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JUDICIAL METHOD AND THE CONSTITUTIONALITY OF THE N. I. R. A.

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I. THE LIABILITY TO ERR

"Unless we allow for the innate capacity of the human mind to entertain contradictory beliefs at the same time, we shall in vain attempt to understand the history of thought," says a learned student of the subject.[1] It is not irreverent to suggest that even the wisest Supreme Court justices, in common with the rest of mankind, including critics of the Court and commentators upon its decisions, are possessed of this capacity. If the suggestion be true, it is futile to expect consistency in a body of decisions upon constitutional questions or any other questions. Excessive praise and excessive blame are alike inappropriate in discussions of the work of the Court. The basis for praise is likely at any time to be withdrawn by some unaccountable yielding on the part of the Court to an idea which negatives those that have prevailed before; and there is little justification for blaming men whose minds are subject to a well-nigh universal limitation. Criticism, however, may serve to reveal error even where the critic has made mistakes of his own. It is not improper or unfair to point out that less liability to err seems to prevail in some quarters than in others or that too much power reposes in a single fallible tribunal. Recent decisions which bear upon the constitutionality of the National Industrial Recovery Act confirm the view that the validity of major regulatory measures in the eyes of the Supreme Court of the United States hinges upon

[1] Frazer, The Golden Bough, at 5, quoted in Adams, The Founding of New England, at 68.

hazardous factors to which the fate of the nation cannot wisely be trusted.[2]

As has been pointed out previously in these pages,[3] three main questions of constitutionality are raised by the Recovery Program of the present administration. 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 repose a wide discretion in the President in his exercise of delegated rule-making powers; and (3) the limitations of due process in respect to the controls imposed upon private interests, with reference to (a) the degree of interference involved and (b) the procedure employed in administration. It is the National Industrial Recovery Act which at the present writing is the focus for the discussion of these questions. It will be convenient to appraise the work of the Court with an eye to the security of the "keystone of the Recovery arch," as the Act has been characterized.

There has been no visible government strategy in the presentation of cases to the Court. They have been allowed to arise as they would, and the Court has been compelled to deal with issues of wide significance in cases that have not revealed their more important implications. Despite the possibility that distinctions will be made in later cases which will save the most essential governmental powers where their exercise is imperatively needed, recent decisions have cast a pall of doubt, if not of unconstitutionality, upon the provisions of the Recovery Act.[4]

II. THE RATIONALE OF NEBBIA V. NEW YORK

Just one year after the Roosevelt administration took office the Supreme Court in the case of *Nebbia v. New York*[5] sustained the establishment of a mandatory retail price for milk under the

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[2]The argument for this view is stated in Fuchs, The Constitutionality of the Recovery Program (1933) 19 St. Louis L. Rev. 1.

[3] Op, cit., at 12.

[4] It is not intended to suggest that the validity of the National Industrial Recovery Act or even of the entire Recovery program is essential to national salvation. It is believed, however, that the power of the Federal Government to deal with economic problems in a comprehensive manner is indispensable, without regard to the merits of any particular legislative program. It can be asserted in behalf of the program of the present administration that it does attempt to deal fairly with many aspects of the economic situation in a manner which certainly is not irrational. Fuchs, op. cit., at 6-11.

[5] (1934) 291 U. S. 502.

authority of a state statute. In the meanwhile price regulation under numerous N. R. A. codes had gone into effect or was contemplated. Assuming the authority of the Federal Government to regulate businesses within the states, there is only partial justification in the opinion in the Nebbia case for the view that price fixing or other drastic regulation, whether by Congress or by state legislatures, will consistently be sustained. The constitutional issue involved, of course, is whether such regulation is consistent with due process of law.

In regard to the constitutionality of legislative attempts at price fixing, two competing doctrines have been at war in the Court ever since the case of *Munn v. Illinois*.[6] According to the one, there exists a class of businesses "affected with a public interest" for which alone legislative regulation is justified. The process of determining the constitutionality of a price-fixing measure, accordingly, consists in the first instance of ascertaining whether the business which is being regulated does or does not belong in this class. In the making of this determination the weight which attaches to an act of the legislature is counterbalanced by the constitutional principle that "freedom is the general rule and restraint the exception,"[7] and the businesses whose prices may be established by law are relatively few in number.[8] According to the other doctrine, it is not possible to catalog in legal terms the situations which justify legislative intervention in private business, and not more so with reference to price fixing than in regard to other forms of regulation. While it may be true

[6] (1876) 94 U. S. 113.

[7] Chas. Wolff Packing Co. v. Court of Industrial Relations (1923) 262 U. S. 522, at 534.

[8] In an effort to clarify the meaning of the phrase, "clothed with a public interest," Mr. Chief Justice Taft in the Wolff Packing Co. case, note 7 above, at 535, enumerated three classes of businesses which are so clothed. These are: (1) businesses enjoying a "public grant of privileges"; (2) certain occupations, regarded as exceptional from the earliest times, such as "those of the keepers of inns, cabs, and gristmills"; and (3) businesses which "have come to hold such a peculiar relation to the public" that governmental regulation is justified. It is the third class which is the critical one, and the Chief Justice confused matters with respect to it by going on to say that in a sense the public is concerned in every business and the real question is whether in a given instance the public interest is strong enough to justify the particular form of regulation sought to be imposed. In regard to price fixing, he noted that "In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

that "the common element" in past instances of judicially approved price fixing is "a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community,"[9] the ascertainment of the existence of this common element and the appropriateness of price fixing as a remedy turn "upon considerations of economics about which there may be reasonable differences of opinion."[10] It is the function of the legislature to make these determinations. The judicial function ends with the ascertainment that the legislature has not acted in a purely arbitrary manner in a given instance.[11]

The strict view, according to which price fixing legislation is prima facie unconstitutional, had its full flowering in three cases decided at the close of the "New Economic Era" which has since yielded place to the "New Deal."[12] The spirit of the contrary view, although not its logical form, appears in *Munn v. Illinois*,[13] *German Alliance Insurance Co. v. Kansas*,[14] and the cases upholding Federal regulation of the stockyards, including the fixing of service charges.[15] The classic formulation of the view appears in the dissenting words of Mr. Justice Stone in the *Theater ticket*

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[9] Mr. Justice Stone, dissenting, in Tyson & Bro. v. Banton (1927) 273 U. S. 418, at 451.

[10] Ibid., at 454.

[11] Ibid.

[12] Tyson & Bro. v. Banton, note 9, above; Ribnik v. McBride (1928) 277 U. S. 350; and Williams v. Standard Oil Co. (1929) 278 U. S. 235. These cases held unconstitutional the attempts of state legislatures to fix, respectively, the commissions of theater ticket brokers, the commissions of private employment exchanges, and the retail price of gasoline. A comprehensive review and criticism of the doctrine of "public interest," from the historical standpoint and from the standpoint of its application, is to be found in two excellent recent articles: McAllister, Lord Hale and Business Affected with a Public Interest (1930) 43 Harv. L. Rev. 759, and Hamilton, Affectation with a Public Interest (1930) 39 Yale L. J. 1089.

[13] Note 6, above. Budd v. New York (1892) 143 U. S. 517, followed Munn v. Illinois. Brass v. North Dakota (1894) 153 U. S. 391, upheld legislative fixing of rates for grain elevators not enjoying the monopoly which featured their operation under the facts of the other two cases. Other "Granger" cases, involving state regulation of railroads, were decided during the same period.

[14] (1914) 233 U. S. 389. The Court, in a six-to-three decision, upheld the power of a state to regulate fire insurance rates.

[15] Stafford v. Wallace (1922) 258 U. S. 495, at 516; Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420.

case.[16] It perhaps underlay the decision in *O'Gorman and Young v. Hartford Fire Ins. Co.*[17] and emerged triumphant, at least for the time being, in the *Nebbia* case,[18] in which Mr. Justice Roberts adopts the logic of Mr. Justice Stone's earlier dissent. "It is clear," he says, "that there is no closed class or category of businesses affected with a public interest." "'Affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression."[19] He denies that "there is something peculiarly sacrosanct about the price one may charge for what he makes or sells" or that, "however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling price itself."[20] "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."[21] Instead of freedom's being the rule and restraint the exception, "subject only to constitutional restraint the private right must yield to the public need."[22] "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[23]

In performing their limited judicial function, moreover, the

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[16] Note 9, above.

[17] (1931) 282 U. S. 251. The decision in this case, upholding the legislative power to fix maximum commissions for fire insurance agents, was placed upon the ground that the fire insurance business had been held in the German Alliance case to be affected with a public interest.

[18] Note 5, above.

[19] 291 U. S. at 536, 533.

[20] P. 532.

[21] P. 537.

[22] P. 525.

[23] P. 525.

courts, according to Mr. Justice Roberts, are to employ a realistic method; for "The function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." In the *Nebbia* case itself the Court relies heavily upon the facts brought out in a New York legislative investigation of the milk industry, which preceded the enactment of the law under attack and which revealed that "the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production."[24] Inadequate sanitation in the production of milk, as well as economic evils, were found to flow from the conditions described.[25] Under the circumstances the Court felt that the legislature had not acted arbitrarily in resorting to price fixing.

With the decision resting as largely as it does upon the facts in the industry in question, it obviously would be hazardous to forecast a frequent acceptance of price fixing or other drastic forms of legislative control of business on the basis of this single decision. Nor should too much reliance be placed upon the Court's change of front in regard to the applicable doctrine. Not only did four dissenting justices stoutly maintain the erstwhile majority point of view, but Mr. Justice Roberts himself found it possible to say without hint of irony or of a smile that "The course of decision in this court exhibits a firm adherence to these principles." Past decisions invalidating price fixing laws, he says, "must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect."[26] If these decisions can rest upon such a basis, so may future decisions similar in tenor. Nevertheless supporters of government control of business, whether by the Federal Government or by the states, will find in the doctrine and in the factual approach of the Court in the *Nebbia* case their strongest reliance in future efforts to sustain

[24] P. 530.
[25] P. 517.
[26] P. 537.

drastic regulation. As regards the Federal power, Mr. Justice Roberts himself takes the occasion to say that "The power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power . . ."

III. THE SCOPE OF THE FEDERAL POWER

In another New York milk law decision at the present term of Court the tide of Federalism appeared to be running strongly at the same time that realism was prevailing over doctrines which stood in the way of decisions responsive to social need. An importer of milk from Vermont into New York sought in the Federal District Court to enjoin the enforcement of the Milk Control Act against him. As applied to him, the Act would have denied licenses to sell in the original cans or in bottles milk which had been purchased in Vermont at less than the minimum price to producers, established under the Act. The Supreme Court affirmed a decree granting an injunction as to sales in the original cans and held that an injunction should also issue to protect the dealer's right to sell in bottles at retail without regard to the wholesale price paid in Vermont. The Court rejected the time-honored argument that when the milk was removed from the "packages" in which it had been imported it necessarily became subject to the state law. "The test of the 'original package'," said Mr. Justice Cardozo for the Court, "is not inflexible and final for the transactions in interstate commerce . . . . The test of the original package is not an ultimate principle. It is an illustration of a principle . . . . What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement."[27]

Conceding that the maintenance of prices to producers in Vermont might be equally as important to consumers in New York as the maintenance of such prices in that State, on account of the effect upon quality, the Court held that this argument failed to sustain the application of the Act to sellers of imported milk for two reasons: (1) "There is neither evidence nor presumption that the same minimum prices established by order of the board for producers in New York are necessary also for

[27] Baldwin v. G. A. F. Seelig, Inc. (1935) 55 S. Ct. 497.

producers in Vermont"; and (2) "Commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product."

Such minimum price regulations applied to products in another state as a condition of their being marketed in the regulating state would be equivalent to the levying of import duties, the Court pointed out. "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." "The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states." "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division."

Thus the identical factors which justified the application of the New York Milk Control Act to private businesses despite the limitations of due process failed to support its application to production in another state, because of the incapacity of the states to burden interstate commerce. The conclusion seems to follow almost without effort that Congress has power to protect producers and consumers in New York from destructive practices on the part of importers and of producers in other states, against which the State is powerless to defend them. Mr. Justice Cardozo, it is true, remits them to the Legislature of Vermont, which, "If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, ... must supply the fitting remedy." But the suggestion is a weak one. Years ago, in his dissent to the first child labor decision denying to Congress the power to prohibit the interstate transportation of the products of child labor, Mr.

Justice Holmes pointed out that the view of the majority created a governmental vacuum, in which neither the nation nor a state had power to control destructive competition from outside the boundaries of the state.[28] *Baldwin v. Seelig* gives the perfect answer to *Hammer v. Dagenhart* and seems to prepare the way for the deserved repudiation of that unfortunate decision. Mr. Justice Cardozo, be it noted, spoke for a unanimous court.

The logical consequence of *Baldwin v. Seelig* is neither much advanced by the earlier case of *Local 167, International Brotherhood of Teamsters, v. United States*[29] nor greatly weakened by the recent *Railway Pension* decision.[30] The *Teamsters'* case, it is true, reaffirms all of the prior decisions construing the commerce clause broadly, but it does not extend to the proposition that labor conditions in production for interstate commerce or conditions in the marketing of products after they have left what is usually regarded as interstate commerce are subject to the power of Congress. The proposition that "The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the state of destination where the interstate movement ends" and "the sales by marketmen to retailers, the prices charged, and the amount of profits exacted" are subject to the provisions of the Sherman Anti-Trust Act, must be taken with the qualification that this subjection to the Federal power is dependent upon a finding that these activities "operate directly to restrain and monopolize interstate commerce" or operate "substantially and directly to restrain and burden . . . . untrammelled shipment and movement . . . . in interstate commerce." That the level of purchasing power among workers in all occupations affects interstate commerce vitally; that a market which is demoralized by shipments from exploiters of labor in other states is the victim of bad tactics in commerce; and that local unfair competitive practices will in the long run impair the market for sales in interstate commerce, may be fairly apparent, but the Supreme Court is not yet expressly committed to such a view. In the *Teamsters'* case itself the conspiracy which was enjoined had as one of its objects the parcelling out of the wholesale business in live poultry in New York

[28] Hammer v. Dagenhart (1918) 247 U. S. 251, at 281.
[29] (1934) 291 U. S. 293.
[30] Railroad Retirement Board v. Alton R. Co. (1935) 55 S. Ct. 758.

City among the members of an association of wholesalers, called marketmen. One of the principal sanctions to be employed was refusal on the part of members of the Teamsters' union to haul poultry from the freight terminals to the establishments of marketmen who failed to observe the association's allocation of business. Such refusal would operate and was intended to operate to prevent the marketmen from purchasing poultry from the "receivers" at the terminals and at West Washington Street Market, whose function it was to remove the poultry from the cars, crate it, and sell it to the marketmen. In the companion case of *Greater New York Live Poultry Chamber of Commerce v. United States*,[31] in which participants in the same conspiracy were criminally convicted, it was held that the sales by receivers to marketmen were in interstate commerce in the same sense as transactions on the grain exchanges and at the stockyards,[32] which are said really to form a part of the single process of getting commodities from producers to the markets, generally located in other states. Intention to prevent sales or shipments in interstate commerce, whether through boycott of products or through stoppages of production, whatever the ultimate purpose, frequently has subjected the tactics of labor to the sanctions of the anti-trust acts.[33] The *Teamsters'* case adds nothing to those that went before.

In the *Railway Pension* case the majority of the Supreme Court, speaking through Mr. Justice Roberts, in addition to branding many features of the Act of Congress which established compulsory retirement pensions for railway employees as violations of the due process clause, held that the power to prescribe such pensions for railway employees was not included in the power of Congress to regulate interstate commerce. Whatever may be the merit or lack of merit in the Court's decision, and whatever the significance of the Court's attitude, the point actually decided in regard to the scope of the commerce power

[31] (C. C. A. 2, 1931) 47 F. (2d) 156, cert. den. (1931) 283 U. S. 837.

[32] Chicago Board of Trade v. Olsen (1923) 262 U. S. 1; Stafford v. Wallace (1922) 258 U. S. 495; Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420.

[33] Loewe v. Lawlor (1908) 208 U. S. 274; Duplex Printing Press Co. v. Deering (1921) 254 U. S. 443; Coronado Coal Co. v. United Mine Workers of America (1925) 268 U. S. 551; Bedford Cut Stone Co. v. Journmen Stone Cutters' Assn. (1927) 274 U. S. 37.

has little relation to the question of the constitutionality of Federal regulation of business in general. Having satisfied itself that pensions to retired employees and the provision of incentives to retirement on the part of employees have little or no bearing upon efficiency and safety in the operation of railroads, the Court concluded that the sole purpose of the pension Act was to minister to the welfare of persons employed by the railroads. The welfare of people in their old age, which is brought on by natural causes unrelated to their employment, said the Court, is a matter for the states and not for Congress to deal with.[34] It follows, as the Court admitted, that features of the employment relation on the railroads which do bear upon safety or efficiency, together with factors in the lives of employees growing out of their employment, are subject to the power of Congress.[35] Four justices, constituting the dissenting minority, pointed out that "The common judgment takes note of the fact that the retirement of workers by reason of incapacity due to advancing years is an incident of employment"; that "The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age"; and that "That view cannot be dismissed as arbitrary or capricious." And if provision for old age can properly be made an incident of employment, Congress should have power to regulate that incident of such employment as undoubtedly is subject to its control.

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[34] The decision of the Court does not in reality exclude the power of Congress. No reason appears why Congress could not levy a payroll tax upon the carriers and provide also for the payment of pensions to retired employees out of the Treasury. The Court thus far has declined to inquire into the purpose of Federal tax measures or expenditures except where a tax law bears evidence on its face that its purpose is to regulate a matter (child labor) which is beyond the power of Congress to control. Veazie Bank v. Fenno (1869) 8 Wall. 533; McCray v. United States (1904) 195 U. S. 27; Nigro v. United States (1928) 276 U. S. 332; Massachusetts v. Mellon (1923) 262 U. S. 447; Bailey v. Drexel Furniture Co. (1922) 259 U. S. 20. To guard against an adverse decision upon a pension law enacted under the taxing power it might be wise to separate the taxing measure and the law authorizing the payment of pensions.

[35] The Court acknowledged the validity of the Safety Appliance and Employers' Liability Acts and cited the case of Tex. & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks (1930) 281 U. S. 548, upholding Congressional legislation in relation to collective bargaining upon the railroads. Wilson v. New (1917) 243 U. S. 332, upholding the Adamson 8-hour law, however, involved legislation whose validity "depended upon circumstances so unusual that this court's decision respecting it cannot be considered a precedent here."

Thus, even if the Court's decision in the Railway Pension case be accepted, it remains emphatically true that all transactions and relations forming part of interstate commerce itself, together with all conduct substantially affecting interstate commerce, are within the power of Congress, subject to the limitations of due process of law. The National Industrial Recovery Act as administered has been applied to four principal groups of businesses, classified with regard to their relation to interstate commerce. These are: (1) businesses, such as the trucking business, actually engaged in the transportation of commodities or in other types of communication among the states; (2) businesses which ship in interstate commerce; (3) businesses which furnish a market for products which move in interstate commerce, either through purchases from sellers in other states or by reason of providing an essential outlet, such as retail stores, for products which have been brought into a state; and (4) businesses, such as local service trades, whose sole substantial relation to interstate commerce lies in in the purchasing power which those engaged in them contribute to the ultimate consumers' market for the products of all commerce, both interstate and intrastate. Various aspects of the conduct of these businesses will, of course, bear upon interstate commerce with differing degrees of substantiality. Thus the wages paid in a barber shop will affect the purchasing power of the employees, whereas the competitive practices of its proprietor toward a shop across the street can scarcely be said to affect interstate commerce in a similarly perceptible manner.

The power of Congress to enact the provisions of the N. I. R. A. thus becomes a complex question whose solution depends upon the application of the Act to particular situations. The answers of the judges to the problems as they arise will depend upon their ability in the light of the data presented to them to perceive the economic relations which exist and upon the purposes they seek to serve. The purposes they seek to serve are a product of their political and social philosophies and can hardly be altered by any of the methods known to the law. If the justices who constituted the majority of the Court in the *Railway Pension* decision, for example, with fair knowledge of present economic circumstances, should be determined to maintain the limits of the Federal power as they were established in

Hammer v. Dagenhart, it is useless to expect a change of attitude. If, however, a disposition on the part of any of the justices to follow that decision is occasioned by a belief that economic production is still a matter which really is of purely local concern, and if those who hold to that view have ability to look facts in the face and to recognize their significance, then there is hope that his disposition may change, if the facts as they actually are point to a contrary conclusion. It is worth while inquiring, accordingly, whether the Court in recent months has displayed a realistic approach to constitutional problems.

IV. REALISM IN CONSTITUTIONAL DECISIONS

The Supreme Court's appetite for facts and its willingness during the past several years to vary its decisions upon constitutional questions in accordance with them has been noted previously.[36] A striking example was furnished a year ago in the case of *Petersen Baking Co. v. Bryan*.[37] In that case, under a Nebraska statute fixing compulsory standard weights for loaves of bread made for sale in the State, a "tolerance" of three ounces overweight per pound, with the standard as a minimum weight within twelve hours after baking, was established by administrative regulation. The statute as elaborated was upheld. In the earlier case of *Burns Baking Co. v. Bryan*[38] a similar statute providing for a tolerance of two ounces overweight per pound, with a 24-hour period during which the standard weight was the minimum, was declared unconstitutional. Mr. Justice Butler wrote the opinion in both cases. In the earlier decision the evidence was deemed to show that loss of weight through evaporation was likely to be more than two ounces per pound during a 24-hour period unless bread was wrapped, thus making compliance difficult. In the subsequent case the greater tolerance for a shorter period was held to cure the arbitrariness which characterized the earlier statute.

Even more striking is the *Tennessee Grade Crossing* case at the present term of court,[39] holding that a crossing elimination

[36] Fuchs, Legal Technique and National Control of the Petroleum Industry (1931) 16 St. Louis L. Rev., at 205; Fuchs, The Constitutionality of the Recovery Program (1933) 19 St. Louis L. Rev., at 22.

[37] (1934) 290 U. S. 570.

[38] (1924) 264 U. S. 504.

[39] Nashville, C. & St. L. R. Co. v. Walters (1935) 55 S. Ct. 486.

order imposing half of the cost upon the railroad company may be so arbitrary as to deprive the carrier of property without due process of law. Previous decisions had uniformly upheld the power of the states to protect the public safety by compelling the elimination of grade crossings at the expense wholly or in part of the affected railroad company. The Supreme Court of Tennessee, from which the instant case was appealed, had relied upon these precedents and had declined to consider data advanced by the railroad company to show that the order was unconstitutional under the circumstances. The Supreme Court, through Mr. Justice Brandeis, held that where the principal hazard to be eliminated by a separation of grades arises from the highway and not from the railroad, where the purpose of the separation is to expedite high-speed highway traffic as well as to promote safety, and where the economic effect upon the railroad is likely to be adverse, the decisions based upon earlier and different conditions are inapplicable. In other words, new conditions created by the establishment of a nation-wide system of through highways competing with the railroads call for new law. Courts from now on in these cases are under a duty to examine the circumstances and to adapt their decisions to them. "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied." It follows, presumably, that a statute invalid when originally enacted may be valid when reenacted at a later time by reason of changed circumstances.

As a matter of procedure, one attacking the validity of a statute must allege and demonstrate the facts which establish its unconstitutionality, especially where these relate to its operation upon a particular party.[40] The allegations of the petition, however, if they state a rational basis upon which unconstitutionality may be predicated, will suffice to present the issue.[41]

The Court's ability to appraise the significance of facts when these have been brought before it and to discriminate in a realistic manner between the rational and constitutional on the one hand and the arbitrary and unconstitutional on the other hand seems to have varied considerably during the past two years.

[40] Hegeman Farms Corp. v. Baldwin (1934) 55 S. Ct. 7; Metropolitan Casualty Ins. Co. v. Brownell (1935) 55 S. Ct. 538.
[41] Borden's Farm Products Co. v. Baldwin (1934) 55 S. Ct. 187.

Few, perhaps, will be found to quarrel with the conclusion that in the category of arbitrary, confiscatory state action, so long as that category is maintained for purposes of constitutional adjudication, belong the measures which compel the railroads to provide the roadbeds for their competitors.[42] In the cases which have followed in the train of the *Minnesota Mortgage Moratorium* decision[43] also, the majority of the Court has shown a fine ability to differentiate situations which do not call for the application of the liberal doctrine of that celebrated case. In the *Minnesota* case it was held that the contract clause of the Federal constitution did not invalidate the State's Moratorium Law of April, 1933. That law applied to mortgages existing at the effective date of the law and provided that in appropriate cases, in judicial proceedings, mortgagors might obtain the stay of foreclosures that might otherwise be had, for periods to be determined in each case but not extending in any event beyond May 1, 1935. Priods of redemption from foreclosure sales already made might be similarly extended. The act provided that in the proceedings which it authorized an order might be had, upon notice, "determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property . . . ., and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court." The act recited the emergency created by the depression. The State presented facts in relation to the emergency. Others were judicially noticed by the lower court. The Supreme Court held that, although contracts cannot be destroyed by state legislation, "It does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the

[42] Mr. Justice Stone and Mr. Justice Cardozo, however, dissented in the Tennessee Grade Crossing case, above, upon the ground that the facts advanced by the railroad company and the facts within the range of judicial notice did not suffice to sustain the burden which rested upon the carrier of "establishing a violation of its constitutional immunities."

[43] Home Building & Loan Assn. v. Blaisdell (1934) 290 U. S. 398.

community .... And .... that power cannot be said to be nonexistent when the urgent public need demanding ... relief is produced by ... economic causes."[44] The Court concluded that "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State" and that the act adopted to meet the emergency, in view of its temporary nature, its appropriateness, and the manifest endeavor to conserve the legitimate interests of all parties concerned in mortgage obligations, was constitutional.

In *W. B. Worthen Co. v. Thomas*[45] the Court declared unconstitutional an Arkansas statute which entirely exempted the proceeds of life, sickness, and accident insurance policies from legal process, in so far as the statute applied to indebtedness of beneficiaries existing at the time of its passage. The legislature, unlike that of Minnesota, had made no attempt to discriminate on the basis of need for relief on the part of particular debtors or classes of debtors and no attempt to limit the resultant sacrifice of contractual rights to what the public need would justify. In *W. B. Worthen Co. v. Cavanaugh*[46] a crude and cynical act of the legislature of Arkansas, virtually empowering special improvement districts to repudiate their bonds, likewise was held unconstitutional. The statute in question prescribed the procedure for the collection of special assessments upon property embraced within such districts, replacing the procedure provided for in an earlier act which was in effect when outstanding bonds were issued. The later act, in addition to reducing interest and penalties upon unpaid assessments, prolonged the minimum time within which property might be sold for their nonpayment from 65 days to 2½ years and provided a further 4-year period of redemption during which the landowner might remain in possession without payments of any kind. In its opinion the Court recognized, as it had in the *Minnesota Mortgage* case, the traditional distinction between the constitutionally protected "obligation" of a contract and the remedy upon the contract. Where it had been said in the *Minnesota* case that it was a question of "reasonableness" whether an impairment of the remedy might

[44] P. 439.
[45] (1934) 292 U. S. 426.
[46] (1935) 55 S. Ct. 555.

amount to an impairment of the obligation,[47] Mr. Justice Cardozo now referred rather impatiently to "much talk" in the books "about distinctions between changes of the substance of the contract and changes of the remedy." "The dividing line," he said, "is at times obscure."

Thus the immunity conferred by the contract clause becomes a matter of degree dependent upon facts and upon the appropriateness of legislative measures devised to meet them. The justices who dissented in the *Minnesota* case could not refrain in the first *Arkansas* case, in which they concurred, from joining specially in the decision, for the purpose of pointing out that the Court's basis for deciding such cases "takes us beyond the fixed and secure boundaries of the fundamental law into a precarious fringe of extraconstitutional territory in which no real boundaries exist. We reject as unsound and dangerous doctrine, threatening the stability of the deliberately framed and wise provisions of the Constitution, the notion that violations of these provisions may be measured by the length of time they are to continue or the extent of the infraction." Such devotion to rigid principle, which, of course, never has characterized the work of the Court with uniformity,[48] has now definitely yielded to a more discriminating methodology.[49]

Judicial discrimination between the "reasonable" and the "arbitrary" on the basis of economic and practical considerations,

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[47] 290 U. S., at 430.

[48] Cases cited, 290 U. S. at 436-442.

[49] The "Gold Clause" cases involving private obligations expressed to be payable in gold dollars of the weight and fineness established at the time they were issued (Norman v. Baltimore & Ohio R. C. (1935) 55 S. Ct. 407) present the same clash between the view of five justices, that governmental power is not so limited by the Constitution as to prevent its being used to cope with pressing economic circumstances, and the view of the minority that the protection afforded to private contracts—in this instance by the due process clause of the Fifth Amendment—is absolute. The decision, of course, involved the power of Congress, as an alleged incident to its undoubted power to change the gold content of the standard dollar or to authorize the President to do so, to provide that currency representing a materially smaller quantity of gold must be accepted in satisfaction of obligations of the type mentioned. The majority of the Court, taking cognizance of the economic dislocation which would result from placing the holders of billions of dollars of "gold clause" bonds in a preferred position in the economic order, held that Congress had the incidental power which it exercised. The minority would have permitted the economic structure to tumble or, perhaps, have viewed with pleasure the virtual cancellation of the constitutional power of Congress to regulate the currency, if Congress could have been forced to yield.

however, unless indulged in the presence of a genuine deference to the legislature, can be as obstructive of necessary regulatory measures as constitutional formulae which are loaded with economic theory. Judicial tyranny can exist under either method of arriving at decisions. The danger that such tyranny will be fastened upon the country in connection with the Court's handling of the "New Deal" legislation is emphasized by the character of the decision in the *Railway Pension* case.[50] Not only was the majority of the Court willing to disregard the belief and the experience of much of the western world, that provision for old age may properly be made through the employment relation, and hence to hold that it cannot become subject to the Federal power in the most clearly interstate of enterprises, but in addition the justices laid down a barage of invalidating objections to what would be essential features of any effective pension plan adopted as a regulatory measure and drew palpably absurd distinctions between the law which was under attack and previous legislation that had been upheld. Thus "the provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises cannot be justified as consistent with due process." It is questionable at best whether a pension plan with separate funds for each carrier could remain solvent in each of the funds. In any event, as Mr. Chief Justice Hughes forcefully pointed out in his dissent, pooled funds for accident compensation to employees, for bank deposit insurance, and for supplementing the earnings of financially weak railroads through loans have been sustained by the Court. It is difficult to see any basis upon which these precedents can be distinguished except the justices' dislike of compelling employers to contribute to the care of retired, superannuated employees. The distinction sought to be drawn by the majority between workmen's compensation and old age pensions, on the ground that the former establishes a substituted liability for that in tort at common law whereas the latter impose a liability wholly new, simply goes to show that the justices are likely to confuse the unfamiliar with the unconstitutional. Since tort

[50] Note 30, above.

liability is confined to instances in which the employer or his representative has been negligent, while under compensation laws there is liability without regard to fault, the Chief Justice correctly points out that "Compensation acts do not simply readjust old burdens and benefits. They add new ones, outside and beyond former burdens and benefits, and thus in truth add a new incident to the relation of employer and employee."

Throughout his extremely able and forceful dissent the Chief Justice battles for a national legislature power which shall be adequate to cope with pressing national problems, whether wisely or unwisely in particular instances. That such power should be in danger of being denied by reason of either rigid constitutional doctrines or the arbitrary notions, however sincerely held, of a few judges, seems a sufficient indictment of the system of judicial review of legislation which makes such an outcome possible.

V. RED TAPE FOR ADMINISTRATORS

As noted previously in these pages,[51] there is danger, even if the substantive powers conferred in regulatory legislation are upheld as constitutional, that constitutional requirements in regard to administrative procedure will so hamper the work of enforcement as to imperil the success of a comprehensive program of control such as that of the "New Deal." The *Panama Refining Company* case[52] at the present term of Court appears to carry forward the tendency to impose hampering restrictions upon the "bureaucracy" which was so strikingly manifested in Crowell v. Benson.[53] No one, of course, objects to the Constitution's being held to guarantee the essentials of fair procedure in administrative action that affects private interests. The question is, in each instance, whether a given procedural requirement serves a useful purpose which is not bought at too great a sacrifice of administrative efficiency.

In the *Panama Refining Company* case the issue was over the validity of an order of the President, promulgated under section 9(c) of the National Industrial Recovery Act, which prohibited the interstate transportation of petroleum produced in violation of restrictions imposed by the state in which it was produced.

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[51] 19 St. Louis L. Rev. at 23.
[52] (1935) 55 S. Ct. 241.
[53] (1932) 285 U. S. 22.

Executive orders to this effect were specifically authorized by the section of the Act in question, which made their violation a punishable offense. The Act, however, did not attempt to state the conditions under which the President should thus, in effect, translate state laws into Federal measures. The purposes for which he might do so were ascertainable, if at all from the words of the Act, from the provisions of section 1, defining the purposes of Congress in enacting the law. The Court held, Mr. Justice Cardozo alone dissenting, that section 9(c) delegated legislative power to the President in an unconstitutional manner because conditions were not specified under which the power should be exercised and because, in consequence, no findings by the President upon which an order might be predicated were made necessary. The general aims set forth in section 1, which, perhaps, the President was expected to keep in mind in deciding whether or not to issue an order under section 9(c), are, the Court felt, too general to serve as a guide. Section 1 declares the policy of Congress to be to remove obstructions to interstate commerce, to provide for the general welfare by promoting organization among trade and labor groups, to promote production and prevent restrictions upon it except temporarily, to increase consumption and purchasing power, and to conserve natural resources. Among these "numerous and diverse objectives," the Court stated, the President was not even directed to choose.

The Court's statement that "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested" will be universally applauded. The real question, however, is whether it did so in enacting section 9(c). Mr. Justice Cardozo convincingly brings out that it did not. The President was to promulgate an order when he became convinced that the ultimate purposes defined in section 1 of the Act would be served by an immediate restriction of interstate transportation, in support of restriction of production by the states. "There is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section."

The requirement that executive findings specifically set forth must accompany an executive order of general application is one wholly new to the law of the Constitution. The Court cites no authority in its support except two cases dealing with adminis-

trative orders of specific, not general, application.[54] In case of such orders, of course, findings are often essential to inform the affected parties of the ground of the administrative action and to furnish a basis for judicial review if that is sought. When it comes to Presidential rule-making, these reasons are entirely absent. At the most, the requirement that findings accompany a Presidential order will help to expose a dishonest use of executive power, provided it cannot be covered by "findings" which are appropriate to it. The entire effect of the *Panama Refining Company* case manifestly will be to introduce additional words into statutes conferring rule-making power upon the executive and into the rules promulgated under such statutes, as well as to stir up litigation for the purpose of challenging the language of future delegations of power in the hope that it may be found insufficient.

It is impossible to predict what future requirements in regard to administrative procedure the Court will see fit to impose. Procedure, of course, is peculiarly within the competence of lawyers, and a Court made up of lawyers should be able to arrive at realistic decisions in that field. There seems to be danger, however, that addiction to certain forms will lead, in the words of Mr. Justice Cardozo, to the ignoring of the truth that "The Constitution of the United States is not a code of civil practice."

[54] The line between orders of specific and those of general application, it is recognized, is not easy to draw. Orders applicable to a fairly limited class of persons might be called either the one or the other. Practical considerations often will determine the characterization which will be given to a particular order and the procedural incidents that will surround its issuance. Thus the Interstate Commerce Commission issues orders which it is convenient to characterize as "quasi-legislative" to distinguish them from other orders issued by the Commission which apply to particular carriers and which are known as "quasi-judicial." Nevertheless, since judicial review is accorded with respect to both classes of orders, findings by the Commission are prerequisites to both. United States v. Baltimore & Ohio R. Co. (1935) 55 S. Ct. 268.