's freedom of contract which is part of the liberty of the individual protected by the due process clause of the Fifth Amendment.

The Morehead case was brought to the Supreme Court by way of habeas corpus originating in the Supreme Court of New York. An owner of a laundry, was jailed for failing to obey a mandatory order of the state industrial commissioner prescribing minimum wages for women employees. It was contended by the owner that the statute, under which the commissioner made the order, was violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. This contention was grounded upon the claim that the statute in question was substantially identical with that enacted by Congress for the District of Columbia, which in 1923 was declared unconstitutional as repugnant to the due process clause of the Fifth Amendment in the Adkins case. The Supreme Court, adhering to the principles laid down in the Adkins case, upheld the owner's contention, and declared the New York statute unconstitutional.

In the Parrish case the appellant operated a hotel and employed the appellee, Elise Parrish, as a chambermaid. She and her husband brought suit to recover the difference between the wages paid her and the minimum wage fixed by the Washington Minimum Wage Act. The appellant challenged the statute as violative of the due process clause of the Fourteenth Amendment, but the State Supreme Court sustained the Act. On appeal the decision was affirmed by the Supreme Court of the United States.

All three cases involved the same subject matter; that being women and employment contracts. In the Adkins and the Morehead cases which the Supreme Court declared the District of Columbia and the New York Minimum Wage acts unconstitutional, all parties to the employment contract were satisfied with their contractual agreement. Both the employer and employee wanted to continue their contractual arrangement. Neither party filed suit alleging a contractual breach against the other party. When the state tried to enter into their contractual affair it entered as an interloper.Footnote55 The Solicitor General of New York in a brief filed for petitioner in the Morehead case, argued that failure by employers to pay women the minimum wages prescribed in the New York Minimum Wage Act, resulted in a large number of women applying for and being accepted for relief and their wages were being supplemented by payments from the Emergency Relief Bureau of the State of New York. The Solicitor General concludes in his brief, that, "the failure of employers to pay women the wages directed under the Act and the resulting burden by the state for support of these women, imposes a heavy burden upon the taxpayers of the state."

The majority of the Court rejected the States argument reasoning that since the women employee's involved in this case where not receiving any benefits from the Emergency Relief Bureau of the State of New York and since these women refused to accept any benefits offered by the state, the burden upon the taxpayers of the state to support these women did not exist. Therefore, the state infringed and interfered with the right or freedom to contract.

However, in the Parrish case, the State of Washington was successfully joined as a third party, because one of the parties to the employer-employee contract, the employee Elise Parrish, sought and received relief benefits from the State of Washington. The State therefore, was not an interloper, but a third party who could show a damage to the taxpayers of the state, by the failure of the hotel to pay to their "ward" (Elise Parrish) a wage sufficient enough to support her and her family. It is also interesting to note that in the original cause of action filed in the Superior Court of Chelan County, Washington, the plaintiff Parrish, denied the existence of any employment contract. At the trial, Elise Parrish upon cross-examination by Mr. Crollard, attorney for the hotel company stated:

"There was nothing said about wages when I was hired. I was not keeping time at the beginning. After I began to keep my time I tried to figure out what I was getting. I cashed the checks which were given me by the hotel company in payment for my services between the dates of the checks. I did not object to any of the checks on the ground that it was not the right amount, but accepted and cashed them.

"I kept track of the checks I received and put it down in my time book. I had in mind that I should have been paid the state wage and that it would be paid. I never made any demand upon the hotel company or any of its agents for the state wage until my discharge. There was nothing ever said about wages. I took what they gave me because I needed the work so badly, and I figured the defendant would pay what was right, the state wage. I had the state wage in mind all of the while at least a short time after I began working for the hotel."

Thus we see the underlining difference between these minimum wage cases. One case relies on liberty of contract, the other claimed no contract existed and called upon the state to intervene on her behalf, after all she was their "ward."Footnote56

Who then is the person with this liberty of contract, a liberty which is protected under the Fifth and Fourteenth Amendments? An Austrian cook in an Oklahoma restaurant, learned that it meant him; and that this liberty included the right to hold his kitchen job although the state had made it a crime for an employer to employ more than one non-voting alien out of five in any business, and his employer in fear of the law was about to discharge him. This was a so called public health, welfare and policy law.Footnote57

Looking at the minimum wage cases, female employee's at a New York laundry found that they also had this liberty of contract and that the opportunity to earn wages that were available and acceptable to them, was a liberty that could not be taken away from them under a health and moral's law by the New York legislature. But this liberty of contract did not exist when an employee for a hotel in Washington State became a "ward" of the state by applying for and receiving state welfare benefits.

One question remains, do the citizens of the states today, have this liberty of contract, or are they considered "wards" of the state and the Federal government.

FEDERAL LABOR STANDARDS ACT

During the first session of the Seventy-fifth Congress, many hearings were held and considerable testimony taken to determine the effect which the continuance of substandard labor conditions exerted on interstate commerce.

The conclusions of both the House and Senate contained in the Conference Committee AgreementFootnote58 were "that the existence in industries engaged in commerce, or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well-being, required immediate action to correct, and as rapidly as possible to eliminate conditions in such industries without substantially curtailing employment or earning power."

In pursuance of the main objections determined by Congress and after many months of debates, Congress enacted the Fair Labor Standards Act of 1938,Footnote59 to provide for the establishment of fair labor standards in employment in interstate commerce, the production of goods for interstate commerce and for other purposes.

Fundamentally, the FLSA is legislation for the control of minimum wages and maximum hours, for employees engaged in interstate commerce. No other person is contemplated in the Act. The power of Congress to legislate against labor conditions detrimental to a minimum standard of

living required for the general well-being of workers engaged in commerce or in production of goods for commerce was finally settled in 1942.Footnote60

Instead of relying, like the National Industrial Recovery Act, on the Constitution's general welfare clause-under which the administration in 1933 tried to regiment virtually all business-the Federal Labor Standards Act depends for validity upon the Federal government's right to regulate interstate commerce. Those individuals engaged in interstate activity would fall under the statute, those individuals who are not engaged in interstate commerce would be immune from the statute and the regulations promulgated under it.

Footnote1

Laws of 1913, Washington, c. 174.

Footnote2

Act of Sept. 19, 1918, c. 174.

Footnote3

Note 2, *supra*.

Footnote4

Acts of August 1, 1892, June 19, 1912, March 3, 1913, March 14, 1917, 27 Stat. c. 340; 37 Stat. c. 347; 37 Stat. 726; 39 Stat. c. 1192.

Footnote5

Stettler v. O'Hara, 139 Pac. 743 (1914); Simpson v. O'Hara, 141 Pac. 158 (1914).

Footnote6

Stettler v. O'Hara, 243 U.S. 629 (1917).

Footnote7

Note 2, *supra*.

Footnote8

243 U.S. 426 (1917).

Footnote9

261 U.S. at 566.

Footnote10

Id. at 564.

Footnote11

Id. at 569.

Footnote12

Murphy v. Sardell, 269 U.S. 530 (1925).

Footnote13

Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1923).

Footnote14

Murphy v. Fardell, 269 U.S. 530 (1925); Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1926).

Footnote15

Topeka Laundry Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).

Footnote16

Adkins v. Children's Hospital, 261 U.S. 525, 559 (1923).

Footnote17

Id. at 559.

Footnote18

Laws of 1933, c. 584.

Footnote19

261 U.S. 525. (1923).

Footnote20

298 U.S. at 604-5.

Footnote21

Id. at 606-7.

Footnote22

Id. at 607-8.

Footnote23

Id. at 609.

Footnote24

Id. at 610.

Footnote25

Id. at 611.

Footnote26

Id. at 613-4.

Footnote27

Id. at 615-7.

Footnote28

Id. at 618.

Footnote29

Id. at 618-9.

Footnote30

Id. at 622.

Footnote31

Id. at 623.

Footnote32

Id. at 624-5.

Footnote33

Id. at 627.

Footnote34

Id. at 627-31.

Footnote35

On May 27, 1935 the Supreme Court in the Schechter case found the National Industrial Recovery Act unconstitutional as an unlawful invasion by Congress to legislate wages and hours of a trade or business engaged in intrastate commerce. Now with the Supreme Court's decision in the New York Minimum Wage Act case, the states could not interfere with the freedom of women to contract for their own wages, that they enjoy the same rights as men under this freedom of contract.. To Roosevelt, if the right of the Federal Government or state governments to regulate the contractual affairs of the citizens of the states relating to wages and labor relations were restricted, how could the Federal government protect the people from unscrupulous "capitalists" and give the people all the benefits they were demanding from the government.

Footnote36

See Chapter 10.

Footnote37

Justice Van Devanter announced his retirement from the Court May 18, 1937; Justice Sutherland retired from the Court on January 17, 1938.

Footnote38

Laws of 1913, c. 174.

Footnote39

Id. at 389-90.

Footnote40

Id. at 391.

Footnote41

Id. at 392.

Footnote42

Id. at 394-5.

Footnote43

Id. at 395-6.

Footnote44

Id. at 398-9.

Footnote45

Id. at 399-400.

Footnote46

Id. at 402.

Footnote47

Id. at 402-3.

Footnote48

Id. at 403-4.

Footnote49

Id. at 404.

Footnote50

Id. at 405.

Footnote51

Id. at 407.

Footnote52

Id. at 409-10.

Footnote53

Id. at 411-3.

Footnote54

Id. at 413-4.

Footnote55

Persons who interfere or intermeddle into business to which they have no right.

Footnote56

Liberty of Contract is examined in Volume II of this work.

Footnote57

Truax v. Raich, 239 U.S. 33, 41 (1915).

Footnote58

Conference Committee Report No. 2738, 75th Cong., p. 28.

Footnote59

Act of June 25, 1938, c. 676, 52 Stat. 1060.

Footnote60

United States v. Darby Lumber Co., 312 U.S. 100; Overnight Motor Transport. Co. v. Missell, 316 U.S. 572.

CHAPTER 12

THE NATIONAL LABOR RELATIONS ACT CASES

"With all these blessings, what more is necessary to make us a happy and prosperous people? Still one thing more, fellow citizens - a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from one mouth of labor the bread it has earned. This is the sum of good government." Thomas Jefferson, First Inaugural Address.

Under our system of government, there can be no action by Congress constitutionally beyond the delegated and implied powers of that body, and conversely there can be no exercise of their police powers by the states which usurps federal authority in any field constitutionally occupied by that authority. It is obvious then, that nationwide and regional commercial, industrial and social reforms could not be completely effected without a juncture of power and a combination of all agencies, federal and state, devoted to a common purpose. A fusion of all power as a means to this end, therefore, became imperative to Franklin Delano Roosevelt.

The National Industrial Recovery Act was foredoomed to failure not only because of its apparent conflict with the Constitution, but because the authors of it conceived their plan in disregard of the position which the states must occupy in labor and industrial reforms. The legislation which the state legislatures in many instances enacted to supplement the NRA was fundamentally dishonest, because it amounted to a surrender to the United States of that measure of home rule which the people had declared in the Constitution should remain in the states. Footnote1

The National Labor Relations Act, commonly called the NLRA, was signed by President Roosevelt on July 5, 1935. Footnote2 It was not a completely new governmental experience in the field of labor relations. An attempt at large-scale regulation of all industry was made in the National Industrial Recovery Act with Section 7(a), but the Supreme Court held the Act unconstitutional for the double reason that it delegated legislative power to the President to declare what was fair competition and that it went beyond the power of Congress to regulate intrastate commerce. Footnote3 Two months after the downfall of the National Industrial Recovery Act, the National Labor Relations Act was passed, embodying in statute form Section 7(a). The Act was justified by its supporters on the basis that the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining led to strikes and other forms of industrial unrest burdensome to commerce. To many it seemed like a dangerous and radical experiment. Footnote4

The scheme of the National Labor Relations Act, 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 bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the flow of commerce. This section is as follows:

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 (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.

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.

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.

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.

The Act then defines the terms it uses, including the terms "commerce" and "effecting commerce." It creates the National Labor Relations Board (referred to as the "Board") and prescribes its organization. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. It defines "unfair labor practices." It lays down rules as to the representation of employees for the purpose of collective bargaining. 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 introduce 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. The Board has broad powers of investigation. Interference with members of the Board or its agents in the performance of their duties is punishable by fine and imprisonment. Nothing in the Act is to be construed to interfere with the right to strike. 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.

The jurisdiction of the board is limited to businesses in which labor disturbances will constitute a burden on interstate or foreign commerce. The Act did not confer on the federal government any general authority over all business.

THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT

Under our government of delegated and reserved powers, Congress has only such powers as are specifically granted to it by the Constitution. Among these is the power to regulate interstate commerce. Footnote5 This power has been interpreted to have a very broad meaning, to include not only actual traffic between the states, but police regulations in regard to such traffic; the control of intrastate commerce when necessary for the effective control of interstate commerce; Footnote6 and regulation of activities which, though not of themselves commerce and though local in nature, are yet in the so-called "current" of interstate commerce, and thus affect it. Footnote7 Under another line of cases, the Anti-Trust cases, combinations in restraint of interstate commerce have been held illegal, and this rule applied directly to combinations of labor. Footnote8 It was established, however, that intrastate matters, including combinations in restraint of trade, could only be regulated where they affect interstate commerce and in a real and substantial way, and not where there is only a remote or indirect relation.

The National Labor Relations Act of 1935 was based on the theory that the denial by employers of the right of employees to organize and bargain collectively causes strikes and other industrial disorders, which obstruct and burden interstate commerce. It was argued by the proponents of the NLRA that labor difficulties had a direct and substantial relation to interstate commerce; that, if labor disorders are enjoinable as in restraint of trade, the conditions which breed them are also subject to regulation under the power to regulate. This argument was supported by the rule that Congress has power not only to restrict but also to promote and protect interstate commerce. Footnote9 It was urged by the proponents of the Act, that labor disturbances were a national problem and could not be dealt with effectively by the states separately. It had been held by the Supreme Court in the First Coronado case, Footnote10 though by way of dictum, that, "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."

Now let's consider the arguments advanced by the opponents in 1935 against the constitutionality of the National Labor Relations Act under the commerce clause. In the first place, in 1935 it was established by previous court decisions that manufacturing and production was not interstate commerce and could not be regulated as such, even though it was intended by the act that the goods produced would later enter the "stream" of interstate commerce. Footnote11 As to the effect of labor disturbances on interstate commerce, it was pointed out by these opponents that, though secondary boycotts have frequently been held in restraint of trade, Footnote12 in these cases the acts of the parties have not been confined to any one state, and have directly affected goods already in the "stream" of interstate commerce. Strikes, however, have generally been held not to be in constraint of trade when the strike was confined within a single state and resulted only in curtailing production. It has been distinctly held that such curtailment of production is of only an incidental and remote relation to interstate trade. Since a large part of the labor difficulties are strikes of this nature, the National Labor Relations Act as applied to them would be invalid; at the most it could not have the wide scope intended. Also, if such strikes are themselves not the substantial relation to interstate trade, then the employer-employee relations underlying them would have a less direct relation to interstate commerce, and are thus not subject to regulation by Congress.

In the Schechter case Footnote13 overthrowing the National Industrial Recovery Act, the Supreme Court reaffirmed the principle that Congress may only regulate transactions which have a close and direct relation to interstate commerce, Footnote14 and the Court also took the view that regulation of local business was not a valid exercise of the commerce power. Footnote15 Though the Court did leave itself a loophole for future decisions when it said that the distinction between direct and indirect effect can "only be drawn as individual cases arise," Footnote16 it would seem, since that case involved the regulation of wages and hours of labor, that the same rule would apply to regulation of other aspects of the employer-employee relation, so far as the power under the commerce clause is concerned.

It was also argued that to extend the commerce clause to include the regulation of local business and industry would be to remove its meaning as a specific grant of power, whereby destroying the very principle of delegated and reserved powers, and would result in a centralized government. On this point it was said in the Schechter case:

"If the commerce clause were construed 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." Footnote17

When the NLRA cases came before the Court in 1937, it seemed extremely doubtful that the Supreme Court would hold the National Labor Relations Act to be a valid exercise of the power of Congress to regulate all interstate activities,.

But, assuming that the National Labor Relations Act was declared valid under the commerce clause, would it be constitutional under the due-process clause of the Fifth Amendment, which has been interpreted to guarantee the right to freedom of contract? Footnote18 Would the NLRA subject the individual employee to the collective bargaining agreement obtained by the union

representative? Or would the individual employee be free to contract for his own labor? Does the NLRA eliminate the limitations on the Federal Government in the exercise of their powers granted to it by the Constitution? Footnote19

In Adair v. United States Footnote20 the Erdman Act of 1898 was directly held by the Supreme Court to be invalid because it interfered with the right of the employer and employee to contract. The Court said:

"it is not within the function of the government to compel any person against his will to accept or retain the personal services of another, or to compel any person against his will to perform personal services for another." Footnote21

This holding was followed in Coppage v. Kansas, Footnote22 in which a similar state statute was declared unconstitutional, the Court holding that:

"Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man." Footnote23

In support of the National Labor Relations Act it was urged that since the Adair case Footnote24 in 1907 economic and social conditions had changed by the 1930's, so that such regulations were now reasonable limitations on the employer and employee's freedom of contract; that, once it is admitted that freedom of contract is subject to some restrictions, the extent to which the state may go becomes a mere matter of degree. The Supreme Court has recognized the necessity for labor unions "to give laborers an opportunity to deal on an equality with their employers" It is also true that the Court in McLean v. Arkansas Footnote25 following the dissent of Justice Holmes in Adair Footnote26 held that the legislature is primarily the judge of the necessity of such enactment's, and that the Court will not interfere unless the act is unmistakably and palpably in excess of legislative power. In view of these considerations it was hoped by the Roosevelt administration that the Supreme Court would overrule Adair v. U.S., but they feared that with the attitude of the Supreme Court in 1937, it was highly improbable that it would sustain the National Labor Relations Act on the point of due process and freedom of contract.

Another objection against the National Labor Relations Act was that it was one-sided, in that no provision was made for employers to complain to the Board of unfair labor practices by labor unions, and also in that, though it was unfair for employers to refuse to bargain collectively, yet labor was under no such obligation, since it was expressly provided that the right to strike be not impaired.

Aside from these objections, it was agreed by both sides that the validity of the NLRA rested largely upon the interpretation of two flexible doctrines; first, that in order for an activity to come within the commerce power, it must have a direct and substantial relation to interstate commerce; and second, that the liberty to contract is subject only to reasonable limitations. It was hoped by the Administration that the Supreme Court would extend these doctrines to uphold the Act, since there surely were some regulations which could be placed upon the employer-employee relationship which would have the effect of promoting industrial peace. But, considering the particular provisions of the act in the light of past decisions of the Court,

Roosevelt lacked confidence that the Supreme Court would uphold the constitutionality of the National Labor Relations Act.

On February 12, 1937, sixty days before the Supreme Court decided the National Labor Relations Act cases, the Circuit Court of Appeals for the First Circuit handed down its decision in Mayers v. Bethlehem Shipbuilding Corporation. Footnote27 In this case the Shipbuilding Corporation and a company union, which was prohibited by the NLRA, had secured an injunction against the National Labor Relations Board, to prevent the board from proceeding with complaints of unfair labor practices. The Circuit Court of Appeals, reviewing the litigation on this subject, said:

"The case is by no means of the first impression. Cases involving the powers and jurisdiction of the National Labor Relations Board have already arisen and been decided in the second, fourth, fifth, sixth, eighth, and ninth circuits, some as in this case on proceedings to enjoin hearings, some on petitions by the board for enforcement of its orders. Where the question was presented it has uniformly been held that the act does not apply to manufacturers. Such persons are not engaged in interstate commerce and their relations with their employees are within the jurisdiction of the state rather than the national government." Footnote28

The court continued:

"On the present state of the law there would seem to be only slight probability that any order which might be made by the board in this case would be enforced." Footnote29

The court was also of the opinion that the fact that the respondent obtained much of its raw material from outside the state in which it was located and sent its finished products out of the state had not the effect of making the business a part of interstate commerce.

In National Labor Relations Board v. Jones & Laughlin Steel Corporation, decided by the Circuit Court of Appeals for the Fifth Circuit on June 15, 1936, the court said:

"The National Labor Relations Board has petitioned us to enforce an order made by it, which required Jones & Laughlin Steel Corporation, organized under the laws of Pennsylvania, to reinstate certain discharged employees in its steel plant in Aliquippa, Pennsylvania and to do other things in the connection.

"The petition must be denied because, under the facts found by the board and shown as evidence, the board has no jurisdiction over a labor dispute between employer and employees touching the discharge of laborers in a steel plant, who were engaged only in manufacture. The Constitution does not vest in the federal government the power to regulate the relation as such of employer and employee in production or manufacture."

The appeals court then quoted from the case of Carter v. Carter Coal Company, decided by the Supreme Court on May 18, 1936, less than a year before the time the Court rendered the National Labor Relations Act decisions. This quotation reads:

"One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale or shipment were originally intended or not, has engaged in two 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 to the former, he is subject only to regulation by the state; in respect to the latter, to regulation only by the federal government. Production is not commerce; but a step in preparation for commerce. Chassaniol v. Greenwood, 291 U.S. 584.

"We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purpose 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 purpose of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing operations 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 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."

The Circuit Court of Appeals then applied this reasoning to the facts of the Jones & Laughlin case. The underlying thought was clear. The Supreme Court had limited the power of the national government to interstate transportation. Nothing can be transported until after mining or manufacture. Production of an article is preparatory to transportation - hence it is local in its nature and beyond the power of the federal government to regulate.

So it was in the other court of appeals. In the case of National Labor Relations Board v. Friedman-Harry Marks Clothing Company, Footnote30 decided July 13, 1936, in the Second Circuit, the court said:

"The relations between the employer and its employees in this manufacturing industry were merely incidents of production. In its manufacturing, respondent was in no way engaged in interstate commerce, nor did its labor practices so directly affect interstate commerce as to come within the federal commerce power. Carter v. Carter Coal Co. 56 S.Ct. 855, 80 L.Ed. 1160 (1936); Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. No authority warrants the conclusion that the powers of the federal government permit the regulation of the dealings between employers or employees when engaged in the purely local business of manufacture." Footnote31

In Schechter Poultry Corp. v. United States, relied upon by the Court of Appeals, it was held that the sale of poultry in New York was not interstate commerce, although 96 per cent of it came from other states, and the sale of sick chickens in violation of the Code had so demoralized the market as to cut importation 20 per cent. Chief Justice Hughes, speaking for the Supreme Court, said in the Schechter opinion:

"Were these transaction 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code provisions as here applied do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When the defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouse in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers.

"The undisputed facts thus afford no warrant for the argument that the poultry handled by the defendants at their slaughterhouse markets was in the 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased. The poultry has come to a permanent rest within the State. It was not held, used or sold by the defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other states. Hence, decisions which deal with a stream of interstate commerce - where goods come to rest within a state temporarily and are later to go forward in interstate commerce - and with the regulation of transactions involved in that practical continuity of movement, are not applicable here.

"Did the defendant's transactions directly 'affect' interstate commerce so as to be subject to federal regulation? In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. Direct effects are illustrated by the railroad cases we have cited, as e.g., the effect of failure to use prescribed safety appliances on railroads which are the highway of both interstate and intrastate commerce, But where the effect of intrastate transportation upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed 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." Footnote32

SUPREME COURT DECISIONS ON THE NATIONAL LABOR RELATIONS ACT

On April 12, 1937 the Supreme Court handed down five decisions Footnote33 upholding the National Labor Relations Act. These cases involved several constitutional questions. Most important of these were, first, the constitutionality of the Act per se, and, second, the limits of its constitutional application.

The opinions in three cases were delivered by Chief Justice Hughes in National Labor Relations Board v. Jones & Laughlin Steel Corporation. In two of the cases, Mr. Justice Roberts delivered the opinion of the Court. In all of the cases, except Washington, Virginia and Maryland Coach Company v. National Labor Relations Board, Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler dissented.

National Labor Relations Board v. Jones & Laughlin Steel Corporation

301 U.S. 1 (1937)

In NLRB v. Jones & Laughlin Steel Corporation, the proceeding was instituted before the National Labor Relations Board by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization, charging that the Steel Corporation had violated the Act in engaging in unfair labor practices affecting commerce. The unfair practices charged were that the Corporation discriminated 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 by discharging certain employees. The Board sustained the charges, ordered the Corporation to cease and desist from the practices, to offer reinstatement to ten of the employees named, to make good their losses and to post for thirty days notices that the Corporation would not discharge or discriminate against union members. Upon the Corporation's failure to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The Court denied the petition on the ground that the order exceeded federal power. The case came before the Supreme Court by way of certiorari.

The order in question was made after complaint, notice and hearing. The Steel Corporation appeared specially, contesting the jurisdiction of the Board and setting up the constitutional invalidity of the statute. After hearing evidence the Board sustained the charges and issued the order complained of.

The Steel Corporation contended (1) that the Act was a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to respondent's relations with its production employees because they are not subject to federal regulation; and (3) that the provisions of the Act violated Section 2 of Article III and the Fifth and Seventh Amendments of the Federal Constitution.

In rejecting these contentions Chief Justice Hughes reviewed the findings of the Board as to the nature and scope of the Steel Corporation's business. Among others the Board found that the Corporation was the fourth largest producer of steel in the United States, which, with its 19 subsidiaries, was a completely integrated enterprise owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal and connecting railroads. The various properties were located in many states. It has sales offices in twenty cities in the United States and a wholly owned subsidiary, which is its distributor in Canada. Its iron and steel manufacturing plants were located in Pittsburgh and Aliquippa, Pennsylvania. About

75% of its product is shipped out of Pennsylvania. Summarizing the Corporation's operations, the Board stated that the works in Pittsburgh and Aliquippa:

"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 to all parts of the nation through the vast mechanism which the respondent has elaborated." Footnote34

To carry out the activities of the Corporation 33,000 men mine ore, 44,000 mine coal, 4,000 quarry limestone, 16,000 manufacture coke, 343,000 manufacture steel, and 83,000 transport its products.

Evidence was also taken by the Board as to relations between the Corporation and its employees, and the Board found that the Corporation had discharged certain employees because of their union activity and for the purpose of discouraging membership in the union.

After a review of these findings the Supreme Court turned its attention to the questions of law raised. The first legal question considered related to the scope of the Act. It was raised in the respondent's contention that the Act attempts to regulate all industry and invades the reserved powers of the states over their local concerns; that the references in the Act to interstate commerce are colorable at best; that it was not a true regulation of commerce or matters directly affecting it, but is designed to place under compulsory federal supervision all industrial labor relations in the nation. The Court, however, was of the opinion that the Act may be construed so as to operate within the sphere of federal constitutional power. The jurisdictional provisions and their effect were described as follows:

"The jurisdiction conferred upon the Board, and invoked in this instance, is found in Section 10(a), which provides:

"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.

"The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce.' The Act specifically defines the 'commerce' to which it refers (sec. 2(6)):

"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.'

"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' (sec. 2(7)):

"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.

"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 rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion. 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." Footnote35

Next referred to were the unfair labor practices involved. In sustaining the definition of "unfair labor practices," the Court pointed out that the Act 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. In upholding this right the Court cited similar provisions of the Railroad Labor Act which had been sustained and said:

"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.

"That is a fundamental right. Employees have as clear 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. We reiterated these views when we had under consideration the Railroad Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could not 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.' We have reasserted the same principle in sustaining the application of the Railroad Labor Act as amended in 1934." Footnote36

The third legal question considered was the crucial one whether the Act was valid as applied to employees engaged in production. The Steel Corporation argued that whatever may be the law as to employees engaged in interstate commerce, manufacturing in itself was not commerce and the relations between employees and employer therein were not subject to federal regulation. In support of this contention numerous decisions were cited including the Schechter case, and the Carter Coal case. But the government distinguished these cases urging that the activities constituted a "stream" of commerce of which industrial strife would cripple the entire flow. The government's contention in this regard was explained as follows in the opinion:

"The various parts of respondent's enterprise are described as interdependent and as thus involving 'a great movement of 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. 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 non-discriminatory 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: "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.' Applying the doctrine of Stafford v. Wallace, the Court sustained the Grain Futures Act of 1922 with respect to transactions on the Chicago Board of Trade, although these transactions were 'not in and of themselves interstate commerce.' Congress had found that they had become 'a constantly recurring burden and obstruction to that commerce.'" Footnote37

The Steel Corporation pointed to various aspects of its business which it urged removed the Aliquippa plant from the flow of commerce and argued that if importation and exportation in interstate commerce did not singly remove local activities into the field of federal power, it should follow that their combination would not alter the situation. The Court found it unnecessary to determine whether the features urged dispose of the analogy to the "stream" of commerce cases and said:

"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 the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety; to foster, protect, control and restrain.' That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' 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. 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. The question is necessarily one of degree." Footnote38

The opinion by Chief Justice Hughes points out further that it is established that intrastate activities by reason of their proximity to interstate commerce may come within the range of federal power. A notable example of this may be found in intrastate railroad rates which are subject to federal regulation by reason of their relation to interstate rates and to prevent discrimination against interstate commerce. Further illustration was cited in the case sustaining the exercise of federal power under the Sherman Anti-Trust Act:

"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.

"Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. 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, 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 [265 U.S. 457], 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 '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.' 259 U.S. p. 408. And in the second Coronado case the Court ruled that while the mere reduction in 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 '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.' 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. International 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.

"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 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." Footnote39

The opinion further stated that even when full weight is given to the contention that the manufacturing process constitutes a break in the stream of commerce, the fact remains, nevertheless, that stoppage of the operations would have a serious effect upon interstate commerce. In elaboration of this the Chief Justice said:

"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 dominate 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 conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience." Footnote40

The Supreme Court then called attention to the fact that experience has demonstrated that the recognition of the employee's right to organize and select their own representatives for purposes of collective bargaining has been conductive to industrial peace, and the provisions of the Act preserving such rights were thought valid.

The opinion discusses questions raised under the due process clause. They were disposed of, however, largely upon the same reasoning as that underlying the decision in the cases under the Railway Labor Act, particularly as set forth in the Virginia Railway Co. v. System Federation No. 40.

Washington, Virginia and Maryland Coach Company v. NLRB

301 U.S. 142 (1937)

The basic constitutionality of the National Labor Relations Act was also affirmed in the Washington, Virginia and Maryland Coach Company case by an unanimous opinion of the Supreme Court, holding that the act was not an unconstitutional attempt to regulate intrastate as well as interstate commerce. In view of the fact that eminent lawyers had expressed positive doubts as to the possibility of such a holding, an examination of its basis in previous decisions of the Court on the question of Congressional power under the commerce clause of the Constitution will help not only in understanding the implications of the Coach Company case, but the other four NLRA decisions also.

In 1908 the Supreme Court of the United States had before it the case of Adair v. United States, Footnote41 involving the constitutionality of the Erdman Act of 1989, section 10 of which provided that:

Any employer subject to the provisions of this act and any officer, agent, or receiver of such employer, who shall require any employe', or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employe' with loss of employment, or shall unjustly discriminate against any employe' because of his membership in such a labor corporation, association, or organization, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars.

The indictment in this case charged that the defendant Adair, being an agent of a railroad company engaged in interstate commerce and subject to the provision of the act, had discharged one Coppage from its service because of his membership in a labor organization. Mr. Justice Harlan, giving the opinion of the Supreme Court, held, first that it was a violation of the Fifth Amendment for Congress to make it a crime to discharge a workman with whom there was no contract for a fixed term because he was a member of a labor organization. The Court said:

"It was the defendant Adair's right - and that right inhered in his personal liberty and was also a right to property - to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests." Footnote42

In the second place the Court decided that there was no:

"such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require an

interstate carrier, under penalties, to employ in the conduct of its interstate business only such members of labor organizations, or only those who are not members of such organizations - a power which could not be recognized as existing under the Constitution of the United States." Footnote43

In short, the Adair case held that the right of an employer to fire employees not under contract was protected by the Fifth Amendment against Congressional interference, and that, moreover, labor organizations in industries admittedly in interstate commerce "have nothing to do with interstate commerce as such." Justices Holmes and McKenna dissented in separate opinions.

On both these points the Washington, Virginia and Maryland Coach Company case seems to reach very different conclusions. In that case the Coach Company operated motor busses for hire between points in the District of Columbia and Virginia. A charge was filed with the National Labor Relations Board by the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, alleging the discharge of drivers and garage workmen for union activity, in violation of Section 8, subd. (1) and (3), and Section 3, subd. (6) and (7) of the National Labor Relations Act, forbidding unfair labor practices.

The board rendered its decision, Footnote44 setting forth its findings of fact, and issued an order against the Coach Company, which admitted the interstate character of its business. The Coach Company did not comply with the order of the board, which then petitioned the Circuit Court of Appeals for the Fourth Circuit. The court entered a decree upholding the Act and enforcing the order of the board. Footnote45 Judge Soper, speaking for the court, held that if the finding of fact of the board were supported by evidence, they would not be inquired into, that the Act was not a denial of due process of law guaranteed by the Fifth Amendment, and that the power given to the board by the Act to prevent unfair labor practices in interstate commerce was properly exercised. This judgment of the Circuit Court of Appeals was unanimously affirmed by the Supreme Court. In the argument before the Circuit Court of Appeals the Coach Company relied on Adair v. United States Footnote46 and its companion case, Coppage v. Kansas, Footnote47 involving a state statute and its validity under the Fourteenth Amendment. Said Judge Soper:

"In the first case, an act of Congress was declared unconstitutional which made it a misdemeanor for a common carrier to discriminate against its employees by discharge or otherwise because of membership in a labor union; and in the second case, a state law was declared invalid which made it unlawful for any individual to coerce or influence any person to enter into an agreement not to join a labor union as a condition of securing or continuing employment.

"These citations are not irrelevant, especially Adair v. United States, because there, as here, a carrier engaged in interstate commerce, in the commonly accepted meaning of the term, was involved, and vigorous argument was advanced by counsel for the United States and by the dissenting justices to sustain the act as a reasonable exercise of the power of Congress to regulate commerce between the states. But the difficulties which these decisions oppose to the validity of the National Labor Relations Act seem to us to have been removed by the more recent unanimous decision of the Court in Texas & New Orleans. Ry. Co. v. Ry. Clerks, interpreting the Railway Labor Act of 1926.

"The Supreme Court held that the act conferred the right of independent self-organization upon the employees, free from interference on the part of the employer enforceable by the courts, and that the prohibition upon the carrier was not a violation of the Fifth Amendment, since it did not interfere with the normal exercise of the right of the carrier to select its employees and discharge them. On this ground Adair v. United States and Coppage v. Kansas were distinguished. The Court said (281 U.S. 548, 570): 'The petitioners invoke the principle declared in Adair v. United States and Coppage v. Kansas, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at interference with the right of the employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selection, they cannot complain of the statute on constitutional grounds.'" Footnote48

The status of Adair v. United States, after the decision of the Supreme Court in the Texas & New Orleans Railway case was certainly not clear. Under the Adair case the employer has a constitutional right to hire and fire for any reason or for no reason. The Railway Labor Act, as interpreted by the Supreme Court, meant that the employer could constitutionally be prohibited from interfering with the right of employees to have representatives of their own choosing. Under the decision in the Texas & New Orleans Railway case, interpreting the Act, could the employer assert the right that was guaranteed him in the Adair case, and discharge every workman who attempted to secure representatives of his own choosing by joining a labor union? True, it is possible to reconcile the cases on the superficial and unsatisfactory ground that "the employee's right to freedom from restraint during the period of employment does not conflict with the employer's right arbitrarily to terminate that period." If this is the true distinction, and Adair v. United States continued to be law after the decision in the Texas & New Orleans Railway case it is clear that the latter was not adequate as a precedent in the Washington, Virginia and Maryland Coach Co. case decided April 12, 1937. In the words of the court, the distinction lies in the fact that under the Railway Labor Act there is no interference with the "normal exercise" of the right of the carrier to select its employees or to discharge them. On what theory can it be said that the employer was not indulging in the "normal exercise" of that right in the Texas & New Orleans Railway, and so could be prevented from the acts in question, but that the employer was in the "normal exercise" of that right in the Adair case? Perhaps it is merely another example of those not infrequent opinions in which the law is laid down with "seemingly studious obscurity," in which we cannot help but leave it. But one may wonder at the unwisdom, from the public's point of view, of leaving intact conflicting lines of authority upon which a court may rely at choice, to reach unpredictable results. Footnote49

DID THE DECISIONS OF THE SUPREME COURT IN THE NLRA CASES CREATE A NEW MEANING UNDER THE COMMERCE CLAUSE?

In the Jones & Laughlin Steel Corporation case, the board found unfair labor practices in the corporation's Aliquippa, Pennsylvania plant, and issued an order applying to production workers. The record showed that all the raw material coming to the plant was stored from three weeks to three months before it was used. It had not only "come to rest" but had been at rest a long time before it was used. Most of the finished products were not manufactured on contract, but were sold afterwards. The Friedman-Harry Marks Clothing Company case involved production employees. In the Trailer case the board's order affected both production and maintenance workers. So sure were counsel that the activities of these employees were not interstate commerce and that, as to them, the NLRA could not be applied constitutionally, that they did not bother to make a defense except to object to the jurisdiction of the board. The majority did not purport to overrule any of these prior decisions, nor did they define interstate commerce.

The Jones & Laughlin case was well epitomized by a newspaper comment which appeared the day after the decisions were handed down, reading: Footnote50

Supporters of the president's argument that his troubles have been due to the judiciary and not to the Constitution emphasized that under the practical formula set forth by Chief Justice Hughes today what is and what is not within the federal power to regulate commerce becomes purely a matter on which the court will judge according to the practical experience and views of a majority of its members and not in accordance with any scheme which can be precisely defined in legal language.

How far the government's power extends away from the "flow" of interstate commerce is, said the Chief Justice, necessarily a question of degree.

In what direction was the Court headed with these decisions? Did the decisions of April 12, 1937 adopt the principles laid down by John Marshall one hundred and fifty years ago, or did the Court simply adopt a glorified interpretation of the transportation doctrine? The following excerpt from the opinion in the Jones & Laughlin Steel case is probably the best answer the decision affords:

"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 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 foreign field into which Congress may not enter which it is necessary to protect interstate commerce from the paralyzing consequences on industrial war?" Footnote51

Four of the justices dissented in the National Labor Relations Act cases, Mr. Justice McReynolds writing the opinion. In his view the majority had overruled the Schechter case and the Carter Coal Company case. Further, he stated that the circuit judges were right in relying on these cases, and intimated that the opinion of the Court was perhaps not fair to the circuit judges who based their opinions on the most recent decisions of the Court. Mr. Justice McReynolds said:

"We conclude that these causes were rightly decided by the three Circuit Court of Appeals and that their judgments should be affirmed. The opinions there given without dissent are terse, well-considered and sound. They disclose the meaning ascribed by experienced judges to what this Court has often declared, and are set out below in full.

"Considering the far-reaching import of these decisions, the departure from what we understand has been consistently ruled here, and the extraordinary power confirmed to a Board of three, the obligation to present our views becomes plain." Footnote52

It was not clear in 1937, in the Jones & Laughlin case, whether the Supreme Court really based its decision on the meaning of the term "interstate commerce" or not. It was suggested that the Court looked upon the precise meaning of the term as not being involved in a decision of the case, since the Court said that Congress has authority to protect interstate commerce from burdens and obstructions which were not an essential part of its "flow" and that Congress may protect interstate commerce from threats of burdens or obstructions from without. A number of writers have insisted with some vehemence that these decisions have not widened the meaning of the term "interstate commerce," but that they recognize and apply an established rule, that Congress may legislate with respect to activities that burden it, though these activities may themselves be wholly outside of commerce between the states.

In a brief discussion of the National Labor Relations Act cases in the Georgetown Law Journal, a writer states:

The scope of the term 'interstate commerce,' as it has previously been understood and interpreted remains the same. The decisions must be limited to the admittedly serious effect of labor disputes and disorders on the 'free flow of interstate commerce.' Nowhere in any of the majority decisions can it be found or even inferentially stated that there is now vested in Congress, as a result thereof, the power to regulate and control the internal affairs of a business of a purely intrastate character where there can be found no serious restriction or burden on the free flow of commerce between the states.

A like view was entertained by Mr. David Lawrence, who wrote in a syndicated article the following:

The Supreme Court has, in effect, told a hesitant, wavering, doubtful Congress that the federal government does have power to protect interstate commerce against the impediments and obstructions which grow out of serious labor disputes.

Thoroughly consistent with the previous opinions, the Supreme Court has merely called attention with renewed emphasis to a decision rendered in May, 1925, known as the Second Coronado case, which governs almost identically conditions such as exist today.

No new commerce clause has been written into the Constitution, but a definition of what really constitutes obstruction of interstate commerce has been restated with remarkable clarity and force.

The American people generally have won a great victory. Labor, in particular, that is honest, decent, law-abiding labor, has won a triumph unexcelled in American history.

The Court has pointed out that production itself may still be local, just as it was in the coal mining case [the Second Coronado case], but that physical acts or obstruction could interfere with the movement of goods. Footnote53

The draftsmen of the National Labor Relations Act were faced with the problem of preparing a statute which should apply as widely as possible the principles of collective bargaining in labor relations. They could have limited the scope of the Act to labor disputes occurring in interstate commerce, subject to the varying definitions of that term which the Supreme Court might from time to time adopt. It would seem fairly obvious, from a reading of the plain words of the Constitution, giving Congress power to regulate commerce among the states, that labor disputes in interstate commerce would be subject to regulation as a part of that commerce, and under the Railroad Labor Act and the Texas & N.O. Railway case which upheld it, that must have seemed to the draftsmen of the National Labor Relations Act established as law, subject to the Adair case. For it must not be forgotten that the Adair case was not overruled by the Texas & N.O. Railway case, and that, in the Adair case the Court took the view that a labor organization whose membership was employed by an interstate carrier, had, nevertheless, no such substantial relation to or connection with interstate commerce as to Congress to impose criminal penalties for discharging an employee because of his union membership. Said Mr. Justice Harlan:

"What possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? It is the employe' as a man, and not a member of a labor organization who labors in the service of an interstate carrier." Footnote54

Nevertheless, in prosecutions and suits under the Sherman Anti-Trust Act, forbidding combinations and conspiracies in restraint of interstate commerce, it has been held that the Sherman Act, "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between states;" and that this prohibition includes combinations of labor; that obstructions of business not part of interstate commerce by combinations of labor intended to restrain interstate commerce, or where that would be the necessary effect of the combination, are subject to the prohibition; in other words, that acts of labor organizations in business themselves either within or without interstate commerce, may constitute an obstruction

of interstate commerce as to come within the regulatory power of Congress, subject to the requirement that if the acts occur in intrastate commerce, they must "affect" interstate commerce "directly."

It would seem to follow that labor disputes in intrastate commerce would be subject to federal legislation, since their necessary effect, or their intended effect, could be to impose a direct burden upon interstate commerce. Such labor disputes and strikes could be regulated by Congress. The regulation might legally be directed toward encouraging collective bargaining in order to discourage strikes. The theory finds expression in the National Labor Relations Act, which says:

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 practices 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. Footnote55 (emphasis added).

The dissent of Mr. Justice McReynolds in the National Labor Relations Act cases deserves a brief discussion. The dissent of Mr. McReynolds will be remembered not for what was written in his opinion but how he delivered his opinion. Ordinarily the celebrated dissenter speaks in a low voice, often difficult to hear, but on April 12, 1937, almost every word came clearly and with feeling.

Mr. Justice McReynolds began giving the dissent of the minority as soon as Chief Justice Hughes closed for the majority. He delivered his views extemporaneously, without once looking down at his manuscript, and expressed them in such a way as to be more emphatic than the written words. After announcing the names of those in the minority, he said:

"You may recall that Webster, in one of his orations, suggested that the argument may proceed more profitably if the issue is more narrowly defined. I think I can tell you in a few minutes just what the issue is in this case and give you some understanding of what the decision means.

"If you got the idea that this legislation was intended to prevent strikes and thereby improve commerce, let me read you a few lines of Section 13 of the act, which says that nothing in the act shall impede the right to strike."

It was reported by those in attendance, Mr. Justice McReynolds looked sternly out into the court room as he went on, his voice rising:

"The Labor Act does not prohibit strikes. This act is leveled at employers, and defines as employers any one who acts for employers. The size and character of the enterprise are not involved. Now we are told that this act is intended to restrain any employer from discharging an employee belonging to a labor union - that is, any organization of any kind, or agencies in which the employee participates in whole or in part for dealing with employers.

"We have here three concerns: first, a large integrated steel company; second, a small manufacturer of trailers - an enterprise built up from a small blacksmith shop, largely the work of one man-third, a small clothing manufacturing plant in Richmond, Virginia, hiring less than 1,000 persons.

"The thing they have in common is this, each is a manufacturer, each imports from outside the State raw material, fabricates it and sends it out of the State. There are the essential elements.

"This Court has decided again and again within the last fifty years and particularly in the last two years, that manufacturing is only incidentally related to interstate commerce and that Congress has no authority to interfere with manufacturing, operating as such.

"We had supposed that was settled as much as anything can be settled. Let us take this little concern down in Richmond. It buys its raw materials in New England, brings them down to Richmond, manufactures the cloth in pants and the pants are sold in North Carolina.

"The argument is that this concern is in the 'stream-m-m-m' of interstate commerce and that when this concern is shut up, the 'stream-m-m-m' is blocked. Now the argument is that Congress has the right to say to the people who build up this business. 'You may not discharge a cutter because he belonged to some sort of an association to negotiate wages.'

"Why has this Congress this right?" Justice McReynolds went on in biting tones by declaring:

"Heretofore it was thought that Congress had no such power. But now it is argued that if a strike occurs it may interfere with the operation of factories and that this may prevent goods coming to North Carolina."

Mr. Justice McReynolds then compared the raising of pigs in Iowa, which are subsequently shipped to Chicago. He asked if the precedent set in the National Labor Relations Act cases gave Congress that right to limit pork production in Iowa.

Justice McReynolds denied that the discharge of employees of the Richmond plant had produced any effect on interstate commerce, and went on to say that the National Labor Board was "interfering directly with management, saying who they shall employ."

"If this continues it will bring about a situation from which no man can foresee the end," he added.

"It is said the Congress has the right to remove any obstruction to the free flow of commerce. In the proper sense it has, but interference must be direct and substantial. It has been gone over again and again and again. It is perfectly true that in the Standard Oil and tobacco cases Congress removed threatened interference with interstate commerce."

In his written opinion, Mr. Justice McReynolds said that under the conclusion of the majority, "almost anything, marriage, birth, death - may in some fashion" be held to affect commerce. In the opinion he declares:

"It is gravely stated that experience teaches that if an employer discourages membership in 'any organization of any kind' 'in which employees participate, and which exists for the purpose in whole or part in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work," discontent may follow and this in turn may lead to a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything - marriage, birth, death - may in some fashion affect commerce." Footnote56

In speaking, he said that "marriage and babies" could be regulated, and that the marriage of "Mary Jones and John Smith" might be considered in the "stream" of commerce.

Voicing the sentiments of the four conservatives, Justices Van Devanter, Sutherland, Butler and himself, he closed by saying:

"The field opened here is wider than most of the citizens of the country can dream. The cause is so momentous, the possibilities for harm so great that we felt it our duty to expose the situation as we view it."

These words were not in his manuscript. Many others he used were not there, although the trend of thought plainly followed the line he had dictated to a secretary.

His voice drawing but in vigorous accents, he scoffed at the idea that the Friedman-Harry Marks Clothing Company had really been in the "stream-m-m-m-m" of interstate commerce, talked about the "pants" made in the factory and asserted again that if, under the decision, Congress could control the relations between employers and employees, it could exercise supervision over marriage and birth.

WHAT WAS THE PUBLIC REACTION TO THE NATIONAL LABOR RELATION ACT DECISIONS?

After the decision by the majority of the Supreme Court upholding the National Labor Relations Act, several statements were issued by the organizations affected the most by the decision. Head officials of the United Automobile Workers Union who were in Detroit on April 12, 1937, expressed their gratification over the Supreme Court's decision in the National Labor Relations Act cases.

According to Homer Martin, president of the union, the upholding of the validity of the act is a definite step forward in keeping with the spirit and purposes of democracy in the handling of labor disputes. He said:

"Had the act been effective a few months ago the strikes in the automobile industry would never have happened," he said. "Intimidation and coercion are completely eliminated because of the court's ruling. The threat of company unions is removed and the workmen are placed in a position where they can defend themselves against anti-labor tactics. The company will now be forced to deal with representatives chosen by the workers themselves. This is particularly true of the Ford workers, who will be given the opportunity they have sought for several years.

"Beginning immediately, the international union will start a concerted drive among Ford workers. Henry Ford is not bigger than the United States Government. The Supreme Court has given its decision and the law will act. Henry Ford can do but one thing - recognize and deal with the unions, even at the price of changing his mind. Others changed theirs, including the Supreme Court.

"We now look forward to an era of peace and quiet in industry, established by legal recognition of labor's rights and collective bargaining."

Comments in official and congressional circles on the Supreme Court's decision upholding the National Labor Relations Act included the following:

Senator Wagner - "It is a great victory for the people of America. The Supreme Court has thrust aside its more recent stereotyped and narrow generalities concerning Federal Power, and has adopted a broader concept fitting the organic interdependence of our nation-wide social and economic system. No one who reads the decisions of the Supreme Court will believe that there is a need at this time for further Federal legislation dealing with labor relations."

Solicitor General Reed - "This is a realistic approach to the commerce clause of the Constitution."

Senator Walsh - "It seems to me the decision tends to place definitely under the control of the Federal Government the labor relations between employers and employees relating to collective bargaining and unfair labor practices in all the major industries of the country which maintain plants in different States and have an interchange of commerce between such plants."

On April 13, 1937 the Los Angeles Times printed the following editorial:

The Supreme Court yesterday disproved the President's contention that it is biased and prejudiced against New Deal legislation by upholding the National Labor Relations Act in all five of the cases before it. The majority opinion so broadens the meaning of the interstate commerce clause of the Constitution, as that has been generally understood, as to let in a majority of New Deal bills if they are drawn with any care.

So far as the labor unions which fought for this measure are concerned, they have produced a weapon likely to be a boomerang. For if Congress may legislate to regulate labor relations, it plainly may legislate to regulate labor unions.

Earl F. Reed, counsel for the Jones & Laughlin Steel Corporation, said that the Supreme Court decision on the National Labor Relations Act, was one which "cuts both ways." Mr. Reed, regarded in 1937 as one of the best informed sources on labor law, successfully fought the National Industrial Recovery Act in the case involving the Weirton Steel Company. Footnote57 After reading press reports of the decision, he told the Associate Press:

"Apparently each case will depend on its own facts and make it very difficult to advise when the law applies.

"Moreover, the decision cuts both ways. Where the union is the minority group it will have no right to bargain even for its own members."

"Would you say that the contracts which the forces of John L. Lewis Footnote58 have obtained with more than fifty steel corporations to bargain for union members makes them the spokesman for all the workers?" he was asked. Reed replied:

"I would not want to say. Those workers who joined the union for whatever reason would obviously be viewed by the National Labor Board as being under their (the National Labor Board) jurisdiction by their representation in the union contract, while whose workers who freely decide not to join the union for whatever reason would be at liberty to contract for their own wages and conditions of employment free of any interference from the National Labor Board or the union."

WAS THE SUPREME COURT PLAYING POLITICS WHEN IT DECIDED THE NATIONAL LABOR RELATION ACT CASES?

Undoubtedly, the Supreme Court did yield to the pressures of public opinion as to changing conditions - and perhaps even to the leverage of Roosevelt's "court packing" bill. But the Court also translated policy (or politics, if you use the word respectfully) into judgment: in short, the Supreme Court also acted in its capacity as an agent of statesmanship.

There are contained in the Constitution clauses, to quote Justice Frankfurter, "so unrestricted by their intrinsic meaning or by their history or by traditions or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life." The commerce clause, is one of those. The four minority Justices were consistent in adhering to the restricted definition of that clause set out in the National Industrial Recovery Act and the Guffey decisions. The five majority Justices felt that "reading life" compelled a less restricted interpretation of it.

Needless to say, Mr. Justice Roberts (who moved over to the liberal members of the Court) must have taken a big look at life between 1936 and 1937.

Chief Justice Hughes, in the Jones & Laughlin case said:

"We have repeatedly held that as between two possible interpretations of a statute, by one which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."

For the word "Act" in this sentence, substitute the word "Court." That was probably Mr. Justice Robert's answer.

AFTER THE DECISIONS IN THE NATIONAL LABOR RELATIONS ACT CASES,

COULD CONGRESS NOW REGULATE WAGES, HOURS, CHILD LABOR IN THE STATES?

The minority of the Supreme Court feared that it could, but the fact is that nobody could answer this question in 1937. The Supreme Court left the road wide open to the affirmation or denial of these powers. The Court might conceivably hold that while strikes, may seriously obstruct interstate commerce by resulting in a walkout of the employees of industries organized on a national scale, substandard wages, excessive hours and child labor threaten interstate commerce only remotely and indirectly. From this it would follow that Congress would be denied the power to deal with such a question.

But the Supreme Court might just as conceivably hold otherwise. It might just as well find that substandard wages, excessive hours and child labor differ from industrial disputes only in that their paralyzing effect upon interstate commerce is insidiously corrosive and ultimate. As Chief Justice Hughes himself pointed out, the Court does not deal with these questions "in an intellectual vacuum."

CONCLUSION

In several important respects the National Labor Relations Act cases, decided by the Supreme Court on April 12, 1937, remain landmarks in constitutional law, and among the most important labor decisions of all time. They indicate an expanded interpretation of the term "interstate commerce." The decisions open new avenues under statutory law for the Federal government to control the everyday lives of the people of the states, but the choice was still left for the people to decide if they would allow such control over their activities.

Statutory law is that body of legislation which is designed to provide mandatory and directory instruction from the lawmaker (sovereign) to the subject. The legislative bodies of the States of the Union and the United States of America (Congress), are empowered to act by the State and Federal Constitutions respectively. All of the "powers" these lawmaking bodies possess are delegated powers. They derive from the creative power inherent in the People (citizen of the several States) expressed as political and judicial sovereignty, and can be revoked, in degree or in total by the People, if needed. Surely, one of the most fundamental concepts underlying

fundamental American law is that no lawmaking body can pass laws that mandate performance upon the part of any Citizen unless by convention of the People, that power is granted to the legislating body expressly. The only implied power that legitimately exists is that which rests upon the explicit mandates of the constitutional language as present in the charters themselves and clarified, if need be, by the express intentions of the framers. If there is no such clear grant given by the People, then there is no capacity to legitimately pass any law that can compel performance.

It is interesting to note, however, that when Roosevelt was Governor of New York in the 1920's, he protested in behalf of the States against the dishonest and lawless use of the Commerce Clause by the Congress and the President to occupy forbidden ground in the States. Speaking before a conference of governors at New London, Connecticut, on July 16, 1929, he condemned the "stretching" of the Commerce Clause by Congress to cover cases not embraced by grants of power to it in the Constitution. Roosevelt declared:

"Our Nation has been a successful experiment in democratic government because the individual States have waived in only a few instances their sovereign rights...

"But there is a tendency, and to my mind a grievous tendency, on the part of our National Government, to encroach, on one excuse or another, ore and more upon State supremacy. The elastic theory of interstate commerce, for instance, has been stretched almost to the breaking point to cover certain regulatory powers desired by Washington. But in many cases this has been due to a failure of the States, themselves, by common agreement, to pass legislation necessary to meet certain conditions."

The Commerce Clause, contains a principle dating back as far as Magna Carta (1215), when King John, faced by armed men, signed an agreement not to interfere in the right of Englishmen to go to and fro in commerce, and abroad and return, except in an exigency of war.

Englishmen in commerce were "in pursuit of happiness," which the Declaration of Independence later denominated a right from the Creator, for the protection of which "governments are instituted among men."

The speeches and writings of Edmund Burke in behalf of the American colonists make clear that the restrictions on commerce by the government of England were far more burdensome and intolerable than was "taxation without representation," usually given as the cause of the American Revolution.

It was obstruction by States of this right to engage in commerce that contributed much to the breakdown of the government under the Articles of Confederation. And the third grant of power to Congress in the Constitution which followed (after taxing and borrowing) is "to regulate commerce...among the States."

Congress is authorized to regulate commerce so that it will not be obstructed as it was before-that is, it is to promote commerce. It is not to obstruct it affirmatively, any more than the early States could rightly do so.

The history of commerce makes clear that legally it is the most important right of men, not to be trifled with by kings or others in power, including the President and Congress.

Getting back to the way "laws" are passed and enforced today, let us remember that despite what appears to be the intent of the policies and mechanization's of the State and Federal governments, the state Constitutions and the National Constitution are still declarative of the Supreme Law of the Land. All laws, rules, regulations, and treaties not made in pursuance to their mandatory provisions, are null and void. Despite the proclamations of the Supreme Court of the United States, and their apparent significance, that Tribunal understands this fact perfectly, and when faced with issues of Law, properly presented, still rules in a manner consistent with the "Common Law precedents of the past," even though they may adopt language and phraseology designed to be less than obvious. The real question is this: Whether or not the "People" are capable of understanding the concepts upon which the organic Laws of the United States of America are founded, and if so, are they willing to accept the responsibility that goes along with the application of those concepts. In other words, are they willing to be free, self-governing Citizens? The Supreme Court in all their decisions dealing with Roosevelt's New Deal legislation left in the hands of the People the obligation to decide the fate of the Nation.

Footnote1

The complete surrender by the states to the Federal government was finally completed in 1972 with the Revenue Sharing Acts, which are examined in Volume II of this work.

Footnote2

Act of July 5, 1935, c. 372, 49 Stat. 449.

Footnote3

See Chapter 7 for a discussion of the *Schechter* case.

Footnote4

The opinion of Judge Otis in Stout v. Pratt, 12 F.Supp. 864. Said Judge Otis, at pages 869-870:

"There is now pending in Congress a resolution to amend the Constitution. The first section of the proposed amendment is this: 'The Congress shall have power by laws uniform in their geographical operation to regulate commerce, business, industry, finance, banking, insurance, manufacturers, transportation, agriculture, and the production of natural resources.' When that proposed amendment has been submitted and ratified the statute now under consideration, in the respects considered here, if then re-enacted, certainly will be constitutional. But not until then. Then also what yet remains of the sovereignty of the states will cease to be and the 'citizens' will have become a 'subject.'"

Footnote5

Art. I, Sec. 8, Clause 3.

Footnote6

Simpson v. Shepard, 230 U.S. 352 (1912).

Footnote7

Swift & Co. v. United States, 196 U.S. 375 (1904).

Footnote8

Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920).

Footnote9

Dayton-Goose Creek Ry. Co. v. United States, 263 U.S. 456 (1923).

Footnote10

United Mine Workers v. Coronado Coal Co., 259 U.S. 341 (1921).

Footnote11

United States v. E.C. Knight Co., 156 U.S. 1 (1894).

Footnote12

Loewe v. Lawlor, 208 U.S. 274 (1907).

Footnote13

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Footnote14

Id. at 544

Footnote15

Id. at 548.

Footnote16

Id. at 546.

Footnote17

295 U.S. at 546.

Footnote18

Allgeyer v. Louisiana, 165 U.S. 578 (1889).

Footnote19

Chicago, Burlington, & Quincy Ry. Co. v. McGuire, 219 U.S. 549 (1910).

Footnote20

208 U.S. 161 (1907).

Footnote21

Id. at 174.

Footnote22

236 U.S. 1 (1914).

Footnote23

Id. at 19.

Footnote24

Adair v. United States, 208 U.S. 161 (1907).

Footnote25

McLean v. Arkansas, 211 U.S. 539, 547 (1908).

Footnote26

208 U.S. at 191.

Footnote27

88 F.2d 154 (1937).

Footnote28

Id. at 155.

Footnote29

Id. at 155.

Footnote30

85 F.2d 1 (1936).

Footnote31

Id. at 2.

Footnote32

295 U.S. at 542-6.

Footnote33

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); National Labor Relations Board v. Fruehauf Trailer Co., 301 U.S. 49 (1937); National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937); Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142 (1937).

Footnote34

301 U.S. 1 at 27.

Footnote35

Id. at 30-2.

Footnote36

Id. at 33-4.

Footnote37

Id. at 34-6.

Footnote38

Id. at 36-7.

Footnote39

Id. at 38-41.

Footnote40

Id. at 41-2.

Footnote41

208 U.S. 161 (1908).

Footnote42

Id. at 172.

Footnote43

Id. at 179.

Footnote44

1 NLRB 769 (1936).

Footnote45

85 F.2d 990 (1936).

Footnote46

208 U.S. 161 (1908).

Footnote47

236 U.S. 1 (1915).

Footnote48

85 F.2d at 993-4.

Footnote49

Perhaps the Supreme Court meant to leave a judicial path open for those who fully understood the true intent behind Roosevelt's New Deal legislation and its subject matter. A discussion on challenging governmental jurisdiction is contained in Volume III of this work.

Footnote50

New York Herald-Tribune, April 13, 1937.

Footnote51

301 U.S at 41.

Footnote52

301 U.S. at 76.

Footnote53

An Independent Judiciary, April 14, 1937.

Footnote54

208 U.S. 161 (1908).

Footnote55

29 USCA 151 (1935).

Footnote56

301 U.S. at 99.

Footnote57

United States v. Weirton Steel Company, 7 F.Supp. 255 (1934). In 1933 while operating under the National Industrial Recovery Act a certain union known as the Amalgamated Association of Iron, Steel and Tin Workers of North America, sought to bring the Weirton Steel Company under the provisions of Section 7(a) of the NRA. Through union representatives sent to Weirton the union sought to sign up a majority of the employees for union representatives. When only a small percent of the employees signed membership cards joining the union, the union representatives and the employees pledged to the union instituted various scare tactics, including the threat of termination for all employees who failed to join the union. As part of their defense, the Weirton Steel Company brought forth employee witnesses to testify against the union and their agents. Mr. Mason, a heater at the Steel Company testified during the trial:

"Q. Will you state what lodge you did join of the Amalgamated? A. Well, in the last part of August, I attended an open meeting of the Amalgamated, and they were discussing dues, and one thing and another, and they said that - it was brought up by a resolution, which was brought before the lodge, that they were going to close the charter right away, and anyone that had not paid in their dues up then, would be assessed $50. So I did not at that night, and the next day, coming down through the mill, Emil Walters, a fellow by the name of John Rawlings was coming down, and he says, "Tom are you going to sign up? I said, "I don't know, it looks like as if I am going to have to." John Rawlings said, "If you are not, your iron is not going to be sheared next week." I said, "What do you mean by that?" He said, "Practically every roller in the plant has signed up, and the majority of them - those rollers that are not signed up by next week are not going to have their iron sheared." Well, I says, "In that case, then, it looks like I will have to." He said, "You certainly are." He says, "If you are not in on the line by next week, by next midnight," he says, "I am afraid you won't have you iron sheared."

Mr. Kinty, a tinner, testified:

"Q. Was anything said to you as to what would happen if they got 51 per cent. of the workers in the Amalgamated? A. Yes, sir; they told me that the U.S. Government would be back of this A.A.

"Q. What do you mean by the A.A? A. This Amalgamated Union.

"Q. The Amalgamated Association? A. Yes, sir. they said when the President (Roosevelt) would get behind their back, it would bring all the boys home.

"Q. Was any statement made to you with respect to the recognition of the Amalgamated Association and what would happen if they came to you? A. They said if the ones did not have a card and unrecognized, they would have no job."

Mr. Miller, a rougher, testified:

"Q Did you join the Amalgamated Association? A. I did.

"Q. Why? A. Because I was told I would lose my job if I didn't."

Footnote58

John L. Lewis was president of the United Mine Workers, and vice president of the American Federation of Labor, until his resignation on November 23, 1935. He resigned from these unions to formed the Committee of Industrial Organization (C.I.O.). The goal of this new militant labor organization, which was secretly endorsed by President Roosevelt, was to create strikes in all industries which would effect or burden interstate commerce, whereby, forcing the Supreme Court into ruling favorably for the newly enacted National Labor Relations Act. The "sit-down" strike technique is credited to the C.I.O.

CHAPTER 13

THE SUPREME COURT AND THE COMMERCE CLAUSE AFTER 1937

"The people - the people - are the rightful masters of both congresses, and courts - not to overthrow the constitution, but to overthrow the men who pervert it." Abraham Lincoln, September 17, 1859.

After the Supreme Court's decision in the National Labor Relations Act cases and their subsequent decisions after 1937, we see that the Court in their expanded interpretation of the commerce clause, divided the commerce clause into three parts: (1) definition of commerce; (2) the distinction between interstate and intrastate commerce; (3) the jurisdiction of the national and the state governments over interstate commerce.

"COMMERCE" DEFINED

You should now be familiar as to the characteristics of interstate and intrastate commerce. As a way of review, let's again review what constituted commerce in the early history of our nation. In the early part of the Nineteenth Century, Chief Justice Marshall laid down the definition of commerce as:

"Commerce, undoubtedly, is traffic, but it is something more - it is intercourse."Footnote1

Following this declaration the Supreme Court consistently defined commerce as commercial intercourse.Footnote2 Then the Court narrowed its interpretation, and confined the meaning of intercourse as meaning only transportation. During this period of judicial decisions, the Court held that no commerce existed unless there was transportation. The Court then held that activities involving manufacturing and insurance was not commerce. On the other hand, the Court held that there was commerce if there was transportation, which included: sending of telegrams; transportation of electric current, transportation of persons; transportation of gas; transmission of radio messages by wireless, transportation of liquor across the state line for one's own use; a sale of tangibles for transportation.

However, the tendency of the Supreme Court in 1937, was to interpret commerce again in terms of traffic, and it was this broader conception that the National Labor Relations ActFootnote3 included in its definition of commerce.

INTERSTATE AND INTRASTATE COMMERCE DISTINGUISHED

Turning now to the difference between interstate commerce and intrastate commerce, it is difficult to lay down an arbitrary rule to determine the line of variance. However, prior to the Supreme Court decisions in 1937 a general definition of commerce existed. Several books on constitutional law defined commerce as:

"Commerce becomes interstate when it involves or concerns more states than one. Whenever there is traffic or commercial intercourse between a person in one state and a person in another state there is interstate commerce."Footnote4

In considering some of the cases in which the commerce involved has been declared to be interstate, it was found that interstate commerce exists in the following instances: the construction and maintenance of telegraph lines, the carrying of passengers by boat from one State to another; the activities of a correspondence school in writing and sending books to, and receiving letters and money from, persons in other States; the sale of electric current by a corporation in one State to a purchaser in another State and the transmission of current from one State to another, the sending of gas into a State through pipes and the sale of the gas to independent distributing companies; the regulation of the sending of lottery tickets from one State to another; the processes involved in the transmission and transcription of stock quotations from the Stock Exchange to buyers through the "ticker service", aviation; radio; the sending of goods in the original package; the installation and test of machinery sold in interstate commerce when such installation and test is part of the contract of sale; a ship moving on a navigable river, even though operating exclusively within one State; the sending of a telegram message through two or more States even though the point of sending and receiving are in the same State; an article which is on its way from one State to another, although it is delayed in one State to prevent its destruction; a sale or purchase of goods for transportation from one State to another; the carrying of a sack of bolts by a railroad employee to be used immediately in the repairing of a bridge used in interstate transportation; a watchman flagging at a crossing of trains which were engaged in both interstate and intrastate carriage.

Looking away from interstate commerce, intrastate commerce has been held to be present in these factual situations; a company which stores goods received in foreign or interstate commerce, later transports the goods within the State; a baseball league composed of clubs of different States which travel to play in various States; a corporation which supplies lists of attorneys in several States who engage in the collection business; a person who hires laborers to be employed in other States; an employee who adjusts machinery to be used in the repair of trains which operate in both interstate and intrastate commerce; a cab company which engages in taking passengers to and from a ferry and is not employed in further transportation; the transmission of gas from one State to another where, after going into the State, it was changed to different pipes and pressure adjusted.

It has been noted above that there are decisions holding that manufacture and production are not even commerce. However, in 1937, there was an apparent change of view by the Supreme Court in calling such activity intrinsically intrastate commerce, at least; and when it is a burden on interstate commerce, it is within the jurisdiction of Congress. In the National Labor Relations Act cases, the act was within the jurisdiction of Congress. In the National Labor Relations Act cases, the act was applied in each instance to employees in the production end of business. The dissenting view in these cases emphasized this fact; and, in urging the unconstitutionality of the act, laid great stress upon the decisions stating that manufacturing is not commerce.Footnote5 The line of cases definitely asserting that manufacturing is not commerce begins with Kidd v. Pearson,Footnote6 in which it is stated, "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature than that between manufacture and commerce." The opinion continues to explain of what the Court believes the distinction to consist. In United States v. KnightFootnote7 is the statement: "Commerce succeeds to manufacture and is not a part of it." Capital City Dairy Company v. OhioFootnote8 follows the same view. Similar, too, is the holding in the United Mine Workers v. Coronado Coal Company.Footnote9

The majority in the National Labor Relations Act cases, on the other hand, refer to cases apparently overruling these earlier decisions and proceeded on such a basis in arriving at their own decision. The holding in Standard Oil Company v. United StatesFootnote10 is principally relied on by the majority as definitely overruling the Knight case. The argument in the Standard Oil case by the petitioners, as stated by the Court, was:

"That the acts, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subject 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."Footnote11

The Court disposed of this argument in the following words:

"But all the structure upon which this argument proceeds is based on the decision in the United States v. E. C. Knight Co., supra. The view however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed on 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."Footnote12

Nor are these statements unique, for there are cases leading up to and supplying a foundation for the holding just quoted. Thus the majority opinion proceeded upon the basis that manufacturing, though not in and of itself interstate commerce, is at least intrastate commerce.

JURISDICTION OVER INTERSTATE AND INTRASTATE COMMERCE.

Having thus reviewed the conception of what commerce was prior to the National Labor Relations Act cases, and having seen generally what kinds of commerce are interstate and what kinds are intrastate in nature, it becomes pertinent again to review what is the jurisdiction of the national and the state governments over interstate and intrastate commerce. Dealing first with jurisdiction over interstate commerce, it is obvious that great confusion reigned in this field in the 1930's in determining when the national, and when the local, governments should regulate commerce. In trying to find some guide, it is necessary to begin with the earlier decisions and trace the concept through succeeding cases.

The rule first laid down was that the States shall regulate all commerce, interstate and intrastate, until Congress enacts legislation on the subject, at which time Congress' legislation will supersede such State law as is contrary.Footnote13

Then, in Wabash v. Illinois,Footnote14 the precept stated was that there is a field of interstate commerce which is national in nature, in which the States could not legislate at all. It was Cooley v. Board of Wardens of PhiladelphiaFootnote15 which definitely established a line of jurisdictional distinction between local and national regulation. In that case, Mr. Justice Curtis said that there are two kinds of interstate commerce; the one local in nature, in which field the States can regulate until Congress steps in with contrary regulations, the other is national in character, and in this field, the power of Congress is exclusive, so that even though Congress has not regulated, the States are prohibited from action. To qualify this doctrine, the decision in In Re RahrerFootnote16 developed the theory that, by its silence, Congress had prohibited state action in the national field, but that Congress could remove that impediment of silence by affirmatively giving the State power so to regulate.

There are certain additional powers and restrictions on congressional action which should be noted. In the first place, Congress is restricted from going beyond the enumerated powers and interfering with the state police powers; and further, Congress may not only regulate certain kinds of commerce, but has the additional power to exclude certain articles from interstate and foreign commerce.

Having examined the jurisdiction of Congress and the States over interstate commerce, it is logical to examine the field of intrastate commerce and observe the jurisdiction of Congress and the States in this regard. Briefly noting the powers and limitations of the States over intrastate commerce, it was held prior to 1937 that the States had power to give their own citizens

preference in the consumption of natural resources; that a State could not forbid a foreign corporation to use local courts in cases of interstate transactions, although it may forbid the use of the courts for intrastate business; that a State was limited in its power of taxation which affected interstate commerce.

It now is relevant to discuss the power of Congress over intrastate commerce, which power arises in two general situations: (1) when the goods constituting intrastate goods are in the "stream of commerce," and (2) when intrastate goods are a burden on interstate commerce. It was primarily upon the power of Congress in these two situations that the Supreme Court relied in upholding the National Labor Relations Act as being a proper subject of congressional legislation. It was on these bases that the Supreme Court distinguished the National Labor Relations Act cases and took them out of the prohibition as to goods in the process of production or manufacture. For, as was mentioned before, later cases held that manufacturing was commerce, even though only intrastate commerce. But in order to take manufacturing out of the sphere of the State's control, it had to be shown that this intrastate commerce was either in the "stream of commerce" or was a burden on interstate commerce.

The theory as to the "stream of commerce" was promulgated in Stafford v. Wallace,Footnote17 in which the Supreme Court upheld the Packers and Stockyards Act. Said the Court:

"The stockyards are but a throat through which the current flows and the transactions which occur therein are only incident to this current from the west to the east and from one state to another."Footnote18

In applying the theory of the "stream of commerce" to the cases under the National Labor Relations Act, the Court (speaking in the Jones-Laughlin case) quoted the finding of the Labor Board that the various parts of the Steel company's enterprise was:

"a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, in the form of steel products into the consuming centers of the country-a definite and well-understood course of business."Footnote19

The Court said 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."Footnote20

The dissenting opinion objected to classifying "in the stream of commerce" such activity as was involved in the Jones-Laughlin case, and relied principally upon the Arkadelphia caseFootnote21 to rebut the majority's argument. In that case it was held that when goods are "subjected to a manufacturing process that materially changed its character, utility and value" the movement from the place of manufacture can not be held to be interstate commerce.

Although there is a possible ground of distinction between the Arkadelphia case and the instant cases, the majority opinion made no direct reply to these objections to the stream of commerce theory, but said:

"We do not find it necessary to determine whether these features of the 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."Footnote22

The power of Congress to control and regulate that which burdens and obstructs interstate commerce, to which the Court refers, is a well-established one. And, as brought out before, it is the second basis of Congress' power to regulate intrastate commerce. This power is defined in the Stafford caseFootnote23 as follows:

"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 facts of danger and meet it."Footnote24

Of particular interest is the reliance of the Supreme Court upon the decisions under the Sherman Anti-Trust Act to prove the right of Congress to regulate labor relations of employees engaged in manufacture. There, a series of decisions established the point that interference with, or disruption of, manufacturing and productive processes had a direct effect on interstate commerce. The irony in the use of these cases is that the original result of these decisions was to give power to restrain union strike activities on the part of employees. Now the same decisions were used to uphold the National Labor Relations Act and to restrain the employers from interfering with the union activities of the employees. But there is no denying that the opinion in the Anti-Trust cases definitely established that strikes in the production or manufacturing end of business would affect interstate commerce. Thus the majority opinion in the National Labor Relations Act cases reasoned that, if the employer interfered with the union activities of his employees, and refused to bargain collectively with them, a discord may result which our national history has shown was a fruitful source of labor disputes and strikes; that strikes were a direct burden on interstate commerce, even though they occur in production; that Congress can act to prevent such a burden; therefore, Congress can act at the source of the evil and eliminate strikes by regulating the conditions which give rise to strikes.

But having reached this conclusion, the Court was confronted with the necessity of reconciling this decision with that in the Carter Coal case,Footnote25 and in the Schechter case.Footnote26 For, in these instances, Congress attempted to regulate labor relations in some phase of industry. And in all these instances, the basis for such attempted regulation was that of relieving interstate commerce of a burden. Although differently applied, the argument in each of the National Labor Relations Act cases was that labor disputes result in a burden on interstate commerce and that, to relieve that burden, regulation of labor relations was essential under the congressional power over interstate commerce. Yet in the Schechter case, in which Chief Justice Hughes wrote the

majority opinion, and in the Carter case, in which the Chief Justice wrote a concurring opinion, it was held, in no uncertain language, that labor disputes are too remote from, and do not constitute a burden on, interstate commerce. However, in the National Labor Relations Act cases, in which the Chief Justice wrote the majority opinion, it was held, in just as certain language, that labor disputes do constitute a burden on interstate commerce and that Congress does have power to regulate the same. A closer examination of these cases clearly reveals the conflicting views.

The Schechter case came up under the National Industrial Recovery Act code of fair competition regulating the poultry business in New York. The government argued in this case that labor disputes resulted in a burden on interstate commerce in this way: that long hours and low wages of employees resulted in low production costs, which in turn resulted in low prices and a demoralized price structure, which is a burden on interstate commerce. However, Chief Justice Hughes, speaking for the Court, held that this regulation of hours and wages was too remote and speculative and did not have a sufficiently direct effect on interstate commerce to be justified. The dissent in the National Labor Relations Act cases urged that, based on the Schechter case, these cases should also be decided to be outside the scope of the interstate commerce clause. And, in fact, there is some force to the argument that the labor activities involved in the National Labor Relations Act cases are just as remote from interstate commerce as those in the Schechter case. But Chief Justice Hughes, in the Jones-Laughlin case stated:

"The question remains as to the effect upon interstate commerce of the labor practice involved. In the A.L.A. Schechter Poultry Corporation case, we found that the effect there was so remote as to be beyond Federal power."Footnote27

Yet in the National Labor Relations Act cases, the majority opinion held that the effect upon interstate commerce was not remote.

But if the Schechter case seems difficult to distinguish, the Carter case is even more difficult to distinguish. The latter case came up as a result of the Bituminous Coal Conservation Act of 1935.Footnote28 This act stated that mining and the distribution of coal was affected with a national public interest and that regulation was necessary because interstate commerce was directly and detrimentally affected by the state of the industry and its labor prices; and that the right of 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 unequal labor costs and in order to prevent the obstructions to commerce which arise from disputes over labor relations at the mines. The Act then provided a plan for regulating price, wages, hours and working conditions. The Court held the act unconstitutional because; (1) it did not come under the power of Congress to regulate commerce, and (2) it violated the due process clause.

In holding that this regulation did not come under the interstate commerce clause, Mr. Justice Sutherland, who wrote the majority opinion, stated:

"Much stress is put upon evils which come from the struggle between employers and employees over matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and the effect on prices, and it is insisted that interstate commerce is greatly affected thereby. But in addition to what has 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. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the subject of the 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."Footnote29

Such a statement would seem to definitely establish the Court's attitude that there is no sufficient relation between labor conditions and interstate commerce to allow national regulation. Chief Justice Hughes further expresses this view in a separate concurring opinion in which he said:

"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 this Court to amend the Constitution by judicial decision."Footnote30

Yet the same Chief Justice stated in the Jones-Laughlin case that:

"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?"Footnote31

To reconcile the two points of view by Chief Justice Hughes seems impossible. The only effort in the Jones-Laughlin case to reconcile that decision with that of the Carter case is the statement:

"In the Carter case the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds - that there was an 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."Footnote32

And referring to both the Carter and the Schechter cases, Chief Justice Hughes said: "These cases are not controlling here." To dismiss thus summarily the Carter case as being inapplicable because it was held unconstitutional also on the basis of due process and improper delegation is entirely unsatisfactory. The inference might be made that the National Labor Relation Act cases overrule the Carter case in the interpretation of the commerce clause, but, since no direct overruling can be found, it seems that the Supreme Court was left free to follow either case.Footnote33 Therefore, whether the Supreme Court in the future will refuse, as in the Jones-Laughlin case "to shut its eyes to the plainest facts of our national life and to deal with the question of direct and indirect effect in an intellectual vacuum," and consequently take a more liberal view in finding labor relations to have a direct effect on interstate commerce; or whether the Court will follow the reasoning of the Carter and Schechter cases, can only depend on the status of the parties involved.

Footnote1

Gibbons v. Ogden, 9 Wheat. 5 (1824).

Footnote2

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1851).

Footnote3

Act of July 5, 1935, c. 372, 49 Stat. 449.

Footnote4

WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES, p. 289 (1936).

Footnote5

NLRB v. Jones and Laughlin Steel, 301 U.S. 1, 85 (1937).

Footnote6

128 U.S. 1 (1888).

Footnote7

156 U.S. 1 (1895).

Footnote8

183 U.S. 238 (1901).

Footnote9

259 U.S. 344 (1922).

Footnote10

221 U.S. 1 (1911).

Footnote11

National Labor Relations Board v. Jones & Laughlin Steel Corporation., 301 U.S. 1, 39 (1937) (quoting from the Standard Oil case).

Footnote12

Id. at 39.

Footnote13

Munn v. Illinois, 94 U.S. 113 (1876).

Footnote14

118 U.S. 557 (1886).

Footnote15

12 How. 299 (1851).

Footnote16

140 U.S. 545 (1891).

Footnote17

258 U.S. 495 (1922).

Footnote18

Id. at 516.

Footnote19

301 U.S. at 34.

Footnote20

Id. at 35.

Footnote21

Arkadelphia Milling Co. v. St. Louis S.W. Ry., 249 U.S. 134 (1918).

Footnote22

Jones & Laughlin, supra, 301 U.S. 1, 36 (1937).

Footnote23

258 U.S. 495 (1922).

Footnote24

Id. at 521.

Footnote25

Carter v. Carter Coal Company, 298 U.S. 238 (1935).

Footnote26

A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1934).

Footnote27

301 U.S. 1, 40 (1937).

Footnote28

Act of August 30, 1935, c.824, 49 Stat. 991.

Footnote29

298 U.S. 238, 308 (1935).

Footnote30

Id. at 318.

Footnote31

301 U.S. 1, 47 (1937).

Footnote32

Id. at 41.

Footnote33

The same reasoning also applies to the Minimum Wage cases. See chapter 11.

CHAPTER 14

THE GREAT SURRENDER

AND THE

RECONSTRUCTED SUPREME COURT

"I do not charge the Judges with willful and ill-intentioned error; but honest error must be arrested, where its toleration leads to public ruin. As for the safety of society, we commit honest maniacs to Bedlam, so judges should be withdrawn from their bench, whose erroneous biases are leading us to dissolution. It may, indeed, injure them in fame or in fortune; but it saves the Republic, which is the first and supreme law." Thomas Jefferson.

Looking back to the 1933 Term, to gain a fair perspective on the Supreme Court's surrender at the 1936 Term, one finds there a tendency to sustain legislation framed to alleviate critical economic conditions. In Home Building & Loan Association v. Braisdell,Footnote1 decided January 8, 1934, the Court sustained the Minnesota Moratorium Act and thus approved reasonable state legislation designed to give certain debtors an extension of time for payment of their obligations. Then on March 5, 1934, in Nebbia v. New York,Footnote2 the power of New York to regulate retail milk prices was upheld. These decisions, it should be noted, dealt only with state power, but they argued well for federal regulatory legislation.

1934 Term

At the October, 1934 Term, however, federal legislation met with reversal at the outset. On January 7, 1935, the Panama Refining Co. v. RyanFootnote3 decision invalidated federal control of petroleum production because of undue delegation of legislative power of the executive. On February 18, 1935, the Gold Clause casesFootnote4 were decided. The power of the federal government to abrogate gold clauses in private contracts was held valid. The action of the government in abrogating the gold clauses in governmental contracts, however, was held unconstitutional, but since the holder of the government obligation could not show damage he was not entitled to recovery.Footnote5 On May 6, 1935, the Railroad Retirement Act was invalidated by a 5-4 decision.Footnote6 The majority opinion was devoted principally to a demonstration that particular features of the pension act violated the due process clause of the Fifth Amendment, but it went further and denied that Congress had the power, under the interstate commerce clause, to enact any compulsory pension act for railroad employees. Congress did pass a second railroad retirement act shortly after this decision, and then in 1937 a third act, which was drafted by the railroads and the employees. On May 27, 1935, the Court pronounced a benediction over an economic collapse when it "Schechtered" the National Industrial Recovery Act.Footnote7

1935 Term

On January 6, 1936, following its established technique "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," the Court found that the Agricultural Adjustment Act control of agricultural production was unconstitutional because it exceeded the limits of the taxing power.Footnote8 Then on May 18, 1936, there followed the six-to-three decision in Carter v. Carter Coal Co.Footnote9 The Bituminous Conservation Act of 1935 undertook to tax, to fix the price of coal and to regulate wages and hours of labor of miners. It contained the usual recitals as to practices in the industry "affecting" interstate commerce.

The Supreme Court held that the provision of the Act of the code in regard to wages, hours and labor adjustment were unconstitutional, that the price-fixing sections were so intertwined that they must fall with the rest, and, therefore, did not pass upon their constitutionality.

The majority opinion was written by Mr. Justice Sutherland. It is evident from the exhaustive character of the opinion, both in its review of the authorities and its complete restatement of fundamental principles, that the majority of the Supreme Court thought that the often stated distinction between production and commerce should be made so clear and positive that it would never again be questioned. After stating that the recitals as to the reasons for the Act were recitals only and not the enactment's of laws, Mr. Justice Sutherland said:

"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. 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 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.

"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 regulations only by the federal government. Utah Power & Light v. Pfost, 286 U.S. 165, 182.

"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.

"Much stress is put upon the evils which come from the struggle between employers and employees over 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. The 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 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."Footnote10

The Chief Justice, in his concurring opinion, agreed that mining was not commerce. He said:

"I agree 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.

"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. 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 effects, Congress in its discretion 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 Courts to amend the Constitution by judicial decision."Footnote11

On May 25, 1936, one week after the decision in the Carter Coal case, the Court held that federal legislation providing for municipal debt readjustments was an unconstitutional exercise of the bankruptcy power.Footnote12 The Court found that state sovereignty was infringed. Then on June 1, 1936, the Court invalidated New York's Minimum Wage law.Footnote13

1936 Term

The 1936 Term will probably rank in the history of the Supreme Court as one of its most important sessions. This is so not only because of the actual decisions rendered, but also by reason of the influence upon these decisions of outside forces. It will be noted that the opinion in the Carter case was handed down on May 18, 1936, shortly before the adjournment of the Court for the summer. Within a few weeks after this decision, the national conventions were held and the campaign for the presidential election of 1936 was in full swing. The Carter case was the last decision of the Court which involved the constitutionality of any Act of Congress before the election. It will be recalled that, before and during the campaign, and even after the election, there were suggestions from many who desired to extend the Federal power to control such things as wages, hours and other matters within the states that the Constitution be amended to confer this authority. Of course, an attempt to amend the Constitution in this way met with determined opposition. The legislature of Missouri, for example, could hardly have ratified such an amendment in the face of the Bill of Rights of the Missouri ConstitutionFootnote14 which provides:

Section 2. That the people of this State have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness: Provided, Such change be not repugnant to the Constitution of the United States.

Section 3. That Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the states and the maintenance of their governments, are necessary to an indestructible Union, and were intended to co-exist with it, the Legislature is not authorized to adopt, nor will the people of this State ever assent to any amendment or change of

the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of this State.Footnote15

Section 4. That all constitutional government is entitled to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief design.Footnote16

The process of amendment by judicial interpretations, however, follows a smoother path. No state nor any group of states can block it. The draftsmen who prepared most of the measures enacted during the Roosevelt administration approached the problem by this smoother route. They sought to connect with interstate commerce every object desired to be accomplished. Nearly all of these New Deal acts contain elaborate and labored recitals, by which Congress purports to find that interstate commerce is affected in some way by the evils sought to be remedied by the legislature.

Up to and including the year 1936, as readily seen from the cases, the Supreme Court, with consistent steadfastness, refused to recognize that recitals could alter facts, and refused to overturn the long settled distinction between production and commerce.

In November, 1936, the presidential election took place. Three months later, on February 5, 1937, a re-elected Franklin Roosevelt sent a message to Congress in which he advocated that the Supreme Court be enlarged by adding new judges so as to bring the total membership to fifteen, obviously motivated by a desire for change in the character of the Supreme Court's decisions. And, whether influenced by the demand or not, the change or "surrender" came. In the crucial cases it was a change in the attitude of Mr. Justice Roberts. For at this term, in the fourteen cases in which one vote determined the outcome, a greater number of such decisions than at any other term in the Court's history, Justice Roberts sided with the liberals in every instance but one; at the previous term he had sided with the conservatives in six out of ten such cases. In at least two casesFootnote17 of the term, the change represented a reversal of position. It is also interesting to note that the Chief Justice and Mr. Justice Roberts, who had written the opinions in the Schechter case, the Railroad Retirement Board v. Alton case and the Butler case, wrote the majority opinions in nearly all of these subsequent cases.

The decisions which resulted in this new position of the Court were all, in one respect or another, labor cases. And they came before it against a background of extensive and far-reaching labor disputes accompanied by the growth of the militant C.I.O. labor organization and the development of the "sit-down" strike technique. It is hardly strange that under such circumstances as these and with mounting pressure from both the executive and legislative branches of government as well as the increased public resentment of the Court, that the Supreme Court would abandon its well established position on interstate commerce, and as Chief Justice Hughes in a speech given later in the year would reply, "What the people really want they generally get. That same Constitution which serves as a shield to protect the rights of the people will now be used as the sword for their own destruction."Footnote18

Ever since the decision in the Schechter caseFootnote19 the literature of the law, has been replete with suggestions to the effect that all would be well if the judges would but see the light and realize that the framers of the Constitution intended to create a national government strong enough to function where the states could not. The Supreme Court did not heed any of these admonitions. In the Guffey caseFootnote20 the majority made it clear that the doctrine of states rights existed not only to protect the states but also to protect private rights in hostility to the expressed desire of the states concerned. And in the Municipal Bankruptcy caseFootnote21 this doctrine was carried so far as to thwart national action directly approved by a state legislature. The hampering effects of undue emphasis on federalism could hardly have gone further.

As a consequence of these decisions it was generally assumed that the Supreme Court would apply a narrow interpretation to the National Labor Relations Act.Footnote22 While that statute by its terms applied only to commerce between the states and with foreign nations, the National Labor Relations Board had sought to invoke it against manufacturing plants whose activities crossed state borders. Thus on February 10, 1937, five days after Roosevelt sent his court packing message to Congress, three cases involving the constitutionality of the National Labor Relations Act were argued before the Supreme Court. They were decided on April 12, 1937, while the Court fight was in full swing. Chief Justice Hughes writing the opinion, and Justices McReynolds, Van Devanter, Sutherland and Butler dissenting.

The case which was chosen as the first of these, and, hence, the vehicle for the Chief Justice's elaborate opinion - shorter ones being written in the other case - was National Labor Relations Board v. Jones and Laughlin.Footnote23 Whether the choice of the case was intentional or accidental, the facts of this case (above all the cases which have been decided) furnished the most plausible reason for abandoning the old landmarks and the best opportunity for metaphysical dialectics. The employees involved in the particular labor dispute were all employees in the production of steel in the steel mills of Jones and Laughlin's plant near Pittsburgh, called the "Aliquippa plant." It appeared from the evidence, however, that Jones and Laughlin in separate and distinct departments also owned and operated private steamships and private railroads to bring a part of its ores and coal and coke to the plant, and barges on the Ohio River to transport a part of its manufactured products. The Chief Justice, without holding that it was necessary to do so, commented on the fact that raw materials were transported in interstate commerce to the plant and that, afterwards, manufactured products were transported in interstate commerce out of the plant, and approved the Government's argument that, in consequence, the plant was in the midst of a stream or flow of commerce - although a similar argument had been made and rejected by the Court in some of the prior cases.

The Chief Justice, in his opinion in the Jones and Laughlin case, referred to the previous decisions of the Supreme Court that manufacturing is not commerce, and said:

"The Government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving 'a great movement of 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.

"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. 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. The question is necessarily one of degree."Footnote24

He then brushed aside the Schechter case and the Carter case and said:

"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 to 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 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."Footnote25

It is noteworthy that in each of these three cases the Circuit Court of Appeals had decided the other way, the Jones and Laughlin case being from the Fifth Circuit, the Fruehauf case from the Sixth Circuit, and the Friedman-Harry Marks Clothing case from the Second Circuit. Each Circuit Court of Appeals had relied upon the Schechter case and the Carter case, and each had considered them so conclusive and controlling as to require only a short per curiam opinion.

Mr. Justice McReynolds delivered the dissenting opinion in all three cases, in which Justices Van Devanter, Sutherland and Butler concurred. The dissenting opinion pointed out that, not only these three Circuit Court of Appeals, but six District Courts had held that the Board had no authority to regulate relations between employers and employees engaged in local production and that no decision or judicial opinion to the contrary had been cited. The dissenting opinion said:

"Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in causes decided within two years. And the lower courts rightly deemed them controlling.

"The three respondents happen to be manufacturing concerns - one large, two relatively small. The Act is now applied to each upon grounds common to all. Obviously what is determined as to these concerns may gravely affect a multitude of employers who engage in a great variety of private enterprises - mercantile, manufacturing, publishing, stock-raising, mining, etc. It puts into the hands of a Board power to control purely local industry beyond anything heretofore deemed permissible."Footnote26

The dissenting opinion then sets out in full the opinions of the three Circuit Court of Appeals. As already mentioned, each Circuit Court of Appeals had handed down a short per curiam opinion referring to the Carter case or the Schechter case, or both, as conclusive authority, evidently considering it unnecessary to write an extended opinion. The dissenting opinion then said:

"Any effect on interstate commerce by the discharge of employees shown here, would be indirect and remote in the highest degree, as consideration of the facts will show. In No. 419 ten men out of ten thousand were discharged; in the other cases only a few. The immediate effect in the factory may be to create discontent among all those employed and a strike may follow, which, in turn, may result in reducing production, which ultimately may reduce the volume of goods moving in interstate commerce. By this chain of indirect and progressively remote events we finally reach the evil with which it is said the legislation under consideration undertakes to deal. A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine.

"The Constitution still recognizes the existence of states with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy.

"We are told the Congress may protect the 'stream of commerce' and that one who buys raw materials without the state, manufactures it therein, and ships the output to another state is in that stream. Therefore it is said he may be prevented form doing anything which may interfere with its flow.

"This, too, goes beyond the constitutional limitations heretofore enforced. If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch? The products of a mine pass daily into interstate commerce; many things are brought to it from other states. Are the owners and the miners within the power of Congress in respect of the miners' tenure and discharge? May a mill owner be prohibited from closing his factory or discontinuing his business because to do so would stop the flow of products to and from his plant in interstate commerce? May employees in a factory be restrained from quitting work in a body because this will close the factory and thereby stop the flow of commerce? May arson of a factory be made a Federal offense whenever this would interfere with such flow? If the business cannot continue with the existing wage scale, may Congress command a reduction? If the ruling of the Court just announced is adhered to these questions suggest some problems certain to arise.

"And if this theory of a continuous 'stream of commerce' as now defined is correct, will it become the duty of the Federal Government hereafter to suppress every strike which by possibility may cause a blockade in that stream? In re Debs, 158 U.S. 564. Moreover, since

Congress has intervened, a labor relations between most manufacturers and their employees removed from all control by the state? Oregon-Washington R. & N. Co. v. Washington, 270 U.S. 87 (1926).

"It is gravely stated that experience teaches that if an employer discourages membership in 'any organization of any kind' in which employees participate, and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work, discontent may follow and this in turn may lead to a strike, and as the outcome of the strike there may be a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything marriage, birth, death may - in some fashion affect commerce."Footnote27

Two other labor cases presented interstate commerce questions during the term. In the Associated Press caseFootnote28 the employer insisted that it was not engaged in commerce at all so far as its editorial staff in New York was concerned, on the theory that the news was there "manufactured." The Supreme Court rejected this fanciful argument, pointing out that the operations of the Press involved the constant use of channels of interstate communication.

In the Virginia Railway caseFootnote29 the employer argued that employees of a repair shop were not engaged in interstate commerce. The Court unanimously held otherwise, on the ground that 97% of the railways business was interstate and that a strike in the repair shops would cripple its business. It was no answer, said Mr. Justice Stone, that the company might close its shops and have the work done elsewhere. So long as it maintained the shops the railway was subject to the provision of the law.

In three other cases decided in 1937, the Supreme Court approved the use of federal power in cooperation with state legislation. The most far-reaching of these are the two cases dealing with the Social Security Act. In Steward Machine Co. v. DavisFootnote30 the unemployment insurance features contained in the act were approved, and in Helvering v. Davis,Footnote31 the old-age pensions. Justice McReynolds, Sutherland and Butler wrote separate dissenting opinions in the first case, Justice Van Devanter agreeing with that of Justice Sutherland. In the second, Justices McReynolds and Butler contented themselves with the brief statement that the law violated the Tenth Amendment.Footnote32

1937 Term

After the Supreme Court executed its volte face in New Deal constitutional law at the 1936 Term, the following 1937 Term is found lacking in the drama and color of its predecessor. But there was a beginning in the "reconstruction" of the Court. Before the October 1937 Term was well under way some significant changes in the Supreme Court's personnel occurred. Justice Van Devanter had retired on June 2, 1937,Footnote33 and Justice Sutherland followed on January 18, 1938.Footnote34 The replacements were Justices BlackFootnote35 and Reed.Footnote36

On January 3, 1938, the question of the validity of the Government's power program was again raised but went unanswered, by a Court acting in concert in Alabama Power Co. v. Ickes and Duke Power Co. v Greenwood County.Footnote37 At its Monday session of January 31, 1938, the Court passed on a challenge to the constitutional authority of Congress in creating the Home Owners' Loan Corporation and providing for the conduct of a business enterprise of that character and held that a person convicted of violating the provisions of the Home Owners' Loan Act which made criminal the making of false statements in connection with a loan thereunder, or excessive charges for services in connection therewith, had no standing to make such a challenge; and that the latter provision did not lack the requisite definiteness for validity under the due process clause of the Fifth Amendment.Footnote38

On March 23, 1938 the Court applied the National Labor Act to a packing plant operating entirely in California.Footnote39 All the fruit packed was grown in California, but, after packing, about 37 per cent of it was shipped out of the state. The plant was thus not in the middle of any "flow" or "stream" of commerce. The Chief Justice said that the term "stream of commerce" previously stressed was a metaphor and the "stream" need not exist.

Mr. Justice Butler, in his dissenting opinion,Footnote40 pointed out that the Court, in the Jones and Laughlin case, did not either expressly overrule or adequately distinguish the Carter case, and that even the dissenting opinion in the Jones and Laughlin case, which relied on the Carter case, had failed to elicit from the majority of the Court an adequate discussion of the Carter case. He also pointed out that in the Fruehauf and Friedman-Harry Marks case, the Carter case had not even been mentioned.Footnote41

In the Santa Cruz caseFootnote42 brought before Judge Haney of the Circuit Court of Appeals for the Ninth Circuit, after the Supreme Court's decision in Jones and Laughlin that Court, said in a concurring opinion that the Jones and Laughlin case did not really define a new "interstate commerce," but that:

"Were it necessary to make such a definition, I believe the inference which might properly be taken from the Jones case is that anything which either starts or aids the flow of the stream is interstate or foreign commerce. As applied here, the beginning of the flow would be traceable to the planting of the seed. Successive stages would consist of the planting and growing, sale and delivery to respondent, the canning, the shipment in interstate commerce, and each step thereafter until the product reached the hands of the consumer and was consumed by him. Each step would be part of the stream. Such an interpretation is what I believe to be the intent of the words as used in the Constitution."

1938 Term

Two new justices, Frankfurter and Douglas, replaced justices Cardozo and Brandeis during the 1938 Term. As Mr. Justice Frankfurter has aptly said, we have a "reconstructed" Court.Footnote43

On December 5, 1938, in Consolidated Edison Co. v. National Labor Relations Board,Footnote44 the Act was held to apply to public utilities, all of whose products was sold within the State of New York. The Court upheld the jurisdiction of the National Board. Affecting interstate commerce, not engaging in it, was the criterion.

In delivering the majority opinion in the Consolidated Edison case, the Chief Justice intimated that if proceedings had been instituted against the utilities under the New York State Labor Relations Act, which was very similar to the national act in principal and set-up, the need for the exertion of federal authority might have been removed. Thus in determining whether to intervene in a dispute where the employers are not themselves engaged in interstate commerce but where their activities may nevertheless have a substantial effect on such commerce, "regard should be had to all the existing circumstances including the hearing and effect of any protective action to the same end already taken under state authority." But the Board need not await the exercise of state authority.Footnote45

National Labor Relations Board v. FainblattFootnote46 was decided on April 17, 1939. In the Fainblatt case, the Court again had occasion to consider the jurisdiction of the NLRB. To the accompaniment of the argument that Congress had plenary power to regulate interstate commerce, "be it great or small," it held that the National Labor Relations Act is applicable to a contractor in the garment industry located in New Jersey and engaged in a "relatively small business" of processing materials for a jobber in New York, even though the merchandise which he shipped in interstate commerce was not his own, but his jobber's. Fainblatt conducted no interstate transaction whatsoever. Mr. Justice Stone writing for the majority said:

"The end sought in the enactment of the statue was the prevention of the disturbance to interstate commerce consequent upon strikes and labor disputes induced or likely to be induced because of unfair labor practices named in the Act. That those consequences may ensue from strikes of the employees of manufacturers who are not engaged in interstate commerce where the cessation of manufacture necessarily results in the cessation of the movement of the manufactured product in interstate commerce has been repeatedly pointed out by this Court.

"Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers.

"Nor do we think it important as respondents seem to argue that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hereinto engaged our attention. The power of Congress is plenary and extends to all such commerce be it great or small."Footnote47

Registering their dissents here as in earlier cases involving the limits of the jurisdiction of the NLRB, Justices McReynolds and Butler patiently record an impressive number of precedents for their view that manufacture is not commerce and that state sovereignty must be respected, and prophetically declared that the subversive views of the majority will seriously impair the "very foundation of our federal system."Footnote48 Their summary was a forceful reminder of the tremendous leap which the Court took in 1936-38 in sanctioning the extension of federal power. After 1936, Mr. Justice McReynolds stated that jurisdiction was claimed on the theory:

"that disapproved labor practices there may lead to disputes; that these may cause a strike; that this may reduce the factory output; that because of such reduction less goods may move across state lines; and thus there may come about interference with the free flow of commerce between the States which Congress has power to regulate. So, it is said, to prevent this possible result Congress may control the relationship between the employer and those employed. Also that the size of the establishment's normal output is of minor or no importance. If the plant presently employed only one women who stitched one skirt during each week which the owner regularly accepted and sent to another State, Congressional power would extend to the enterprise according to the logic of the Court's opinion. Manifestly if such attenuated reasoning - possibly massed upon possibility - suffices, Congress may regulate wages, hours, outputs, prices, etc. whenever any product of employed labor is intended to pass beyond state lines - possibly if consumed next door. Producers of potatoes in Maine, peanuts in Virginia, cotton in Georgia, minerals in Colorado, wheat in Dakota, oranges in California, and thousands of small local enterprises become subject to national direction through a Board.

"Of course, no such results was intended by those who framed the Constitution. If the possibility of this had been declared the Constitution could not have been adopted. So construed, the power to regulate interstate commerce brings within the orbit of federal control most if not all activities of the Nation; subjects states to the will of Congress and permits disruption of our federated system.

"The doctrine approved in Kidd v. Pearson has been often applied. It was the recognized view of this Court for more than a hundred years.

"The present decision and the reasoning offered to support it will inevitably intensify bewilderment. The resulting curtailment of the independence reserved to the states and the tremendous enlargement of federal power denote the serious impairment of the very foundation of our federated system. Perhaps the change in direction, no longer capable of concealment, will give potency to the efforts of those who apparently hope to end a system of government found inhospitable to their ultimate designs."Footnote49

Perhaps the most sensational decision of the Supreme Court in constitutional law during the 1930's was the case of Erie Railroad Co. v. Tompkins.Footnote50 This decision touches our dual form of government as well as the supremacy of the Supreme Court, but perhaps it is better to treat it under the latter heading. This case overruled the case of Swift v. Tyson.Footnote51

Swift v. Tyson had established the rule that in diversity of citizenship cases wherever there was a question of general or commercial interest, the federal courts would not follow the judge-made

law of the highest courts of the states but would make their own common law upon the subject. Erie R. Co. v. Tompkins has theoretically changed this rule and now requires all the federal courts to apply in such cases not a federal common law but the common law of that state in which the particular federal court is sitting. The Supreme Court in this case placed its decision not on the ground the Swift v. Tyson had incorrectly interpreted the conformity act of Congress, but that it had rendered an unconstitutional decision in holding that the judicial power of the United States included the power to decide substantive law.

CONCLUSION

The advent of the New Deal in 1933 represented a marked change in attitude concerning the functions of government. It was inevitable that the executive and legislative should clash with the judiciary unless the latter recognized the trend of the times. At first the judiciary was receptive. The Braisdell and Nebbia cases, while dealing with state regulations, argued well for federal regulatory legislation. At the 1934 Term after viewing the path the executive branch of government wanted the country to travel, a majority of the Court began a process of judicial nullification; this trend was accelerated at the 1935 term. Two utterly inconsistent conceptions of government had collided. Taking the initiative the executive caused the "court-packing" bill to be introduced at about the middle of the 1936 Term. This forced a show down. Bowing to increased Congressional, presidential and public pressure the Supreme Court started gradual reversal of previous decisions and interpretations of constitutional law and the opinions of Justices Van Devanter, Sutherland, Butler and McReynolds were decisively defeated. A volte face in constitutional law occurred. Retirements of justices followed. Replacements accentuated the trend of the new constitutional law. Before the end of the 1939 Term the Supreme Court contained five Roosevelt appointees.Footnote52 Mr. Justice Frankfurter did aptly say, we have a "reconstructed" Court.

Before "the great divide" the Supreme Court stood for the protection of all types of individual rights against what was conceived of, in many quarters, as the inroads of government. The protection afforded the individual was so absolute at times as to create a no-man's land wherein neither state nor federal government could enter. But soon a new "federalism" emerged. This new "federalism" would result in the subjection of the individual to governmental supremacy.

Footnote1

290 U.S. 398 (1934).

Footnote2

291 U.S. 502 (1934).

Footnote3

293 U.S. 388 (1935).

Footnote4

Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935).

Footnote5

Perry v. United States, 294 U.S. 330 (1935).

Footnote6

Railroad Retirement Board v. Alton R.R., 295 U.S. 330 (1935).

Footnote7

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Footnote8

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

Footnote9

298 U.S. 238 (1936).

Footnote10

Id. at 295-308.

Footnote11

Id. at 317-18.

Footnote12

Ashton v. Cameron County Water Improvement District, 298 U.S. 513 (1936).

Footnote13

Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

Footnote14

Article I, sections 2-4.

Footnote15

Matter in italics, deleted in 1945 and replaced with; "that all proposed amendments to the Constitution of the United States qualifying or affecting the individual liberties of the people or which in any wise may impair the right of local self-government belonging to the people of this state, should be submitted to conventions of the people."

Footnote16

Matter in *italics*, added effective 1945.

Footnote17

The Minimum Wage and N.L.R.B. cases.

Footnote18

Perhaps the Chief Justice was offering a warning to those who wish to give up this protection for the benefits and protection offered from a kind Federal government.

Footnote19

295 U.S. 495 (1935).

Footnote20

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

Footnote21

Ashton v. Cameron Co. Water Improvement Dist., 298 U.S. 513 (1936).

Footnote22

Act of July 5, 1935, c. 372, 49 Stat. 449.

Footnote23

301 U.S. 1 (1937).

Footnote24

301 U.S. at 34-7.

Footnote25

301 U.S. at 40.

Footnote26

301 U.S. at 77-8.

Footnote27

301 U.S. 96-9.

Footnote28

301 U.S. 103 (1937).

Footnote29

Virginia Railway Company v. system Federation No. 40, 300 U.S. 515 (1937).

Footnote30

301 U.S. 548 (1937).

Footnote31

301 U.S. 619 (1937).

Footnote32

The opinion in Steward Machine v. Davis is thoroughly analyzed in Volume II of this work.

Footnote33

302 U.S. iii.

Footnote34

303 U.S. iv.

Footnote35

302 U.S. iii.

Footnote36

303 U.S. iv.

Footnote37

302 U.S. 464 (1938).

Footnote38

Kay v. United States, 303 U.S. 1 (1938).

Footnote39

Santa Cruz Packing Co. v. National Labor Relations Board, 303 U.S. 453 (1938).

Footnote40

Justice McReynolds joined in the dissenting opinion, Justices Van Devanter and Sutherland having by this time retired. Justices Cardozo and Reed took no part in the consideration and decision of this case.

Footnote41

In the Chief Justice's opinion in the Santa Cruz case itself, the Carter case is merely referred to, not analyzed.

Footnote42

91 F.2d 790 (1937).

Footnote43

Helvering v. Gerhardt, 304 U.S. 405 (1938).

Footnote44

305 U.S. 197 (1938).

Footnote45

305 U.S. at 224.

Footnote46

National Labor Relations Board v. Fainblatt, 306 U.S. 601 (1939).

Footnote47

Id. at 604-6.

Footnote48

Id. at 673.

Footnote49

Id. at 610-4.

Footnote50

Footnote51

41 U.S. 1 (1842).

Footnote52

Justice Hugh Black was appointed to the Court August 17, 1937; Stanley Reed was appointed to the Court January 25, 1938; Felix Frankfurter was appointed to the Court January 17, 1939; William Douglas was appointed to the Court April 4, 1939; Frank Murphy was appointed to the Court January 15, 1940.

CHAPTER 15

THE "GREAT SECRET"

THE PRIVILEGE TO ENGAGE IN INTERSTATE COMMERCE THROUGH FEDERAL LICENSING

"If ye love wealth better than liberty, the tranquillity of servitude better than the animating contest of freedom, go home from us in peace. We ask not your counsels or arms. Crouch down and lick the hands which feed you. May your chains set lightly upon you, and may posterity forget that ye were our countrymen." Samuel Adams, 1776.

The purpose of this chapter is to set forth briefly and as simply as possible the reasons for believing that a vital change in the relations of the Federal Government to local affairs has taken place since Roosevelt's presidency, and that this change is based chiefly upon the construction put upon the commerce clause of the Constitution. This is not based on theory, but an accomplished fact; not whether the Federal Government should regulate all local intrastate business, but the fact that, with the Supreme Court's acquiescence, it has done so.

In order to view this change in its proper perspective, we needed to review the historic background proceeding this change, which was the chief design of this book: First, the setting and the circumstances in which Roosevelt submitted his New Deal legislation, and the discussion which took place in attempting to validate these acts under the commerce clause and general welfare clauses of the Constitution; second, the meaning attributed to the commerce clause by the Supreme Court in the long period of years following the adoption of the Constitution; third, the Supreme Court's invalidation of Roosevelt's "New Deal" legislation; fourth, the violent controversy over Roosevelt's attempt to pack the Supreme Court; and finally, the surrender of the Supreme Court in 1937, by acquiescence and the Court's adoption of an expanded interpretation of the commerce clause in 1937.

This chapter explains how the sovereign people of this nation have traded their sovereignty for security and protection from the cradle to the grave, and how we have asked the Federal Government to regulate all our activities for our own protection. Ever since the Roosevelt presidency, federal regulatory acts have increased ten-fold. At the present time we find that our national government is now dictating to all businesses such matters as hours of labor, wages,

prices, output of production, retirement pensions, environmental safety, and soon health care. These regulations increase daily.

It should now be well established in your mind, after reading the previous chapters of this work, that the Federal Government has only such powers as are expressly conferred upon it by the Constitution, and Congress has the express power to regulate interstate commerce; not only the power to regulate matters clearly interstate in character, but also the implied power to regulate matters otherwise of only local concern, if they affect or burden interstate commerce. So long as the Federal Government is acting within its proper sphere, however, it is supreme. Its activities cannot be limited or interfered with by the states. Accordingly:

"When Congress acts within the limits of its Congressional authority, it is not the province of the judicial branch of government to question its motives."Footnote1

The power of the states to regulate their purely internal affairs cannot be interfered with by the Congress unless this power has been surrendered to the Federal Government by the states. The maintenance of this balance is essential to the preservation of our dual system of government and is one of the safeguards of traditional American liberty. If the states and the people were to willingly acquiesce their sovereign power, there would soon be such an encroachment upon the reserved powers of the states and the people that this power would be entirely whittled away and we would awake to find ourselves to all intents and purposes wholly under a central government and impotent in local affairs. That this danger was foreseen by the framers of the Constitution, and that they deliberately sought to guard against it, is nowhere stated more forcefully than in the following passage from an opinion of the Supreme Court in a case in which it rejected the contention that there are legislative powers effecting the nation as a whole which belong to, although they are not expressed in, the grant of powers. In reiterating that the Federal Government is one of enumerated powers, and that this proposition, although clear from the Constitution itself, was reasserted by the Tenth Amendment, the Supreme Court declared:

"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 be granted by the people in the manner they had provided for amending that act."Footnote2

It is probably conceded that the only basis upon which the extension of federal regulatory power can dictate over business activity is through the commerce clause of the Federal Constitution. If the subject matter sought to be regulated is not within the commerce clause, the national government has not satisfactorily explained its exercise of powers which are otherwise reserved to the states or to the people.

The possibilities of such an extension of the federal authority were never more graphically indicated than by Roosevelt's New Deal legislation, all of which were sought to be sustained as logical extensions of granted federal powers; and to reduce the states to mere administrative districts in a central government.

Roosevelt's principal argument to sustain these laws, was a plea that the national emergency and changed economic conditions which existed in the 1930's justified a wide extension of federal power. But initially the Supreme Court properly ruled that the limits of constitutional authority apply under all circumstances and conditions. If an act was unconstitutional, neither an emergency nor a widely-felt economic necessity can justify it.Footnote3

That an action by Congress is economically or otherwise highly desirable is immaterial in a condition of federal power. Thus in holding invalid the Railroad Retirement Act, an act having purposes similar to those of Title II of the Social Security Act, the Supreme Court said:

"though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare."Footnote4

Similarly, in holding invalid a tax, the purpose of which was to prevent the employment of child labor in manufacturing and mining industries, the Court said that it could not avoid this duty:

"even though it require us to refuse to give effect to legislation designed to promote the highest good."Footnote5

In invalidating the National Industrial Recovery Act codes by unanimous action, the Supreme Court held that neither the existence of a "national crisis" demanding "a broad and intensive cooperative effort by those engaged in trade and industry," nor the existence of a "serious economic situation" could justify federal action beyond the scope of its delegated powers.Footnote6

In order to sustain the various provisions of Roosevelt's New Deal legislation, it was therefore necessary to find an express or implied grant of federal power of which each of the provisions is an exercise.

The only power under which these acts could be sustained was under the power of Congress to regulate interstate commerce among the several States. If these acts could not be justified as an exercise under the commerce clause of the Constitution only an amendment to the Constitution by the people could validate these New Deal acts.

History records no such amendment to the Constitution during the 1930's, but today it seems that Congress can and does regulate private business activity in all of the states of the Union. A question therefore must be asked. Where did Congress get this power to regulate our working environment, our social environment and very soon our health environment? As Abraham Lincoln said:

"I have said, very many times that no man believed more than I in the principle of self-government; that it lies at the bottom of all my ideas of just government, from beginning to end. I believe each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other's rights - that each community, as a State, has a right to do exactly as it pleases with all the concerns within that State that interfere with the

rights of no other State, and that the general government, upon principle, has no right to interfere with anything other than that general class of things that does concern the whole."Footnote7

In the First Employers' Liability cases,Footnote8 the Supreme Court said:

"Though the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce, that power cannot be lawfully extended to include the regulation of master and servant as to things which are not interstate commerce."

In the First Employers' Liability case, the Supreme Court reaffirmed the principle, that, Congress has no authority to regulate the employer-employee (master-servant) relationship involved in intrastate commerce, being it is outside the scope of the authority of Congress. This was true in 1908 when this case was decided. It was true in the 1930's during the Roosevelt presidency. It is true today. Congress cannot impose any federal regulation upon the employer or employee, who's relationship is purely intrastate in nature. Congress for instance, could not compel the proprietor and employees of every corner grocery store and filling station to contribute to the payment of federal retirement plans, like those contained in the Social Security Act, nor could Congress mandate federal health care upon the employer or employees solely engaged in intrastate commerce. Nevertheless, Congress seems willing and able to force their will upon the people and mandate compliance to their regulations. How is this possible? Under what constitutional grant of power does Congress claim this authority? Why does it seem impossible to release ourselves from the bonds of Congress and their massive regulations?

The answer is simple. Congress is exercising their regulatory power under the presumption that you are engaged in interstate commerce and Congress has jurisdiction over not only the master and servant relation involving interstate commerce but in all activities of interstate commerce.

It is submitted, that Congress acquired this jurisdiction over you by way of a federal license. It is submitted that you acquired a federal license to engage in the privilege of interstate commerce, and this license is prima facie evidence of your willingness to engage in this privilege, which grants to Congress exclusive jurisdiction over all your business activities. "But I don't have a license to engage in interstate commerce," you may be saying. "I certainly would remember getting such a license," you exclaim. It is submitted that the social security account number is a license to engage in the privilege of interstate commerce!

In this chapter we will briefly examine this "great secret." A secret which has been hidden from the American people for over fifty years. We shall explain the various proposals developed by the Roosevelt administration and used by later administrations to bring you under the jurisdiction and control of Congress. Little is known of this "great secret." The vast majority of Congress I suppose are ignorant and not even aware of the connection between the social security number and its connection with the interstate commerce clause of the Constitution, but those who really are in control in this country, know this "great secret," use it to their advantage, and have tried for over fifty years to prevent this "great secret" from being exposed to the masses.

As explained in the book's introduction, its purpose is to open your eyes, to give you an idea of what is really going on in this country by looking at the past. You must have milk before your

meat. Dulocracy in America, Volume II, brings you up to present day and explores in depth this "great secret" and how it has developed into more than a mere license to engage in privileged activity in interstate commerce. Volume II shows by clear and conclusive evidence how this federal license developed into a bigger system, a system where you pledge your future performance and the future performance of your children into a welfare scheme under a federal bankruptcy, whereby all you have and all you produce is pledged as surety for a non-existing national debt.

Let's now explain how this federal license to engage in interstate commerce evolved.

During the presidential campaign of 1936, one of the chief issues consisted of the enlarged demands upon Congress by the people for remedial legislation in times of economic stress. The state and federal courts found Roosevelt's New Deal legislation lacking of constitutional authority. Many opposed to this legislation warned that Roosevelt, through his advocacy and approval of such measures as the National Industrial Recovery Act, the Agricultural Adjustment Act, the Railroad Retirement Act, the Social Security Act and others, had undertaken to destroy the fundamental conception of the American government. After the Supreme Court invalidated several key New Deal laws as beyond the federal government's power to regulate intrastate commerce, the question was raised as to whether or not further amendment of the Constitution of the United States was necessary in order to carry through measures for the relief of labor and industry. The courts had declared during this period, Congress has power under the commerce clause of the Constitution to regulate all matters national and local affecting interstate commerce, but their authority ended when activities became intrastate in nature.

After the many decisions of the Supreme Court invalidating all the work Roosevelt had done, he demanded that this situation be worked out, that a substitute means for effecting the purpose of the New Deal legislation be found. Some of the proposals submitted, suggested an amendment to the Constitution empowering Congress to regulate hours and conditions of labor and to establish minimum wages in any employment, and to regulate production, industry, business, trade, and commerce both interstate and intrastate.

One such amendment submitted to Congress read as follows:

Section 1. The Congress shall have the power to regulate hours and conditions of labor and to establish minimum wages in any employment and to regulate production, industry, business, trade and commerce to prevent unfair methods and practices therein.

Section 2. The due process of law clauses of the Fifth and Fourteenth Amendments shall be construed to impose no limitations upon legislation by the Congress or by the several States with respect to any of the subjects referred to in Section 1, except as to the methods or procedure for the enforcement of such legislation.

Section 3. Nothing in these articles shall be construed to impair that regulatory power of the several States with respect to any of the subjects referred to in Section 1, except to the extent that the exercise of such power by a State is in conflict with legislation enacted by the Congress pursuant to this article.

This amendment was rejected by Roosevelt as being too time consuming, after all, Roosevelt had a schedule to keep. Any proposal Roosevelt demanded for centralized and coordinated control of all state industrial and commercial activities by Congress, had to be within the constitutional bounds set down by the Supreme Court, and such a program must involve state cooperation, and provide for voluntary participation by the individual citizens of the states. After a careful and thorough study, it was agreed that the foundation upon which any proposal would rest, would be with the power of Congress to regulate interstate commerce.

Soon several proposals were developed and submitted to Roosevelt which contained all his requirements. These proposals or plans called for the use of entirely new legal techniques and the establishment of new administrative agencies, or at least a drastic reorganization of present governmental agencies in conformity with the new legal requirements.

Under these proposals, it was decided that Roosevelt could accomplish his goal of centralized control of all business by adopting one or more of the following methods:

(1) A compulsory federal incorporation act.

(2) An act providing that each state shall have power to exclude from the privilege of doing an interstate business within its borders any state corporation which was not formed under an act embodying the uniform principles drafted and approved by the Interstate Commission.

(3) An act prohibiting the conduct of interstate commerce by corporations or "persons" except under federal license.

It was unanimously agreed by all involved in this "great secret" that in order to achieve the required results, any proposal if adopted would have to have the backing of the states in order for it to be effective, therefore all the proposals submitted to Roosevelt called for interstate compacts between the states with supplementary federal legislation relating to interstate commerce. To induce the states to accept and relinquish power to the Federal Government, the Federal Government would offer federal-in-aid grants to any state participating in this new "federalism."

In order to enter into these compacts and receive this federal money the states would be required to perform the following:

(1) The legislature of each state desiring to avail itself of the opportunity to join the compact (and receive these federal grants) would authorize the appointment of a commission to represent the state in a national Interstate Commission on Corporation Law. Each state would be required to adopt an Uniform Business Corporation Act.

(2) Congress would pass an act approving a compact and authorizing the appointment of a commission to represent the Federal Government and the territories and the District of Columbia in this Interstate Commission.

(3) The Interstate Commission would draft model statutory provisions covering:

(a) Those features which are essential for the adequate protection of the interest of investors and creditors.

(b) The admission and regulation of foreign corporation, and a more satisfactory definition of what constitutes "doing business."

(4) The compact would provide that each state ratifying it shall forthwith by enactment adopt the uniform provisions drafted and approved by the Interstate Commission, and that the appropriate administrative agencies of each state shall thereafter supervise and enforce the operation of these provisions.

Let's now examine several of the proposals submitted to Roosevelt.

THE STATES AND INTERSTATE COMPACTS

In order to find the best method whereby Roosevelt could bring the states into conformity with the interstate commerce clause, he sought and got help from the National Conference of Commissioners on Uniform State Laws. He asked the Commissioners to enlarge the scope of their work and to consider model acts whereby the several States of the Union, through concerted action and with the approval of Congress, would attain some objectives which the Federal Government itself, under the limitations of the Constitution, could not have accomplished. For example, upon the question of laws relating to hours, conditions, and compensation of labor, it was proposed that a group of states, facing similar problems of supply and demand, could establish uniform laws that would have no application in other sections of the country. The Federal Government, limited as it was by the Constitution as declared by the Supreme Court in the Schechter case, the Butler case, and the other New Deal cases, was powerless to act in matters which strictly affect intrastate business and could not provide the legislation or regulations; but the several states affected by these conditions could provide the necessary legislation and by compact between themselves, with the approval of Congress, could mutually enforce such laws.

The Constitution in Article I, Section 10, paragraph 3, provides: "No state shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State." Until 1935, advantage had not been taken of this provision permitting interstate compacts, except as a means of settling public disputes between states; for example, as a means of establishing boundaries, determining water rights, and providing for the building and maintenance of interstate bridges.

At its meeting held in Los Angeles in July, 1935, the National Conference of Commissioners on Uniform State Laws adopted the following resolution:

RESOLVED, that this Committee report to the Executive committee that in order to promote and expedite the use of the provision of the Constitution of the United States permitting negotiation of Compacts and Agreements among the states, and to further the adoption of Uniform State Legislation, the Committee on Compacts and Agreements be directed to draft a uniform act creating a State Commission on Interstate Cooperation for the negotiation of Compacts and Agreements among states, and for the consideration and adoption of Uniform State Legislation.

Another national organization, the American Legislators' Association, sponsored a similar movement and promoted the enactment of a model law for the creation of machinery leading to interstate cooperation. The following significant paragraphs are taken from the joint resolution adopted by the Ohio Legislature:

WHEREAS, There is constant confusion and there are frequent competitions and conflicts between the states of the union in their laws and their administrative practices concerning taxation, labor, commerce, agriculture, liquor traffic, motor vehicles, crime prevention, public welfare, and many other subjects of government with which this state is vitally concerned, and

WHEREAS, It is desirable for the people of this state that such disharmony and chaos shall not continue, but that the governments shall strive together in accordance with enlightened standards and mutually acceptable policies; and

WHEREAS, The necessity for official cooperation between the state governments is recognized by the compact provision in section 10 of article 1 of the constitution of the United States; and

WHEREAS, The president of the United States has recently declared that 'both the congress and the executive departments of the national government are constantly confronted with problems whose solutions require coordinated effort on the part of the states and of the federal government,' and that 'it is apparent to all students of government that there is urgent need for better machinery of cooperation between federal, state, and local governments in many fields'; and now, therefore be it Resolved, etc.Footnote9

This new undertaking on the part of the National Conference on Uniform State Laws was thought to furnish a new "out" in the controversy over whether measures for social and economic relief must be provided by the Federal Government or by the several States themselves by independent and unrelated legislative action. This new venture by state compacts meant the application of an old principle for a new purpose.

At the Forty-sixth Annual Conference of the National Conference of Commissioners on Uniform State Laws, held in Boston, August 17-22, 1936, the conference adopted an amendment to its constitution, recommended by the executive committee, whereby the objectives of the conference was enlarged to include model acts on "(a) subjects suitable for interstate compacts, and (b) subjects in which uniformity will make more effective the exercise of state powers and promote interstate cooperation." This amendment meant that in the future the National Conference on Uniform State Laws would consider model laws to become valid by interstate cooperation under the sanction and approval of Congress.

While working on this plan, the Commission on Uniform State Laws submitted a report to Roosevelt informing him that in their opinion Congress had the power to regulate the interstate and international commerce of state corporations, and there appeared to be no constitutional reason why Congress could not enact regulations applicable only to the commerce of corporation.

THE CORPORATION OF THE STATES.

A COMPULSORY

FEDERAL INCORPORATION ACT

With the problem of state co-operation now solved, the next hurdle to deal with, was to find a way to get all corporations under the exclusive control and jurisdiction of Congress. The idea of a Federal Incorporation Act seemed like a workable solution to Roosevelt. The idea of a federal incorporation act for companies engaged in interstate commerce was not new and the Roosevelt administration reasoned it was well established that Congress had the authority to organize corporations as a means of exercising any of the functions conferred upon it by the Constitution, and may grant them such powers as may be appropriate for that purpose. This Federal Incorporation Act proposal would depend upon the extent of the proposed regulation and whether the purpose of the legislation was to regulate interstate commerce itself, or merely to regulate the corporate units which engage in that commerce. There was little doubt in Roosevelt's mind that Congress could authorize the incorporation of privately owned companies for the purpose of engaging in interstate and foreign commerce. It must be remembered that a corporation is a creature of the state, whereas the individual is the creator of the state. In considering the constitutionality of the government's regulation of corporations, it was concluded at the outset that in dealing with corporations the government was managing its own creatures.

Although federal incorporation was mentioned by Hamilton as early as 1791,Footnote10 it was not until the period between 1904 and 1920 that the measure received serious attention. During this period a federal incorporation act was advocated by President Taft, and was discussed by Presidents Theodore Roosevelt and Woodrow Wilson.

In 1904 a plan was suggested of regulating state corporations engaged in interstate or international commerce by prohibiting them from engaging in such commerce, except upon obtaining from some government official a license to be issued only upon compliance with prescribed regulations with respect to the issue of their stocks and bonds, the conduct of their business and the management of their internal affairs. Against the constitutionality of such legislation it was argued that (1) the right of corporations, as well as of partnerships and individuals, to engage in interstate and international commerce is not derived from the national government and does not exist merely by grace or license of that government; (2) the Constitution does not confer upon Congress power to prohibit interstate or international commerce, but only confers power to regulate it; that the power of regulation extends only to acts done in carrying on commerce and to matters connected directly with the transaction of

commerce; (3) the organization, powers, and internal affairs of trading corporations are not directly connected with the transaction of commerce, but bears only a remote relation thereto.

Strong arguments, however where advanced in support of the constitutionality of such legislation. No state can confer a legal right or franchise to act in a corporate capacity in other states, and Congress alone is vested by the Constitution with the power to legislate for the regulation of interstate and international commerce, and may be of such a character as to render the commercial operations of the corporation a menace to the security and welfare of the people of all the states. Furthermore, if interstate and international commerce cannot be carried on in an orderly manner and with safety to the public by a multitude of corporations organized under the diverse and varying legislation of different states and subjects in each state to special regulations and restrictions, it seemed justifiable (to those promoting this theory), under the power to regulate interstate and international commerce, to require all corporations engaging in such commerce to comply with any appropriate regulations for the protection of the public and also to confer upon all corporations complying with the prescribed regulations a legal right or franchise to carry on their interstate and international commerce throughout the United States, free from restrictions imposed by the several States.

On January 7, 1910, President William Taft gave an address wherein he supported the idea of creating a federal incorporation law. In this address President Taft states:

"I therefore recommend the enactment by Congress of a general law providing for the formation of corporations to engage in trade and commerce among the States and with foreign nations, protecting them from undue interference by the States and regulating their activities, so as to prevent the recurrence, under national auspices, of those abuses which have arisen under state control. Such a law should provide for the issue of stock of such corporations to an amount equal only to the cash paid in on the stock; and if the stock be issued for property, than at a fair valuation, ascertained under approval and supervision of federal authority after a full and complete disclosure of all the facts pertaining to the value of such property and the interest therein of the persons to whom it is proposed to issue stock in payment of such property. It should subject the real and personal property only of such corporations to the same taxation as is imposed by the States within which it may be situated upon other similar property located therein, and it should require such corporations to file full and complete reports of their operations with the Department of Commerce and Labor at regular intervals. Corporations organized under this act should be prohibited from acquiring and holding stock in other corporations (except for special reasons upon approval by the proper federal authority).

"There are those who doubt the constitutionality of such federal incorporation. The regulation of interstate and foreign commerce is certainly conferred in the fullest measure upon Congress, and if for the purpose of securing in the most thorough manner that kind of regulation Congress shall insist that it may provide and authorize certain agencies to carry on that commerce, it would seem to be within its power. This has been distinctly affirmed with respect to railroad companies doing an interstate business and interstate bridges. The power of incorporation has been exercised by Congress and upheld by the Supreme Court in this regard. Why, then, with respect to any other form of interstate commerce, like the sale of goods across state boundaries and into foreign commerce, may the same power not be asserted? Indeed, it is the very fact that they carry

on interstate commerce that makes these great industrial concerns subject to federal prosecution and control.

"Even those who are willing to concede that the Supreme Court may sustain such federal incorporation are inclined to oppose it on the ground of its tendency to the enlargement of the federal power at the expense of the power of the States. It is as sufficient answer to this argument to say that no other method can be suggested which offers federal protection on the one hand and close federal supervision on the other of those great organizations that are in fact federal because they are as wide as the country and are entirely unlimited in their business by state lines. Nor is the centralization of federal power under this act likely to be excessive. Only the largest corporation would avail themselves of such a law, because the burden of complete federal supervision and control that must certainly be imposed to accomplish the purpose of the incorporation would not be accepted by the ordinary business concern.

"A federal compulsory license tax, urged as a substitute for a federal incorporation law, is unnecessary except to reach that kind of corporation which, by virtue of the considerations already advanced, will take advantage voluntarily of an incorporation law, while the other state corporations doing an interstate business do not need the supervision or the regulation of a federal license and would only be unnecessarily burdened thereby."

The proposal for federal incorporation never became law. After 1920 public interest in federal incorporation apparently waned. However, on August 5, 1935, Senator O'Mahoney resurrected the idea of federal incorporation by introducing Senate Bill 10, which provided for federal incorporation of all corporations engaged in interstate commerce.

One obviously important purpose of the bill was to facilitate wages and hours regulations by enlarging the scope of collective bargaining. Additional teeth was put into the National Labor Relations Act by requiring licensees to comply with the provisions of that act.

Under the federal incorporation bill submitted by O'Mahoney, a corporation was required to have its chief place of business in the state of its incorporation. A corporation would have no power to hold the stock of any other corporation, unless it had such power on the date of the enactment of this act and unless the latter corporation is a subsidiary of the former. A corporation would have no power outside its own state which it does not have within it. A corporation must make a full accounting to its subsidiary annually, and vice versa. A corporation would have nonvoting stock. A corporation holding stock cannot vote it, but stockholders of the corporation may vote their pro rata share. Officers and directors of a corporation must own stock in the corporation.

Every officer and director of a corporation subject to the act would be a trustee of the stockholders of such corporation. Each officer or director would be liable in damages for any money or property that may be paid to a corporation in which he may be a director or officer, or in which he may own more than five pre centum of the corporate stock or other securities. Such officer or director would take no profit other than his salary, nor would he take any bonus except by vote of the stockholders.

The O'Mahoney federal incorporation act was not compulsory, but could be taken advantage of, if at all, by voluntary action.

A FEDERAL ACT

PERMITTING STATES TO DENY TO CERTAIN FOREIGN CORPORATIONS THE PRIVILEGE OF DOING

INTERSTATE BUSINESS

In order to convince corporations to voluntarily accept some form of federal incorporation or licensing requirement, it was advanced by the National Conference of Commissioners that Congress could enact a law empowering the states to exclude from the privilege of doing an interstate business any state corporation which had not been formed under a federal incorporation act and the uniformed principles drafted and approved by the Interstate Commission. The Commission reported to Roosevelt that such an act would be valid.

That Congress has power to enact such a statute seems to be indicated by the Supreme Court's decision in Clark Distilling Co. v. Western Maryland Ry.Footnote11 The facts in this case were: West Virginia had passed an act which, among other things, prohibited carriers from bringing into the state intoxicating liquors intended for personal use, and prohibited the receipt and possession of such liquors when so introduced for personal use. Shortly afterwards, Congress passed the Webb-Kenyon Act, which was entitled: "An Act divesting intoxicating liquors of their interstate character in certain cases." It prohibited the shipment or transportation of intoxicating liquors from one state to another when such liquors were intended to be received, possessed, sold, or in any manner used in violation of any law of the latter state.

Chief Justice White, in writing the opinion of the Supreme Court, said that:

"The sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control to the States by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence, in the nature of things, was wanting in uniformity."

Answering this claim, he said:

"The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the Act of Congress ceased to apply. So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play - that its provisions

apply to all the States, - so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States."Footnote12

There was one serious drawback with this proposal. The Commission determined this legislation, if adopted into law, could be attacked by individuals who would contend that their right of engaging in private commerce was unconstitutionally restricted. It was finally decided by those involved in this "great secret," that since Congress has exclusive power to control interstate commerce, it has power to compel "persons" desiring to engage in privileged activities to incorporate under a federal statute.

THE CITIZENS OF THE STATES

To make a licensing or incorporation plan workable, it was decided Roosevelt would take directly to the people, his appeal to centralize all power, in order to help relieve the pain and suffering the people were feeling from the stress of economic and social disturbances. After all, Roosevelt could feel their pain.

Once a sufficient amount of the citizenry voluntarily availed themselves of this new federal incorporation or licensing plan, the law of contracts and the doctrine of estoppel could then be utilized thereby, forcing the citizenry to comply with all the regulations promulgated by Congress pursuant to the statute. For legal precedent, Roosevelt would relied on Guardian Trust Co. v. Fisher.Footnote13 In the Guardian Trust case the Supreme Court stated:

"An individual may be under no obligation to do a particulate thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing he comes under an implied obligation in respect to the manner in which he does it."

Once the individual accepts to act a certain way, he is under an implied obligation or contract to act. It is important that he must voluntarily accept to act. Did you voluntarily accept a social security card? After all you went to the field office and voluntarily applied for one, or did your parents fill out the SS-5 application for you?

"The Social Security Act is unconstitutional," you might be saying. "I'll claim that the Act is unconstitutional." Under the Ashwander Doctrine you would be estopped from addressing this argument in a cause of action. The principle of the Ashwander DoctrineFootnote14 states:

"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."

The acceptance of the benefit, in your case social security, would estop you from bringing a constitutional issue before the court concerning the Social Security Act or its amendments. "But I have yet to receive any benefits from social security," you're probably saying. Sorry, under the act, the social security account number is the benefit. This is stated in Jones v. Bowen.Footnote15 In this case the court said:

"a social security number, or corresponding card, constitutes a benefit created by statute (42 USCS 405(c)(2)(D), ..."

We thus see that the individual could voluntarily accept to place himself under the jurisdictional umbrella of Congress by accepting a federal license to engage in the privilege of interstate commerce and by such a voluntary act, he would be barred under the doctrine of estoppel from bringing a constitutional issue before the Court on any issue where this number or "license" is attached or claimed. Could this be the reason, you are always being asked for your social security number? After all, according to Department of Health and Human Services publications, the number was not intended to be used as a Standard Universal Identifier (SUI).

FEDERAL LICENSING FOR "PERSONS" TO ENGAGE IN INTERSTATE COMMERCE

Those involved in this "great secret" found this proposal the most satisfactory method of achieving Roosevelt's desire for complete control over all business activities. This proposal for a federal license would be more orthodox than the proposal to permit states to exclude from the privilege of doing interstate business those corporations formed in non-conforming states. A federal licensing act would also be more effective than the other proposals, for the reluctance of some states to join a compact would be overcome by the realization that corporations formed under their laws could not secure a federal license to engage in interstate commerce in any state. It would be more satisfactory than a compulsory federal incorporation, for, by leaving incorporation to the states, it should tend to produce a greater degree of uniformity, first, by eliminating the possible divergence between the federal act and the various state corporation acts, and second, by offering the states the incentive to join the compact in order to retain the business of incorporating companies to engage in interstate commerce.

It was not intended that the proposal would include a requirement that every business "unit" must incorporate in order to obtain a federal license to engage in interstate commerce, but only that those businesses which are incorporated must show the satisfactory condition of the law under which they were incorporated before they can obtain a federal license. The proposal included a recommendation that even individuals must secure a federal license to engage in privileged activity or receive some benefit associated with such activity under interstate commerce.

Included under this federal licensing act would be a regulation requiring all licensees to furnish to a designated federal officer, commission or other federal agency, such reports, statements and information regarding their business and their financial condition, such as income derived from their privilege activity under interstate commerce, as that officer, commission or federal agency may require.

After careful planning by those involved in this "great secret" it was decided a federal licensing act, one involving natural individual "persons" and one for artificial corporate "persons" would provide Roosevelt with the necessary legal entanglements to fulfill his vision for a new socio-economic order and would bring the citizenry of the American union under the total control of Roosevelt's centralized government.Footnote16

Footnote1

Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 210 (1921).

Footnote2

Kansas v. Colorado, 206 U.S. 46, 90 (1907).

Footnote3

Schechter Poultry v. United States, 295 U.S. 495, 529, 549 (1935).

Footnote4

Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330, 346 (1935).

Footnote5

Bailey v. Drexel Furniture Co., 259 U.S. 20, 37 (1922).

Footnote6

Note 3, *supra*.

Footnote7

July 10, 1858.

Footnote8

Howard v. Illinois R.R. Co., 207 U.S. 463, 496. (1908).

Footnote9

Laws of 1935, Ohio, S.J. R. No. 52.

Footnote10

THE FEDERALIST, pg. 657. In arguing for the constitutionality of the act under which the First Bank of the United Stated was incorporated, Hamilton argued that the power existed in congress under the Commerce Clause to create trading corporations.

Footnote11

242 U.S. 311 (1917).

Footnote12

242 U.S. at 326-327.

Footnote13

200 U.S. 57 (1906).

Footnote14

Ashwander v. Tennessee Valley authority, 297 U.S. 288, 323 (1936).

Footnote15

692 F.Supp. 887 (1988).

Footnote16

The proposal which was finally adopted by Congress and utilized today by the federal government to regulate all business of the citizenry of the states is explained in Volume II of this work.

CONCLUSION

An equilibrium of balance within the Federal Government itself has not always been obtained in our national history, but it is correct to say that with the exception of a state of war, there never has been heretofore such vast concentration of congressionally delegated power in the office of the Chief Executive as existed under Roosevelt's New Deal administration. In 1933, the justification for such a deposit of power was that the emergency nature of the times demanded it, and that the Chief Executive himself, or his office, could with greater efficiency exercise or execute it. As in a state of war, the President is empowered by Congress to declare by public proclamation when this emergency status had ended. This has not yet been done, even fifty-five years after the so-called "great depression" ended, and the view now widely held in Congress is that the powers delegated to the Executive arm will be retained indefinitely, or until Congress itself reassumes the powers or repeals the statutes. Particularly in the expenditure of federal funds without specific allocation or "earmarking," or at most only in broad terms, did the Congress empower the President with absolute authority; or stated otherwise, with respect to expenditure of federal funds, it signed a blank check, authorizing the Executive to fill in the amounts. The irony of this practice in so far as the Congress was concerned has been that in expending federal funds for business pump-priming, social legislation, health care and of course, pork-barrel expenditures, the Chief Executive has great power either to defend or elect Congressmen, according as they were or were not his supporters.

Under the Constitution, of course, there was no legal machinery to prevent this deposit of power by Congress, in the first instance, nor to compel repeal of such legislation. The only possible constitutional remedy was for a private litigant in a proper case or controversy to question exercise of a given instance of such power, if he could prove special damage. This might be difficult to prove.Footnote1 And obviously the recipients of these federal funds would not challenge the source of power,Footnote2 and even had they done so would not have been met by well established judicial doctrines of estoppel or waiver, as the case might be. Government by executive order or decree has been made possible under the vast powers thus entrusted to the President by a complaisant Congress, thus substantially destroying, for the time, equilibrium of power within the federal framework. That Congress during the 1930's or even today, may have been or may be motivated by laudable intentions does not validate it as constitutional.

FRANKLIN ROOSEVELT'S VIEWS OF THE CONSTITUTION

AND THE

FUNCTIONS OF THE SUPREME COURT

In tracing the various forces and events which have led to a "streamlined" Constitution, special attention should be drawn to the views held by Franklin Delano Roosevelt - the Chief Executive of the Constitution and of the character of the functions of the Supreme Court, because by virtue of this high office such views had wide influence upon the American people, and undoubtedly millions of them agreed with Roosevelt, but equally other millions did not.

While deciding whether or not to run for an unprecedented third term, Roosevelt received several telegrams from various supporters urging him to run for the sake of the nation and the people. One labor group adopted the following resolution:

Resolutions of the Missouri State Federation of Labor and the Kansas City Central Labor Union

Whereas we have today in the White House a Chief Executive of unsurpassed ability and statesmanship; a man of unimpeachable character and stainless record, whose great sympathy and understanding of the needs of the common people have endeared him to the masses of this Nation, and whose championing of the cause of the wage earners of our country has brought down upon his head the enmity and the hatred of the privileged class; a man whose recognition, support, and encouragement to our American labor movement have enable us to carry on in our resistless march toward the liberation of the American working man and woman; and

Whereas this great humanitarian, President Franklin Delano Roosevelt, has by his liberal and progressive administration, his persistent and resolute opposition to the chiseler and the profiteer, the exploiter and the parasite, aroused against him all of the reactionary forces of the Nation; and

Whereas there is no legal nor logical reason why our great President cannot accept a third term as Chief Executive, and in view of the overwhelming sentiment of the great mass of people in his favor: Be it therefore

Resolved, That the forty-third annual and third biennial convention of the Missouri State Federation of Labor go on record as urging upon Franklin Delano Roosevelt, in the name of the common people, for the sake of the "forgotten man," and in the cause of humanity, to accept a third term as President of the United States, and thereby pledge our loyal support to his success; and be it further

Resolved, That all interested parties be furnished with copies of this resolution.

Following the decision of the Supreme Court invalidating in large part the National Industrial Recovery Act, Roosevelt expressing his disappointment, if not resentment with the decision, referred to the Constitution as a relic of the "horse and buggy" era. On other occasions, Roosevelt, criticizing the Court's position on minimum wages prior to its subsequent overruling itself, stated that the Constitution as thus interpreted created a "no man's land" where neither the Federal Government nor the several States could legislate, which in his opinion was a reductio ad absurdum. His conception thus exhibited seemed to be that Government in the United States should be all powerful and not subject to those heretofore well established rights of the individual against governmental invasion. In another public address Roosevelt stated that the "general welfare" clause in the body of the Constitution (not the preamble) justified blanket legislative power unconnected with the spending power, a view which would clearly negate the rule that the Central Government was one of delegated power, for if that Government was to have blanket power there would have been no rationality in the drafters of the Constitution in specifically enumerating the powers delegated. Now, criticism of the Supreme Court or at least some of its personnel, on the part of the Chief Executives of the past, is not without precedent in our national history - Andrew Jackson and Thomas Jefferson and even Lincoln being notable examples. President Theodore Roosevelt had emphatic views of the extent of powers granted the Executive, but he did not put himself on record publicly to the extent that President Roosevelt did in 1937. Such criticism on the part of the Chief Executive was but systematic of the temper of the American people, struggling with economic depression, and looking to government for material aid and assistance, yet fearing that the governmental framework under the Constitution would not permit it if attacked in an independent Supreme Court.

Equally striking is the viewpoint of Roosevelt with respect to the nature of the Supreme Court's functions and duties. Early in his administration, in seeking emergency power through legislation to combat the depression, Roosevelt is said to have privately sounded out Chief Justice Hughes on the question of the Supreme Court's co-operation with the two other branches of the Government in the likely event that the Court would be asked by litigants to review the validity of the measures enacted. He is said to have received an unfavorable reaction on the ground that the Court's functions did not permit such cooperation promised in advance, and that the admitted gravity of the times afforded no justification for any departure from the established practice. Roosevelt is said to have cited as precedent for his action similar cooperation given him by the New York Court of Appeals when he was Governor of the State. That the Supreme Court could not cooperate with Roosevelt, let alone promise it, is amply illustrated by its subsequent decisions during the first four years of the New Deal administration, but prior to the defeat of the Judiciary Bill of 1937.

On one public occasion, Roosevelt strikingly illustrated his conception of judicial cooperation with the other branches of the government by drawing an analogy with a three-horse team plowing a field; in order to have the field properly plowed, he reasoned, it was necessary for all to pull together. Democracy could be made to work in America, he said, only by this method, and not by allowing one of the horses-presumably the judiciary in his analogy-to pull in an opposite direction from the other two. And in still another public address, Roosevelt stated that in the Constitutional Convention of 1787 a plan had been brought forward, but rejected, to give the federal judiciary veto power over acts of Congress and the President. The inference drawn by Roosevelt was that the federal courts today should not have the power to declare acts of

Congress or the President unconstitutional. What he did not make clear was that veto power standing in isolation is in reality a part of the legislative or executive power, whereas the power to declare laws unconstitutional in proper cases and controversies only, is totally different. The federal judiciary never had the so-called "Veto" power, because this was not a proper judicial function, and the delegates were on sound ground in voting such proposal down; but the judiciary did rightfully have the power to declare laws unconstitutional because of the essential nature of the governmental framework created by these same delegates in the Constitutional Convention.

By the early 1940's, after nearly a decade of governmental handouts and intrusion, the people were finally ready for the last phase of Roosevelt's New Deal. Unlike the war raging in Europe and the Pacific, the war in America for control over the minds of the people had been won without a single shot being fired. This is evident in Roosevelt's State of the Union address, delivered January 7, 1943, in which be claimed victory over the minds of the people by declaring:

"When you talk with our young men and women, you will find they want to work for themselves and for their families; they consider they have the right to work; and they know that after the last war their fathers did not gain that right.

"When you talk with our young men and women you will find that with the opportunity for employment they want assurance against the evils of all major economic hazards - assurance that will extend from the cradle to the grave. And this great government can and must provide this assurance.

"And if the security of the individual citizen, or the family, should become a subject of national debate, the country knows where I stand."

In order for this peaceful counter-revolution to continue a new generation of American's had to be taught and trained to uphold and sustain this new way of their fathers. The job fell upon the public school system to continue the job of indoctrinating teachers and students by preparing teaching materials designed to "influence the social attitudes, ideals, and behavior of coming generations. Completely new textbooks were needed. Millions of school children learned American political and economic history and structure in the 1940's from several books.

The class struggle theme was the vehicle used to openly advocate cradle-to-grave welfare care for all. F.A. Magruder in his American Government textbookFootnote3 uses this technique. Magruder says:

From birth to death our governments act as guardians. They provide free education and require children to avail themselves of it, they provide employment or relief for the middle-aged, and they provide old-age pensions or benefits for the aged who need them.

In a later edition of the American Government textbook, Magruder equates opposition to the welfare state with selfishness of the few. In a section blatantly entitled, Welfare of the People from the Cradle to the Grave, Magruder says:

The United States has increasingly curbed the selfish and provided for the welfare of the many. The Government has established the Children's Bureau to look after the welfare of every child born in America. (pg. 15)

Indoctrination in the availability and rightness of the free handout was not limited to high school students. The re-education started in the first grade. Recall the story about the hardworking little squirrel who gathered and stored nuts for the winter. The story has a moral: Work hard and save wisely for uncertain days ahead.

But in 1961, the story was rewritten. The new version was found in a first grade textbook entitled, The New Our New Friends, published by Scott, Foresman & Company in 1956. The chapter was entitled, Ask for It. In it, a little squirrel named Bobby, ate nuts from a tree during the summer. Other squirrels suggested that Bobby put some nuts away for winter. As Bobby Squirrel didn't like to work, he ignored the advice.

Winter came and one morning Bobby awakened to find the world covered with snow - and all the nuts were gone from the tree. He got awful hungry but remembered that a boy who lived in a white house had taken some of the nuts from his tree during the summer. Bobby went to the white house and gave a squirrel call. A door opened and a "fine brown nut" rolled out. Bobby Squirrel learned his lesson. The story concludes:

"Well!" thought Bobby. "I know how to get my dinner. All I have to do is ask for it." (pg. 159)

But at what cost. A loss of our unique national character. Or perhaps a loss of personal freedom to ourselves and our posterity. Viewing the current state of affairs of the Nation, one can only wonder if the benefit or in Bobby's case, the "fine brown nut," was worth the price.

To conclude, let us turn to the authority of the universally esteemed and lamented Justice Story, as to the high responsibilities of the people, and the proper means of guarding their individual liberties. In reference to the Constitution of government he says:

"It must perish, if there be not that vital spirit in the people, which alone can nourish, sustain, and direct all its movements. It is in vain that statesmen shall form plans of government, in which the beauty and harmony of a republic shall be embodied in visible order, shall be built up on solid substructions, and adorned by every useful ornament, if the inhabitants suffer the silent power of time to dilapidate its walls, or crumble its massy supporters into dust; if the assaults from without are never resisted, and the rottenness and mining from within are never guarded against. Who can preserve the rights and liberties of the people, when they shall be abandoned by themselves? Who shall keep watch in the temple, when the watchmen sleep at their posts? Who shall call upon the people to redeem their possessions, and revive the republic, when their own hands have deliberately and corruptly surrendered them to the oppressor, and have built the prisons or dug the graves of their own friends? This dark picture, it is hoped, will never be applicable to the Republic of America. And yet it affords a warning, which, like all the lessons of past experience, we are not permitted to disregard. America, free, happy, and enlightened as she is, must rest the preservation of her rights and liberties upon the virtue, independence, justice, and sagacity of the people. If either fail, the republic is gone. Its shadow may remain with all the pomp, and

circumstance, and trickery of government, but its vital power will have departed. In America, the demagogue may arise as well as elsewhere. He is the natural, though spurious, growth of republics; and, like other courtier, he may, by his blandishments, delude the ears and blind the eyes of the people to their own destruction. If ever the day shall arrive, in which the best talents and the best virtues shall be driven from office by intrigue or corruption, by the ostracism of the press, or the still more unrelenting persecution of party, legislation will cease to be national. It will be wise by accident, and bad by system.

"In a free state, every man, who is supposed a free agent, ought to be concerned in his own government; therefore the legislative power should reside in the whole body of the people, or their representatives. The political liberty of the citizen is a tranquillity of mind, arising from the opinion each person has of his safety. The enjoyment of liberty, and even its support and preservation, consists in every man's being allowed to speak his thoughts, and lay open his sentiments."

Footnote1

Ashwander doctrine.

Footnote2

Revenue Sharing Acts.

Footnote3

1940, p. 8.