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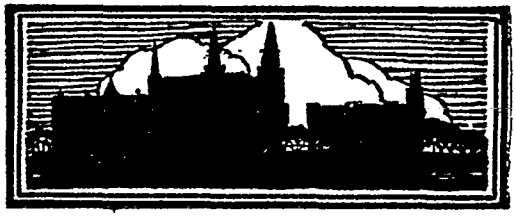

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THE VALIDITY OF FEDERAL LABOR LEGISLATION WITH SPECIAL EMPHASIS UPON THE NATIONAL LABOR RELATIONS ACT*

RICHARD B. JOHNS, JR.

THERE exists today a strong belief on the part of proponents of a more powerful central government that the argument of unconstitutionality is being used to thwart vital legislation made necessary by changing social and economic relations. It is pointed out that virtually every departure from established tradition is attacked either upon the ground that it is an invasion of private rights, an unauthorized delegation of power, or an act outside the scope of federal power. The contention is made that these phrases are illusory, that the interpretation of the Constitution is not fixed and permanently determined, but rather is susceptible of change and revision by the legislature and court immediately in power. Further, the loose and general language of certain clauses is pointed to as evidence that the framers recognized the need for elasticity, in that economic necessity and the exigencies of the moment might dictate a revision and restatement of these rights.

Before we accept too readily the views thus expressed, let us look to the conditions existing at the inception of our federal government. Immediately following the Revolutionary War there occurred an era of

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economic distress equalling in severity any like experience in the history of this nation.[1] The expense of carrying on the War, coupled with subsequent purchases upon credit from the nations of Europe, had built up an enormous public and private debt. England, through a series of embargoes and prohibitory decrees, had succeeded in stifling American trade in what had hitherto been its most profitable markets. Unable to meet their obligations as they matured, the colonies adopted acts of repudiation which the weak Confederation frowned upon but was powerless to prevent. Credit and financial aid was then withdrawn by European nations, and America found itself in the position of having endless natural resources but insufficient capital for their development.[2]

Yielding to the angry insistence of the debtor class, the legislatures of the various states adopted so-called emergency legislation. There came a period of currency inflation, a period characterized by the prodigal issuance of fiat money on the part of both private corporations and the various governments. Confusion existed as to the true value of this money, it was often discounted to a small fraction of its face value, and the paper money of one colony was seldom freely accepted in the markets of another. The values of land and property depreciated, as there was neither the capital to render it productive nor the market for what it might produce. Thereupon, the legislatures turned to a more immediate form of relief. Laws were passed which extended arbitrarily the maturation date of obligations, in some instances authorizing virtual repudiation of certain types of indebtedness. This resulted in a stoppage of the ordinary functions of trade and commerce, as those who had money to loan refused to do so, and merchants hesitated to sell to citizens of other colonies for fear that their interests would not be fairly protected.[3]

Upon this anxious scene appeared the advocates of the present Constitution. They recommended strict enforcement of contract obligations, the protection of creditor rights, and the establishment of a central government capable of enunciating and enforcing a universal law. These men saw the need for faith and confidence in the political and economic system of the country. They recognized the need for some stable form of government which could bring forth domestic capital from hiding, force a recognition of just and rightful debts, and reestablish favorable trade relations between this and foreign nations.

The proposed Constitution was contested on the ground that it was a reversion to an autonomous type of government prevalent in Europe.

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[1] *Home Bldg. & Loan Ass'n.* v. *Blaisdell,* 290 U.S. 398, 427, 54 Sup. Ct. 231, 78 L.ed. 413 (1934).

[2] MARSHALL, LIFE OF WASHINGTON (1807) vol. 5, pp. 88-131; ANDREWS, HISTORY OF THE UNITED STATES (1929) vol. 2, pp. 162-193.

[3] *Ibid.*

State rights and private rights were held to be imperilled by the new plan, and debates in the various legislative halls were bitter against it. However, the framers of the Constitution were public figures, well known for their honesty and sagacity, and trusted by the people. They realized that the federal government which they proposed would be one of a vastly greater power than any heretofore conceived. For this reason they included within the Constitution safeguards to protect the vital rights of the states and the people. They went as far as they wanted to go in delegating power to the federal government, and in the end their suggested document was accepted without amendment as the law henceforth to govern and protect the respective positions of the people, the states and the federal government.[4]

To state that the framers of the Constitution were well aware that latitude of interpretation would in future times be necessary, is to state a manifest untruth. It is but necessary to search the letters and documents of the time to determine the convictions of these men. When they incorporated into the document the pronouncement against any "Law impairing the Obligation of Contracts," they meant precisely that,[5] for they were dealing with a situation within the scope of their own personal experiences—a situation in no way affected by the phenomenal change in our economic life since that time. It is stated in the Constitution and has forever been a principle of judicial guidance that the federal government is one of expressly delegated powers. This in itself implies a strict limitation. The powers intended to be delegated were clearly determined in the minds of the statesmen of that time. If the language has since become obscure or the meaning clouded by judicial or legislative tampering, it is but necessary to refer to the public pronouncements and official documents accompanying its adoption to determine again the scope of these disputed powers.[6] No language is so precise, nor any man so articulate, but that his utterances may be warped and twisted to express a contrary meaning. What the framers of the document did not foresee was the struggle for misinterpretation which has existed from its adoption to the present day.

The people of that day required a written code which would prevent any recurrence of the abuses existing in governments from which they had migrated. They desired that the powers of this government be expressed in a clear and permanent form, and they established a judiciary branch of the government to perpetuate and protect the rights which they reserved to themselves or the various states. However, they did not vest in the judiciary the power to change from time to

[4] *Ibid.*
[5] ELLIOT'S DEBATES, vol. 1, pp. 491, 492; vol. 3, p. 478; vol. 4, pp. 156, 191, 333; vol. 5, pp. 485, 488, 545, 546.
[6] *Ibid.*

time the basic form of government. These demands have been bred by political expediency or seeming economic necessity. The people of that time experienced and appreciated many of the problems with which we are faced today, and they established a permanent law to deal with these problems. Were the language of the Constitution interpreted for the first time today, there might be some justification for recent disputed legislation, but it is to be pointed out that the construction of this instrument has been crystalized by judicial decision over a period of one hundred and fifty years, and that history, conditions, and purpose at the time of its inception must determine the construction of its terms. There can be no consideration of present social relations or uncertain economic theories, but rather a scrupulous attention to the principles of government under written constitution. There is no authority for changing interpretations. If change is necessary it must come through the authorized procedure for amendment prescribed in the Constitution.[7]

The Welfare Clause

There have been numerous attempts to justify under the welfare clause federal interference in matters of state concern. These attempts spring from a contorted interpretation of the clause. It is stated that the clause empowers the federal government to intervene in matters of public concern in order to promote the general welfare, thus isolating from the context the important tax phrase. In a recent decision declaring invalid the Agricultural Adjustment Act, the Supreme Court, in speaking of the welfare clause, said, "The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. * * * The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare."[8] The history of the court is replete with like interpretations of the power granted under this clause.[9] It would not be true, however, to state that the federal government had never used this power for purposes other than the raising of revenue. Through the use of excessive taxation it virtually destroyed or sought to destroy traffic in certain drugs.[10] By the same means the

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[7] *Child Labor Tax Case*, 259 U.S. 20, 37, 42 Sup. Ct. 449, 66 L.ed. 817 (1922); *United States* v. *Sprague*, 282 U.S. 716, 731, 51 Sup. Ct. 220, 75 L.ed. 640 (1931); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 55 Sup. Ct. 837, 79 L.ed. 1570 (1935); *United States* v. *Butler*, 56 Sup. Ct. 312 (1936).

[8] *United States* v. *Butler*, 56 Sup. Ct. 312, 318 (1936).

[9] *Child Labor Tax Case*, 259 U.S. 20, 42 Sup. Ct. 449, 66 L.ed 817 (1922); *Hill* v. *Wallace*, 259 U.S. 44, 66 L.ed. 822 (1922); *United States* v. *Constantine*, 56 Sup. Ct. 223 (1935).

[10] *United States* v. *Doremus*, 249 U.S. 86, 39 Sup. Ct. 214, 63 L.ed. 493 (1919).

government sought to affect trade in oleomargarine,[11] and to cripple the circulation as money of notes issued by private persons or state banks.[12] But in all these measures the court found no sufficient departure from the purpose of taxation to invalidate the acts, stating, in effect, that it was not the function of the court to determine whether a tax was excessive or oppressive, and that a measure was not invalid merely because a secondary motive other than taxation might have contributed to its passage.[13] This may be specious reasoning by the Court, but it cannot be said that it has ever been applied to any controversy different in character from those mentioned above. It is admitted that the power to tax is the power to destroy, but in its exercise of this power the federal government is confined to subjects amenable to federal taxation and may not tax so as to "* * * impair the separate existence and independent self-government of the states," or "for ends inconsistent with the limited grants of power in the Constitution."[14] The general rule laid down is that Congress may use this power to tax for the express purpose of raising revenue, and that it may not be used to accomplish indirectly that which Congress may not do directly.

The Commerce Clause

Under the power conveyed to the government to regulate commerce among the several states, Congress has at times attempted legislation transcending the powers conferred by the grant. This clause can in no way be interpreted to authorize licentious inter-meddling in affairs properly of state concern.[15] Where intrastate activities affect directly, and with obvious intent, the free flow of interstate commerce, the federal government may legislate to prevent such activities;[16] but, as the Supreme Court states in the *Schechter* case,[17] "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only

[11] *McCray* v. *United States,* 195 U.S. 27, 24 Sup. Ct. 769, 49 L.ed. 78 (1904).
[12] *Veazie Bank* v. *Fenno,* 8 Wall. 533, 19 L.ed. 482 (1869).
[13] *Child Labor Tax Case,* 259 U.S. 20, 43, 42 Sup. St. 449, 66 L.ed. 817 (1922).
[14] Note 13, *supra,* p. 41.
[15] *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L.ed. 23 (1824); *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U.S. 439, 35 Sup. Ct. 902, 59 L.ed. 1397 (1915); *Coe* v. *Errol,* 116 U.S. 517, 6 Sup. Ct. 475, 29 L.ed. 715 (1886); *Kidd* v. *Pearson,* 128 U.S. 1, 21, 9 Sup. Ct. 6, 32 L.ed. 346 (1888); *United States* v. *Dewitt,* 9 Wall. 41, 45, 19 L.ed. 593 (1869); *Keller* v. *United States,* 213 U.S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L.ed. 737 (1909); *Hammer* v. *Dagenhart,* 247 U.S. 251, 38 Sup. Ct. 529, 62 L.ed. 1101 (1918); COOLEY, CONSTITUTIONAL LIMITATIONS (7th Ed.) p. 11.
[16] *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n.,* 274 U.S. 37, 47 Sup. Ct. 522, 71 L.ed. 916 (1927).
[17] *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 546, 55 Sup. Ct. 837, 79 L.ed. 1570 (1935).

by sufferance of the federal government. * * * It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it." That the power granted is of a wide character is not disputed. It may be used to exclude entirely from interstate commerce items deleterious to the public health or morals.[18] The power implies the right to regulate all of the necessary incidents and transactions of interstate commerce.[19] It has been held broad enough to authorize government intervention in disputes between labor and the carriers on the ground that such disputes lead to an interruption of the flow of commerce.[20] These incidental powers are all necessary adjuncts flowing out of the broader responsibility to regulate commerce, and are necessary in order that the regulation be one in fact, not theory. But, "The power of states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government."[21]

THE WAGNER ACT[22]

The purpose as stated in the Act is "to remove obstructions to the free flow of commerce by encouraging the practice of collective bargaining, and by protecting the exercise of the worker of full freedom of association, self-organization, and designation of representatives of his own choosing, for the purpose of negotiating the terms and conditions of his employment or their mutual aid or protection." In order to achieve this purpose the Act sets up a Board of three members, with power to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Act. The Board may proceed upon complaint or suspicion against any employer, issue notice of hearing and, upon facts determined at such hearing, issue an order to cease and desist from the unfair labor practice complained of, and may take such affirmative action, including restitution, as will effectuate the policies of the Act. Both the Board and any aggrieved person may appeal to the proper court for a review of such order, but for purposes of review the findings of fact made by the Board, if supported by evidence, shall be conclusive. Finally, the Board may force, through application to the courts in cases of recalcitrant witnesses, the presence

[18] *Champion* v. *Ames,* 188 U.S. 321, 23 Sup. Ct. 321, 47 L.ed. 492 (1903); *Hipolite Egg Co.* v. *United States,* 220 U.S. 45, 31 Sup. Ct. 364, 55 L.ed. 364 (1911).

[19] "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L.ed. 23 (1824).

[20] *Texas & New Orleans R. R. Co.* v. *Brotherhood,* 281 U.S. 548, 50 Sup. Ct. 427, 74 L.ed. 1034 (1930).

[21] *New York* v. *Miln,* 11 Pet. 102, 139, 9 L.ed. 648 (1837).

[22] The NATIONAL LABOR RELATIONS ACT, 49 STAT. 372, § 14 (1935), 29 U.S.C.A. §§ 151-166 (1935).

of any witness and the submission of any desired evidence discovered in the unlimited search authorized by the Act.

Employees are protected by the Act in their right to self-organization, to form, join or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

The unfair labor practices prohibited by the act are (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in the Act; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act; (5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of the Act.

There is no pretense that this Act is predicated upon extraordinary powers springing from a great national emergency. It is an attempt permanently to enunciate certain alleged rights which shall henceforth be protected by permanent federal legislation. Senator Wagner, in his hearing before the Labor Committee of the House of Representatives,[23] warned of a permanent state of inequality between employer and employee unless legislation of this type were enacted. He also cited the unequal distribution of the national income since the World War, and the unfavorable decisions of the Supreme Court over a period of several decades. His contention throughout is that industry must be burdened by a permanent legislative handicap if the relative positions of capital and labor are to be equalized.

The Act specifies five unfair labor practices, and briefly defines what these practices shall be. Senator Wagner avers that protection of the employee against these practices is a duty which falls squarely within the constitutional obligations of the federal government. He states:

"I want to emphasize even more strongly the constitutional power and the intent of Congress to prohibit these unfair labor practices even where they do not lead to or threaten to lead to strikes. Under our present economic system collective bargaining is one of the essentials for maintaining an adequate distribution of purchasing power among the population generally. The impairment of collective bargaining is likely to intensify the maldistribution of buying power, thus reducing

[23] H. R. Rep. No. 6288, 74th Cong. 1st Sess. (1935) 8-25.

standards of living, unbalancing the economic structure, and bringing on depressions with their devastating effect upon the flow of commerce. The theory of the Recovery Act is that wage fixing by means of codes may bear a direct relationship to interstate commerce. If that is true, other processes of fixing wages, such as collective bargaining, have an equally important bearing upon such commerce.

"The Supreme Court already has recognized the relationship between prices and commerce. In Chicago Board of Trade v. Olsen (262 U.S. 1) (1922), upholding the validity of Federal regulation of boards of trade at terminal markets, the Court said:

" 'The question of price dominates trade between the States.'

"In effect upon commerce wages are undistinguishable from prices.

"In the more recent case of Appalachian Coal Co. v. United States (53 Supreme Court 471) (1933), the present Chief Justice recognized in dramatic language the relationship between general business conditions and the flow of commerce. He wrote:

" 'The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.'

"This language is no less applicable when Congress has declared that the lack of enforcement of the right to bargain collectively is having an adverse effect upon the maintenance of sound economic conditions.

"While this bill does not intend to go beyond the constitutional power of Congress, it goes to the full limit of that power in preventing these unfair labor practices. It seeks to prevent them, whether they affect interstate commerce by causing strikes, or by destroying the equivalence of economic forces upon which the full flow of commerce depends, or by occurring in interstate commerce."[24]

It is further stated that the Act in no way violates the due process clause. In support of this statement the author of the bill cites the decision of the Court in *Texas & New Orleans R. R. Co.* v. *Brotherhood*,[25] which, he states, upholds the power of Congress "to guarantee freedom of organization, to prohibit the company-dominated union, and to prevent employers from requiring membership or non-membership in any union."

Let us now determine whether the reasoning and the statements of the Senator square with the facts. We find that the Act is an attempt through federal legislation to coerce the employer into bargaining with the representative chosen by the majority of his employees

[24] Note 23, *supra*, pp. 23, 24.
[25] 281 U.S. 548, 50 Sup. Ct. 427, 74 L.ed. 1034 (1930).

upon any demand which this majority seeks to impose, and to restrain him from interfering with the actions of any or all of his employees, regardless of the character of these actions, providing they are aimed toward organization or unionization. Concerning the first requirement Senator Wagner says:

"While the bill explicitly states the right of employees to organize, their unification will prove of little value if it is to be used solely for Saturday-night dances and Sunday-afternoon picinics. Therefore, while the bill does not state specifically the duty of an employer to recognize and bargain collectively with the representatives of his employees, *because of the difficulty of setting forth this matter precisely in statutory language,* such a duty is clearly implicit in the bill."[26]

From what source springs this asserted difficulty of expression? A provision making the refusal to bargain an unfair labor practice was without difficulty incorporated in the Act before passage. Certainly it was not a want of articulate expression on the part of the author, for he has stated in terms as clear as could be desired the duty implied in the original draft of the Act. We have never observed that the inability to find proper satutory language severely affected the clarity or amount of proposed legislation. More proper would be the statement that it was difficult to find constitutional language in which to express this implied duty. The fact that labor trouble has existed in every state in the Union and has resulted in conditions which have had a national effect does not give the federal government the necessary power to intervene. The industries in which these troubles have occurred are largely engaged in business of intrastate character. Any effect upon interstate commerce is of indirect and incidental origin.[27] It is ridicu-

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[26] Note 23, *supra,* p. 16.

[27] In *A. L. A. Schechter Poultry Corp* v. *United States,* 295 U.S. 495, 547, 55 Sup. Ct. 837, 79 L.ed. 1570 (1935) the Court said, "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Company v. United Mine Workers, 268 U.S. 295, 310, 45 Sup. Ct. 551, 69 L.ed. 963. But, where that intent is absent and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. United Mine Workers v. Coronado Coal Company, 259 U.S. 344, 410, 411, 42 Sup. Ct. 570, 61 L.ed. 975, 27 A.L.R. 762; United Leather Workers' International Union v. Herkert, 265 U.S. 457, 464-467, 44 Sup. Ct. 623, 68 L.ed. 1104, 33 A.L.R. 566; Industrial Association v. United States, 268 U.S. 64, 82, 45 Sup. Ct. 403, 69 L.ed. 849; Levering & Garrigues v. Morrin, 289 U.S. 103, 107, 108, 53 Sup. Ct. 549, 551, 77 L.ed. 1062. * * * While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to federal power, and for all practical purposes

lous to assume that the authors of this bill had any deep-seated desire to stimulate the flow of commerce. The apparent and purposeful desire was to inject the federal government into a sphere of industrial relations in which it had no authority to appear. The motive behind this desire is to be sought in the political history of the times.

It is stated that under our present economic system collective bargaining is an essential for maintaining purchasing power, that the impairment of this right tends to produce depressions which directly affect interstate commerce. This is economic theory. By like reasoning one may trace the tortuous path of every intrastate activity to some distant point where it affects interstate commerce. It is true that, were it not for intrastate activity, there would be no interstate commerce; but how specious is the reasoning that attempts to trace back to the farm or the workshop the ills of interstate commerce, trusting that by such fabrication authority will be found which does not in fact exist. In the recent *Schechter* case is found an indictment of legislation based upon this type of authority.[28] There it is said:

"The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—'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.'"

The *Chicago Board of Trade* v. *Olsen* case[29] is cited and reference is made to the statement of the Court that "The question of price dominates trade between the states." An analogy is drawn between prices and wages, with the inference clearly drawn that since the government intervened in this case involving the price of grain, it possesses the power to intervene in wage disputes. To tear an isolated sentence from its context, vest it with the character of law, and cite it in support of this far-fetched contention, is to betray utterly the false ground upon which this legislation stands. The case cited involves speculation in grain futures at terminal markets. The Court held that mere temporary stoppage of grain in transit does not remove it from interstate com-

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we should have a completely centralized government. * * * It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it."

[28] *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 528, 55 Sup. Ct. 837, 79 L.ed. 1570 (1935).

[29] 262 U.S. 1, 43 Sup. Ct. 470, 67 L.ed. 839 (1923).

merce, and that "Manipulations of grain futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and * * * disturb the normal flow of actual consignments."[30] Does the author of the Wagner Act assert that this legislation will remove from the matter of wage fixing the uncertain elements which now exist, or that it will result in a revaluation of services according to the doctrine of supply and demand? Decidedly not; it is a social measure aimed solely at the improvement of conditions of labor.

The federal government has power to regulate interstate commerce and its incidents because commerce relies upon a far-flung system of transportation and communication impossible of regulation by the various states.[31] Any conspiracy or other action which might tend to interfere directly with this vital process may be prohibited by the federal government.[32] The power of the government to regulate wages of employees engaged in interstate commerce was upheld in *Wilson* v. *New*,[33] but only insofar as such regulation was necessary to prevent a disturbance of the free flow of commerce. The clear implication of this decision is that such power is of an entirely temporary nature, to be used to meet emergencies and not to determine permanent policies, and that it is limited exclusively in its application to instruments of interstate commerce. There is no precedent here for an extension of this power to activities of intrastate character.

The premise upon which the Wagner Act is founded is that the federal government, under power conveyed in the commerce clause, has jurisdiction to intervene in intrastate labor relations when such relations tend to affect the *amount* of interstate commerce transacted. Strikes and the impairment of economic stability, which are the matters complained of in the Declaration of Policy of this Act, can affect interstate commerce only by decreasing its volume. The suggestion that this result affords jurisdiction to the federal government is a novel conclusion. Why, if this be true, did the present administration engage in

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[30] Note 29, *supra*, p. 39.

[31] "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations." *Bowman* v. *Chicago & N. W. R. Co.*, 125 U.S. 465, 507, 508, 31 L.ed. 700 (1888).

[32] *R. R. Commission of Wisconsin* v. *Chi., B. & Q. R. Co.*, 257 U.S. 563, 42 Sup. Ct. 232, 66 L.ed. 371 (1922) where intrastate railway rates were declared discriminatory, therefore "affecting" interstate commerce. See also *Coronado Co.* v. *U. M. Workers*, 268 U.S. 295, 45 Sup. Ct. 551, 69 L.ed. 963 (1925); *Bedford Co.* v. *Stone Cutters' Ass'n.*, 274 U.S. 37, 47 Sup. Ct. 522, 71 L.ed. 916 (1927).

[33] 243 U.S. 332, 37 Sup. Ct. 298, 61 L.ed. 755 (1917). See also *Texas & New Orleans R. R. Co.* v. *Brotherhood*, 281 U.S. 548, 50 Sup. Ct. 427, 74 L.ed. 1034 (1930).

the elaborate attempt to justify the Agricultural Adjustment Act under the Welfare Clause? Why not decide instead that the farmer is producing either too much or too little, that such action affects interstate commerce, and therefore is subject to federal regulation? This reasoning is no more irrational than that under consideration, which, if accepted, would subject every intrastate activity to federal control. The Court, however, has clearly defined the power of the government under the commerce clause. In the case of *Industrial Association* v. *United States*[34] it is said, "The alleged conspiracy, and the acts here complained of, spent their intended and direct force upon a local situation —for building is as essentially local as mining, manufacturing or growing crops—and if, by resulting diminution of commercial demand, interstate trade was curtailed either generally or in specific instances that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

The theory advanced in this Act would imply an authority in the federal government to direct a continuity of industrial production at a normal or standardized level, since any increase or decrease in production would, through subsequent shipment in interstate commerce, affect the volume of that commerce. The court has specifically denied that any such power exists, and a scrupulous examination of these decisions, devoid of intentional misconstruction, will determine that legislation such as the Wagner Act finds no authorization under the commerce clause.[35] A classic example of an unauthorized extension of the power conveyed in the commerce clause is found in the case of *Hammer* v. *Dagenhart*.[36] The government, in an attempt to effect national prohibition of child labor, excluded from transportation in interstate commerce goods produced by this type of labor. Said the Court, "Over interstate commerce, 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. * * * The grant of power to Con-

[34] 268 U.S. 64, 82, 45 Sup. Ct. 403, 69 L.ed. 849 (1925).

[35] "In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. * * * The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state." This, said the Court, affords no opportunity for the exercise of federal power. *Simpson* v. *Shepard*, 230 U.S. 352, 410, 33 Sup. Ct. 729, 57 L.ed. 1511 (1913). "The power of a Legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon." *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of Kansas*, 262 U.S. 522, 543, 43 Sup. Ct. 630, 67 L.ed. 1103 (1923). See also *Kidd* v. *Pearson*, 128 U.S. 1, 21, 9 Sup. Ct. 6, 32 L. ed. 346 (1888), *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 259, 260, 43 Sup. Ct. 83, 67 L.ed. 237 (1922).

[36] 247 U.S. 251, 272, 38 Sup. Ct. 529, 62 L.ed. 1101 (1918).

gress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in the exercise of the police power over local trade and manufacture. * * * Police regulations relating to internal trade and affairs of the state have been uniformly recognized as within such control."

The character or possible benefits to be derived from an act are not persuasive in any consideration of its constitutionality.[37] The Court freely admits that the purpose of much contested legislation is wholly good, but it is not the function of the Court to determine the economic or social merit of this legislation.[38] The Court is impressed with the sole duty of determining whether it is within the scope of legislative power.[39] When it has performed that duty, it has reached the limit of its authority.[40] A mistaken conception of this function has led to much recent criticizm, a conception premised upon the idea that the Court may revise the settled meaning of words and phrases if the need for such revision seems sufficiently urgent. In its defense of recent legislation the government has spoken much of unemployment, social relations and economic conditions, the inference clearly being that the Court should, in the alleged interest of public welfare, disregard the unconstitutionality of the acts. Obviously this may not be done. The Constitution invests Congress with the power to regulate commerce between the several states. This is not a variable power to be expanded or contracted at will. It has been consistently interpreted to be the power to regulate the conduct and protect the machinery of such commerce from direct, destructive influences. Were the power enlarged to the extent contended for by the government, state and private rights as understood under our present system of dual government would be obliterated, and the necessary prestige enjoyed by the Court would be irreparably impaired.

The contention that this form of legislation does not violate due process is equally open to attack. It is admitted by the author that the

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[37] "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co.* v. *United States,* 193 U.S. 197, 337, 24 Sup. Ct. 436, 48 L.ed. 679 (1904). "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." *Nebbia* v. *People of State of New York,* 291 U.S. 502, 537, 54 Sup. Ct. 505, 78 L.ed. 940 (1934).

[38] "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good." *Child Labor Tax Case,* 259 U.S. 20, 37, 42 Sup. Ct. 449, 66 L.ed. 817 (1922).

[39] *United States* v. *Butler,* 56 Sup. Ct. 312; 318 (1936).

[40] Note 39, *supra,* p. 318.

purpose of the Act is to influence wages through governmental intervention. That the government may not do this directly is the pronouncement of the *Schechter* case.[41] How then may the government seek to achieve the same result by way of vesting the employee with sufficient power to enforce his demands? "Liberty" and "property" are equally protected under the Fifth Amendment. Freedom of contract is one of the recognized rights within the protection of the first of these terms. The right of the employer to contract for labor, and the right of the employee to contract as to the wage and conditions of his labor, are recognized property rights.[42] Until one of these rights is violated, the power of the federal government may not be invoked. But here is an admitted attempt to force the employer into a contract not of his own choosing, and with parties with whom he may not wish to deal.[43]

The author of the Act contends that the groundwork for such legislation was laid by the decision of the Court in *Texas & New Orleans R. R. Co.* v. *Brotherhood.*[44] This was a case directly concerning interstate commerce, in which the employees and the carrier involved were vital instruments of commerce. Wilfully the carrier sought to coerce its employees into a company union, thereby attempting to dictate the choice of their representatives. Vicious and coercive methods were used by the carrier, causing a serious condition which became a very real peril to the continued carrying on of commerce. The Court restrained the actions of the carrier insofar as these actions interfered with the right of the employee to organize and select his own representative. It was emphasized that the rules laid down in this decision applied only to industries clothed with a public interest, that the rights of private parties could and would be disregarded in the face of a greater right of the public. The right of the government thus to intervene in the dispute between the carrier and its employees was predicated squarely

[41] "We are of the opinion that the attempt through the provisions of the code to fix hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power." *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 550, 55 Sup. Ct. 837, 79 L.ed. 1570 (1935).

[42] *Coppage* v. *State of Kansas,* 236 U.S. 1, 35 Sup. Ct. 240, 59 L.ed. 441 (1914).

[43] *Meyer* v. *Nebraska,* 262 U.S. 390, 399, 43 Sup. Ct. 625, 67 L.ed. 1042 (1923). Here a law prohibiting the teaching of foreign languages was declared unconstitutional as an infringement of the liberty of contract and rights of property. The Court said, "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." In *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of Kansas,* 267 U.S. 552, 566, 45 Sup. Ct. 441, 69 L.ed. 785 (1925) the court considered a scheme of compulsory arbitration. Said the Court, "It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his private affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment." See also *Coppage* v. *State of Kansas,* 236 U.S. 1, 35 Sup. Ct. 240, 59 L.ed. 441 (1914).

[44] 281 U.S. 548, 50 Sup. Ct. 427, 74 L.ed. 1034 (1930).

upon the broad power of the commerce clause, and the parties affected were proper subjects of this power.

That the author should choose this case upon which to premise the constitutionality of his bill speaks eloquently of the frenzied search for authority to so legislate. The Court carefully qualified its language in order that no such interpretation would be possible.[45] There was no attempt to force the carrier to deal with the representatives ultimately chosen. The matter of collective bargaining through governmental coercion was not in issue. It has long been recognized that labor has the right to organize and select representatives of its own choosing. The employer had violated this right, and the protection of the government was invoked to prevent further injury. It is submitted that the Wagner Act exerts coercion of no less degree in violation of an equal right of the employer. In *Coppage* v. *State of Kansas*[46] the Court said, "The employe's liberty of making contracts does not include a liberty to procure employment from an unwilling employer or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is accorded to the employee. * * * There may not be one rule of liberty for a labor organization or its members and a more restrictive rule for employers."

There are certain private rights specifically guaranteed to every person in this country. When an impairment of one of these rights occurs an opportunity exists for the exercise of the protective power of the government. There is no need for affirmative legislation concerning these rights as they are clearly outlined in the Constitution. There can be no justification for legislation which extends an existing right or creates a new right for a certain class at the expense of rights justly enjoyed and fairly exercised by another class. It is not contended that the exercise of these rights may not be regulated reasonably in protection of the general welfare,[47] but class legislation bred of political expediency and the pressure of an organized minority does not accomplish this result, nor does it fall within the scope of federal power.[48]

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[45] Note 44, *supra*, pp. 570, 571.

[46] 236 U.S. 1, 20, 35 Sup. Ct. 240, 59 L.ed. 441 (1914).

[47] "While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances." *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of Kansas*, 267 U.S. 552, 566, 45 Sup. Ct. 441, 69 L.ed. 785 (1925). See also *Adkins* v. *Children's Hospital*, 261 U.S. 525, 43 Sup. Ct. 394, 67 L.ed. 785 (1923).

[48] *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 374, 55 Sup. Ct. 758, 79 L.ed. 1468 (1935). Herein the Court held invalid the compulsory retirement and pension system contained in the Railroad Retirement Act (45 U.S.C.A. §§ 201-214). The Court said, "We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of inter-

The Board set up for the administration of this Act is empowered to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Act, to investigate and determine the existence of unfair labor practices broadly defined in the Act, to arrange for collective bargaining under rules and conditions prescribed by the Board, to issue cease and desist orders and take such affirmative action, including restitution, as may be necessary to effectuate the policies of the Act; and, though orders of the Board are appealable, they shall be conclusive as to findings of fact if supported by evidence taken without regard to the rules of evidence prevailing in courts of law or equity.[49] Thus we find that the Board may make, amend, and rescind rules and regulations preventing the employer from interfering with, or coercing employees in their exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. The Board may also take such affirmative action, including restitution, as may be necessary to remove obstructions to commerce by encouraging the practice of collective bargaining, and by protecting the rights of free association, self-organization, the selection of representatives, and negotiation of terms and conditions of employment or their mutual aid or protection.[50]

Legislation curbing the exercise of private rights must be specific as to the rules and regulations under which such limitation is to be imposed, particularly when dealing with rights of parties not engaged in an undertaking clothed with a public interest.[51] Laws which delegate power must state in clear and explicit terms the exact limit, purpose, and exercise of such power in order that the administrative body may not be vested with legislative license.[52] The Wagner Act outlines a broad field of activity in which the administrative body may roam at will under rules of its own devising and power of its own prescription. Neither the rules for its administration nor the scope of its application is defined by the Act. It is left entirely to the Board to determine as to whether an act of the employer is an act of interference or coercion, and this determination is to be reached through proceedings conducted

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state transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the states, but as a means of assuring a particular class of employees against old age dependency." See also *Coppage* v. *Kansas*, 236 U.S. 1, 35 Sup. Ct. 240, 59 L.ed. 441 (1914); *Truax* v. *Corrigan*, 257 U.S. 312, 42 Sup. Ct. 124, 66 L.ed. 254 (1921).

[49] The National Labor Relations Act, 49 STAT. 372, § 14 (1935), 29 U.S.C.A. §§ 151-166 (1935).

[50] Note 49, *supra*.

[51] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 426-433, 55 Sup. Ct. 241 (1935).

[52] Note 51, *supra*. See also *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529-541, 55 Sup. Ct. 837, 79 L.ed. 1570 (1935).

under rules prescribed by the Board. To vest an administrative body with the discretionary license which characterizes this Act is an unconstitutional delegation of legislative power.[53]

A further defect, of less significance but equally as fatal to the portion of the Act which it affects, is the power of illegal search and seizure. It is stated in the Act that the Board or its agents shall have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. It is further provided that any member of the Board shall have the power to issue subpoenas to compel the production of such evidence at hearings held by the Board. The penalty provided for resisting, preventing, impeding, or interfering with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act is a fine of not more than $5,000.00 or imprisonment not to exceed one year, or both. Now let us look to the Constitution. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." No expression of law could be more lucid or precise than the terms of this amendment. The meaning is neither obscure or ambiguous. The Court has held that warrants, issued upon probable cause, upon Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized, are requisite to a legal search of any premises, excepting, however, search of places the very nature of which demands immediate action by the officers of the law.[54] Excepting in the last described instance, no searches are legal unless conducted under a warrant, and no warrant may be used for the purpose of an exploratory search.[55] Any evidence obtained in violation of this procedure may not be used in proceedings against the suspected parties.[56]. The Wagner Act, in effect, issues a blanket warrant to the Board or its agents to invade the premises of any suspected industry and conduct an exploratory search for

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[53] Note 52, *supra.*

[54] *Gouled* v. *United States,* 225 U.S. 298, 41 Sup. Ct. 261, 65 L.ed. 647 (1921); *Boyd* v. *United States,* 116 U.S. 616, 6 Sup. Ct. 524, 29 L.ed. 746 (1886); *Weeks* v. *United States,* 232 U.S. 383, 34 Sup. Ct. 341, 58 L.ed. 652 (1914); *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 Sup. Ct. 182, 64 L.ed. 319 (1920); *Carroll* v. *United States,* 267 U.S. 132, 45 Sup. Ct. 280, 69 L.ed. 543 (1925).

[55] Note 54, *supra.*

[56] *Gouled* v. *United States,* 225 U.S. 298, 41 Sup. Ct. 261, 65 L.ed. 647 (1921); *Weeks* v. *United States,* 232 U.S. 383, 34 Sup. Ct. 341, 58 L.ed 652 (1914); *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 Sup. Ct. 182, 64 L.ed. 319 (1920).

damaging evidence. Since this procedure is prohibited, the method of investigation prescribed in the Act fails as a violation of law.

CONCLUSION

An attempt has been made herein to analyze the power of the federal government as opposed to that of the states and the people. As has been shown, the taxing power of the welfare clause has at times been used to accomplish purposes falling upon the borderline of state and federal jurisdiction. These instances have been relatively few, and the field for the exercise of the prohibitive or coercive use of taxation has been strictly limited by judicial decision and legislative consent. An attempt to regulate the evil of child labor was rightfully repulsed by the Court as an abuse of the federal taxing power and an intrusion upon state and private rights. Like attempts have met a similar end. Any scheme for national labor legislation predicated upon the power conferred in the welfare clause is predestined to failure, as such use of the power is foreign to the obvious intent and purpose of the grant, is an imposition upon state and private rights, and is expressly prohibited by the pronouncements of the Court and the tradition of the nation.

The recent attempts at federal labor legislation have been founded upon a tortured interpretation of the commerce clause. The sum and substance of judicial interpretation has been that by virtue of the power conveyed in this clause the federal government is authorized to *regulate* commerce *among* the states, to enunciate and enforce rules for the conduct of such commerce and to insure continuity of the nation-wide *service* of commerce by protecting it against the direct, intentional, and destructive action of outside interests. The service, subject to rules laid down by Congress, must be available and continuous, but the use of this service is optional with the individual. He may ship all or none of his product in interstate commerce. The extent of its use or the amount of interstate business transacted are matters of no concern to the federal government. The National Industrial Relations Act and the present National Labor Relations Act were premised upon the theory that industrial unrest and labor disputes "affect" commerce by causing a diminution in the *amount* of commerce carried on. The far-reaching effects of this interpretation are clearly evident. Any temporary fluctuation of industrial or agricultural activity, voluntary or involuntary, would constitute an opportunity for the exercise of federal authority. State lines and state sovereignty would be obliterated, and our dual system of government, under which we have successfully weathered the political and economic crises of the past century and a half, would pass into history. That the control and regulation of intra-

state business is outside the scope of federal power has been the principle of judicial action since the court first ruled upon this subject. That future legislation under the commerce clause must conform with this principle is a conclusion springing from the presumption that the Court will continue an honest performance of its duty, unintimidated by the pressure of economic theorists, special interests, or organized minorities.

The material and conclusions presented herein may not be contorted to represent a criticism or obstruction to future progress. It is admitted that there are certain changes which seem advisable at the present moment, and it is submitted that these changes may be effected in a constitutional manner without destroying the fundamental structure of our government, but to convert this nation into a testing-ground for irrational economic theory or political experimentation without the sanction of the people, is to corrupt the use of federal power as it exists under our present constitution. During the past year there have been many discussions in the news organs of the country concerning the power of the Supreme Court, and the purpose to which this power has been exercised. Personalities have been indulged in, and attacks upon the character and integrity of the present members of the Court have not been unknown. Numerous plans have been proposed for limiting the Court's power of invalidation. These are insidious, deliberate attempts to accomplish through indirection a purpose considered too dangerous to attempt through forthright action. If the power and prestige of the Court can be undermined to the extent that it can no longer oppose the will of Congress, the necessity of risking constitutional amendment and the possible political repercussion accompanying it will have been eliminated. By this circuitous path the proponents of an all-extensive federal power hope to achieve their purpose.

By written constitution, all federal power is distributed among three departments of government. To fulfill the duties imposed by the Constitution, each department must exercise its authorized power free from interference by the other branches of government. The duty of the Court and the power which it is authorized to exercise are outlined in historic and concise language in *Marbury* v. *Madison*.[57] The Court is unqualifiedly sworn to uphold the Constitution. The words of this oath

[57] 1 Cranch 137, 2 L.ed. 60 (1803). "The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. * * * The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law: if the latter part be true, then written

are not meaningless. When legislation is attempted which is inimicable to the principles of the Constitution, it is the solemn duty of the Court to pronounce it so. The fact that the other branches of government have been derelict in the performance of a like duty should exert no influence upon the action of the Court.

That there has been a concerted attempt to lift us from the slough of this last depression through the use of unconstitutional methods cannot be denied, nor is it denied. There is no widespread belief that the federal government is acting within its constitutional powers when it adopts a nationwide scheme for the fixing of commodity prices or

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constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

"This theory is essentially attached to a written constitution, and is consequently, to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject. * * *

"Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

"That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

"The judicial power of the United States is extended to all cases arising under the Constitution.

"Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

"This is too extravagant to be maintained. * * *

"Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

"If such be the real state of things, this worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

"It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *Constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the Constitution, have that rank.

"Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that *courts,* as well as other departments, are bound by that instrument."

the determination of the hours and wages of labor. That it *should* be able to do this is another matter. We are concerned only with the validity of the method adopted. If it falls within the limits of the powers expressly delegated to our national government, the Court is not concerned with the good or evil which might result. If it falls without these limits, the court is no more concerned with the good or evil of the method itself, but rather with the evil which will result from such disregard of our written Constitution.

The history of this nation for the last century and a half bears mute testimony to the benefits to be derived from government under written constitution. The freedom of action and liberty of expression enjoyed by the people of this nation are unparalleled in the history of the world. We have but to look to Germany and Italy to see the results of all-powerful central governments operating without the restraint of written limitations upon the power of government. There, it is true, the existence of personal liberty is staunchly professed, but freedom of action and belief are given lip-service only. The paramount objective is the glorification of the State, an objective which minimizes individual rights in the interests of an exalted collectivism. And this is precisely what this country is drifting toward when its lawmakers suggest a fundamental change in the structure of government, not to be accomplished through popular sanction as provided for in the Constitution, but to be achieved through periodical tampering with the traditional and accepted meaning of the terms of the supreme law. When this method of change is authorized, the purpose of government by written constitution will have been defeated. The great advantages of government under a written code are the clarity and permanency with which the rights of its citizens may be defined and the express limitations which may be imposed upon governmental interference with these rights. If the stability and permanency of this government is to be preserved, necessary changes in governmental structure or power must be accomplished, not through legislative or executive decree, not through intimidation or emasculation of the Supreme Court, but rather by authorized amendment of the franchise under which the people have allowed themselves to be governed.