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# Some Constitutional Angles of the New Deal

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# SOME CONSTITUTIONAL ANGLES OF THE "NEW DEAL"

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THE executive and legislative departments of the United States government have cooperated to create some of the most unusual legislation and governmental machinery that has ever existed in the history of the United States. That the "New Deal" is both popular and unpopular with certain portions of the public is a matter of every day knowledge. What the judicial department of the government will find concerning the constitutionality of the new legislation, however, is a matter of great conjecture and anxiety at this time. It is the intention of the author to present some of the constitutional problems which may arise concerning the constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act, the two principal statutes of the "New Deal."

Before commencing a discussion of the legality of said acts it may be well to explain briefly what each of these acts proposes to do. The N. I. R. A. is an attempt to bring back prosperity by increasing the purchasing power of consumers. It proposes to increase this purchasing power by creating codes of fair competition which fix prices, control output, raise wages, shorten hours of labor, and abolish or limit child labor. The A. A. A. is an experiment intended to raise the income of farmers. It proposes to do this by limiting the amount of crops planted so that production may be controlled and higher prices obtained. Farmers who cooperate with the government by reducing crops planted are to remunerated from process taxes placed upon manufactured articles.

In dealing with the constitutionality of the acts in question a distinction should be made between codes that are signed voluntarily and those which are imposed upon employers, industries and farmers against their will. The former class probably are valid inasmuch as they are contracts voluntarily entered into for the benefit of third party beneficiaries also; because the contracting parties hope indirectly to benefit themselves. An interesting decision on this point

was recently handed down in the Denver District Court by Judge Frank McDonough, Sr., who allowed employes to recover from their employer minimum wages set by a code which had been voluntarily signed by a restaurant owner. There is the possibility, however, that some code agreements which are signed voluntarily may be held unconstitutional if the signing was caused by duress. Where codes are arbitrarily imposed, however, a different problem arises. Codes of the latter type will be considered hereafter in this article.

It must be remembered that the United States government is a government of restricted powers; that only certain designated powers are given to it, and that under the tenth amendment to the constitution, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Therefore, if the aforementioned acts are to be found constitutional, some specific authority of congress to pass them must be found.

Section I of the N. I. R. A. declares that "a disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people," exists in this country. It may be concluded from the above declaration that the constitutionality of the act is based upon the power of congress to regulate interstate and foreign commerce, or to provide for the public welfare. The latter ground will be considered first.

It has been repeatedly held that the "general welfare clause" is merely incidental to the power of congress to tax, and that said clause does not confer any new power upon congress.[1] The clause in question is Article I, Section 8 of the Constitution, which reads as follows: "The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." In view of the above, it is practically certain that

[1]Temple Law Quarterly, Vol. VIII, No. 1, page 6; and 36 Harvard Law Rev. 548.

the constitutionality of the acts in question cannot be sustained under the "general welfare" clause.

A more difficult question is presented, however, as to whether or not the acts in question are a valid regulation of interstate and foreign commerce. The general rule seems to be that it is unconstitutional for congress to attempt to regulate prices,[2] hours of employment, child labor,[3] and wages in the industries under the guise of regulating interstate commerce.[4] The most famous decision on this point was made in The Child Labor Case, Hammer vs. Dagenhart.[5] In that case an act of congress was held unconstitutional which intended to prevent interstate commerce in the products of child labor. The court stated:

> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to congress over commerce but also exerts a power to a purely local matter to which the federal authority does not extend."

Furthermore, the imposition of codes prescribing minimum wages probably constitute a deprivation of life, liberty, or property without due process of law, contrary to the provisions of Amendment 5 of the Constitution, for it has been held that liberty includes the right to make contracts of employment upon such terms as the employer and employe think proper.[6]

Proponents of the constitutionality of the N. R. A. and the A. A. A. claim that though the acts would probably be unconstitutional in normal times, that because they are predicated upon an emergency, and because they are expressly limited to two years, they are constitutional under the police power of the government.[7] In support of this position the

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[2] 47 Supreme Court Reporter 426.
[3] 259 U. S. 20 and 247 U. S. 251.
[4] *Nation*, October 18, 1933.
[5] 247 U. S. 251.
[6] 262 U. S. 522, 208 U. S. 161, 236 U. S. 1.
[7] Temple Law Quarterly, Vol. VIII, No. 1, page 3.

cases of Wilson vs. New,[8] Block vs. Hirsh,[9] Marcus Brown Holding Co. vs. Feldman,[10] and Wolff Packing Cases[11] are cited.

*Wilson vs. New* held constitutional an act of congress which for 30 days only set minimum wages and maximum hours for employes of trains engaged in interstate commerce. The act was designed to prevent a strike which would have stifled interstate commerce, and is quite different from an attempt to regulate intrastate conditions of employment in factories, stores, etc. The *Wolff Packing Cases* cannot be considered authority for the acts of the "New Deal," because there the Kansas Court of Industrial Relations Act, which gave an administrative board the authority to fix the terms of contracts of employment, was held unconstitutional. Any statements in favor of the constitutionality of such acts as are considered here are only *obiter dicta.*

*Block vs. Hirsh* and *Marcus Brown Holding Co. vs. Feldman* were decided together, involve the same facts, and are known as "The Rent Cases." The former case involved an act of congress for the District of Columbia, and the latter case a statute of New York. During the world war so many people flocked to Washington, D. C., and New York City on official business that it became almost impossible for government officials to rent a house in those cities at a reasonable rent. Consequently, statutes were passed which allowed tenants to continue in possession of premises after the end of the term, and against the will of the landlord, provided the tenants paid rents which a commission determined were reasonable. The statutes were to be in effect for only two years. The statutes in each of these cases were held constitutional. In the decision of the court it was stated, "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." The court based authority for the act in the police power of the government, and states, "The only matter that seems to us open to debate is whether the statute goes too far. For just as there

[8] 243 U. S. 332.
[9] 256 U. S. 135.
[10] 256 U. S. 170.
[11] 262 U. S. 522.

comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

Whether the police power provides sufficient constitutional authority for acts such as the N. I. R. A. and the A. A. A. is indeed a border line question, and one which the writer will not be so vain as to attempt to answer. The acts in the "Rent Cases" and the acts of the "New Deal" both are limited to two years. Both recite that they are based upon an emergency. In the Rent Cases the emergency was a war. Whether a depression can be considered such an emergency as would justify the government in doing things normally unconstitutional is yet to be decided. Then, too, the N. I. R. A. and the A. A. A. attempt to regulate many more things than simply the regulation of rent, and in the decision of the "Rent Cases" Justice Holmes recognizes that there is a point at which the police power ceases, and that the going beyond that point would be taking property without due process of law. In a more recent decision,[12] Justice Holmes discusses the "Rent Cases" in the following language: "The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act."

Those who, in view of past decisions, believe that the N. I. R. A. and the A. A. A. are unconstitutional claim that the acts attempt to make permanent economic changes rather than temporary changes and that the "emergency" will not abate but will continue. They say that if the acts succeed that they will not be done away with, but will be intensified.[13] In Pennsylvania Coal Co. vs. Mahon, *supra*, the court stated, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitu-

[12]Pennsylvania Coal Co. vs. Mahon, 43 Supreme Court Reporter 158.
[13]*Nation*, October 18, 1933.

tional way of paying for the change." If it is true that permanent changes are being made, nothing short of a constitutional amendment should justify the change; otherwise the Constitution would become a mere scrap of paper.

In wagering what decision the Supreme Court will hand down it should be remembered that in the past the court has always been very conservative and very prone to protect vested property rights; that the Child Labor Case and the Rent Cases are five to four decisions; that the personnel of the court is slightly changed from what it was; that it might prove very unpopular for the court to declare the acts unconstitutional; and that congress and the president could exercise their power of packing the Supreme Court by adding new justices as was done during the legal tender cases in the seventies.[14]

There are other constitutional angles concerning said acts which cannot be considered in this article (such as an improper delegation of the powers of the legislature to the executive department of the government). It is interesting to note that in the only decision by a federal judge down to the time of the writing of this article, the N. I. R. A. was held unconstitutional. In that case Judge Alexander Akerman refused to enjoin a St. Petersburg, Florida, cleaner who was charging prices below those set by the N. R. A. code. In his decision Judge Akerman said, "It would require a stretch of imagination beyond the power of this court to concede that a local industry engaged in the pressing, cleaning, and dyeing of clothes was engaged in interstate commerce . . ." The Constitution gave the national government no authority "to invade the reserve power of the states in regulation of a local industry even in an emergency."

[14]*Nation*, October 18, 1933.
[15]*The U. S. News*, December 11, 1933, page 16.