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CONSTITUTIONAL ASPECTS OF THE NEW DEAL IN THE UNITED STATES*

Introduction

I have been asked to discuss some of the constitutional aspects of the New Deal. I shall pass in review briefly the monetary and banking policy of the present administration, its use of the taxing and spending powers, and its attempt to control the whole economic machinery of the country under its power over interstate and foreign commerce.

Constitutional law in the Unired States is a field of study to which I have devoted some attention for many years. Therefore, I approach a discussion of my present subject with a full appreciation of its scope and difficulty. I shall hope only to be able to suggest to you in briefest outline the major constitutional problems which have been raised by the post-war economic débâcle, followed by the New Deal's effort to stimulate recovery and to lay the foundations for a better economic order.

Three points in our constitutional theory must always be kept in mind if one is to grasp the problems which arise under our constitutional system; and these points are bound to be of controlling importance in determining the effectiveness of the New Deal programme, and the permanent form which it may ultimately assume.

Our national government and all of our state governments are bound by written constitutions drafted with the intention of controlling the legislatures as well as the courts and the executives. This was held in the States, before the Federal Constitution was adopted, and soon after the adoption of that instrument it was declared by Chief Justice Marshall that the same purpose was there embodied. A written Constitution

* Address at the Annual Banquet of the Law Club, University of Toronto, April 3, 1935.

with us is not then a declaration of pious political ideals, but is very literally the supreme law; and it is the duty of a court to give effect to that law when any statute comes in conflict with it. Of course I know that this conception of the superior authority of an organic act is not unfamiliar to you in Canada.

The controlling effect of a written constitution may give stability to government and throw safeguards about individual rights. It may also at times seem to confine governmental action within a too rigid framework, and to vest an appellate court with too great power to set its judgment against that of the people's representatives. Certainly those tribunals should exercise their power of nullification with great restraint, supporting where possible statutes regularly enacted, and conforming the meaning of general constitutional provisions to the changing demands of society.

All of our Constitutions have another point in common, namely, that they all embody, expressly or by the clearest implication, the doctrine of the separation of the executive, legislative and judicial powers. By this means, as was elaborately argued by Hamilton and Madison in the *Federalist*, is it intended that tyranny shall be prevented. No one of the three branches of government may so invade the field of another as to endanger its independence. It is also held to follow that a legislature must itself exercise the law-making power vested in it—it may not delegate this power to others. Not that it may not authorize a commission or an executive officer to do a part of that which it might do, but it must not attempt to vest others with the very essence of its power—the discretion to determine the principles which are to apply to a given situation, and the purpose with which they are to be applied. However, having exercised this essential discretion, a legislature may delegate the *application* of the chosen principles to the situations involved, and such application may be by the promulgation of rules having the force of law.

The third point which we always have to keep in mind in constitutional discussions in the United States is that the governments of our individual States exercise by inheritance all of the powers of sovereignty except those clearly transferred to the central government, or forbidden to them in the Constitution of the United States or in their own constitutions, while the government of the United States can claim only those powers which are granted to it by the Federal Constitution. The National Government is one of enumerated powers—within its

own sphere it is supreme, but that sphere was intended to be strictly limited. Besides the exclusive powers over foreign affairs, the important national powers for our purposes are to regulate interstate and foreign commerce, to coin money and regulate its value, and to tax, to borrow and to appropriate money, coupled with the further authority to make all laws necessary and proper for carrying these powers into execution.

This is the somewhat complex constitutional situation with which the National Government was confronted when at the opening of President Roosevelt's administration it was decided that a "New Deal" was imperative; and in the use of this term I am not attempting to distinguish between the administration's recovery program and its long-time program for the improvement of our economic and social system. It was necessary for the administration to take account of the fact that the various parts of its program would inevitably be subjected sooner or later to judicial review. It had to canvas the express grant of powers by the Constitution of the United States to the National Government, and the possible limits to which those powers might be expanded by virtue of our present emergency. Finally, in its plans for rapidly building up a great administrative machine to carry out the projects to be undertaken, it had to consider the extent to which Congress could delegate to the President or to other administrative officers the powers to make regulations having the force of law. The States in attempting to coöperate with the national administration or in attempting new deals of their own have also had to envisage judicial review based upon their own constitutional limitations and their own constitutional doctrines of the separation of governmental powers.

Control of Money and Banking

At the time of President Roosevelt's inauguration the country was faced with a banking crisis. In October, 1932, the Nevada banks were closed; in February, 1933, the same action was taken in Louisiana and Michigan; in the early days of March all of the other States of the Union followed suit. On March 6th, the President proclaimed a national bank holiday. His authority was a war emergency act still on the books. It did not in law justify his action, but what he had done was ratified by Congress three days later in the Emergency Banking Act. This act also forbade all banks, members of the Federal Reserve system, to open until examined and found sound. States followed the same course as to state banks. This was accepted

as a reasonable exercise of power to protect the public, exerted by both federal and state governments over their own institutions.

Then in quick succession under Congressional authority, the President prohibited, with minor exceptions, the shipment abroad of gold; the Secretary of the Treasury ordered the surrender to the national banks of all gold privately owned in exchange for paper money; the Reconstruction Finance Corporation bought gold at home and abroad at figures substantially above the current foreign exchange rate equivalents, thus further depreciating the dollar; and finally, the President revalued the dollar at 59.06 of the former figure. In January 1934, Congress declared the title to all gold to be in the National Government, giving national obligations in its place; and in June of the same year by joint resolution Congress declared invalid, as against public policy, the gold clauses in all public and private obligations.

The embargo on the shipment of gold abroad falls clearly under the national government's control of international commerce. Congressional authority to provide for the purchase of gold (and later of silver), for the devaluation of the dollar, and for the taking of gold by eminent domain from all individuals and banks, is unquestionably supportable under the currency provision of the Constitution, though complaint was made—unsuccessfully—that depreciated paper money was not that "just compensation" for the gold appropriated, which is required by the Constitution when property is taken for a public purpose. Though the very wide discretion granted by Congress to the President, the Secretary of the Treasury, and the Reconstruction Finance Corporation, in the matters just referred to, lays the legislation involved open to question on the ground of unconstitutional delegation of legislative power, the legislation has so far gotten by; and in fact if originally defective, action taken under it was probably cured by later legislative ratification.

Of course the high point of interest so far, in the whole monetary program of the Government, was reached with the "gold clause" decisions handed down by the Supreme Court on February 18th of this year.[1] These decisions involved both private bonds and obligations of the United States. After the cases were argued excitement ran high—this was reflected in the stock market, in the conversation of lawyers, bankers and men

[1] *Norman* v. *Baltimore & Ohio R.R.* and *United States* v. *Bankers Trust Co.* (1935), 294 U.S. 240.

on the street, and in the nervousness of government officials. The court took unprecedented notice of the tenseness of public feeling in twice announcing before "opinion days" that no pronouncement in these cases would be made on those days, and in a statement made by the Chief Justice on February 18th before the opinions were read, as to the decisions which had been arrived at. The scene in court when the decisions were rendered was itself highly dramatic—the dignified presence and delivery of the Chief Justice, speaking for the majority of five; the emphatic statement by Justice McReynolds, sitting at the right of the Chief Justice, in which he paraphrased his opinion written for the minority of four, bitterly attacking the decisions reached by the majority.

The Supreme Court recognized that the gold clauses were binding and valid at the times when they were written,[2] that they were not contracts for payment in gold as a commodity, and that they were entered into for the very purpose of preventing payment in a depreciated currency. As to the private contracts containing gold clauses, the court held that they were made subject to the reasonable exercise of the comprehensive monetary powers of the National Government over revenue, finance and currency; that the question of policy involved in the Joint Resolution of Congress was for that body and not for the Courts; that the 75 billions of private gold clause obligations, if enforceable, would greatly impair the efforts of Congress to create a cheaper dollar; that it therefore could not be said that the abrogation of such obligations was not an appropriate means to the legitimate end aimed at by Congress; and therefore that, though property was taken, there was no lack of due process of law in its taking, and the guarantee in our bill of rights against depriving a person of property without due process of law was not infringed.

This decision is now the companion piece to the famous trilogy of Legal Tender Cases of Civil War and post Civil War days.[3] There the Supreme Court first held it unconstitutional to require creditors to take paper money in payment of debts; then held by five to four (two members of the Court having been replaced by new appointees) that in war time such legislation was justified by a combination of the monetary and war powers, and finally concluded that in time of peace the power

[2] *Bronson* v. *Rodes* (U.S., 1868), 7 Wall. 229; *Trebilcock* v. *Wilson* (U.S., 1871), 12 Wall. 667.

[3] *Hepburn* v. *Griswold* (U.S., 1869) 8 Wall. 603; *Legal Tender Cases: Knox* v. *Lee, Parker* v. *Davis* (U.S., 1870), 12 Wall. 457; *Legal Tender Case: Julliard* v. *Greenman* (1884), 110 U.S. 421.

over the currency combined with the power to borrow money on the credit of the United States, and to issue negotiable obligations of the government for its payment, would permit the Federal Government to compel creditors to accept depreciated paper currency in place of metallic money. To safeguard creditors in advance against the recurrence of such a situation gold clauses have been largely used during the last fifty years in long term obligations. Now we find that their abrogation is also due process.

In dealing with the problem of United States bonds the Supreme Court held that the constitutional power of the Congress "to borrow money *on the credit* of the United States", and the provision in the Fourteenth Amendment that "the validity of the public debt of the United States, authorized by law . . . shall not be questioned", made the gold clauses in such bonds inviolable, and that the Joint Resolution of Congress therefore did not invalidate them. However, no immediate comfort was given to the domestic holders of United States gold bonds. The holder of a $10,000 matured gold bond could sue in the Court of Claims, but his damages would be covered by $10,000 in paper currency, for, if he *got* gold, he could not legally use it in foreign transactions because of the embargo, and he could not make domestic use of it, except to turn it in to the government under the anti-hoarding legislation in exchange for an equal number of paper dollars. In seeking $16,931.25 in payment of his $10,000 bond the holder was not, in the view of the Court, seeking "a recoupment of loss in any proper sense but an unjustified enrichment".

It still remains to be seen whether the foreign holder of federal gold bonds will fare better. It may be guessed that he will not.[4] We shall also know before long whether the holder of a federal gold bond for $1,000 can use it for the payment of more than $1,000 of federal taxes.

Two further steps of great importance have been taken in the banking field: (1) The separation of commercial banking and investment banking on the part of national banks and state banks members of the Federal Reserve system, which is wholly desirable. (2) Provision for the guaranteeing of deposits in such banks by subscription to stock of the new Federal Deposit Insurance Corporation. Both of these steps being taken within the field of federal action for the control of the federal banking

[4] Public Resolution No. 63, 74th Congress, approved August 27th 1935, prohibits suits against the Government on such bonds.

system, and being for the protection of that system and of depositors, pretty clearly constitute due process, and are therefore constitutional; though the guarantee of deposits has been much attacked on grounds of policy.

Taxing and Spending

A considerable part of the New Deal programme, and a part which is far-reaching in its significance, must rest upon the power of the Federal Government to raise and spend money, a power expressed in these terms in the Constitution: "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States". It is also provided in that instrument that "No money shall be drawn from the treasury but in consequence of appropriation made by law".

Taxes must of course be levied for a public purpose, but the Supreme Court has gone far in upholding as public purposes very advanced socialistic programmes when it has had to pass upon the question in relation to taxes earmarked for specific projects. In determining the validity of any tax so labelled, the controlling considerations are the widespread need for that which is to be furnished by means of the tax, and the not unreasonable belief that this need can only be adequately supplied by taxation. It is apparent that abnormal conditions may have important bearings upon both of these factors.

However, state and certainly federal taxes generally are not earmarked nor segregated for particular purposes, but a whole series of taxes is levied to meet the general expenses of government, and later funds are appropriated from time to time from existing balances in the treasury. The levy of a tax to meet the general expenses of government is certainly not open to attack as not being for a public purpose. And the Supreme Court has held that an objecting taxpayer has no standing when he attempts to enjoin as unconstitutional an *appropriation* by Congress of funds already raised by federal taxation, because he can not show that his contribution to the fund, and so his threatened injury, is such as to give him a standing in a court of equity.[5]

I think you will agree that the constitutional grant to Congress to levy taxes to "provide for . . . the common welfare" is an expansive one, and that it fairly gives Congress power to levy taxes earmarked for purposes which fall outside of the limited fields in which it has authority to enact regulatory

[5] *Frothingham* v. *Mellon* (1923), 262 U.S. 447.

legislation. And when, as is usual, sums are appropriated from moneys not levied and earmarked for specified purposes, there seem no limitations which can be enforced by a taxpayer through judicial proceedings upon the power to appropriate.

Often we have congressional appropriation from federal funds which are made upon condition that the money appropriated will be expended only in a State if that State meets certain regulatory conditions laid down by the National Government. The pressure to accept these conditions may be very great, for the residents of the State will have contributed part of the funds which are at the time in the national treasury, and they will naturally be desirous of getting back the State's share of such funds for use within the State. We have here great possibility of congressional government by indirection, namely, through the use of federal funds which, at the point of appropriation, can not be attacked as unconstitutional, accompanied by regulative conditions which are operative in fields where Congress can not legislate directly. We have had experience of this form of indirect control as the result of appropriations to foster within the States programmes as to education and health—subjects with which Congress has no delegated authority to deal directly.

The present administration has not overlooked the possibilities which lie in its power to raise and spend money.

The Agricultural Adjustment Act of May 12, 1933, provides for the purchase by the Government of surplus agricultural stocks and for compensation to farmers to induce them to diminish their production. It further provides for a processing tax "to obtain revenue for extraordinary expenses by reason of the national economic emergency", but which tax is also to be so adjusted as to aid in bringing prices of agricultural produce up to a fair exchange value. Unless there is some invalidating delegation of legislative power to administrative officers, it seems reasonable to believe that the processing tax will be held immune from successful attack since it is an excise tax, levied for revenue, to meet the general expenses of government, though also incidentally employed as an instrument of regulation. It is also fair to believe that expenditure of funds from the treasury of the United States with the purpose of improving the agricultural situation throughout the United States is an expenditure for the "general welfare" as that term is used in the Constitution; but if it is not, no taxpayer has sufficient interest in any fund appropriated to obtain any redress through an attempt to enjoin the appropriation. Thus the financial features of the Agri-

cultural Adjustment Act appear to have a pretty clear bill of health, as against objections that they overstep the taxing and appropriating powers.[6]

Other appropriations of federal funds seem equally immune from successful attack on constitutional grounds, for the reasons just stated—namely, that they have been raised by general taxes, not earmarked for specific purposes, that furthermore the uses in question fairly fall within the general welfare clause, and finally that there is no procedure by which a taxpayer can successfully attack federal appropriations once the money is in the treasury. Such uses are the loan of federal funds to home owners and farm owners burdened by mortgages, the expenditure of funds for public construction and other public works to create employment, the allocation of such funds to colleges to create work for students who might not otherwise obtain a college education, and the like.

However, the Federal Government's immunity in the *ultimate use* of its public funds may not prove as complete as its immunity from restraint in raising and appropriating them, for, in such ultimate use, interests may become involved which are of such a kind as to give the possessors a better standing in court than the taxpayer, and these interested parties may be able to show that the government has overstepped its constitutional sphere of action. When in national development of a navigable stream, under the interstate commerce power, dams are built for water control, surplus water may be supplied for irrigation, and the incidental generation of electricity may be justified for sale at the plant. But in the Tennessee Valley project the T. V. A. has attempted to contract for the purchase of transmission lines of a private corporation against the will of certain stockholders. In slum clearance projects, within the States, the National Government is seeking to condemn land by the use of the power of eminent domain. As part of the public works programme the United States Government is proposing to supply funds to municipalities so that they may construct electric plants to compete with private utility companies. Out of such moves of the Government are emerging court proceedings which raise these questions: Are interests here involved which will give courts jurisdiction, and are such uses of public funds constitutional? So far the lower courts have held that the parties have such interests as to give them a standing in equity, and have

[6] Since the delivery of this address the Agricultural Adjustment Act has been somewhat amended to meet constitutional and other objections. See Public No. 320, 74th Congress, approved August 24, 1935.

held that the Government is invading fields of action outside of its constitutional sphere. Cases of the kinds which I have suggested are on their way to the Supreme Court. If I were to hazard guesses as to the results of the controversies raised, they would be these: That the development of power as an incident to the control of water in a stream which is a channel of interstate commerce is valid, and that it may then be valid to arrange to sell the electricity produced at retail instead of at wholesale, and to make contracts to this end; that money may be supplied to states for slum clearance or to buy submarginal land, and that probably the United States could buy from a willing seller for the same purposes, but that control of the use of land within a State for slum clearance does not fall within Congress' power to spend money; that general readiness to respond with funds to municipalities, which desire to conduct their own service plants, may not be said to be outside of the concept of use of national funds for the "general welfare".

The social security program, which the national administration is sponsoring as part of the New Deal, involving particularly old age pensions and unemployment insurance, may also give opportunities for determining what is a provision for the "general welfare of the United States", for which taxes may be laid by Congress. This opportunity will clearly arise if such lesgislation takes the form contemplated of a tax on earnings of employees and of an excise tax on business, not to meet the general expenses of government but for the sole purpose of setting up pension and unemployment funds. Under such legislation each taxpayer would be in position, by moving for injunctive relief or by way of defense, to attack the constitutionality of the tax levied against him, on the ground that the purpose of the tax was not "to provide for the general welfare of the United States". I am inclined to think that the Supreme Court would uphold the constitutionality of the proposed old age pension and unemployment insurance acts, finding justification for the view that the general welfare of the country at large would be promoted by nationwide provision against destitution in old age and against destitution through unemployment.[7]

Delegation of Power and Regulation of Commerce under the N.I.R.A.

The National Industrial Recovery Act of June 16, 1933, and the Agricultural Adjustment Act passed a month earlier (May

[7] See the Social Security Act which was later passed, 2 U.S. Law Week, No. 50, sec. 2 (Aug. 13, 1935).

12, 1933) were heralded as the principal instruments of the New Deal. The Recovery Act is frankly and directly regulatory. It provides for the construction of Codes of Fair Competition by representatives of trades and industries with the President's approval, or if a group will not prepare a Code the President may do so. Codes are to have the force of law, and breaches of them constitute misdemeanors. Every Code must provide that employees may organize and engage in collective bargaining and that they are not to be compelled to join company unions, that employers shall comply with all rules approved or established by the President as to maximum hours, minimum wages, and other conditions of employment (in which has been included abolition of child labour). The President may make rules to carry out the purposes of the Act, any breach of which is a misdemeanor.

It was attempted through Codes to bring every business under the N.R.A. (National Recovery Administration), from the man who presses clothes or runs a local gasoline station to the great producers of steel, oil and coal. There is a section at the end of the Act which vests in the President special powers for oil regulation.

Many States, including my own State of New York, have passed laws to supplement the N.I.R.A.

Under its first fighting administrator, N.R.A. got off to a fast start. The general public felt something had to be done and was glad to give support to this new agency of government, being thrilled by the dramatic way in which the Democratic programme was rapidly unfolded during the first months of the Roosevelt administration. Labour came in with enthusiasm, being greatly pleased by the provisions for collective bargaining, and for control of hours and wages. Employers came in more slowly, but now the large employers, at least, would probably prefer to keep the Industrial Act than to have it swept away, though they may complain of it and its administration in detail. They have a large part in framing their Codes, by which those in each group arrive at a *modus vivendi;* they are free, while they live up to their Codes, from danger of prosecution under the anti-trust laws, and so far they have managed to come off pretty well in their bouts with labour.

However, there have been plenty of individual objectors to raise the constitutional questions which the Supreme Court will shortly answer. These questions are two, though the provisions of law and the situations of fact are various. First, is the

executive branch of the government exercising legislative power? Second, is the regulation which is attempted a regulation of "commerce . . . among the several States"?

The first decision of the Supreme Court involving delegation of power under the recovery programme did not touch the general scheme of business control, but dealt only with the special authority for oil regulation. It was in the *Hot Oil Cases*.[8] "Hot Oil" is oil illegally produced. The Recovery Act *authorizes* the President to prohibit transportation of "hot oil" in interstate commerce. This he did. The Court, holding the President's decree of prohibition invalid, declared that no policy had been laid down by Congress, no standard established which the President was *directed* to follow in dealing with "hot oil". He was left free to exercise *his own* discretion. He was to determine, without any directive guidance from Congress, whether "hot oil" should flow through interstate channels of commerce. The Court said that to vest the Executive with such discretion is pure delegation, *i.e.*, abdication of legislative power, and so unconstitutional. Justice Cardozo dissented, finding a sufficient declaration of policy by Congress in the opening section of the Act, namely, "to eliminate unfair competitive practices". He deduced from this section that the President was not given unlimited discretion, but had authority only to exclude from interstate commerce the oil of those who had broken state laws when it should appear that by such exclusion "unfair competitive practices" would be eliminated.

The case is significant as the first one in our history in which the Supreme Court has held unconstitutional a delegation to the President of rule-making power. It may have special significance at a time when regulation by executive order has been widely resorted to under congressional authorization, as showing an inclination of the Court to view critically a sweeping grant of regulatory power to an executive officer. Of course the particular situation, involving control of "hot oil", can be met easily by a more definite congressional declaration of policy and purpose to control the President's future exercise of discretion.

Within the month a Federal District Judge in New Jersey[9] has hit at the whole system for the construction of Codes of Fair Competition by declaring that it attempts an unconstitutional delegation of legislative authority. He describes that

[8] *Panama Refining Co.* v. *Ryan* (1935), 55 Sup. Ct. Rep. 241.
[9] *Acme. Inc.* v. *Besson* (1935), 2 U.S. Law Week 684.

most important part of the statute which deals with the Codes as an attempted authorization to the majority of those interested in any industry to frame Codes without legislative debate, and without the requirement of consideration by any representative of the public except the President. He views the attempt of Congress to give to Codes so framed the force of law as a complete, and therefore, an unconstitutional delegation of legislative power to the industrial representatives and the President acting jointly. The Supreme Court of Wisconsin has on the same grounds held unconstitutional a similar provision for Code-making in that State by coöperation of industrial groups and the Governor.[10]

It is true that by the Recovery Act the President is authorized to approve Codes proposed by industrial groups, or, when Codes are not proposed for his consideration, to prescribe Codes. But it is also true that the Act provides that Codes must not promote monopoly, must "tend to effectuate the policy" of the Act, and must contain certain labour provisions already referred to. Before approval of a Code the President may impose conditions or exceptions for the protection of consumers, competitors, employees, or otherwise to effectuate the policy declared in the Act. The "policy" of the Act is in section 1 declared to be to remove obstructions to the free flow of interstate commerce, to provide for the general welfare by promoting coöperative action in industry and coöperation of labour and capital, to increase production and consumption, to decrease unemployment, to improve standards of labour, to rehabilitate industry and to conserve natural resources. Have we here such a declaration of policy and an establishment of standards to guide the Executive, as was found wanting by Chief Justice Hughes in the *Hot Oil Cases*, so that we may say that the legislature has exercised its discretion in declaring the principles which shall govern and the ends to be accomplished? Or has Congress spoken in such generalities that it has delegated to the President its own task of deciding what kind of laws shall be made to bring industry out of its depression? The Supreme Court will soon say. That Court has been liberal in finding in statutes, even by implication, such direction to executive officers and administrative bodies who are given rule-making power as to disprove unconstitutional delegation. My belief is that under the precedents that Court can find enough in the Recovery Act to support the making of Codes, in so far as they govern transactions in interstate and

[10] *Gibson Auto Co., Inc.* v. *Finnegan* (1935), 2 U.S. Law Week 668.

foreign commerce, if a majority of its members should prove to be in sympathy with its policy and purposes.[11]

There are more than 300 cases now pending in the courts involving the constitutionality of the National Industrial Recovery Act. Most of these involve specifically the question, "What is interstate commerce?" for the Act rests solely on the authority granted to the Congress "to regulate commerce with foreign nations and among the several States".

Emergency does not create governmental powers nor abrogate constitutional guarantees. It may call into operation a power which is granted expressly for an emergency, such as the power to declare and conduct a war. It may create conditions which will make reasonable a regulation of interstate commerce which might otherwise be held unreasonable, as the prevalence of an epidemic disease among cattle will justify Congress in closing interstate commerce routes to the species of cattle involved. But will an emergency change that into *inter*state commerce which was *intra*state commerce before? When the question is put in that way the answer seems obviously "No". But is it so clear that an emergency may not throw a new light upon economic relationships, and so induce a broadening of the judicial definition of interstate commerce?

The National Recovery Administration attempted for 18 months to bring under the blue eagle all industrialists, small and large, the pressers of suits, the purveyors of gasoline, the restauranteurs as well as the meat packers, the miners of coal, and the makers of steel. Codes have been written and promulgated for 731 groups.

John Marshall, the great Chief Justice of the Supreme Court, early declared that commerce is more than traffic—it includes transportation. It may best be described, he says, as "intercourse". Interstate commerce is, then, interstate intercourse. Interstate railroads and interstate telegraph companies are engaged in interstate commerce. So are those who enter into contracts for interstate shipment of goods. Since Congress may regulate interstate commerce, it has been held that it may protect interstate transactions against monopolies and combinations which would affect it adversely. (The anti-trust laws). It may enforce the public service duties of interstate common carriers with regard to rates and service. (Interstate Commerce Act). It may legislate to protect interstate transportation

[11] But the court proved to be against the statute, *Schechter Poultry Corporation v. United States* (1935), 55 Sup. Ct. Rep. 837.

against accident and against interruption, and to these ends its regulation of the relationship of employer and employee in interstate railroads has been upheld. (Federal Employers' Liability Act, Safety Appliance Act, and the Adamson Law.)

The mere production of goods for interstate shipment has repeatedly been held by the Supreme Court not to constitute a part of interstate commerce. Purely intrastate transportation has also been placed beyond the sphere of federal action.

But of course this whole question of what legitimately may be considered a regulation of interstate commerce is anything but simple. Railroad systems are so interwoven that certain intrastate rates may directly affect the interstate rate structure. In so far as it is reasonably necessary for the adequate regulation of interstate transportation to regulate certain intrastate rates, such regulation is held constitutional. It is not a far step from this conception of what is legitimate regulation along the periphery of interstate commerce to a declaration that agreements of buyers, though they are all in Chicago, as to prices to be paid for cattle shipped to Chicago from all over the west, or agreements between producers of gasoline in one state as to prices to be asked for shipment to other states, so directly affect the flow of interstate commerce as to come within the legitimate sphere of the federal anti-trust laws, passed to prevent unreasonable restraint of commerce between the States. If buyers and sellers, who thus combine within a single state to affect adversely the free flow of interstate commerce, may be dealt with by the Federal Government under the power to regulate commerce between the States, so, also, says the Supreme Court, may employees, who combine to stop the production of coal *with the purpose* of preventing its shipment to other States.

I have attempted to sketch in very briefly the background against which the N.I.R.A. as a regulation of interstate commerce must be viewed, and I have pointed out to you that some transactions, which are immediately intrastate in their character, are nevertheless held to be subject to federal regulation because they are intended to affect directly and adversely the free flow of interstate intercourse.

The businesses which are intrastate in all of their activities, such as the retail purveying of food and clothing, the supplying of amusements and the like, are so clearly and exclusively *intra*state that one wonders that it was ever sought to bring them under N.R.A. control. A large territory was sought to be annexed when a federal prosecutor contended that :

> It is the Government's position that low wages and long hours in the parking industry [i.e., the parking of automobiles] burden and affect interstate commerce, and that for that reason they may be regulated by Congress. The relation between hours and wages and interstate commerce is based upon the dependence of interstate commerce upon national purchasing power for its very life. If people have not the means wherewith to buy, commerce can not flow . . . . In brief, unemployment and industrial disorganization burden interstate commerce. . . .

This contention the administration, in its proposal for the continuation of the N.I.R.A., has now seemingly abandoned, desiring to drop all Codes which do not deal with industries engaged in or "affecting" interstate commerce.

The administration *does* apparently hope for an enlargement of the judicial concept of interstate commerce to allow regulation in relation to hours of work, wages, and prices of all those engaged in production for the interstate or foreign market. Such regulation is justified in the minds of the administration as a regulation of interstate *commerce* because it is hoped that such regulation will operate as a stimulant of interstate *intercourse*. Before the depression the Supreme Court had pushed out the frontier of national jurisdiction in the regulation of interstate commerce to include certain types of interstate conspiracies *directly* and *adversely* affecting the flow of commerce between the States. The Recovery Act would draw within the orbit of the interstate commerce clause *all* activity directly or indirectly "affecting" interstate commerce. That word "affecting" is in the Act, but it is not in the Constitution. The supporters of the Recovery Act depend of course upon the emergency to induce in the Court a more liberal point of view as to what is reasonable regulation of interstate commerce.

Personally I do not expect the Supreme Court to follow the Administration so far. It will, I think, hold to the distinction between interstate and intrastate commerce, and continue to view the processes of production as intrastate, though the products of such processes are destined for interstate commerce; only treating intrastate acts as falling within the scope of interstate regulation when they consist of group action directly and adversely affecting intercourse between the States or with foreign countries. A lively fear that this would be the attitude of the Supreme Court seems to have led to the very recent withdrawal of a test case which was on the docket of that tribunal.[12]

[12] *United States* v. *Belcher* (1935), 294 U.S. 736 (dismissed April 2, 1935). But see the *Schechter* case, in the next preceeding note, in which the Statute was held unconstitutional.

But even though my guess on this point should prove correct, the commerce clause may still furnish, through another approach, a useful weapon in support of the New Deal. The thirteen States when they adopted our Constitution to form "a more perfect union", possessed complete control of commerce crossing their borders. This in all its plenitude they delegated to the United States. The Supreme Court has upheld the outlawing by Congress from interstate commerce of liquor, lottery tickets, persons carried in the white slave traffic, stolen automobiles, justifying the exercise of this power by the protection given to those who would be affected by the transportation—*i.e.*, those in the States of destination. By a 5 to 4 vote it decided 17 years ago that the products of child labour could not be excluded by Congress from interstate commerce, because the federal Act did not aim at the protection of States of destination from things which would prove injurious to their inhabitants, but was passed in an effort to regulate intrastate production in the States of origin.[13] I think the decision unsound—first, because the intention of the Federal Child Labor Act *was* to protect States of destination and all other States competing with child made goods; and second, because I think the power granted to Congress over interstate commerce is plenary, delegating the same absolute right to control the movement of goods across State lines which the States in 1789 had as part of their independent sovereignty. I regret that I have not time to expand the argument.[14] However, my conclusion is that, while Congress may not directly control intrastate production by rules enforceable by criminal and civil process, it may constitutionally exclude what it will from the channels of interstate commerce, and so may admit what it will to such channels of commerce upon such conditions as it choses to lay down, thus indirectly exerting a most effective control of the methods of production of those things intended for interstate shipment. In view of the emergency and the consequent recognition of the common importance of any national programme adopted to stimulate general economic recovery, the Supreme Court might now uphold Congressional legislation imposing, as a condition of interstate shipment of goods, compliance with rules as to quantity of production, prices, wages, hours of work and collective bargaining, thus frankly overruling, or by some formula distinguishing, the child labour case.

Two other constitutional provisions not as yet much used, but whose potentialities are great, should be referred to here.

[13] *Hammer* v. *Dagenhart* (1918), 247 U.S. 251.

[14] See E. S. Corwin, *Congress's Power to Prohibit Commerce a Crucial Constitutional Issue* (1933), 18 Cornell Law Quarterly 477.

They are the provisions respectively which vest exclusive treaty-making power in the Federal Government, and which give to the States the power to make compacts among themselves with the consent of Congress.

Our Presidents often find it hard to get the necessary two-thirds vote on treaties in the Senate, but when passed treaties become part of the supreme law of the land. No treaty has yet been held invalid; none will be held invalid which deals with a matter which is properly the subject of international agreement. A treaty may be implemented by congressional legislation which, because not within one of the fields of legislation delegated to Congress, could not be passed constitutionally without the treaty. So, for instance, we have treaties which control the inheritance by aliens of property within the States, though Congress is given no power to legislate on this subject. So also our treaty with Canada for the protection of migratory birds, not being in form self-executing, is implemented by congressional legislation superseding state laws, and this treaty and statute have been held constitutional, in spite of the fact that a similar statute, passed by Congress before the treaty, was declared invalid by the lower federal courts.[15] The possibilities of international labour conventions and of international trade conventions may yet be explored on our side of the border as well as upon yours by supporters of the New Deal.

Compacts between our States have been made for the use and control of boundary rivers, for the distribution of water, to settle boundary disputes, to concert action for the conservation of natural resources, and to further coöperation in the suppression of crime. Seventy compacts among the States have been approved by Congress. It would appear possible under our Constitution for States to enter into compacts touching intrastate production, intrastate distribution, and intrastate regulation of labour. It would further seem feasible for the National Government, at the time of approving any compact, to associate itself by legislation with the States by supplementary interstate regulation, and so obtain unified action where now there is divided constitutional control. I feel sure that in interstate compacts lie great possibilities. You may have noticed an account of a recent meeting of the representatives of New York

[15] I have been interested to note, since this address was delivered, that an International Labor Organization Conference adopted in a first test vote certain conventions containing distinctly advanced provisions as to hours of work and standard of living. New York Times of June 21, 1935, p. 6.

and neighbouring States, to discuss the control of the production and sale of milk, especially as such control affects the New York metropolitan area.

State Action

The several States also have not been behindhand in initiating their own New Deals nor in attempts to aid in giving effect to the New Deal of the National Government. The provision in the Constitution of the United States that States shall not deprive any person "of liberty or property without due process of law" has not been held to prevent mortgage moratoria or the regulation within a State of the purchase and sales prices of such a commodity as milk. These regulations have been held to come within the reasonable exercise of the "police" or reserved power of the States, at least in such a period of emergency as the present. But the States have also suffered judicial setbacks. For instance, New York was told by the Supreme Court of the United States that she cannot fix the price at which milk purchased out of the State shall be sold in New York City for this would put an unjustifiable burden on interstate commerce. Also the attempt to adopt *prospectively*, as part of the State law, Codes of Fair Competition which shall from time to time be approved by the President, has been declared by lower state courts to constitute invalid abdication of law-making power in favor of the federal government.[16]

Concluding Observations

Our original thirteen States, jealous of their new independence and suspicious of each other, framed a Constitution which was to give to the central government only those enumerated powers as to which unified control seemed necessary. All the residuum of sovereignty was to remain in the States, except when the exercise of a part was forbidden to them, and in such a situation it was to be possessed by the people. On the other hand, thinking to benefit by the lesson to be learned from our Civil War, the British North America Act was framed to give enumerated powers to the provincial governments, while leaving to the dominion government "the vast undefined residuum" of legislative power.

During our recent history governmental authority has continually grown at the expense of personal independence. Collectivism has made deep inroads on individualism. The

[16] See the later decision of the New York Court of Appeals to the same effect—*Darweger* v. *Staats* (1935), 267 N.Y. 290.

ambits of due process and police power have progressively widened. This is but saying, in terms of our own Constitution what seems to have happened in all communities—the philosophy of *laissez faire* has given place to a craving for regulation.

With us this will to regulate has resulted in the expansion of federal powers at the expense of the States. With you up to the present time, the trend seems to have been in the other direction, leading to a development of provincial powers, rather than of those of the dominion government. Much of this Professor Kennedy has pointed out in one of his most enlightening "Essays in Constitutional Law" far better than I can do.

A national emergency in the United States immediately or ultimately results in a cry for the enlargement of national control and an expansion of national powers. There seems to be developing in this country also a demand for great extension of Dominion regulation, which, it appears to an observer, may lead you rapidly on the same road towards centralized control which we have long been travelling.

In both our countries government must face the possibility of a judicial declaration of *ultra vires*, since in both the sphere of legislative power is controlled by an organic law. However our constitutional problems are made more complex for the courts because added to the difficulty of interpreting grants of legislative power is the further difficulty of construing the limitations in our bills of rights. I believe that you in Canada have also no rule, express or implied, against the delegation of legislative authority, such as was invoked by the Supreme Court in the *Hot Oil Cases* to upset the presidential decree.

If public opinion is strongly and persistently in favor of changes or developments in government a way to accomplish the desires of the people will of course be found. In our countries, where the organic law is the supreme law of the land, the courts may delay, they may to some extent direct, but they cannot in the long run withstand a defined and persistent public opinion. Sometimes constitutional decisions will be distinguished or frankly overruled, sometimes it will be found that a new legislative approach to a problem exposes a constitutional solution which had not been apparent before. Occasionally constitutional amendment may have to be resorted to. There we are perhaps more fortunate than you in having the machinery for amendment definitely provided for.

The New Deal has found the monetary powers of Congress still resilient and adaptable. On the other hand the national

administration has been warned by the Supreme Court that separation of powers is still a principle of our government, and Congress can not transfer its essential law-making power to the President. The real struggle is going to center now about the commerce power and the spending power of Congress. This struggle will involve efforts to redefine the power of Congress "to regulate commerce with foreign nations and among the several States", so as to allow the direct control of production of goods destined for interstate and foreign commerce, or so as to permit exclusion from the channels of interstate and foreign commerce of goods not produced in conformity with rules laid down by Congress. It will also be directed towards the firm establishment of the spending power of the national government as justifying, first, expenditures for any purposes which Congress may reasonably think will advance "the general welfare" though not in the fields in which Congress may pass regulatory legislation; as justifying, second, the imposition upon States or municipalities of regulatory conditions in connection with grants of federal funds; and as justifying, third, business transactions, and possibly the exercise of eminent domain on the part of the United States within the States, in furtherance of projects upon which federal funds are being expended.

If you in Canada are embarking upon a New Deal you may view with some interest not only the practical but also the constitutional developments to the south of you. You may be sure that we shall watch most eagerly the moves which you may make, and the way in which you will mould your constitutional doctrines to meet your national objectives.

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