

# ST. LOUIS LAW REVIEW

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Vol. XIX

DECEMBER, 1933

No. 1

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## THE CONSTITUTIONALITY OF THE RECOVERY PROGRAM

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### I. THE NATURE OF CONSTITUTIONALITY

The proverbial Man from Mars undoubtedly would have great difficulty in understanding the situation which at present exists in the United States with respect to the constitutionality of the National Recovery Program. He would find that last spring the duly elected representatives of the people, regardless of party, following the leadership of a President chosen by an overwhelming popular majority, had enacted the series of measures that constitute that program, designed to rescue the country from almost certain economic collapse. He would learn that public opinion had for some time supported these measures with virtual unanimity and that even yet, despite growing criticism of particular portions of the Government's program, there is hardly a suggestion in public, emanating from a responsible source, that the entire effort is ill-advised and should be abandoned. With the people's representatives, having full power to act, about to reassemble, there is no thought that they will undo more than a small part of what has been done but, rather, an expectation that they will remedy deficiencies and supply omissions in the legislative structure so as to carry the country farther along the road which it has chosen to travel. If the Recovery Program is weakened in Congress, it will be by underhanded sabotage rather than by deliberate, responsible action.

Yet our inquiring Visitor would be told that there is the greatest doubt whether, after all, the Recovery Program, even if successful, will not turn out to have been beyond the power of Con-

gress and the President to put into effect. If so, it will have to be abandoned, or at least not repeated in the next of those recurring crises to which our economic order, or disorder, is subject.

Upon asking who it is that could deny the authority of the responsible heads of a democratic government to carry out policies which they have evolved with popular approval,<sup>1</sup> the Gentleman from Mars would be told that it is a hierarchy of judges, the most important of whom are elderly gentlemen holding office for life. He would at once assume that these judges were superstatesmen of broad experience, to whom the community deferred in matters of fundamental policy. He doubtless would ask why they had not been consulted long ago so as to avoid the upsetting effect of an adverse decision following some time after the adoption of a national policy. He then would receive the surprising information that the judges are not primarily statesmen but lawyers, trained in a discipline which is designed to fit them for the function of adjusting conflicting claims of a legal nature. Among these claims, he would be told, are some put forward either by the government itself or by private parties, which rest upon recent legislation, such as the Recovery legislation, imposing restrictions upon individuals or making important innovations in governmental powers and functions. Since the question can be raised whether such legislation conforms to the Constitution, the fundamental charter of government which protects also certain private rights, the judges assume to decide this question in order to dispose properly of the claims which have been advanced before them. If in their judgment the conflict exists, the legislation must fall to the ground, together with the claims based upon it. Logically, of course, there is no reason why a decision upon this point should affect more than the decision of the particular case. But such is the confusion which would attend a conflict of view between the community and the courts, and such is the boldness with which the judges have advanced the claim to oracular powers

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<sup>1</sup> The Recovery Program, of course, was not submitted in advance to the people. It was in part formulated and presented to Congress by an Administration that had been elected without reference to specific economic measures which it might sponsor, and in part developed by Congress itself. Popular approval has not received formal expression and must be inferred from unofficial utterances and from the actions of politicians who supposedly are in touch with public opinion.

of interpretation, that a habit of deference to judicial opinion in these matters has fastened itself upon the entire body-politic.<sup>2</sup> Hence when the judicial hierarchy has once determined for itself that a law is unconstitutional, it is erased from the statute books and all attempts at enforcement cease.<sup>3</sup> It is ordinarily assumed, moreover, that future laws of a similar nature will meet with the same fate, and a paralysis of legislative effort in the particular direction often ensues.<sup>4</sup>

Thus, as a by-product to the decision of ordinary legal controversies,<sup>5</sup> the constitutionality of highly important measures

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<sup>2</sup> Field, Effect of an Unconstitutional Statute (1926) 1 Ind. L. Rev. 1, 60 Am. L. Rev. 232.

<sup>3</sup> There are, of course, historical exceptions to the prevailing attitude. These were produced by unusual circumstances which led the executive to declare himself not bound by unsatisfactory judicial decisions, at least as respects future legislation. See 2 Warren, The Supreme Court in United States History (1924) 221 ff.; 3 *ibid.*, 52 ff.

<sup>4</sup> Thus efforts to secure direct legislative establishment of minimum wages for women's employment largely ended with the Supreme Court's decision in *Adkins v. Children's Hospital* (1923) 261 U. S. 525. No attempt to establish compulsory arbitration for labor disputes has followed *Wolff Packing Co. v. Court of Industrial Relations* (1923) 262 U. S. 522. The fatalistic attitude which prevailed until recently with regard to the possibility of Federal regulation of petroleum production, criticized in Fuchs, *Legal Technique and National Control of Petroleum Production* (1931) 16 St. Louis L. Rev. 189, is an example of the blighting effect of decisions which are only remotely related to a particular subject. On the other hand, where there exists a sufficiently powerful social demand, legislation differing only slightly from a law which has been declared unconstitutional will be attempted. Thus it required two decisions of the Supreme Court, invalidating successive laws, to bar Congressional regulation of the labor of children. *Hammer v. Dagenhart* (1918) 247 U. S. 251; *Bailey v. Drexel Furn. Co.* (1923) 259 U. S. 20. Sometimes such legislative efforts meet with success. *Stafford v. Wallace* (1922) 258 U. S. 495 (Federal control of trading in grain futures); cases cited in note (1933) 18 St. Louis L. Rev. 228 (state regulation of rates, etc., of motor carriers).

<sup>5</sup> It is not intended to discuss here the relative merits of this by-product determination of constitutionality and the alternative method, in effect in Massachusetts, of judicial opinions advisory to the legislature. The concreteness of the cases presented to the courts under the system which is general may be an aid in securing a more realistic appraisal of the interests involved. See Frankfurter, A Note on Advisory Opinions (1924) 37 Harv. L. Rev. 1002. To some extent impairing this consideration is the fact that frequently cases are deliberately framed to secure a judicial determination of constitutionality. Thus unreal issues are presented which may mislead the court. In *Adkins v. Children's Hospital*, note 4 above, the action was brought by an elevator operator in a charitable institution to establish her right to work for less than the legal minimum wage! Of importance here is simply the fact that ordinary courts are utilized for the performance of a broad public function under the constitutional system.

is determined by judges whose qualifications for the socially important task of passing upon the validity of legislation are accidental if they exist at all.<sup>6</sup> No observer approaching such a system with unspoiled eyes could well brand it as anything but irrational. Even assuming that a far-sighted check upon legislative action is desirable,<sup>7</sup> it seems obvious that the tribunal entrusted with the high function of imposing it should consist of persons who bring together the fruits of varying mental disciplines and life experiences—a small council of the nation's wisest men and women instead of merely eminent representatives of a single profession.<sup>8</sup>

Be that as it may, a historical development<sup>9</sup> has brought it about that a Supreme Court of lawyers, whether they wish it or not, mustering what wisdom they can for the guidance of the lesser hierarchy of judges and the enlightenment of the nation, must bit by bit decide upon the constitutionality of the multitudinous aspects of the Recovery Program. In cases duly coming before them and involving specific provisions of the New Deal legislation, they are to say whether the laws shall stand or yield to constitutional restrictions invoked by private interests or by advocates of government-as-it-has-been.

The avowed considerations upon which the decisions will turn are not primarily those of statecraft. First principles of legis-

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<sup>6</sup> The matter of adapting legal education to the training of lawyers and judges who shall be equipped to comprehend the social significance of their work (in more routine affairs as well as in controversies involving the constitutionality of legislation) has, of course, received much attention of late; but as yet only a beginning has been made. See Keyserling, *Social Objectives in Legal Education* (1933) 33 *Colum. L. Rev.* 437, for a summary of what has been accomplished in this direction in certain pioneering schools. The Senate also, in considering appointments to the Federal bench, and no doubt in many instances the President in making nominations, has brought to the fore the question of the fitness of nominees to decide those questions of general economic and political importance which may come before them. In so far as these efforts to call upon well-trained men are successful, they reduce the element of chance in the securing of judges equipped to deal with matters of statecraft.

<sup>7</sup> Some objections to judicial review of legislation are excellently stated in Cohen, *Law and the Social Order* (1933) 148-161.

<sup>8</sup> For an engaging discussion of control by the Supreme Court as a government by philosophers such as Plato envisaged see Commons, *Legal Foundations of Capitalism* (1924) c. 9.

<sup>9</sup> As to the history of the doctrine of judicial review prior to the decision in *Marbury v. Madison* (1803) 1 *Cranch* 137, see 1 Warren, *op. cit.* note 3 above, 255-268 and authorities cited.

lation, such as the unworkability of foreign measures superimposed upon a body of law which cannot assimilate them,<sup>10</sup> will not be argued in court. Whether the Recovery Program is inherently unsound, a first step toward more fundamental measures, or a genuine cure for the country's ills, it will stand or fall on the basis of its relation to certain doctrines of constitutional law. The application of constitutional principles, it is true, is partly dependent upon the factual situations with which the legislature has dealt; but it is only such facts as are pertinent to the doctrines, and not all that bear upon the wisdom of the laws under attack, which may come before the courts. Equally as important as the facts, consequently, are the various schemes of ideas, or of constitutional doctrine, which the judges have under their hats and to which, consciously or unconsciously, they are inclined to insist that new legislation conform. These mental patterns, to the extent that they have become embodied in previous decisions, take on added force from the doctrine of *stare decisis*, and, until disavowed, are in effect parts of the Constitution itself, whether or not they find actual support in the text.

It is more or less generally assumed that *laissez faire* economics is written into the Constitution of the United States. If so, such a charter of economic discipline as the Recovery Program could not be sustained except by completely distorting the provisions of that document. A reading of the words, however, does not convey this impression. It is clear from the financial provisions that a monetary system is contemplated and from the power of Congress over bankruptcy<sup>11</sup> that some form of commercial enterprise was regarded as normal by the framers. That contracts were known at this time and thought to be legitimate is clear from the provision forbidding the States to enact any law impairing the obligation of contracts.<sup>12</sup> Literally nothing else in the Con-

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<sup>10</sup> See Freund, *Standards of American Legislation* (1917) p. 225 ff. As applied to the Recovery Program this principle is the juristic counterpart to the skepticism of the Socialist regarding the Recovery Program. The Socialist sees a fatal inconsistency between the basic legal structure, which gives scope to the seeking of immediate advantage through higgling in the markets, even casting a duty upon the management of corporate enterprises to serve the profits of shareholders, and the superimposed statutory "control" of the Recovery Program, which attempts to mitigate the process of mutual exploitation for the sake of long-run social objectives.

<sup>11</sup> Art I, sec. 8.

<sup>12</sup> Art I, sec. 9.

stitution gives any indication of the type of economic system which was to prevail;<sup>13</sup> and there are no limitations upon the powers of the State and Federal governments to impose such regulations upon business as seem wise to them, except those provisions which promote nationalism by limiting the power of the States to erect economic barriers on their borders.<sup>14</sup>

The entire notion, then, that the Constitution embodies the *laissez faire* economic theory has been drawn from other quarters than the words of the document. So far as the courts have subscribed to the notion, they have done so almost entirely within the past fifty years.<sup>15</sup> It is important to know the relation between the Recovery legislation and this superstructure of judicial doctrines which has been erected upon the Constitution; for it may be that more recent barriers are as unyielding as would be the words of the instrument itself.

## II. THE NATURE OF THE RECOVERY PROGRAM

An examination of the Acts of Congress which constitute the Recovery Program reveals that they are a less radical departure from previous regulatory measures than is generally supposed. The types of control which are established are not essentially different from those previously known. It is in the scope of the new measures, rather than in the nature of the governmental processes prescribed, that Congress has advanced far into new territory.

The key measures in the program are Title I of the National Industrial Recovery Act,<sup>16</sup> Title I of the Agricultural Adjustment Act,<sup>17</sup> and certain provisions relating to the national currency and credit.<sup>17a</sup> Of chief importance in the former are the provisions for "codes of fair competition," to be submitted to the President by trade or industrial associations and approved by him in his discretion, with or without modifications,<sup>18</sup> or pre-

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<sup>13</sup> Except, of course, that the carrying on of commerce is contemplated; but under whose auspices is not stated.

<sup>14</sup> Art. I, sec. 10. The fifth, or due-process, amendment plainly had no economic significance at the time it was adopted as one of the Bill of Rights.

<sup>15</sup> Corwin, *Social Planning Under the Constitution* (1932) 26 *Am. Pol. Sci. Rev.* 1.

<sup>16</sup> June 11, 1933, 73d Cong. 1st Sess. c. 90.

<sup>17</sup> May 12, 1933, 73d Cong. 1st Sess. c. 25.

<sup>17a</sup> See notes 36, 38, below.

<sup>18</sup> Sec. 3(a).

scribed in their entirety by the President.<sup>19</sup> These are enforceable by injunction proceedings,<sup>20</sup> Federal Trade Commission action,<sup>21</sup> or criminal process.<sup>22</sup> The codes shall not be the product of associations which impose "inequitable restrictions on admission to membership,"<sup>23</sup> nor "be designed to promote monopolies" or oppress small enterprises.<sup>24</sup> If necessary to prevent "destructive wage or price cutting or other activities contrary to the provisions" of the Act, the President may require licenses of business enterprises in or affecting interstate commerce, in a trade or industry affected by such practices.<sup>25</sup> If a trade or industry which is subject to a code is threatened by competition from abroad, the President may impose such fees and quotas upon importations as will eliminate the threat.<sup>26</sup> The President is given broad powers to require information from trade and industrial associations.<sup>27</sup> The purposes which are to control in the administration of the Act are stated in section 7, relating to labor standards,<sup>28</sup> and in section 1, "Declaration of Policy." Included in the latter are the elimination of the emergency, the removal of obstructions to interstate commerce, the promotion of cooperative action in industry, the suppression of unfair competitive practices, the stimulation of production, and the increase of consumption by additions to purchasing power. No administrative agencies are prescribed in the Act, but the President is given full power to establish them,<sup>29</sup> and specifically to delegate to the Secretary of Agriculture the administration of the Act as applied to agricultural-product industries.<sup>30</sup>

In the Agricultural Adjustment Act, section 1 declares an emergency in such terms as to make clear the purposes which are to control in the administration of the Act. These are: to eliminate the disparity between the prices of agricultural products and of other products so as to increase the purchasing power of farmers; to remove the danger to the national credit structure from the depreciation of agricultural assets; and to remove burdens from interstate commerce. These purposes are erected

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<sup>19</sup> Secs. 3(d), 7(c).

<sup>20</sup> Sec. 3(c).

<sup>21</sup> Sec. 3(b).

<sup>22</sup> Sec. 3(f).

<sup>23</sup> Sec. 3(a).

<sup>24</sup> *Ibid.*

<sup>25</sup> Sec. 4.

<sup>26</sup> Sec. 3(e).

<sup>27</sup> Sec. 6.

<sup>28</sup> See note, 19 ST. LOUIS L. REV. 32, below.

<sup>29</sup> Sec. 2.

<sup>30</sup> Sec. 8(b).

into a more definite guide in section 2, whereby the restoration of the purchasing power of agricultural commodities to pre-war levels by gradual stages is declared to be the policy of the Act. The mechanism for attaining this object is prescribed in sections 8 and 9, whereby the Secretary of Agriculture is empowered to make benefit payments to farmers in return for reduction of production, the money for this purpose to be raised by taxes upon the "processing"—i. e., preparation for consumption—of agricultural commodities. The taxes are to be in such amounts as, when added to the current market prices of the commodities upon which they are levied, will be the equivalent, in terms of "articles farmers buy," of the pre-war purchasing power of the same commodities. The Secretary, however, is to ascertain the probable effect of the taxes to be levied and to fix them at a lower amount if the resulting high prices would be likely to cause an accumulation of stocks or if a shifting of the incidence to the farmer might take place. If demand is shifted to competing products, "compensatory taxes" may be levied upon them.<sup>31</sup> Similarly, competing imports may be taxed.<sup>32</sup> The Secretary is given power to license processors and handlers of agricultural products in interstate commerce,<sup>33</sup> to make necessary rules and regulations,<sup>34</sup> and to appoint officers and employees to carry out the Act.<sup>35</sup>

In the management of the nation's currency and credit, the President is given powers not dissimilar to the foregoing. He is authorized in times of emergency to regulate and prohibit foreign exchange transactions, transfer of credit between banks, and the hoarding of money.<sup>36</sup> Whenever parities are unduly disturbed or foreign commerce is adversely affected by changed relationships between the currencies of the United States and of other countries, and whenever an "economic emergency" requires an expansion of credit, the President is authorized to enter into arrangements with the Federal Reserve authorities to purchase securities of the United States;<sup>37</sup> to cause the Treasury to purchase such securities with United States notes (paper money)

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<sup>31</sup> Sec. 12(d).

<sup>34</sup> Sec. 10(c) (d).

<sup>32</sup> Sec. 15(e).

<sup>35</sup> Sec. 10(a).

<sup>33</sup> Sec. 8.

<sup>36</sup> Mar. 9, 1933, c. 1, sec. 2.

<sup>37</sup> As to the purpose of these "open market" operations see Reed, *The Development of Federal Reserve Policy* (1922) c. 9.



to an amount not exceeding \$3,000,000,000; to fix the content of the gold and silver dollars for the purpose, among others, of stabilizing prices; and to establish the relation of the United States and foreign currencies by international agreement.<sup>38</sup>

Thus the following aspects of the country's economic life are subjected in the recovery legislation to governmental control: (1) competitive practices; (2) wages and employment conditions; (3) the relation between production and consumption in the domestic economic system; (4) foreign trade; and (5) the supply of currency and credit.<sup>39</sup> As an important supplementary power, the authority to borrow money for the purpose of injecting capital expenditures into the country's economic life through the public works program, is conferred upon the President.<sup>40</sup> Although many of the powers thus vested in the executive are expressed to be temporary,<sup>41</sup> the reasoning behind them would lead as validly to their permanent exercise with the object of avoiding economic maladjustments and eliminating long-time evils.

Thus, under the Recovery Program, powers are conferred upon the executive for the two-fold purpose of eliminating or preventing abuses in the conduct of business and of coordinating economic activity for purposes defined by Congress. In the pursuit of the former objective, voluntary action by trades and industries and by labor is invoked, subject to official approval and with enforcement under official auspices. The objective of co-

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<sup>38</sup> May 12, 1933, 73d Cong. 1st Sess. c. 25, tit. III, sec. 43, as amended June 5, 1933, c. 48, sec. 2.

<sup>39</sup> The credit and currency features of the recovery legislation are, of course, supplementary to those of the Federal Reserve Act, which authorized open-market operations by the Federal Reserve Banks (the President, of course, having no function in that connection). 38 Stat. 264 (1912), 12 U. S. C. sec. 355. More significant, supposedly, is the provision authorizing the Federal Reserve banks, subject to review by the Federal Reserve Board, to establish "rediscount rates" for their purchases of commercial paper (*ibid.*, 12 U. S. C. sec. 357), thereby enabling them to establish by fiat the interest rates to be charged commercial banks and to influence the rates exacted of business enterprises by the latter. The Federal Reserve Board has power, also, to suspend the reserve requirements of the Act, thus permitting emergency expansion of currency and credit. *Ibid.*, sec. 16, 12 U. S. C. sec. 248(c). In addition, the Federal Reserve Banks have had it in their power from the beginning to be more or less strict in their purchases of commercial paper. *Ibid.*, sec. 13, 12 U. S. C. sec. 343.

<sup>40</sup> National Industrial Recovery Act, note 16 above, Title II.

<sup>41</sup> N. I. R. A. secs. 2(c), 4(b); A. A. A. sec. 13.

ordination is to be attained largely by official action of a technically expert character. Fundamental to the attainment of both objectives is constant supervision and control of economic enterprises and of market phenomena by trained governmental agents, charged with the duty of serving social purposes.

Such a system of supervision and control is in effect an extension over a wider field of previously developed administrative techniques. The growth of "administrative powers over persons and property"<sup>42</sup> and of "administrative justice"<sup>43</sup> is commonplace in recent legal literature.<sup>44</sup> By and large that growth, as it affects economic activity,<sup>45</sup> has represented an effort to eliminate abuses by owners of businesses and of property, and to allot their just dues, expertly ascertained, to claimants of economic goods. Until the Recovery Program was enacted, these extensions of administrative control, except during the World War, operated only in limited fields and with reference to specific matters. Under the Recovery Program they are applied to the entire economic system. Until recently it appeared sufficient to safeguard and mediate between the interests attaching to the railroads;<sup>46</sup> to eliminate specific unfair methods of compe-

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<sup>42</sup> The phrase is the title of a book by Freund (1928) containing an analysis of executive control of "private" activity.

<sup>43</sup> See Dickinson, *Administrative Justice and the Supremacy of Law* (1927).

<sup>44</sup> *The Growth of American Administrative Law* (St. Louis, 1923); Pound, *The Administrative Application of Legal Standards* (1919) 44 A. B. A. Rep. 445; Robson, *Justice and Administrative Law* (1928). In England extreme views in books which purport to be serious presentations of the development are more common than in the United States. See Hewart, *The New Despotism* (1929).

<sup>45</sup> The similar resort to administrative powers in non-economic fields occurred principally in reference to matters of health and safety and in the management of public property and the conduct of governmental enterprises. As to the former, see Freund, *op. cit.* note 42 above, cc. 24, 25. As to the latter, see Dickinson, *op. cit.* note 43 above, c. 10. When a governmental enterprise is in an area traditionally occupied by business, the economic field has, of course, been entered. Most important among the governmental enterprises which thus far have called for the exercise of executive discretion is the fighting of a war. The economic ramifications of modern warfare led during the World War to economic controls which bear a striking similarity to many of those embodied in the Recovery Program. See note (1933) 33 Colum. L. Rev. 1197 for an excellent summary of war-time administrative methods in the United States.

<sup>46</sup> The powers of the Interstate Commerce Commission, as they have developed, are directed toward assuring an adequate transportation system to the country, eliminating discrimination in the conduct of the carriers, and allocating revenues and establishing rates in such manner as will best serve

tition after they had cropped up;<sup>47</sup> to take steps to prevent stoppages of production through strikes and lockouts where labor disputes had reached an acute stage;<sup>48</sup> to safeguard consumers and workers against gross abuses of power at the hands of the owners of businesses;<sup>49</sup> and to exert a rather limited control over credit and currency.<sup>50</sup> Now it seems necessary to guard in advance against unfair competition and oppression of consumers and workers throughout industry and trade; to encourage widespread collective bargaining by labor under safeguards;<sup>51</sup> to hold the balance between farmers, producers in other fields, and consumers; to provide flexible adjustment of importation to domestic production; and to "manage" the currency. The advance is of deep significance, legally as well as otherwise; but the types of difficulties sought to be overcome are the same and the administrative methods invoked are not essentially different.<sup>52</sup>

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the interests of shippers, investors, and communities. In carrying on its duties the Commission, employing its expert discretion, secures "realistic adjustments, based upon a full knowledge and consideration of the facts, carefully balanced conclusions, grounded in an impartial appreciation of the complexity of the interests involved, and permanently significant and independent determinations, free from the makeshifts that spring from pressure of temporary discontent and from fear of political prestige." 1 Sharfman, *The Interstate Commerce Commission* (1931) 286. See the entire c. 7 and 2 *ibid.*, c 10 for a more complete characterization of the Commission's methods.

<sup>47</sup> Henderson, *The Federal Trade Commission* (1924) 71-77. As respects consequences such as monopoly, which might grow out of the methods indulged in, the work of the Commission is, of course, preventive. *Ibid.*, 17-44.

<sup>48</sup> *Kansas Industrial Court Act*, declared unconstitutional in *Wolff Packing Co. v. Ct. of Industrial Relations*, note 4 above.

<sup>49</sup> *Pure Food and Drug Act*, 34 Stat. 768 (1906) 21 U. S. C. The D. C. minimum wage act, declared unconstitutional in *Adkins v. Children's Hospital*, note 4 above, provided for the establishment of minimum wages for women by an administrative commission. See also *State v. Lange Canning Co.* (1916) 164 Wis. 228, 160 N. N. 57.

<sup>50</sup> See the powers lodged in the Federal Reserve authorities, note 39, above.

<sup>51</sup> N. I. R. A., secs. 7(a), 7(b); *op. cit.* note 28 above.

<sup>52</sup> For an excellent demonstration of the continuity between administrative methods under the Recovery Program and prior legislation see Wahrenbrock, *Federal Anti-Trust Law and the National Industrial Recovery Act* (1933) 31 Mich. L. Rev. 1009. To point out that the administrative methods authorized by the recent Acts of Congress are based upon experience is not, of course, to assert their adequacy. Not only may the task imposed upon the executive be fundamentally impossible of performance, as pointed out above (note 10), but avoidable weaknesses in administration may develop. Reliance may be placed upon a personnel which is inadequate in size or in capacity, or there may be lack of coordination among the various administrative agencies.

## III. PERTINENT CONSTITUTIONAL QUESTIONS

Naturally a legislative program which draws upon previous experience raises constitutional issues that can easily be identified. It has been pointed out that three main questions arise with reference to the constitutionality of the Recovery Program.<sup>53</sup> These are: (1) the power of Congress to legislate with reference to the conduct of businesses within the several states; (2) the power of Congress to delegate to the executive such wide discretionary powers as those contained in the more important Recovery Acts; and (3) the question of whether, assuming the power of Congress to legislate with reference to the affairs covered, the regulatory powers embodied in the several Acts are not so drastic as to deprive affected persons and corporations of their property without due process of law.<sup>54</sup> The latter question resolves itself into two subquestions—(a) whether the degree of interference with private activity which the Acts authorize is an unconstitutional invasion of liberty and property and (b) whether the administrative procedure which is called for by the Acts contains those safeguards that are essential to due process.

As regards the precedents which bear upon these questions much has been written. Thus it is well understood that the power of Congress to regulate business activity is incident to its power to "regulate commerce with foreign nations and among the several States."<sup>55</sup> Among its "implied powers"<sup>56</sup> is that of legislating with reference to matters "affecting" interstate com-

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<sup>53</sup> See Handler, *The National Industrial Recovery Act (1933)* 19 A. B. A. J. 440; Wahrenbrock, *op. cit.*; note (1933) 47 Harv. L. Rev. 85.

<sup>54</sup> At least one other important question is involved—that of the power of Congress to spend Federal money for bounties to farmers under the Agricultural Adjustment Act, for public works in the local communities under Title II of the N. I. R. A., and for relief purposes under the Federal Emergency Relief Act, May 12, 1933, 73d Cong. 1st Sess., c. 30. It is doubtful whether the question can be raised in court and unlikely, even if it can, that the courts would pass judgment upon the action of Congress in authorizing expenditures. See Corwin, *The Spending Power of Congress (1923)* 36 Harv. L. Rev. 548. Compare *U. S. v. Realty Co.* (1896) 163 U. S. 427, at 432-433; note (1933) 33 Colum. L. Rev. 1036.

<sup>55</sup> Const., Art. I, sec. 8.

<sup>56</sup> *Ibid.* "The Congress shall have power . . . To make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

merce.<sup>57</sup> The farthest extension of Congressional power over business activities within the several States is in the Anti-Trust Acts, which regulate the ownership and the price and production policies of manufacturing and trading enterprises upon the theory that these aspects of economic endeavor vitally affect interstate commerce.<sup>58</sup> Competitive practices are equally subject to the Federal power.<sup>59</sup> Much of the content of the codes of fair competition falls under these heads. The quantity of agricultural production seems as intimately connected with the volume of interstate commerce as the foregoing matters, so that its control by Congress is justified; and it appears no less possible to demonstrate a close relation between the purchasing power of consumers and the flow of commerce.<sup>60</sup> Farmers and salary and wage earners constitute the great mass of consumers, whose expenditure are determined by their incomes. Federal legislation with reference to those incomes seems therefore to be well grounded in fact and in constitutional doctrine; and it appears to be immaterial whether the enterprises from which these incomes are derived are engaged in interstate commerce or not.<sup>61</sup>

Control by Congress of the nation's currency and credit is founded not only upon the intimate relation of finance to interstate commerce but also upon the specific power "to borrow money upon the credit of the United States" and "to coin money [and] regulate the value thereof and of foreign coin."<sup>62</sup> It has long

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<sup>57</sup> An important point also is the question of what constitutes interstate commerce itself. On the whole a broad construction of the term has been followed, so that it is understood to include "traffic," communication, and intercourse, as well as "trade." See Corwin, *Congress' Power to Prohibit Commerce, a Crucial Constitutional Issue* (1933) 18 *Corn. L. Q.* 477; cases cited in note, (1933) 19 *St. Louis L. Rev.* 25, below.

<sup>58</sup> The connection between these matters and interstate commerce was at first denied by the Supreme Court but is now unquestioned. See Fuchs, *Legal Technique and National Control of the Petroleum Industry* (1931) 16 *St. Louis L. Rev.* 189, at p. 199; Wahrenbrock, *op. cit.* note 52 above, 1047 ff.; Corwin, *op. cit.* note 57 above, at p. 501, for discussions of the cases.

<sup>59</sup> Note 47 above.

<sup>60</sup> See Wahrenbrock, *op. cit.* note 52 above, 1054 ff. for a good brief statement of this reasoning.

<sup>61</sup> Regulating the prices and competitive practices of local businesses such as barber shops and dyeing and cleaning establishments is more difficult to bring within the scope of the Federal power. Invalidating the application of the N. I. R. A. to these aspects of the conduct of such enterprises would seem not to impair materially the effectiveness of the Recovery Program. See 1 *U. S. News* 484:1 (Dec. 11, 1933).

<sup>62</sup> *Const.*, Art. I, sec. 8.

been settled that the entire banking and credit system is so intimately connected with the credit of the United States and the value of its currency as to subject it to the Federal power.<sup>63</sup>

The constitutionality of conferring broad discretionary authority upon the executive has been disputed upon the ground that such authority is essentially legislative and hence cannot be delegated by the Congress in which it is reposed by the Constitution. The question is not a judicial one with reference to broad areas of executive power, including some that are marked out by the recovery legislation. Thus the power of the President under the National Industrial Recovery Act and of the Secretary of Agriculture under the Agricultural Adjustment Act to create the administrative agencies and fix the salaries and duties of the officers who are to carry out these Acts<sup>64</sup> does not raise litigable questions of private right.<sup>65</sup> Similarly the rule-making power of the President and the Secretary<sup>66</sup> cannot be called in question before a court in so far as it is exercised merely to direct subordinate officials in the performance of their duties or to lay down procedures for the administration of the Acts.<sup>67</sup> Probably the same point holds good with reference to the discretion of the Secretary of Agriculture in determining the bases of the payments to farmers under the Agricultural Adjustment Act, since no vested right to such payments is created by the Act. It is only when the discretionary power of the executive operates upon private persons and property, as in the promulgation and enforcement of codes of fair competition, the fixing of import duties, or the levying of the processing tax, that the question of the constitutionality of the delegation of discretion can become a judicial one. In this connection at least two situations must be distinguished.

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<sup>63</sup> *McCulloch v. Maryland* (1819) 4 Wheat. 316; *Veazie Bank v. Fenno* (1869) 8 Wall. 533; *First National Bank v. Fellows* (1917) 244 U. S. 416.

<sup>64</sup> Notes 29, 35, above.

<sup>65</sup> Compare *Wetzel v. McNutt* (D. C. Ind. 1933) 4 F. Supp. 233. Similarly no question can be raised under the Economy Act, Mar. 20, 1933, 73d Cong. 1st Sess., c. 3, authorizing the President to reduce the salaries of Federal employees and the compensation of veterans, since the recipients of these payments have no vested rights to them.

<sup>66</sup> Note 34 above; N. I. R. A. sec. 10.

<sup>67</sup> See Goodnow, *Principles of the Administrative Law of the United States* (1905) 84-89, 143; Fairlie, *Administrative Legislation* (1920) 18 Mich. L. Rev. 181, for useful brief summaries of the executive rule-making power and the types of situations to which it is applied.

In the first of these situations the so-called exercise of discretion by the executive consists largely of the ascertainment of facts which the legislature has specified as the basis upon which future official action shall rest. Of this variety is the function of the Secretary of Agriculture in fixing the amount of the processing tax.<sup>68</sup> He is expected to set the tax according to the statistical measures prescribed, and he exercises scientific judgment in getting at the facts rather than a choice of policies. There can be little doubt of the constitutionality of delegating this type of authority to the executive.<sup>69</sup>

In deciding whether to pay benefits to the producers of a particular commodity and therefore to levy a tax upon its processing, on the other hand, the Secretary must decide what course will be beneficial in the light of the purposes of the Act and what payments will be "fair and reasonable." Hence he makes real decisions of policy—i. e., choices based upon consideration of future benefits and losses. Of a similar sort are the decisions of the President in determining whether to give approval to codes and what conditions to insist upon. His judgments as to competitive practices, wages, and hours of labor are not directed by statistical formulas but are based in part upon a choice of the interests to be served. The interests of employers, workers, or consumers may be given precedence in particular matters upon the ground that they coincide most nearly with the public purpose of Congress as embodied in the Act.

The choice of interests to be served in these decisions of the Secretary and the President obviously is not unlimited. Hence the discretion of the executive is not "full" or "plenary." In its essence it is an "expert" discretion,<sup>70</sup> based upon informed ap-

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<sup>68</sup> See the text preceding note 31, above.

<sup>69</sup> *Hampton & Co. v. United States* (1928) 276 U. S. 394 and cases cited.

<sup>70</sup> See Freund, *op. cit.* note 42 above, p. 71 ff, for an analysis of several types of discretion. The "mediating" discretion which is there distinguished is also "expert" in nature where it is exercised by officials who are versed in the matters with which they deal. Under some circumstances it is possible to invoke a judicial check upon an exercise of executive discretion which has been based upon broader considerations of policy than those specified or implied in the statute. Thus in *Southern Pacific Co. v. United States* (1911) 219 U. S. 433, the Court reversed a decree of the lower court dismissing a bill to enjoin the enforcement of a rate order of the Interstate Commerce Commission, upon the ground that the Commission had based its order upon considerations of fairness to an affected industry in a given locality, whereas

praisal of existing facts and tendencies in relation to the legislatively-prescribed policy. It is reposed in the executive because nowhere else in the government is the necessary expertness available; nor is it possible by other means to achieve the flexibility of regulation which the rapid tempo and the complexity of modern life demand. If the legislature continues in the name of the community to perform the vital function of specifying goals to be sought after, it cannot be said to abdicate its functions.<sup>71</sup>

The due-process objection to the constitutionality of the Recovery Program, in so far as it is based upon the degree of judicial interference with private interests which the Acts authorize, cannot be disposed of on the basis of precedents or legal rules. Due process of law as a criterion of the validity of substantive legislation has no definite content that can be made use of in predicting judicial decisions.<sup>72</sup> Its availability to the courts simply affords them an opportunity to give effect to their views of the reasonableness of legislative action in matters of disputed social policy. No precedents or principles exist which furnish more worthy guides to the probable views of the judges than the

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its power extended only to issuing orders based upon the justness and reasonableness of a rate "in and of itself." In substance, the decision of the Court attempted to confine the Commission's discretion to railroading factors which were deemed to be within its expert competence, such as cost of rendering service, competition with other forms of transportation, etc. Subsequent attempts, by legislation and otherwise, to procure a modification of the Court's attitude in the interest of economic planning or of consideration for distressed interests have not met with success. *United States v. New York Cent. R. Co.* (1924) 263 U. S. 603; *Anchor Coal Co. v. Interstate Commerce Commission* (D. C. W. Va. 1928) 25 F. (2d) 462, 279 U. S. 812; *Ann Arbor R. Co. v. United States* (1930) 281 U. S. 658. See note (1931) 40 *Yale L. J.* 600.

<sup>71</sup> Thus the distinction is apparent between the Acts constituting the Recovery Program, where Congress has specified the direction in which the country is to go, and a possible act in which Congress sought to cast upon the executive the two-fold duty of deciding whether a predominantly agricultural or predominantly industrial nation would be better for the general welfare and of shaping economic policies accordingly. Upon the presence of a legislative choice of ends, which is to be drawn from all of the provisions of an Act, rather than upon the conformity of specific words of guidance to supposed judicial requirements of definiteness, the question of whether legislative power has been delegated should turn. *N. Y. Central Securities Corp. v. United States* (1932) 287 U. S. 12. Compare note (1933) 19 *St. Louis L. Rev.* 46, below.

<sup>72</sup> Freund, *op. cit.* note 10 above, p. 220; *People v. Nebbia* (1933) 262 N. Y. 259, 186 N. E. 694.



mystic phrase itself.<sup>73</sup> Surveys of past decisions make interesting reading,<sup>74</sup> revealing as they do conflicting cases upon every proposition that can be formulated to include more than a single fact situation;<sup>75</sup> but the future cannot be charted from these pronouncements of the courts. Hence, even if it were otherwise valid to do so, it would be of no aid to break down the powers conferred in the Recovery acts into specific types of authority, such as authority to fix prices, establish wages and hours of labor, limit production, or strike down economic coercion of employees, and to endeavor to determine the constitutionality of each.

It would, however, be entirely fallacious to consider the constitutionality of component parts of the Recovery Program without reference to the whole structure of powers conferred by Congress. The fact that the legislature has come to grips with the entire economic problem alters the setting of each regulatory provision to a degree which makes the provision quite unlike previous attempts to exert superficially similar powers. It is one thing to throw sub-standard employees out of work by setting minimum wages, without other provision for their subsistence; to fix the prices of particular commodities or services without accompanying effort to hold costs to corresponding levels; or to establish wages and employment conditions through compulsory arbitration in a particular State at levels which appear to be a handicap in the face of interstate competition. It is quite another thing to impose similar controls, together with many others, upon substantially all parts of the economic system simultaneously in an effort to obtain desired results. Whether one approve or disapprove of judicial conservatism in such matters, one can hardly fail to grant that in a competitive order where each must fend for himself there is justification for the declaration of a unanimous Court that according to the Constitution

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<sup>73</sup> The attitude of certain judges can be ascertained with greater definiteness than the tendencies of an entire court or the tenets of "the law." Yet the essential liberty of women workers to contract for low wages has no counterpart in the mind of the same Justice in a guaranteed freedom to contract for long hours of work. Compare *Adkins v. Children's Hospital*, note 4 above, with *Radice v. New York* (1924) 264 U. S. 292.

<sup>74</sup> Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 Harv. L. Rev. 943.

<sup>75</sup> Compare Fuchs, *op. cit.* note 4 above, at 196-197.

"freedom is the general rule, and restraint the exception."<sup>76</sup> That justification lies in the danger of discrimination against particular private interests, and it exists to a much less degree where the legislature provides for the evaluating and safeguarding of all pertinent claims in the light of declared purposes. The plea for legislative authority to adopt the method of economic planning, which won the adherence of but two justices in the only case in which it has been explicitly put forward,<sup>77</sup> sounds more prophetic than pertinent when applied to the action of a single state legislature with reference to a single industry. It is strictly applicable to the action of Congress in adopting the Recovery Program, and nothing in the Supreme Court's past decisions constitutes a precedent for its rejection.<sup>78</sup>

The procedural aspects of the question of due process, when applied to the Recovery Program, present a more complex pattern. Two sets of problems arise in this connection. The first of these relates to the sufficiency of the notice and hearing accorded to affected parties in connection with administrative acts. The second set of problems concerns the extent of review by the judiciary of the administrative determination upon which such acts are based.

Upon the former point, administrative acts which are clearly of the rule-making variety may be put to one side. In connection with acts affecting large numbers of partly unknown parties it is manifestly impossible to give advance notice to each, and there is no requirement that this be done.<sup>79</sup> If a hearing is accorded,

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<sup>76</sup> *Chas. Wolff Packing Co. v. Court of Industrial Relations*, note 4 above, at p. 534.

<sup>77</sup> *New State Ice Co. v. Liebmann* (1932) 285 U. S. 262, Brandeis and Stone, JJ. dissenting.

<sup>78</sup> On the contrary, the door seems open to the substitution of governmental for private enterprise and to the destruction of the latter by public competition to whatever extent the legislative power may think fit. *Green v. Frazier* (1920) 253 U. S. 233. It is difficult to see why the lesser step of introducing administrative control over private enterprise, with conscientious weighing of affected interests, should be deemed to violate the Constitution.

<sup>79</sup> *McMillan v. Sims* (1925) 132 Wash. 265, 231 Pac. 943; *Bi-Metallic Inv. Co. Colorado* (1915) 239 U. S. 441; *Assigned Car Cases* (1927) 274 U. S. 564. Borderline cases of course arise in which an administrative order, although general in form, so prominently affects a particular party as to be "quasi-judicial" in relation to that party and to require the according of notice and hearing to him. As to rate orders affecting utilities see *Chi., Milwaukee & St. P. R. Co. v. Minn.* (1890) 134 U. S. 418; *Interstate Commerce*

it is as a matter of grace or for the information of the responsible authorities, and no constitutional requirements exist with reference to the type of hearing extended.<sup>80</sup> The Recovery Acts are generous in their provision for hearings in advance of "quasi-legislative" administrative action.<sup>81</sup>

As respects administrative acts of more restricted application, affecting matters of private right and involving substantial fact determinations, notice and hearing in advance of enforcement are essential to due process unless the urgency of immediate action forbids.<sup>82</sup> There are few if any lapses in the recognition of this right in the essential Recovery measures.<sup>83</sup>

Constitutional requirements as to review of administrative determinations by the judiciary, under a recent decision, include the demands not only of due process of law but also of the preservation of the judicial function.<sup>84</sup> Upon the latter ground it is held that in "cases of private right" certain "jurisdictional" facts, while their determination in a preliminary way by administrative officials may be provided for, must be left to the courts

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Comm. v. L. & N. R. Co. (1913) 227 U. S. 88. Compare Commonwealth v. Sisson (1905) 189 Mass. 247, 75 N. E. 619.

<sup>80</sup> Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294.

<sup>81</sup> Thus, as against any other interests than those fairly represented by the proponents of a code, the President is required to accord a hearing before approving it. N. I. R. A. sec. 3(a). So before promulgating a code which he prescribes the President is directed to accord "such public notice and hearing as he shall specify." *Ibid.*, secs. 3(d), 6(c). So as to the imposition of duties and quotas upon imports. *Ibid.*, sec. 3(e). Under the Agricultural Adjustment Act, although the processing tax may be levied according to the statutory statistical formula without notice or hearing, subsequent revisions and the imposition of compensatory taxes must be preceded by these formalities. A. A. A. secs. 9(a), 15(d).

<sup>82</sup> Bratton v. Chandler (1922) 260 U. S. 110; Missouri ex rel. v. North (1926) 271 U. S. 40; Brewer v. Valk (1933) 204 N. C. 186, 167 S. E. 638; Londoner v. Denver (1908) 210 U. S. 373; Heidenway v. Harding (1929) 336 Ill. 606, 168 N. E. 630; Chi., Milwaukee & St. P. R. Co. v. Minn., note 79 above.

<sup>83</sup> Thus under the Agricultural Adjustment Act licenses of processors and handlers of agricultural products can be revoked only after "due notice and opportunity for hearing." Sec. 8(3). Since issuance of licenses almost necessarily involves applications and consideration thereof, it may be inferred that a hearing must be accorded before final refusal. So of licenses to parties engaged in a branch of interstate commerce for which the licensing requirement is put into effect. N. I. R. A. sec. 4(b). Enforcement of the codes of fair competition in court or by Federal Trade Commission action necessarily involves formal notice and hearing.

<sup>84</sup> Crowell v. Benson (1932) 285 U. S. 22.

for final determination, either upon trial *de novo* or upon review of the administrative record.<sup>85</sup> Due process, on the other hand, requires that in any class of case arising before administrative authorities there shall be opportunity for judicial determination of facts bearing upon an issue of constitutional right.<sup>86</sup> If statutory procedure for procuring such a determination is not available, common law or equitable remedies may be employed.<sup>87</sup> And it is well settled that administrative determinations of law may be judicially reviewed unless, in matters not affecting private right, a statute specifically prevents.<sup>88</sup>

In proceedings to enforce codes of fair competition under the National Industrial Recovery Act, either by means of injunction suits, by Federal Trade Commission action, or by criminal prosecution, pertinent questions of constitutional right may receive judicial determination. Clearly the promulgation of such codes, being quasi-legislative because of the large number of parties affected, involves no matters which the Constitution requires to be judicially determined. Moreover it is probable that threats to inflict irreparable damage by enforcing unconstitutional provisions in codes may be made the basis of injunction proceedings,<sup>89</sup> while the collection of a processing tax not levied in accordance with law might be followed by a suit to recover the amount paid.<sup>90</sup> As regards license revocation, the provisions of both the National Industrial Recovery Act and the Agricultural Adjustment Act are to the effect that revocations "shall be final if in accordance with law."<sup>91</sup> It will require a judicial determination that

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<sup>85</sup> Trial *de novo* was held authorized by the statute in *Crowell v. Benson* because of the supposed incidents of injunction proceedings, specified as the mode of review. What are cases of private right doubtless will come to be known through a "process of judicial inclusion and exclusion." For the present they include employees' compensation proceedings and do not include tax proceedings, proceedings before utilities commissions, and cases arising out of the administration of public services.

<sup>86</sup> *Ohio Valley Water Co. v. Ben Avon Borough* (1920) 253 U. S. 287; *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420, at 443-444.

<sup>87</sup> *Ng Fung Ho v. White* (1922) 259 U. S. 276; *Lloyd Sabauo Societa v. Elting* (1932) 287 U. S. 329; *Federal Radio Comm. v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266.

<sup>88</sup> *Albertsworth, Judicial Review of Administrative Action* (1921) 35 *Harv. L. Rev.* 127; *Freund*, op. cit. note 42 above, p. 289; *Dickinson*, op. cit. note 43 above, 49 ff.

<sup>89</sup> *Lipke v. Lederer* (1922) 259 U. S. 557.

<sup>90</sup> 26 U. S. C. sec. 156; A. A. A. sec. 19.

<sup>91</sup> N. I. R. A. sec. 4(b); A. A. A. sec. 8(3).

an erroneous revocation which threatens unconstitutionally to destroy a business is not in accordance with law, to preserve the essentials of judicial review in this class of cases. Here, as in connection with refusal of a license, an injunction suit to prevent interference with the conduct of the unlicensed business doubtless will lie where the withholding of the license is unlawful.<sup>92</sup>

#### IV. THE SUFFICIENCY OF THE JUDICIAL PROCESS

It is apparent that in the United States the judicial process is a part of the entire governmental process whereby problems of economic control must be attacked. At present it is a weak, or at least an uncertain, link in the chain of official action. The formulation of policy by the executive and by Congress has proceeded with great resourcefulness. Legislative draftsmanship as exemplified in the Recovery measures appears to be of a high order of merit. Administrative methods as thus far developed possess at least the merit of adaptability.<sup>93</sup> Success in procuring satisfactory judicial decisions, however, is dependent upon a technique of presenting cases in court and of procuring their adequate consideration which can scarcely be said to have been worked out. Minimum requirements appear to be, first, the marshalling of pertinent facts in such a way that their significance will be revealed to the courts<sup>94</sup> and, second, the litigating of cases at such times and in such order that favorable decisions are most likely to be forthcoming. Both requirements seem to call for an organized legal strategy on the part of the Government under the direction of the Attorney General and the

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<sup>92</sup> No question as to the propriety of such procedure was raised in *Brougham v. Blanton Mfg. Co.* (1919) 249 U. S. 495.

<sup>93</sup> In so far as administration turns out to be inadequate it may be in part because of judicial unwillingness to concede necessary powers in the crucial matter of obtaining information. The National Industrial Recovery Act contains adequate provisions to aid the administration in this respect. Secs. 3(a), 6(c). If the Supreme Court insists, as heretofore, that the production of only such books and documents as can be alleged to be pertinent to suspected violations of law may be compelled under the Fourth Amendment, the administration will be helpless. *Fed. Trade Comm. v. American Tobacco Co.* (1924) 264 U. S. 298. Here as elsewhere, however, the substitution of a controlled economy for the system of cut-throat competition in business may affect criteria of reasonableness. Continuing supervision under the authority of Congress would seem to carry with it powers of investigation approaching those of Congress itself. *McGrain v. Daugherty* (1927) 273 U. S. 135; *Sinclair v. United States* (1922) 279 U. S. 263.

<sup>94</sup> Fuchs, *op. cit.* note 4 above.

Solicitor General, with continuous gathering of data for legal purposes and a planned docket. Whether such a strategy exists at present, it is impossible to say.<sup>95</sup> Past methods lend no encouragement to the belief that it does.<sup>96</sup>

If the judicial mind turns out to be adequate to the task of assimilating the Recovery Program to the American constitutional system, the result will be a tribute to the adequacy of the process of selecting the judiciary and to the effect of public office upon social attitudes. Certainly the intellectual milieu from which the judges come, supplied by the Bar, is outrageously hostile to economic and social change. Perhaps subservience to the supposed wishes of clients accounts in part for the opposition of the American Bar Association to so mild a reform as the proposed child labor amendment to the Federal Constitution. It is probable, however, that the resolution of the Association, adopted at its meeting in August, 1933, represents an emotional attachment to a familiar distribution of governmental powers.<sup>97</sup> In either event the effect is blighting and offers a sorry contrast to the attitude of other elements in the community.

The courts themselves have recently given evidence of a greater sense of realism. The Supreme Court's appreciation of the significance of facts in the determination of constitutional questions has been noted previously.<sup>98</sup> The frank statement in an important case that experience with a statute which has been upheld as constitutional may lead to a declaration of its invalidity<sup>99</sup> is a proposition that cuts both ways.<sup>100</sup> In dealing with a feature of essential importance in the Recovery Program itself a Federal court has declared that, "The due process clause in such a situation cannot

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<sup>95</sup> The present Attorney General is quoted as saying that "All in good time, I suppose these matters will be argued out before our courts." 19 A. B. A. J. 578 (1933).

<sup>96</sup> In the enforcement of the Anti-Trust Acts there has in the past been almost complete lack of coordination between the Department of Justice and the Federal Trade Commission despite explicit statutory provision for mutual aid. Keezer & May, *Public Control of Business* (1930) 35-38.

<sup>97</sup> 19 A. B. A. J. 557 (1933). The amazing inaccuracy of the Association's resolution in expressing opposition "on the ground that the Constitution should not be encumbered by prohibitory legislation" lends color to the latter view. Opposition that was shrewdly calculated would scarcely discredit itself through such a characterization of an enabling amendment.

<sup>98</sup> Fuchs, *op. cit.* note 4 above.

<sup>99</sup> *Abie State Bank v. Bryan* (1931) 282 U. S. 765.

<sup>100</sup> (1931) 40 Yale L. J. 1191.

properly be construed to obstruct the national policy. Neither the Constitution nor the due process clause requires the perpetuation of conditions which impair the national vitality."<sup>101</sup> The real danger, however, lies less in the direction of a flat-footed declaration that the entire program, or even a particular provision of substantive law, exceeds the power of Congress than in the strong possibility that the Supreme Court will unduly hamper the administration of the Recovery Program by insisting upon procedural technicalities. A decision at the present term of court is disquieting in this connection.<sup>102</sup> It would not be difficult in this way to cast discouragement upon the effort to devise adequate governmental means of economic control.

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<sup>101</sup> *United States v. Calistan Packers* (D. C. Cal. 1933) 4 F. Supp. 660.

<sup>102</sup> *Southern Ry. Co. v. Commonwealth ex rel.* (1933) 54 S. Ct. 148. The Court held that judicial review in an injunction suit, available to the carrier on the ground of arbitrary action, would not save the constitutionality of a statute providing for orders, without advance notice and hearing, that grade crossings be eliminated. Thus not only before an administrative order is enforced, but even before it is made, notice and hearing must be accorded if the order may turn out to be confiscatory and if an emergency requiring immediate action is not present. Judicial redetermination of questions of constitutional right must also be permitted. Note 80 above; *Lehigh Valley R. Co. v. Board of Utility Comrs.* (1928) 278 U. S. 24. The same tendency needlessly to hamper administrative processes has been manifested in *Crowell v. Benson*, note 84 above, and in the judicial review of Federal Trade Commission determinations which the Supreme Court has insisted upon. See note (1930) 16 *St. Louis L. Rev.* 55.