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Some Constitutional Aspects of State Recovery Acts

COMMENTS.

SOME CONSTITUTIONAL ASPECTS OF STATE RECOVERY ACTS.—Concurrently with his plea for an extension of the National Industrial Recovery Act,[1] President Roosevelt has indicated that he is desirous that the states should enact recovery acts[2] in support of the federal statute. While it seems that if the federal act is upheld, despite *Hammer v. Dagenhart*,[3] and if the court gives a broad application to the rule enunciated in the *Shreveport Case*,[4] the commercial and industrial field will become almost exclusively one of federal jurisdiction, still certain businesses must remain solely within the control of the states.[5] The need for a centralized agency to combat present economic prob-

1. See N. Y. World-Telegram, Feb. 20, 1935, at 1; N. Y. Times, Mar. 7, 1935, at 1.

2. See note 80, *infra* for a list of state acts.

3. 247 U. S. 251 (1918), denying to Congress the power to prohibit the transportation in interstate commerce, goods which are the result of child production. It is the language of the Court which places the obstacle in the path of the constitutionality of the National Industrial Recovery Act. At page 272 the Court said that over "interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation." Possible grounds of distinction have been suggested on the theory that the National Act is not prohibitory but attempts to increase the volume of goods flowing in interstate commerce; that the emergency is bringing production and commerce closer together; that the Act will put men back to work; that in putting men to work it increases buying power; that with the increase of buying power the flow of goods in interstate commerce will be increased and therefore in order to regulate and promote interstate commerce Congress must extend its control into the producing sources. See Hagan, *The Elasticity of the Federal Constitution* (1934) 20 VA. L. REV. 391; Russell, *The New Deal and the Constitution* (1934) 28 ILL. L. REV. 720; Black, *The Commerce Clause and the New Deal* (1935) 20 CORN. L. Q. 169; Comment (1933) 47 HARV. L. REV. 85; Cousens, *The Use of the Federal Interstate Commerce Power to Regulate Matters Within the States* (1934) 21 VA. L. REV. 51. But see Smith, *The National Industrial Recovery Act: Is it Constitutional?* (May 1934) 20 A. B A. J. 273, 318, to the effect that the attempted exercise is beyond the scope of Congressional powers and contrary to the intent of the framers of the Constitution.

4. Houston & Texas Ry. v. United States, 234 U. S. 342 (1914), holding that when interstate and intrastate transactions are so related that the government of one involves a control of the other, Congress is to prescribe the final and dominant rule. *Accord:* Ill. Cent. R. R. Co. v. Public Util. Comm. 245 U. S. 493 (1918); Wis. R. R. Com. v. C. B. & Q. R. R. Co., 257 U. S. 563 (1922); New York v. United States, 257 U. S. 591 (1922); United States v. Schussler, 7 F. Supp. 123 (N. D. Ill. 1934); *cf.* Seelig, Inc., v. Baldwin, 55 Sup. Ct. 497 (1935).

5. This is forcibly evidenced in those cases where control is denied to the Secretary of Agriculture, proceeding under the Agricultural Adjustment Act [48 STAT. 34 (1933), 7 U. S. C. Supp. VII § 8 (1934)] in his attempts to regulate milk production. The Act gives him power to issue licenses permitting processors and associations to engage in the handling in the current of interstate or foreign commerce, of any agricultural commodity or product thereof and competing commodity or product thereof. The licensing power was expressly denied in the following cases on the ground that the business was wholly intrastate: United States v. Nuendorff, 8 F. Supp. 403 (S. D. Iowa 1934); United States v. Greenwood Dairy Farms Inc., 8 F. Supp. 398 (D. C. Ind. 1934); Douglas v. Wallace, 8 F. Supp. 379 (W. D. Okla. 1934); *cf.* United States v. Schussler, 7 F. Supp. 123 (N. D. Ill. 1934), where control was upheld because the interstate and intrastate milk business was so commingled that effective interstate supervision also required intrastate regulation.

lems is apparent,[6] but it is still doubtful whether the exigencies of the situation will influence the Court to such an extent as to result in the tempering of accepted political concepts involving the sovereignties of our dual form of government.[7] The "Hot Oil" case[8] may be prophetic; perhaps just as much a warning against the loooseness of the statute as an indication of the suspicion of the Supreme Court that the scope of the act is not within the field of federal control. A refusal by the Supreme Court to uphold the National Industrial Recovery Act will in turn defeat the purpose of the state recovery acts enacted to lend uniformity to the scheme of the federal act. However, as a supplement to a federal act, assumed to be valid, the state acts assume importance because of their attempts to cover fields which are concededly beyond federal control. While the federal act is dependent upon a broad interpretation of implied powers incident to the grant delegated to the federal government over matters involving interstate commerce,[9] the jurisdiction of the states will depend upon the scope of the police power,[10] a nebulous concept, which has broadened in judicial forums[11] during the past year concurrently with the attempts by Congress to broaden federal powers.

Police Power in General

Police power, in its broadest concept, is the power of a sovereign to protect and promote the general welfare.[12] In the nature of things, it is probably as old as government itself.[13] Identified with the maxim *Sic utere tuo ut alienum non laedas* in English common law,[14] the concept was not unknown to the early colonies and references to it are found in the "Federalist" and at the Constitutional Convention.[15] The protection afforded by the Constitution to individual rights as against arbitrary governmental action, requires that some attempt be made to classify the power in view of constitutional limitations. An examination of the concept in the light of the political theories prevalent during the period when the Constitution was adopted, confuses rather than aids in any attempt to divine its scope.[16] Since the formation of our dual

6. See Panama Refining Co. v. Ryan, 293 U. S. 388, 443 (1935).

7. See notes 17, 18, 19 *infra.*

8. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935), *infra* p. 341.

9. U. S. CONST. art. 1 § 8. "Congress shall have power to . . . regulate commerce with foreign nations and among the several States, and with the Indian tribes. . . "

10. See note 20, *infra.*

11. The police power has been given a relatively broad application in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934) and Nebbia v. New York, 291 U. S. 502 (1934). See Comment (1935) 4 FORDHAM L. REV. 73.

12. MOTT, DUE PROCESS OF LAW (1926) 300.

13. See JENKS, THE STATE AND THE NATION (1919) 30-32, for a discussion of the historic origin of this power.

14. The classification of the police power concept as a distinct governmental power originated in the seventeenth century with the rise of the various theories concerning sovereignty. MOTT, DUE PROCESS OF LAW (1926) 300-301.

15. See 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION (1911) 629-632.

16. COKE'S INSTITUTES AND COMMENTARIES ON LITTLETON, setting forth his theory of the limitation upon the sovereign power, and LOCKE'S TWO TREATISES ON GOVERNMENT, enunciating the social compact, enjoyed an important place in the colonial libraries. MOTT,

form of government is the approximation to the ideal of a sovereign people, resort must be had to theory to classify the police power concept and to round out the ideal. The powers of the federal and state governments are the expressions of the sovereignty of the people;[17] the scope of the federal powers being limited to the field designated in the Federal Constitution, and subject to the prohibitions contained therein. The scope of the states' powers is plenary[18] except as limited by express prohibitions appearing in the Federal and State Constitutions. In theory constitutional limitations constitute restrictions upon the sovereignty of the people as a group in favor of the protection of the individual; protection afforded to a minority against the will of a dominant majority as theoretically represented by the legislatures.[19] Therefore, in the determination of the extent of the state police power, the issue resolves itself into a clash between these sovereign powers and constitutional limitations. The issue has been for the courts, and in the course of a century and a half of judicial interpretation the concept has been recognized as the power inherent in a government to enact, within constitutional limitations, laws designed to promote the order, safety, health, morals and general welfare of society.[20] However, cases involving business regulation relative to the promotion of the public health, safety and morals offer little aid as precedent in relation to the constitutionality[21] of the state recovery acts. The validity of

DUE PROCESS OF LAW (1926) 89. For a recognition of the social compact theory as underlying the present form of government, see Calder v. Bull, 3 U. S. 385, 388 (1798); Wilkinson v. Leland, 27 U. S. 627, 655-656 (1829); Legal Tender Cases, 79 U. S. 457, 582 (1870); Oslow v. Nicholson, 80 U. S. 654, 662 (1871); Gunn v. Barry, 82 U. S. 610, 623 (1872). However, BLACKSTONE'S COMMENTARIES with his exaltation of the sovereign power, also enjoyed wide circulation in the colonial period. See Corwin, *The "Higher Law" Background of American Constitutional Law* (1929) 42 HARV. L. REV. 365, 407.

17. "The people of the state, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the king by his prerogative. Through the medium of their legislatures they may exercise all the powers which previous to the revolution could have been exercised by the king alone, or by him in conjunction with his parliament; subject only to those restrictions which have been imposed by the constitution of the states or the United States." Lansing v. Smith, 4 Wend. 20 (N. Y. 1829). See Penhallow v. Doane's Administrators, 3 U. S. 53 (1795); Calder v. Bull, 3 U. S. 385, 387-388 (1798); Campbell's Case, 2 Bland's Ch. 209, 20 Am. Dec. 360, 373 (Md. 1829).

18. The belief that state governments were governments of delegated powers as in the case of the federal government, deriving their powers from the state constitutions was expressed in Calder v. Bull, 3 U. S. 385, 386 (1798). But that view has been rejected and the accepted doctrine now is that the power of the states is plenary subject only to constitutional limitations. See Railroad Company v. County of Otoe, 83 U. S. 667, 672, 673 (1872); People v. Flagg, 46 N. Y. 400 (1871).

19. See Corwin, *supra* note 16, at 407.

20. This is the classic definition set out in Commonwealth v. Alger, 61 Mass. 53, 85 (1851). See Home Bldg. & Loan Ass'n v. Blaisdell 290 U. S. 398 (1934) for an exhaustive examination of the police power concept. Specific applications of the principles are: Texas & New Orleans R. R. Co. v. Miller, 221 U. S. 408 (1910) (public safety); Fertilizing Co. v. Hyde Park, 97 U. S. 659 (1878) (public health); Beer Co. v. Mass., 97 U. S. 25 (1877) (public morals).

21. In order to justify a police power statute as a public health or public moral or public safety measure, it must be shown that there is a causal connection between the

these acts will probably depend upon whether such regulation of business is within the broad concept of regulation for the general welfare.

Police Power—Regulation of Business

Statutes regulating prices of commodities and hours and wages of employment were passed during the fourteenth, sixteenth and eighteenth centuries in England, remaining in force until 1825.[22] The colonial legislatures prior to the adoption of the Constitution, at the instigation of the Confederation passed price fixing statutes setting maximum prices on sale of commodities.[23] Impracticability of enforcement, however, led to immediate repeal.[24] Although the Constitution was framed immediately following this period, no attempt to limit this price fixing power appears although the power of the state to interfere with existing contracts was expressly prohibited.[25] Since the due process clause in the Constitution was a restriction only upon the federal government, constitutional limitations, if any, upon the price-fixing exercise of the police power prior to the adoption of the Fourteenth Amendment[26] must be found in the due process clauses of the state constitutions.[27]

The period immediately following the adoption of the Constitution and until after the Civil War is practically devoid of state interference with business. Dominating this period from a political viewpoint, is the clash between the

regulation and the health or the morals or safety of the public. However, the argument that the economic depression has affected the morals of the people, might be found to be too illusory by the courts. In the following cases the regulation of hours by statute was not sustained because the courts maintained that there was no connection between the regulation and the health of those employed: Lochner v. New York, 198 U. S. 45 (1905); United States v. Northern Commercial Co., 6 Alaska 94 (1918) (statute limited to eight hours the employment of all wage earners); State v. Henry, 25 P. (2d) 204 (N. Mex. 1933) (statute prohibiting labor of male employees in mercantile establishments to eight hours, held void); Saiville v. Corliss, 46 Utah 495 (1915) (regulating working hours of employees of mercantile establishments in cities of over ten thousand population, void). These cases implied that the law may only be upheld where there is imminent danger to health. *Cf.* Muller v. Oregon, 208 U. S. 412 (1908); see Adkins v. Children's Hospital, 261 U. S. 525, 567 (1923).

22. 23 Edw. III, c. 6 (1349); 5 Eliz., Cap. IV (1563); 18 Eliz., Cap. III (1576); 31 Geo. II, c. 29 (1758). See 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 469, where it is stated that the "old law was founded upon the view that it was for the state to regulate the conditions of trade. All the medieval statutes dealing wtih commercial matters rest upon this basis."

23. See Comment (1920) 33 HARV. L. REV. 838, 839 n. 5, citing colonial statutes which regulated the prices of commodities during the Revolutionary War: *e.g.*, N. Y. Laws 1778, c. 34 entitled "An Act to Regulate the wages mechanicks and labourers, the price of goods. . . . *Thirdly:* That all kinds of American manufactures, and internal produce not particularly mentioned and regulated by the said convention be estimated at rates not exceeding seventy-five per centum advance from the prices they were usually sold at. . . "

24. See N. Y. Laws 1778, c. 2 (2d Sess.), indicating that the act was repealed because it could not be effectively enforced.

25. See Comment (1935) 4 FORDHAM L. REV. 73, 74.

26. This amendment was not adopted until 1868.

27. See MOTT, DUE PROCESS OF LAW (1926) 80 n. 28, showing that from 1780 to 1840 seventy-five per cent of the states had due process clauses in their constitutions.

respective powers of the states and the federal government; from an economic standpoint, it represents the expansion of commerce and business and the breaking down of the western frontier. Protectionist tariffs provide governmental stimuli to domestic industries, and there is also present, whether consciously or not, a *laissez-faire* attitude toward business.[28] However, whatever regulation was attempted during this period was upheld as a valid exercise of the police power. In 1841 in the decision of *Mobile v. Yuille,* the Alabama Supreme Court upheld an ordinance of Mobile which fixed the price of bread, maintaining that although there can be no general restraint of trade, such restraint may be upheld if it be "for the good of the inhabitants."[29] However, even if the power were questioned, it does not seem likely that the courts could have found an express constitutional prohibition. Due process, although in the state constitutions in various forms, was identified at this time with the question of procedure and not as a substantive limitation upon state powers.[30] It was not until the middle of the nineteenth century that due process received any recognition as a substantive limitation upon the powers of a state.[31] In 1868, with the adoption of the Fourteenth Amendment[32] to the Federal Constitution, due process became a federal limitation upon state powers. The first judicial interpretation of this clause indicated that it was not a substantive limitation upon state powers but was designed to protect and guarantee to the

28. This period is outstanding for its many political and sectional classes: states rights adherents versus those in favor of a strong federal government; the triangular clash among the industrial capitalistic East, the planting and land-holding South and the agrarian West; the disputes between the South and the East over the protectionist tariffs; the general feeling of hostility toward the privately-owned United States bank in the agrarian West. Important, however, is the *laissez faire* attitude which dominated the Democratic Party. The political creed of the party was an opposition to the tariff, the bank, and any interference with the domestic institutions of the states which furnished the labor supply of the southern planters. Likewise, the expansion of business, with consequent employment, was the best brief in favor of non-governmental interference. See BEARD AND BEARD, THE RISE OF AMERICAN CIVILIZATION (1930) 628-724; PECK, THE JACKSONIAN EPOCH (1899) for a discussion of national politics during this period; HUNT, JOHN C. CALHOUN (1903) for a valuable description of governmental theories during this period.

29. 3 Ala. 137 (1841); *cf.* Matter of Dorsey, 7 Port. 293 (Ala. 1838).

30. The following cases recite that the due process limitation was procedural: Cohen v. Wright, 22 Cal. 293 (1863); *Ex parte* Grace, 12 Iowa 208 (1861); Taylor v. Porter, 4 Hill 140 (N. Y. 1843); Embury v. Conner 3 N. Y. 511 (1850); Brown v. Hummel, 6 Pa. St. 86 (1847); State v. Maxay, 1 McMull L. 501 (S. C. 1837); State v. Simons, 2 Speers 761 (S. C. 1844). However there were some jurisdictions which treated due process as a restriction upon arbitrary legislative excercise. Hoke v. Henderson, 4 Dev. 1 (N. C. 1833); Bank of State v. Cooper, 2 Yerg. 599 (Tenn. 1831); Jones' Heirs v. Perry, 10 Yerg. 59 (Tenn. 1836).

31. The trend probably began with Commonwealth v. Alger, 61 Mass. 53 (1853), and Thorpe v. Rutland & B. R. Co., 27 Vt. 140 (1855) wherein the courts maintained that the police power was subject to limitations. And in Wynehamer v. People, 13 N. Y. 378 (1856) it was plainly stated that due process was a substantive limitation upon arbitrary legislative exercise. *Cf.* Samuels v. McCurdy, 267 U. S. 188 (1925).

32. See note 34, *infra.*

negroes equal rights of citizenship.[33] However, this interpretation was soon questioned. One of the draftsmen[34] of the Amendment revealed that no such narrow limitation was intended and this contention is strengthened when considered in the light of the evolution of the scope of this term.[35] Subsequent judicial interpretations have given to it the quality of a substantive limitation, and such has become its accepted meaning.[36]

Modern state regulation of business began with *Munn v. Illinois*[37] decided in 1877. Statutes, the result of the Granger movement, were passed in many of the western states regulating the prices to be charged by grain elevators whose owners were enjoying a virtual monopoly.[38] During an era which accepted competition as the *summum bonum,* and the theory that prices were determined by impersonal forces, it was recognized that state regulation would be required where a situation existed which enabled prices to be arbitrarily fixed. The United States Supreme Court upheld the power of the Illinois legislature to regulate what was in fact a monopoly, and characterized the business as one which could be controlled because it was "affected with a public interest."[39] The prevailing evil was the ability to fix arbitrary prices. Failure to exercise a power raises the presumption that it never existed and the decision was unfavorably commented upon by the press.[40] On the same day the Court sustained a statute fixing railroad rates[41] and precedent existed for state control despite the Fourteenth Amendment which was given a substantive interpretation. Seventeen years later the Supreme Court, in *Brass v. Stoeser,*[42] broadened the field by upholding a statute regulating grain elevators where no

33. Slaughter House Cases, 83 U. S. 36 (1872). In this decision the Supreme Court defined the purpose and scope of the Fourteenth Amendment maintaining that its primary purpose was to guarantee to the negro equal rights of citizenship. *Accord:* United States v. Cruickshank, 92 U. S. 542 (1875); Minor v. Happersett, 88 U. S. 162 (1874).

34. Mr. Roscoe Conkling, who was a member of the committee which framed the Fourteenth Amendment, in arguing the case before the United States Supreme Court, produced in court the unpublished journal of the committee to support his contention that the Amendment was not intended solely to protect the negro. See Cushing, *The Fourteenth Amendment* (1922) 20 MICH. L. REV. 737, 743 n. 20.

35. See cases cited in note 31, *supra.*

36. See Corwin, *The Supreme Court and the Fourteenth Amendment* (1909) 7 MICH. L. REV. 641; Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943, 946-948.

37. 94 U. S. 113 (1877).

38. See Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 COL. L. REV. 401, 403. See also Hamilton, *Affectation with a Public Interest* (1930) 39 YALE L. J. 1089.

39. The Court in rendering the decision applied the term "affected with a public interest," used before for a different purpose by Justice Hale in England, to support its conclusion. There is no doubt that the Court's conclusion constitutes historical error. See Munn v. Illinois, 94 U. S. 113, 149 (1877).

40. See N. Y. Times, March 29, 1877, wherein decision was characterized as being mischievous and meddlesome and one which would drive foreign capital out of the country. See 9 ROSE'S NOTES ON U. S. REPORTS 510 (Rev. Ed. 1918).

41. Chicago, Burlington & Quincy R. R. Co. v. Iowa, 94 U. S. 155 (1877), upholding the power of the state to fix railroad rates.

42. 153 U. S. 391 (1894).

semblance of monopoly existed. But in this broad decision the seed of a narrow limitation of the doctrine enunciated in *Munn v. Illinois* may be found. The Court indicated, in explaining away the lack of a factual monopoly which had existed in the *Munn Case,* that if the business fell within the class designated as being "affected with a public interest" it might be regulated regardless of the pertinent facts or proof of an abuse.[43] What businesses were "affected with a public interest" received some semblance of definition in *Wolff Packing Company v. The Court of Industrial Relations*[44] where the businesses which were "affected with a public interest" were classified as follows: (1) those carried on by virtue of a public grant; (2) inn-keepers, cabs and such which had been controlled since early English common law; (3) those private businesses where there is a presumption that the owner has granted to the public a use therein. Regulation of the first two has never been questioned; constitutional issues arise only in the question of the arbitrariness of the prices set.[45] It is in the last class that the power of control has been seriously questioned. Beginning with the *Wolff Packing Company Case* where the states' power to regulate the meat packing business was denied, control of the business of ticket brokers,[46] employment agencies[47] and the ice business,[48] was denied to the states. The Court in each of these decisions seemed to have implied from the language in the *Brass v. Stoeser* decision that a business must fall within the category of businesses "affected with a public interest" before it could be controlled. To the Court, "affected with a public interest" had become a conceptual term, a

43. *Id.* at 403, where the Court said that "great stress is laid upon expressions used in our previous opinions, in which the business, as carried at Chicago and Buffalo, is spoken of as a practical monopoly. . . When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain . . . such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances." Between this decision and Munn v. Illinois 94 U. S. 113 (1877), the case of Budd v. New York, 143 U. S. 517 (1892), which substantially followed the Munn Case, was decided.

44. 262 U. S. 522 (1923). Prior to this decision the Supreme Court had upheld the power of the states to regulate the rates of fire insurance companies. German Alliance Insurance Company v. Kansas, 233 U. S. 389 (1914).

45. Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287 (1920); Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456 (1924). See 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1301, n. 1.

46. Tyson & Bro. v. Banton, 273 U. S. 418 (1927). This decision represents the use of the term "affected with a public interest" as a rule of exclusion rather than inclusion. It seems to be predicated on the fact that theatre tickets are not necessaries of life.

47. Ribnik v. McBride, 277 U. S. 350 (1928), holding that despite the existence of evils, the state had no power to fix rates.

48. New State Ice Co. v. Liebmann, 285 U. S. 262 (1932). The case involved the power of the state to require a certificate of convenience before an individual or corporation could engage in a business of manufacturing ice. The Court maintained that ice was not such a necessary as would require control and also there was no question in regard to protecting the consumer. Prior to this decision the Court, in Williams v. Standard Oil Co., 278 U. S. 235 (1929), held that a state had no power to regulate the prices at which gasoline could be sold. The Court insisted that if a business did not fall within the category of one which is "affected with a public interest," it could not be controlled. *Cf.* O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251 (1931).

condition precedent which must be satisfied before the state might interfere.[49] Failure of a business to fall within this category was fatal regardless of whatever abuses might arise because of a lack of regulation. No standard was set up to determine which private businesses fell within the class, but the size of the business and the character of the commodity were important factors.[50] These decisions are punctuated with the dissents of Holmes,[51] Brandeis[52] and Stone,[53] denying that there is such a thing as a closed category of business and insisting that the evil which would result from an unregulated business is the criterion in the determination of whether such businesses should be controlled.

Such was the general trend of the law involving state regulation of private businesses prior to the *Nebbia Case*.[54] In this decision the United States Supreme Court repudiated the theory that there is a closed category of business which is "affected with a public interest."[55] The immediate facts of the case concerned the power of the Milk Board to fix a minimum price at which a retailer could sell to a consumer. This Board had been established after a thorough legislative investigation, and was granted certain powers as outlined in the emergency statute.[56] Destructive price cutting had placed the farmer in a desperate situation and was affecting a basic industry of the state. The minimum price questioned was one of the methods calculated to wipe out the

49. See notes 46, 47, 48 *supra*. Under this theory, it seemed immaterial whether evils might arise because of the lack of regulation; if the business was not "affected with a public interest," regulation was not possible.

50. See notes 46, 48, *supra*.

51. Justice Holmes wrote a vigorous dissenting opinion in Tyson & Bro. v. Banton, 273 U. S. 418, 445 (1927) maintaining that the "affectation with a public interest" was nothing more than a fiction. His view is political—if the legislature, representing the people, think that regulation will benefit the public welfare, the Court should not question the wisdom or the power of the legislature despite the fact that the Court might reasonably differ with the wisdom, expediency or enforceability of the legislation.

52. See New State Co. v. Liebmann, 285 U. S. 262, 280 (1932). He maintained that if the relevant facts show that regulation is required for the public protection, the state should have the power to regulate.

53. See Ribnik v. McBride, 277 U. S. 350, 359 (1928). Justice Stone argues against the use of "affectation with a public interest" as a condition precedent to control, and maintains that the evil would result from a lack of regulation is the criterion. The dissents of Justice Holmes, Brandeis and Stone represent the majority view in Nebbia v. New York, 291 U. S. 502 (1934).

54. Nebbia v. New York, 291 U. S. 502 (1934).

55. "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of 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." Nebbia v. New York, 291 U. S. 502, 536 (1934).

56. See N. Y. Legis. Doc. No. 59 (1933), setting forth the report of the Pitcher Committee in regard to the condition of the milk business in New York. The circumstances reported were: (1) the milk business affected the health and prosperity of the state; (2) the financial situation of the dairy farmer was desperate; (3) the low prices paid to the farmer were due to unfair and destructive trade practices in the distribution of milk and the instability of the milk business in general.

evil.[57] With a recognition of the normative force of existing facts the court upheld the regulation and returned to the true interpretation of the *Munn* decision.[58] Decisions are subject to the dynamics of the economic order. It is probably true that the economic theories behind the two statutes are the antitheses of each other. In the *Munn* decision, the statute assumed that prices were the result of impersonal forces and that competition was the *summum bonum;* in the *Nebbia* decision, the indication was that competition as exercised was not desired, and as a substitute prices should in part be determined by conscious human control. One statute was enacted to prevent the fixing of arbitrary prices—the consumer was the beneficiary of the act;[59] the other was enacted to protect an industry and a livelihood—the farmer-producer was the primary beneficiary of the act.[60] Despite the different economic theories behind the statutes, the decisions enunciate the same rule of law in their holding that a state may regulate if such regulation is necessary to promote the economic welfare of the state. An outstanding feature in the *Nebbia Case* is that the court had before it facts, the result of a thorough legislative fact finding,[61] which indicated a basis for the statute and which enabled the court to determine whether or not the act was a pure arbitrary measure.[62] Also, the emergency angle was not a factor in the decision, although it was a factual element responsible for the enactment of the statute.[63]

The Supreme Court indicated in the *Nebbia Case* that it would not interfere

57. This was one of the methods recommended by the Pitcher Committee in order to mitigate the evil of price cutting. See New York Legis. Doc. No. 59 (1933).

58. The decision in the Munn Case was predicated upon the existence of a situation creating a monopoly which enable the owners to fix arbitrary prices. However, the Court attempted to further sustain the statute by referring to the "affected with a public interest" theory as used by Justice Hale in his treatise *De Portibus Maris.* The part of the decision dealing with this term could probably be considered as nothing more than *dictum.*

59. In the Munn Case, the ability to fix prices would have been a detriment to those dealing with the owners of the grain elevators. See JACOBSON, THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT—A DOCUMENTARY HISTORY (1932) c. 7 for the effect of social changes upon the political and legal philosophy in the United States.

60. See N. Y. Laws, 1933 c. 158. While partly labelled as a health statute, the primary purpose of the statute was the protection of the livelihood of the farmer. Hon. Henry Epstein, Solicitor General of the state of New York, who was on the brief in the argument of the Nebbia Case before the Supreme Court of United States, stated in N. Y. S. B. A. BULL. (1934) at 442 that the "motivation of the act may have well been the poverty of the farmer-producer and the threat to his existence in under payment; the desire to bring him a greater return, a living income from his tiresome labors."

61. See the brief of the Attorney General of the State of New York in the Nebbia Case citing the legislative fact finding, thereby giving the Court an insight into the actual conditions existing in the milk industry in New York.

62. See Nebbia v. New York, 291 U. S. 502, 518-19 (1934) wherein the Court refers to the exhaustive fact finding by the legislature indicating that regulation was necessary.

63. See N. Y. Laws, 1933, c. 158 reciting the existence of the emergency. The Court made a slight reference to the fact that it was an emergency measure but there is no reference to this factor in the ultimate conclusion of the Court. The emergency is important only as a factual element which would bring those businesses, where there would not have been any necessity for control in previous years, under the control of the state to-day.

with the economic policy of a state which was reasonably directed toward the promotion of the public welfare.[64] The state recovery acts represent an effort by the legislatures to effect a recovery from the present economic depression. While the regulations under these acts are not the result of a long legislative fact finding, the "denial of the right to experiment may be fraught with serious consequences to the nation."[65] To determine what economic theory lies behind this paternalistic attitude of the states, resort must be had to the National Industrial Recovery Act. As the Act indicates it is primarily a recovery measure. Whether it was designed to effect recovery by an elimination of competition in favor of "monopoly," or to give competition an opportunity to work is a matter of debate.[66] Attempts have been made to place purchasing power in the hands of those who will buy by means of large public expenditures and

64. Nebbia v. New York, 291 U. S. 502, 537 (1934): "So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare."

65. Dissent of Justice Brandeis in New State Ice Co. v. Liebmann, 285 U. S. 262, 311 (1932).

66. See Gulick, *Some Economic Aspects of the National Industrial Recovery Act* (1933) 33 COL. L. REV. 1103. *E.g.*, there are two bills before the Senate at the present time S. 2199 provides that it shall be lawful to make contracts reasonably regulating competition, while S. 2211 provides for the supplementing of existing laws against combinations in restraint of trade.

Aside from questions of power, the desirability of the recovery acts must be considered. Such an inquiry must first cover the purpose. Undoubtedly the ultimate purpose was recovery and the next intermediate purpose revolves about two alternatives. Shall recovery be achieved by the elimination of competition and gradual obliteration of *laissez-faire* in favor of "monopoly"; or on the other hand does the National Industrial Recovery Act represent the following: BERLE AND MEANS in THE MODERN CORPORATION AND PRIVATE PROPERTY (1933) have shown that the country's economic and social existence has become the domain of two hundred corporations. LAIDLER, CONCENTRATION OF CONTROL IN AMERICAN INDUSTRY (1931), shows that almost every industry has one or a few dominating enterprises which serve as leaders in every respect, and this condition developed despite the anti-trust laws and the Federal Trade Commission. The ability of these more heavily endowed enterprises to carry on trade at a loss over a longer period than the smaller enterprise was forcing the latter out of business with consequent unemployment. Therefore the theory was that by providing for the fixation of prices and a uniform wage and hour scale, the smaller businesses would be able to compete with the larger enterprises; a tendency which was directly contrary to the first alternative set out above in regard to the obliteration of competition. Furthermore, by establishing a new plane of competition, the superior bargaining power of the larger enterprises would be diminished, *e.g.*, discounts. Presumably the essence of recovery was immediate employment and it would seem, therefore, that the latter alternative would be the best means of achieving that result. The efficacy of the choice of methods, the codes of fair competition, is, as viewed in the light of the comments of the proponents and opponents of these regulations, still the subject of much controversy. See BINGHAM AND RODMAN, CHALLENGE TO THE NEW DEAL (1934), for a collection of articles attacking the administration; COREY, THE DECLINE OF AMERICAN CAPITALISM (1934), for an analytical survey of present conditions; STOLBERG AND VINTON, THE ECONOMIC CONSEQUENCES OF THE NEW DEAL (1935) (major failure of the New Deal has been its timidity and hypocrisy in supporting labor); N. Y. Times, Dec. 6, 1934 at 1 (Moley discusses the aims of industrial recovery); Richberg, *Legal Problems of the National Recovery Administration* (1933), 38 COM. L. J. 682.

the increase of wages and the shortening of hours of labor.[67] Also it constitutes an attempt to eliminate unfair methods of competition, competition carried on by means of destructive price and wage cutting, by fixing prices,[68] wages and hours of labor in the codes adopted by the industries.[69] The *Nebbia* decision has been used to sustain the recovery acts.[70] Undoubtedly the language in the decision is suggestive enough to give good basis for the courts' upholding this economic policy of the states.[71] But the language must be considered in the light of the relevant facts. The Court was dealing with an economic policy adopted only after a thorough legislative fact finding. The Court insisted that the wisdom of the legislation is for the legislatures, but reserved to the courts is the power of determining whether the means adopted satisfy the end and purpose of the statute.[72] This limitation, however, would seem to continue to preserve to the courts the power to prescribe the dominant policy.

Many of the courts have upheld the acts in the spirit of the experiment but a closer scrutiny will probably be given to the future acts.[73] The judiciary

67. See Gulick, *Some Economic Aspects of the National Industrial Recovery Act* (1933) 33 COL. L. REV. 1103. N. Y. Times, May 7, 1933 at 1 (President Roosevelt agrees that public works should be used to relieve unemployment); Richberg, *Legal Problems of the National Recovery Administration* (1933) 38 COM. L. J. 682.

68. Undoubtedly the government does not approve of direct price fixing. Price regulation has assumed the form of prohibition of selling below costs together with a price publishing list. Various methods have been used: (a) Open price filing—listing of prices with some board or agency. Selling below such price filed constitutes a violation. See Bituminous Coal Code, art. VI (4). (b) Basing points—a manufacturer must file a list of basic prices for all standard products of the industry f.o.b. one of several designated shipping points; see Iron & Steel Code, sect. E. (c) Minimum prices—only a few codes provide for a uniform minimum price for the entire industry; see Petroleum Code, art. III (6). (d) All the codes provide against selling below cost.

69. All the codes provide for a fixing of hours and a minimum wage. It is mandatory under sect. 7 (a) to abide by these regulations when the President approves the code.

70. Spielman Motor Sales Co. v. Dodge, 8 F. Supp. 437 (1934) (price regulation by a code does not violate the Constitution, citing Nebbia decision); State of Ohio *ex rel.* Knepper (Ct. of Com. Pleas, Ohio, 1935) (recovery act constitutes valid police measure to promote the public welfare, citing the Nebbia decision); Reams v. Dusha (Ct. of Com. Pleas, Ohio, 1934); Haddon v. Standard Drug Co., Inc. (Va. Law & Equity, Ct. of Rich. 1934) (no closed class or category of business affected with a public interest).

71. State regulation of business finds good constitutional support in the Nebbia decision since the Court indicated that a state may adopt whatever economic policy may be deemed to promote the public welfare. Nebbia v. New York, 291 U. S. 502, 537 (1934). However the reasonableness of the legislation may depend upon the individual economic beliefs of the nine justices. Also, it may be argued that the Nebbia decision may be distinguished on the ground that price regulation was necessary to protect the health of the consumer. See Epstein, *The Constitutional Significance of the New York Milk Case* (1934) N. Y. S. B. A. BULL. 437.

72. How far the courts will go in questioning the regulation by the states depends upon the interpretation of the statement of the Court that "the function of courts . . . 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." Nebbia v. New York, 291 U. S. 502, at 536 (1934).

73. Decisions sustaining the recovery acts have been brief in the majority of the cases indicating an inclination toward upholding the acts without a too thorough survey of constitutional problems involved. See cases cited note 70, *supra*.

probably will demand a more definite standard by which it may be able to determine whether the means adopted satisfy the purpose of the statutes. There is an indication that even though one individual under a code is prevented from obtaining a "fair return," that fact alone will not condemn the regulation as arbitrary.[74] The question also remains whether the upholding of a code for a particular industry will be conclusive as to the constitutionality of the statute. Under the argument that all businesses are interrelated and the approval of the regulations in one industry affects business as a whole, it might be argued that once a recovery act has been upheld, constitutional issues revolve about the arbitrariness of the regulations and not whether in the first instance such business could have been regulated.[75]

Delegation of Legislative Power

Many of the federal and state courts have declared the state acts void on the ground that they constitute an undue delegation of legislative power.[76] In view of the "Hot Oil" case, it is reasonably inferable that most of the state acts will prove vulnerable on the ground of an undue delegation of legislative power.[77] However, should a national act be reenacted which should satisfy the complaint of the Court in the *Oil Case,* the following problems arise in connec-

74. See Spielman Motor Sales Co. v. Dodge, 8 F. Supp. 437, 440 (S. D. N. Y. 1934) ("The principle of regulation of price is fundamentally fair, even though there is some reasonable disregard in individual cases. Such disregard is inherent in any broad social policy."). *Cf.* 2 COOLEY, CONSTITUTIONAL LIMITATIONS, (8th ed. 1927) 1301, n. 1.

75. This question apparently has not been raised. Since there is but one statute providing for the regulations it would seem that a decision upholding regulations under one code may be conclusive as to the scope of the power.

76. Cox v. Dunbar (Superior Ct. of Calif. 1934) (administrative rules may be adopted by reference but adoption of national act constitutes undue delegation); Reams v. Dusha (Ct. of App. Ohio 1935); Cline v. Consumers Co-operative Gas & Oil Co., 152 Misc. 653, 274 N. Y. Supp. 302 (Sup. Ct. 1934) (legislature has no power to delegate, and in no event to a non-state created agency); Darweger v. Staats, 153 Misc. 522, 275 N. Y. Supp. 394 (Sup. Ct. 1934) (violations are determined by something not in existence at the time of enactment); *aff'd* Staats v. Darweger (N. Y. Sup. Ct. App. Div. 3d Dep't 1935) (no sufficient statement of the legislative policy); Gibson Auto Co. v. Finnegan (Wis. Sup. Ct. No. 223, 1935); *cf.* People v. Grant, 242 App. Div. 310, 275 N. Y. Supp. 74 (3d Dep't 1934) (law giving liquor board power to make rules and allowing it to determine what rules violated shall constitute a crime, void). The following courts have held that the recovery acts are not void on the grounds that the legislature has unduly delegated its legislative power: Spielman Motor Sales Co. v. Dodge, 8 F. Supp. 437 (S. D. N. Y. 1934); *Ex parte* Lasswell, 36 P. (2d) 678 (Cal. 1934); Schneider v. Allen (Ct. of Com. Pleas Ohio 1934); Reams v. Dusha (Ct. of Com. Pleas Ohio 1934), *rev'd* (Ct. of App. Ohio 1935); State of Ohio v. Knepper (Ct. of Com. Pleas Ohio 1935); Stokes v. Newtown Creek Coal & Coke Co., 153 Misc. 821, 275 N. Y. Supp 290 (Sup. Ct. 1934); Sabatini v. Andrews, 276 N. Y. Supp. 502 (App. Div. 1st Dep't 1934); Spaulding v. Kaminski, 153 Misc. 678, 276 N. Y. Supp. 663 (Sup. Ct. 1934); Medows v. Furrow (C. C. W. Va. 1934); Haddon v. Standard Drug Co., Inc. (Va. Law and Equity, Ct. of Rich. 1934).

77. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935). The Supreme Court indicated that the power given to the President under the oil provision of the National Industrial Recovery Act (709 c.) was too broad and constituted a delegation of legislative power. It also intimated that a standard could not be found in § 1. Therefore, it might be argued that the whole act constituted a delegation of power in allowing the President to proceed to

tion with the state acts. All state constitutions provide for a separation of powers and therefore in fact constitute a prohibition against undue delegation.[78] Some states, also, prohibit the adoption of existing laws by reference.[79] In the event that the National Industrial Recovery Act is reenacted, those jurisdictions should not attempt to incorporate it by mere reference.[80] The state acts should embody a standard copied on the style of the national act, and it should be provided that the codes approved by the President should constitute standards of competition within the state when filed with the secretary of state.[81]

formulate rules and regulations for many of the industries. The adoption of these codes by the states would *a fortiori* constitute the adoption of more than mere administrative rules. The state courts will no doubt give deference to the ruling of the Supreme Court. *Cf.* Staats v. Darweger (N. Y. Sup. Ct. App. Div. 3d Dep't 1935); Reams v. Dusha, (Ct. of App. Ohio 1935) (undue delegation of power, therefore state recovery act unconstitutional).

78. There is no direct prohibition against a delegation of legislative power, but all of the state constitutions provide that the legislative power of the state shall be vested in the legislatures. *E.g.*, N. Y. Const. art. III § 1 provides that the "legislative power of this state shall be vested in the Senate and Assembly." *Cf.* Barto v. Himrod, 8 N. Y. 483 (1853); Stanton v. Board of Supervisors, 191 N. Y. 428 (1908).

79. Approximately two-thirds of the states prohibit the adoption of existing laws by reference. Comment (1934) 11 N. Y. U. L. Q. REV. 601. *E.g.*, N. Y. Const. art III § 17: "Existing laws not applicable by reference." The purpose of the prohibition is to prevent the adoption of prior statutes into another statute so as to eliminate the possibility of a law being adopted with which the legislature is not fully acquainted. People *ex rel.* N. Y. Elec. Lines Co. v. Squire, 107 N. Y. 593 (1888); People v. Lorillard, 135 N. Y. 285 (1892).

80. The following states have recovery acts which adopt the National Industrial Recovery Act by reference: Cal. Laws 1933, c. 1037; Col. Sess. Laws 1933, H. B. 67; Ill. Laws 3d Spec. Sess. 1933, H. B. 162; N. M. Laws 1st Spec. Sess. 1933, c. 18; Tex. 1st Spec. Sess. 1933, H. B. 10; Va. Acts 1933, c. 61; Wash. Laws 1933, S. B. 92; W. Va. Laws 2d Spec. Sess. 1933, H. B. 142; Wyo. Laws 1933, c. 16.

Two states provide for the filing of the codes with the secretary of state before they will have the force of law. In these jurisdictions, incorporation by reference does not occur unless the codes themselves constitute more than administrative rulings. N. Y. Laws 1933, cc. 781, 783; N. Y. Laws 1934, c. 166; S. C. Acts 1934, n. 1135; three jurisdictions provide that the governor may approve codes of fair competition. Ohio Laws 1933, H. B. 705; Utah Laws 1933, c. 21; Wis. Laws 1933, c. 476. New Jersey originally enacted such a provision. N. J. Laws 1933, cc. 369, 372. But this has been repealed. N. J. Laws 1934, c. 37. Some jurisdictions, while not providing for an adoption of the National Industrial Recovery Act, suspend the anti-trust laws in relation to regulations under the codes. Kan. Laws 1933, H. B. 2; Miss. Gen. Laws 1934, H. B. 349. One jurisdiction suspends a labor law. Mass. Acts 1933, c. 347.

There is pending legislation providing for either the adoption or extension of some form of the recovery acts in the following states: Cal. (S. 224; A. 113); Col. (S. 473); Conn. (S. 368; H. 546); Kan. (S. 210); Mass. (S. 356; H. 1621); Neb. (H. 306, H. 308); N. H. (H. 68); N. D. (S. 78); Ore. (H. 103); Pa. (H. 358); Utah (S. 94; H. 98); Wis. (S. 44); Wyo. (S. 61). The following states have pending legislation providing for a repeal of the state recovery acts: Ill. (H. 3); W. Va. (S. 50).

81. There is no objection to adopting the standards set up by Congress.. See *In re* Opinion of the Justices, 239 Mass. 606, 612, 133 N. E. 453, 455 (1921); State v. Vino Medical Co. 121 Me. 438, 440, 117 Atl. 589, 590 (1922) ("we are not aware of any objection on constitutional grounds to the adoption of legislative enactments of any existing definition or standard enacted by Congress").

Under a valid federal act these codes would constitute merely administrative rules and regulations although given the force of law.[82] Since the purpose of an administrative body is to make regulations pursuant to the act that gives it the power, codes adopted subsequent to the act carry out the purposes of the state acts when they are filed with the secretary of the state.[83] Objections may be taken on the ground that a representative of a different government formulates these regulations,[84] and as such is proceeding under a standard set up by Congress and not by the state legislatures.[85] By formulating state recovery act standards on the style of the federal standard, this objection should lose its force and it could be argued that the President is following two identical standards. If a standard has been set up, it should not be fatal if the regulations are made by a representative of a different sovereignty.[86]

As to those states which do not prohibit incorporation by reference, the incorporation of the federal act would not violate any express provision of their constitutions.[87] However, if it referred to any amendments made by Congress subsequent to the enactment of the state act, it would be void as to such.[88] But the reference to the automatic adoptions of the future regulations, the codes, would not seem to violate any constitutional limitation, although some courts have expressed doubts on this point.[89]

Objection to the state acts is also predicated on the ground that there is a denial of due process of law since they do not sufficiently define what shall constitute a crime.[90] The acts generally provide that the violation of any provision of the codes shall be a misdemeanor punishable by fine. In estab-

82. Rules and regulations of the administrative bodies do not have the force of statutes even though the legislature might give them the force and effect of laws. Schumer v. Caplin, 241 N. Y. 346, 150 N. E. 139 (1925).

83. The purpose of any administrative board set up by the legislature, is to carry out the purpose of the law by formulating rules *in futuro*.

84. The question should be immaterial whether the regulation is made by a state agency or a foreign agency; if it is an administrative regulation, it violates no constitutional prohibition. See Comment (1935) 33 MICH. L. REV. 597, 601 setting forth the adoption by the states of federal administrative determinations in those fields where the national and state governments have pursued a common policy; *e.g.*, federal narcotic laws.

85. In State v. Larson [10 N. J. Misc. 384, 160 Atl. 556 (1932)], the state aviation act which purported to allow the state aviation commission to proceed under a standard set up by Congress was declared void on this ground. *Cf.* Sweetland v. Curtis Airport Corp. 41 F. (2d) 929 (N. D. Ohio 1930).

86. See note 84, *supra*.

87. Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co., 28 Ariz. 22, 235 Pac. 137 (1925); Cox v. Dunbar (Superior Ct. Calif. 1934); Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202 (1922).

88. Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co., 28 Ariz. 22, 235 Pac. 137 (1925) (void as to the attempt to adopt the standard of insurance as subsequently adopted by New York); Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202 (1922) (cannot incorporate laws to be made *in futuro* by Congress).

89. Cline v. Consumers Co-operative Gas & Oil Co., 152 Misc. 653, 274 N. Y. Supp. 302 (Sup. Ct. 1934); Darweger v. Staats, 275 N. Y. Supp. 394 (Sup. Ct. 1934).

90. Darweger v. Staats, 275 N. Y. Supp. 394 (Sup. Ct. 1934) (violations are determined by something not in existence at time of enactment, and the definition of a crime is left to a foreign agency).

lishing a crime, a legislature must fix an ascertainable standard of guilt, so that those subject thereto may regulate their conduct in accordance with the act.[91] In the recovery acts, however, the filing of the codes will have established the standard of guilt, and it is recognized that the legislatures may delegate the power to make rules and regulations and provide that violations shall constitute a crime.[92]

THE SATISFACTION OF GOLD CLAUSE OBLIGATIONS BY LEGAL TENDER PAPER. Not until 1867 did anyone seriously litigate[1] what Charles Pinckney meant when he successfully urged upon the Constitutional Convention[2] that the document it was then formulating confer upon the Congress the power "To coin money" and "regulate the value thereof."[3] During that year and those that have followed, however, the Supreme Court of the United States on four occasions[4] has been called upon to declare what this government's founders contemplated when they incorporated this provision into the paramount law of the land.[5] Confessedly, numerous other powers delegated in terms to the national

91. United States v. Cohen Grocery Co., 255 U. S. 81 (1921); Connally v. General Const. Co., 269 U. S. 385 (1926); Cline v. Frink Dairy Co., 274 U. S. 445 (1926); Champlain Rfg. Co. v. Commission, 286 U. S. 210 (1931).

92. United States v. Grimaud, 220 U. S. 506, 522 (1911). ("A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."). *Accord:* Avent v. United States 266 U. S. 127 (1924); Hampton & Co. v. United States, 276 U. S. 394 (1928); *cf.* Broadbine v. Inhabitants of Town of Revere, 182 Mass. 598, 66 N. E. 607 (1903).

1. Hepburn v. Griswold, 75 U. S. 603 (1869), was first argued before the United States Supreme Court during the December term of 1867. It is scarcely necessary to remark that the question had already been determined in state courts as well as inferior federal tribunals.

2. In the draft of the Constitution proposed by Mr. Pinckney there appeared a coinage clause virtually identical with that ultimately adopted. See 1 ELLIOT, DEBATES (2d ed. 1836) 184.

3. While other litigation, not unrelated to this grant of power, arose at substantially the same time and resulted in a line of decisions of which Bronson v. Rodes, 74 U. S. 229 (1868), may be regarded as the parent, it was considerably narrower in scope and concerned chiefly an interpretation of the terms of the Legal Tender Acts, the Court holding the provisions thereof were not intended to extend to contracts expressly made payable in gold and silver coin.

4. Hepburn v. Griswold, 75 U. S. 603 (1869); Legal Tender Cases, Knox v. Lee, Parker v. Davis, 79 U. S. 457 (1871); Juilliard v. Greenman, 110 U. S. 421 (1884); Gold Clause Cases, 55 Sup. Ct. 407 (1935). These last decisions are divided as follows: Norman v. Baltimore & Ohio R. R., United States et al. v. Bankers' Trust Co. et al. (two cases), *ibid.;* Nortz v. United States, *id.* at 428; Perry v. United States, *id.* at 432. For the dissenting opinion of Mr. Justice McReynolds, applicable to all the cases, see *id.* at 419.

5. U. S. CONST. Art. I, § 8. "The Congress shall have the power . . . To coin money, regulate the value thereof, and of foreign coin. . . ."