SOME CONSTITUTIONAL ASPECTS OF STATE UNEMPLOYMENT COMPENSATION LAWS

THOMAS H. ELIOT†

Thirty-five states[1] and the District of Columbia were certified to the Treasury by the Social Security Board on December 31,

† General Counsel, Social Security Board.

1. STATE	LAW	DATE APPROVED BY BOARD
Alabama	Acts, 1935, ch. 447, as amended by Acts 1935, chs. 156, 194 and 195	December 31, 1935
Arizona	Laws 1936 (Spec. Sess.) S. B. No. 3	December 22, 1936
California	Laws 1935, ch. 352	December 27, 1935
Colorado	Laws 1936 (3d Spec. Sess.) H. B. No. 1	November 27, 1936
Connecticut	Laws 1936 (Sp. Sess.) Ch. 2	December 8, 1936
District of Columbia	Pub. No. 386, 74th Cong. as amended by Pub. No. 446 and Pub. No. 762	November 15, 1935
Idaho	Laws 1936 (3d Sp. Sess.) ch. 12	September 1, 1936
Indiana	Laws 1936 (Sp. Sess.) ch. 4	April 18, 1936
Iowa	Laws 1936 (Ex. Sess.) S. F. No. 1	December 29, 1936
Kentucky	Acts 1936 (4th Spec. Sess.) Ch. 1	December 31, 1936
Louisiana	Laws 1936, Act No. 97	November 20, 1936
Maine	Laws 1936 (Spec. Sess.) H. B. 1883, L. D. 938	December 24, 1936
Maryland	Laws 1936 (2nd Spec. Sess.) Ch. 1	December 22, 1936
Massachusetts	Laws 1935, c. 479 as amended by Laws 1936, cc. 12 and 249	February 4, 1936
Michigan	Pub. Acts 1936 (Ex. Sess.) Act No. 1	December 29, 1936
Minnesota	Laws 1936 (Ex. Sess.) Ch. 2	December 29, 1936
Mississippi	Laws 1936, ch. 176, as amended by Laws, 1936 (Spec. Sess.) ch. 3	May 21, 1936
New Hampshire	Laws 1935, ch. 99, as amended by Laws 1935, ch. 142 and Laws 1936, ch. 3	December 13, 1935
New Jersey	P. L. 1936, ch. 270	December 24, 1936
New Mexico	Laws 1936 (Spec. Sess.) ch. 1	December 19, 1936
New York	Laws 1935 ch. 468, as amended by Laws 1936, chs. 117 and 697	January 24, 1936
North Carolina	Laws 1936 (Spec. Sess.) H. B. No. 1.	December 19, 1936
Ohio	Laws 1936 (Spec. Sess.) H. B. No. 608	December 22, 1936
Oklahoma	Laws 1936 (Ex. Sess.) H. B. No. 1	December 19, 1936
Oregon	Laws 1935 (Spec. Sess.) Ch. 70	December 23, 1935
Pennsylvania	Laws 1936 (2d Ex. Sess.) Act No. 1	December 8, 1936
Rhode Island	P. L. 1936, Ch. 2333	June 8, 1936
South Carolina	Laws 1936, Act No. 768	July 22, 1936
South Dakota	Laws 1936 (Spec. Sess.) S. B. No. 1	December 29, 1936
Tennessee	Laws 1936 (Ex. Sess.) Ch. 1	December 22, 1936
Texas	Laws 1936 (3d Called Sess.) S. B. No. 5	November 5, 1936
Utah	Laws 1936 (Spec. Sess.) Ch. 1	September 15, 1936
Virginia	Acts 1936 (Ex. Sess.) Ch. 1	December 19, 1936
Vermont	Laws 1936 (Spec. Sess.) H. No. 1	December 29, 1936
West Virginia	Laws 1936 (2d Ex. Sess.) H. B. No. 1	December 22, 1936
Wisconsin	Laws 1931, Ch. 20, as amended by Laws 1933, chs. 186 and 383 and Laws 1935, chs. 192, 272 and 446	November 27, 1935

1936, as having enacted unemployment compensation laws.[2] Most of these statutes had been passed during 1936, and none had come into effect earlier than 1934.[3] The constitutional problems raised by these new State programs have not yet been solved,[3a] although during the winter of 1937, the United States Supreme Court may well pass upon the validity of one or more of these statutes.[4]

In several states, employers who are required to contribute to state unemployment compensation funds have resisted, alleging that the State law was unconstitutional. But in only one case[5] has a State commission been enjoined from enforcing the law, and then by a federal rather than a state court. The highest courts of three States have upheld unemployment compensation laws,[6] as have two Federal courts[7] and two inferior State courts.[8]

In this article it will be necessary to touch only briefly upon the general, basic question of "due process of law" under the Fourteenth Amendment. A complete analysis would require an exhaustive survey of economic and industrial phenomena.[9] But

2. See 49 Stat. 640, 42 U. S. C. A. sec. 1103(b); Social Security Act, sec. 902(b) (1935).

3. Wisconsin enacted a Law in 1931, but its effective date was postponed until July 1, 1934.

3a. On the constitutionality of state laws under the United States Constitution, see Note, Compulsory Unemployment Insurance Under the Social Security Act (1937) 22 WASHINGTON U. LAW QUARTERLY 236, 242-246. For a discussion of some aspects of the constitutionality of the Federal Act, see ibid. pp. 246-250.

4. W. H. H. Chamberlin, Inc. v. Andrews, 276 N. Y. 1, 2 N. E. (2d) 22 (1936). The United States Supreme Court affirmed the favorable decision of the New York Court of Appeals on November 23, 1936 in a per curiam decision by an equally divided court. 57 S. Ct. 122. A petition for a rehearing had, at this writing, been neither allowed nor denied.

5. Gulf States Paper Corp. v. Carmichael (D. C. M. D., Ala., Dec. 15, 1936). Not yet reported (Three judge court).

6. W. H. H. Chamberlain, Inc. v. Andrews, supra, note 4; Gillum v. Johnson, 62 P. (2d) 810 (Cal., 1936), reh. denied 62 P. (2d) 1037; Howes Brothers Co. v. Unemployment Compensation Commission (Mass., December 31, 1936) not yet reported. Certiorari denied by the United States Supreme Court on February 2, 1937. 4 U. S. Law Week 605.

7. Aponaug Manufacturing Co. et al. v. Fly et al. (D. C. S. D. Miss., Jan. 12, 1937) not reported; Aponaug Manufacturing Co. et al. v. Wheeless et al. (D. C. S. D. Miss., Jan. 12, 1937: three judge court) not reported.

8. Killian v. Gulf States Steel Co., circuit court, Etowah County, Alabama, Jan., 1937, not reported; Beeland Wholesale Co. v. Kaufman et al., circuit court, Montgomery County, Alabama, Jan. 1937, not reported.

9. For a treatment of this problem see the economic brief filed by the State of New York in the United States Supreme Court. Supra, note 4.

there are guide-posts in the form of Supreme Court decisions in analogous situations, and any state legislature contemplating the enactment of a new law or amendment of an old law does well to keep them in mind. Whether or not "doubts as to constitutionality, however reasonable,"[10] should prevent the passage of a bill, certainly those doubts should not be allowed to deter the legislature when they might reasonably be dispelled.

It is advisable to touch briefly, also, upon the matter of classification in the various state laws, inasmuch as a three-judge Federal Court held the Alabama Act invalid, partly on the ground that it applied to employers of eight or more workers, but not to smaller employers.

Finally, there is one subject, which has been the source of litigation in California, and which may raise perplexing questions in a few other states, including Missouri. This is the handling of the unemployment compensation funds by the State, prior to their being paid out as benefits to unemployed workers.

But before examining any of these issues further, we should understand the general structure and purpose of unemployment compensation laws.[10a]

In general, of course, these laws provide for raising funds by levies upon employers and, sometimes, employees, and holding those funds for the payment of regular weekly benefits to persons who have been employed but lose their jobs and cannot find new work. All the state laws exact from employers a portion of their payroll, the highest levy being 3% in New York. In certain states,[11] employees are to contribute a small percentage of their wages. Benefits are postponed until 1938,[12] and then will amount to a stated percentage (usually about 50%) of the beneficiary's average wage and may be paid for 12 weeks or more[13] of unem-

10. Letter of President Roosevelt to Congressman S. B. Hill, dated July 5, 1935. 79 Cong. Rec. 14363.

10a. See Note, 22 WASHINGTON U. LAW QUARTERLY 236-242 (1937).

11. Alabama, California, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, New Hampshire, New Jersey and Rhode Island.

12. Benefit payments have already been commenced in Wisconsin. The first unemployment compensation check was issued August 17, 1936.

13. Rhode Island provides the maximum duration of full weekly benefit payments. One week of benefits are allowed for every four of employment within the last 104 weeks, but not more than 20 weeks of benefits. "Additional benefits" are then allowed on a ratio of one week's benefit to 20 weeks of employment within the last 260 weeks. Some of the more recent laws allow $1.00 of benefits to $6.00 of wages earned within the first eight of the

ployment, depending upon the length of prior service performed or wages earned by the employee.

In most states, only establishments wherein are employed eight or more persons in 20 weeks in the year are covered by the law, but some state laws have extended coverage to establishments or five or more,[14] four or more,[15] three or more[16] and five state laws[17] cover all businesses where one employee is working. Certain types of employment, such as agricultural labor and domestic services are generally excluded.

The state unemployment compensation funds in every case, are to be turned over to the Unemployment Trust Fund of the United States for investment.[18] The state may draw upon its account with the Unemployment Trust Fund at any time.[19] The transaction is not unlike opening an ordinary checking account at a bank, or (because the state would bear a part of any theoretical loss suffered by the Trust Fund) maintaining an account with an investment trust.

I. THE DUE PROCESS CLAUSE

Unemployment insurance laws in many foreign countries[20] provide among other things for compulsory exactions upon employers and for "pooling" the proceeds for the payment of bene-

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last nine quarters preceding unemployment, but not to exceed 16 times the benefit amount. These states are Maine, Maryland, Minnesota, New Mexico, North Carolina, South Dakota, Tennessee, and Virginia. New Jersey and Oklahoma provide for payments equal to 16 times the benefit amount of 1/6 of wages earned in the first four of the last five quarters. In general these are the methods used in computing duration of benefit payments, although considerable variation is found in the final result from state to state.

14. Connecticut.

15. Kentucky, New Hampshire, New York, Oregon, Rhode Island, and Utah.

16. Arizona and Ohio.

17. District of Columbia, Idaho, Michigan, Minnesota, and Pennsylvania.

18. Section 9(b) of the Maine law is a typical example of a provision covering payment over to the Unemployment Trust Fund. It reads in part, "After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this state in the Unemployment Trust Fund, established and maintained pursuant to Section 904 of the Social Security Act, as amended, any provisions of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary nothwithstanding."

19. 49 Stat. 640, 42 U. S. C. A. sec. 1104(f); Social Security Act, sec. 904 (f).

20. Austria, Bulgaria, Germany, Great Britain and Northern Ireland, Irish Free State, Italy, Poland, and Queensland. (See *Bulletin of the United States Bureau of Labor Statistics, No. 544* "Unemployment Benefit Plans in the United States and Unemployment Insurance in Foreign Countries.")

fits to unemployed persons, with no means test other than the mere fact of involuntary unemployment. In the United States, our legislatures have had the advantage of examining this foreign experience, and of making their own surveys[21] of unemployment conditions in America. Could a state legislature which acted in accordance with long foreign experience, to meet conditions revealed by the research of its own committees, be said to be acting so arbitrarily, unreasonably, or capriciously as to violate due process of law?

The employers who have asserted that the state laws violate the Fourteenth Amendment have made, roughly, these main arguments. First, they object to placing the burden of unemployment compensation directly upon employers, saying that employers "as a class are not responsible for unemployment." Second, they argue that it is unfair and unreasonable to assess all employers at the same rate, regardless of wide variations in irregularity of unemployment. Third, they believe that the "pooling" principle,[22] under which the unemployed in one industry may draw benefits from a fund to which other industries must contribute, is unconstitutional under the decision in *Railroad Retirement Board v. Alton.*[23]

To the first argument, that employers "as a class" should not bear part or all of the burden, there are several possible answers. First, unemployment often cannot be controlled by individual

21. The following states, among others, have prepared reports on unemployment problems prior to enactment of laws: *California,* State Unemployment Commission, Report and Recommendations 1932; *Massachusetts,* Special Commission on Stabilization of Employment. Final Report 1932. Supplementary Report 1934. Special Commission appointed to make an investigation of Unemployment Insurance, Reserves, and Benefits. Report 1934. Second and final report 1935; *Missouri,* Report of the Committee on Social Security of 1936; *New York,* State Joint Legislative Committee on Unemployment. Preliminary Report 1932; *Ohio,* Report of Ohio Commission on Unemployment Insurance, 1932-3; *Rhode Island,* Unemployment Insurance Fund Commission. Report to the General Assembly 1936; *Wisconsin,* Legislative Interim Committee on Unemployment Report 1931.

22. To date, all but two state laws embody the pooling principle, Wisconsin and Oregon having only employers' reserve, with optional guaranteed employment plans. Five states have straight pooled fund, four states have straight pooled fund with merit rating dependent on future legislation, three have pooled fund with merit rating by commission classification, sixteen have pooled fund with individual merit rating, two have pooled fund with merit rating and guaranteed employment and private plans, one has pooled fund with merit rating and guaranteed employment, one has pooled fund with reserve fund elective, one has a reserve fund with one-sixth pooled, and one has a reserve fund with one-sixth pooled and guaranteed employment.

23. 295 U. S. 330, 55 S. Ct. 758, 79 L. ed. 1468 (1935).

employers, but it does occur largely as a result of maladjustments in the industrial process itself. Second, even in times of prosperity, industry finds it necessary to maintain a "reservoir" of labor—an unemployed labor force waiting for jobs to which they will be called, and bearing the full cost of waiting.[24] Third, there are numerous instances where legislatures have allocated the cost of a necessary evil to a particular group, out of whose activities the evil arises. One need only refer to the sheep-dog cases[25] and the workmen's compensation cases[26] for analogous statutes which have been upheld.

The employers' second argument cannot be made strongly in every state, for only five laws[27] fail to provide for an eventual differentiation among employers in accordance with their "employment experience." But even in the other states, the rate is to be uniform for some years. In all cases where the funds are "pooled," and particularly where there is no provision for "merit rating," the language of Mr. Justice Roberts in the *Alton* cases becomes peculiarly important. But his decision did not purport to overrule the holdings in earlier cases[28] involving uniform rates and pooled funds. Rather, it would appear from a close reading of the opinion that the "pooling" feature of the Railroad Retirement Act was held invalid for reasons which do not necessarily affect unemployment compensation laws. The uniform rate upon the railroads was prescribed despite the existence of facts, pleaded and proved, that from the outset the age groups employed differed widely among the various roads. In this, as in other features, the Railroad Retirement Act operated retroactively. Nothing in the opinion indicated that a pooled fund, with contributions at a uniform rate, would be unreason-

24. Cf. J. F. Clark, *Economics of Overhead Costs* (1933) 366-7.

25. McGlone v. Womack, 129 Ky. 274, 111 S. W. 688 (1908); Cole v. Hall, 103 Ill. 30 (1882).

26. New York Central Railroad Co. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. ed. 667 (1917); Hawkins v. Bleakley, 243 U. S. 210, 37 S. Ct. 255, 61 L. ed. 678 (1917); Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. ed. 685 (1917); Arizona Employers' Liability Cases, 250 U. S. 400, 39 S. Ct. 553, 63 L. ed. 1058 (1919); Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 S. Ct. 167, 59 L. ed. 364 (1915); Middleton v. Texas Power and Light Co., 249 U. S. 152, 39 S. Ct. 227, 63 L. ed. 527 (1919).

27. Maryland, New York, Pennsylvania, South Dakota, Virginia. In four other states, Maine, Mississippi, North Carolina and Rhode Island, the final merit rating plan is dependent upon future legislation.

28. Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. ed. 685 (1917); Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. ed. 112 (1911).

able in a statute acting wholly prospectively, with no existing factual basis for varying the contribution rates among employers.[29]

II. NUMERICAL CLASSIFICATION

It had appeared so clear, from past decisions,[30] that the legislative judgment in the matter of numerical classification would ordinarly be respected, that the decision of the three judge Court in Alabama,[31] holding that employers of eight or more were denied equal protection, came as a surprise. It also increased the importance of showing that reason does exist for drawing a line between very small employers and larger employers, and for exempting the former from unemployment compensation laws.

The following table, the result of a thoroughgoing nation-wide study of all industries, depicts the effects of the 1920-21 depression, and gives ample foundation for a distinction between large and small firms:

A COMPARISON OF THE VOLUME OF EMPLOYMENT AT THE PEAK AND IN THE TROUGH FOR LEADING INDUSTRIAL GROUPS (1920-1921 DEPRESSION)[32]

Employees per Concern	Full Time Hours (Millions)			Hours Actually Worked (Millions)		
	Peak	Trough	Percent Decline	Peak	Trough	Percent Decline
0-20	7,105	6,892	3.00	6,956	6,742	3.08
21-100	3,132	2,640	15.71	2,926	2,521	13.84
Over 100	9,215	6,997	24.07	9,181	6,589	28.23

29. Powell, Commerce, Pensions, and Codes (1935) 49 Harv. L. Rev. 1.

30. Jeffrey Mfg. Co. v. Blagg, supra, note 26; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. ed. 350 (1912); St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 22 S. Ct. 616, 46 L. ed. 872 (1902); Middleton v. Texas Power Light Co., supra, note 26; McLean v. Arkansas, 211 U. S. 539, 551, 29 S. Ct. 206, 53 L. ed. 315 (1909); Booth v. Indiana, 237 U. S. 391, 397, 35 S. Ct. 617, 59 L. ed. 1011 (1915); Miller v. Strahl, 239 U. S. 426, 434, 36 S. Ct. 147, 60 L. ed. 364 (1915).

31. Supra, note 5. There is another rather convincing justification for distinguishing the large from the smaller firm. The administrative task of dealing with small employers might easily wreck an unemployment insurance system in its early years. Not only will the collection of contributions from the smaller employers make for a huge administrative task, but in addition, since unemployment insurance necessitates the verification of the suitability of employment offered to the unemployed, the administrative burden becomes all the more difficult.

32. King, *Employment Hours and Earnings in Prosperity and Depression, United States 1920-1922*, p. 60. (Results of an inquiry conducted by the National Bureau of Economic Research with the help of the Bureau of Markets and Crop Estimates and the Bureau of the Census for the President's Conference on Unemployment.) The difference between the Full Time Hours and Hours Actually Worked represents the amount of work gained through overtime, or lost through part-time work.

A more recent survey, covering the employment experiences of industry in St. Paul, Minneapolis, and Duluth from 1929 to 1931, reaches figures which, while not quite so striking, nevertheless offer convincing proof of the greater unemployment in the larger firms. The average maximum decline found in that survey was 13.4% for units employing 1 to 20 employees, 18.4% for those employing 21 to 100 and 21.9% for those employing 100 or more.[33]

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33. *The Decline of Employment in the 1930 to 1931 Depression in St. Paul, Minneapolis and Duluth.* By Hansen, Bjornaraa, and Sogge, p. 21, Volume I, No. 5 of the *Bulletins of the University of Minnesota Employment Stabilization Research Institute* (1932).

34. Authorities in the field stressing the administrative difficulties in early years, urge the exclusion of small units. See Douglas, *Standards of Unemployment Insurance* (1933) 51; Hansen, Murray, Stevenson and Stewart, *A Program for Unemployment Insurance and Relief in the United States* (1934) 34.

35. That difference in the degree of administrative difficulty encountered may justify a classification is well settled. Hatch v. Reardon, 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415 (1907); Continental Baking Co. v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. ed. 1155 (1932); La Belle Iron Works v. United States, 256 U. S. 377, 41 S. Ct. 528, 65 L. ed. 998 (1921); Aero Transit Co. v. Georgia Commission, 295 U. S. 285, 55 S. Ct. 709, 79 L. ed. 1439 (1935).

36. WAGE EARNERS IN ESTABLISHMENTS CLASSIFIED ACCORDING TO NUMBER OF WAGE EARNERS, 1929

No. of Wage Earners	Number of Establishments	Number of Wage Earners (Average for year)
None	7,426	....
1- 5	95,767	279,734
6- 20	53,524	595,708
21- 50	25,022	814,465
51- 100	12,467	891,671
101- 250	10,195	1,589,040
251- 500	3,840	1,331,145
501-1,000	1,722	1,176,991
1,001-2,500	790	1,444,735
2,501 and over	206	1,015,254
Total	210,959	8,838,743

Only 3.2% of the entire group of employees included, work in establishments of fewer than five wage earners.

The basic distinction between large and small employers being justified, the drawing of the line at a particular point can hardly be questioned. As stated by Mr. Justice Hughes in *Continental Baking Co. v. Woodring*:[36a]

> "It is obvious that the legislature . . . would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn."

III. THE HANDLING OF THE FUNDS

To be approved by the Social Security Board, a State unemployment compensation law must provide that all moneys received by the State unemployment fund shall immediately "be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund."[37] This is merely a condition of approval by the Board, as is the additional requirement[38] that money withdrawn from the Trust Fund by the state shall be used solely in paying benefits. The state can get the money back at any time,[39] and it can use it for any purpose if it does not value the Board's approval.[40]

In most state constitutions there are no obstacles to providing for paying over the funds to the Secretary of the Treasury. Litigation on the point did arise in California.[41] There, Section 16½ of Article XVI of the State Constitution provided that: "All moneys belonging to, or in custody of, the state . . . may be deposited in any national bank or banks within this state. . . ." The Secretary of the Treasury designated a bank in California to receive deposits for the Trust Fund. The Supreme Court of California held that the State unemployment fund was composed of moneys "in the custody of the State" but that the State law could be complied with without violating the constitutional restriction. "When a Federal Reserve or a member bank within this State is so designated and the unemployment fund is de-

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36a. 286 U. S. 352, 371, 52 S. Ct. 595, 76 L. ed. 1155 (1932).

37. 42 U. S. C. A. sec. 1103 (a) (3); 49 Stat. 640 (1935); Social Security Act, sec. 903 (a) (3). Also cf. supra, note 18.

38. 49 Stat. 640, 42 U. S. C. A. sec. 1103 (a) (4); Social Security Act, sec. 903 (a) (4).

39. Supra, note 19.

40. Obviously, if either the Social Security Act or the State Act were repealed or held invalid, the State would not care whether the Board approved the State Act or not.

41. Gillum v. Johnson, supra, note 6.

posited therein by the responding treasurer, there is no violation of the section of the State constitution referred to."

The situation in Missouri is more difficult. Article 10, Section 15 of the Missouri constitution provides that: "All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State . . . in such banks as he may . . . select . . . the said bank or banks giving security . . . for the safe keeping and payment of such deposit. . . ." The words "to the credit of the state" did not appear in the section of the California constitution considered by the California Court.

Assuming that Missouri enacted an unemployment compensation law, and that the moneys in its unemployment fund were subject to Article 10, Section 15, of the State Constitution, could the statute comply with the Social Security Act? Could the contributions be "paid over to the Secretary of the Treasury, to the credit of the Unemployment Trust Fund," and the constitution still be complied with?

The fact that the State Treasurer may requisition the funds so deposited in the Trust Fund would as a practical matter give the State Treasurer all the control over the fund which he would have over a general deposit in a bank. The dangers against which the framers of the Missouri constitution sought to guard are not present in the provisions for deposit in a national Trust Fund and withdrawal by requisition on the Secretary of the Treasury. Nevertheless, the Missouri constitution is so worded that if the compensation fund is held to be State money, it seems doubtful if it could be deposited by the State Treasurer in a manner creating a trustee-beneficiary relationship. The Missouri constitution seems to contemplate that the State of Missouri shall be a creditor of the depository and not a beneficiary of a trust.

It is quite possible, however, that the state unemployment fund would not be held to be affected at all by the constitutional limitation. The language of the Supreme Court of Missouri in one case sheds some light on the matter. The question directly before the Court involved the construction of Article 4, Section 43 of the State Constitution, which provides:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the Treasury, and the General Assembly shall have no power to divert the

same, or to permit money to be drawn from the Treasury, except in pursuance of regular appropriations made by law. . . ."

There is obviously an important connection between this article of the constitution and Article 10, Section 15. The latter contains directions as to the handling of money in the State Treasury belonging to the State; Article 4, Section 43, indicates what money shall go into the State Treasury.

State ex rel. Thompson v. Board of Regents,[41a] was a case where the State Treasurer sought by mandamus to compel the regents of one of the State teachers' colleges to pay into the State treasury the proceeds of insurance policies on certain of the college buildings which had burned. The policies were payable to the board and the premiums had been paid out of college funds derived from tuition fees. The Court held that the Board, while it was an agent of the State with defined powers, was not the State; and that the money received both from tuition fees and under the insurance policies was not money received by the State. Walker, J. said:

"This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the State from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the State from whatsoever source derived which is subject to appropriation for public uses. The current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or State money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, State money means money the State in its sovereign capacity, is authorized to received, the source of its authority being the Legislature.

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"We have stated generally that no statute required the payment into the State treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money.

41a. 305 Mo. 57, 264 S. W. 698 (1924).

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"In harmony with the construction given to the foregoing sections is section 11508, which requires the Board at its annual meeting to set apart 'all moneys derived from incidental or other fees paid by students,' etc., thus clearly recognizing that the college has funds within its control which were never in the state treasury nor appropriated by the Legislature."

The statement that revenue is current income of the State from whatever source derived which "is subject to appropriations for public uses" is worthy of notice. It is clear that any law which Missouri would adopt in conformity with the Social Security Act would limit the use of the employers' contributions to the payment of unemployment benefits. It would hardly be current income of the State subject to appropriation for public uses. The opinion of the above case indicates that the State Legislature might isolate these funds from the funds out of which the general expenses of the State are to be paid. If they are so separated either in fact or by legislative fiat, then the interpretation of Article 4, Section 43 in the *Thompson* case might well apply.[42]

The language of the Court in the *Thompson* case can, it must be admitted, be construed in more than one way. "Money, the state, in its sovereign capacity, is authorized to receive, the source of its authority being the legislature," would seem to include unemployment funds raised by state levy. But are those funds "current income . . . subject to appropriation for public uses"? And what if the statute did not "require the payment into the State treasury"?

Of course, the facts of the *Thompson* case are fairly far afield. Closer analogies are provided by cases decided in other states, holding that workmen's compensation funds were not "state money" within the meaning of constitutional provisions relating

42. See also cases cited in Appendix C, Opinion of Professor Ralph F. Fuchs, and Appendix E, Opinion of Hon. Roy McKittrick, Attorney-General of Missouri, to the *Report of the Committee on Social Security*, to the Governor of Missouri (Dec. 22, 1936) pp. 113-116, 129-136. It is there indicated that, if moneys paid by employers in the State to be used for the benefit of employees are to be considered as special funds and not as state funds, the provisions of the Missouri Constitution will not form an obstacle to Missouri participation under the Social Security Act. The cases cited also indicate that there is good authority for the view that such moneys need not be construed as "state funds."

to appropriations, or general laws concerning auditing and disbursing procedure.[43]

In any event, the question of investment of funds appears to be peculiar to the State of Missouri, although there may be some problems involved in other States than California. The question of numerical classification has become wholly academic in some States which have covered very small establishments employing only one employee, and there seems ample justification for drawing the line somewhere above one, if considerations of policy so indicate. But for a final ruling on the major question of due process, we must await a decision of the Supreme Court of the United States on the New York law, or on some other statute that may be brought before it.

43. Stong v. The Industrial Commission, 71 Colo. 133, 204 Pac. 895 (1922); State ex rel. Stearns v. Olsen, 43 N. D. 619, 175 N. W. 714 (1919).