Marquette Law Review

Volume 18
Issue 2 *February 1934*

Article 4

Recovery Legislation: Chapter 476, Laws of 1933 (Page 111 Includes Editorial Board).

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MARQUETTE
LAW REVIEW

February, 1934

VOLUME XVIII MILWAUKEE, WISCONSIN NUMBER TWO

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Published December, February, April, and June by the students of Marquette University School of Law. $2.00 per annum. 60 cents per current number.

NOTES

RECOVERY LEGISLATION—CHAPTER 476, LAWS OF 1933.—The days of the governmental policy of laissez-faire being numbered,[1] and national enlightenment proceeding on a broad front[2] it is perhaps both wise and important to thoughtfully consider the paternalistic enactments of state legislatures arising out of our most recent national emergency, particularly the so-called "Wisconsin Recovery Act."[3]

[1] "The battle for an individualistic laissez faire economy is definitely lost * * * we shall do well to avert our eyes from the pretense that we can achieve a fundamentally individualistic society * * * why not frankly acknowledge that sensible management for collective purposes is the necessary control, and see what we can do to achieve it?" George Soule, A Planned Society (1932), 172. "The appeal to laissez faire in industry for instance, has come to mean a mere partisan request for leave to engage in a street brawl which interferes with the legitimate pursuits of everyone else. It becomes more and more clear that these freedoms have to be restricted." Tugwell, An Industrialized Society (1933),33.

[2] "In proportion as a structure of a government gives force to public opinion, it is essential that public opinion should be enlightened." Washington, Farewell Address.

[3] Chapter 476, Laws of 1933. Published July 29, 1933.

It is axiomatic that the United States government is by its constitution a government of limited enumerated and delegated powers,[4] and that as to these express powers it may enact all laws which may be necessary and proper to carry into effect the powers expressly granted to it[5], but that to go beyond this the federal government would be trespassing upon the sovereign rights of the several states.[6] These rights are comprehensively denominated the "police power" to protect public safety, health, and morals, over which the state has exclusive control,[7] provided that there is no conflict with the provisions of federal legislation,[8] or the constitution.[9] "These propositions are too numerously confirmed by repeated unanimous decisions to admit of a doubt."

When the National Industrial Recovery Act,[10] was published, it was realized immediately that it was probably limited to interstate commerce, and that as far as intrastate commerce was concerned, state legislation was needed.[11] Consequently many state legislatures,[12] have

[4] *Marbury* v. *Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803).

[5] *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L.Ed. 23 (1824).

[6] *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L. Ed. 529 (1819).

[7] See Note 5.

[8] *New York* v. *Miln,* 11 Pet. 102, 9 L.Ed. 648 (1837); *Sherlock* v. *Alling,* 93 U.S. 99, 23 L.Ed. 819 (1876); *Mobile County* v. *Kimball,* 102 U.S. 691, 26 L.Ed. 238 (1880); *Parkersburg, etc., Transportation Company* v. *Parkersburg,* 107 U.S. 691, 2 Sup. Ct. 732, 27 L.Ed. 584 (1882); *Huese* v. *Glover,* 119 U.S. 543, 7 Sup. Ct. 313, 30 L.Ed. 487 (1886); *Luken* v *Lake Shore, etc., R. Company,* 248 Ill. 377, 94 N.E. 175, 140 Am. St. Rep. 220, 21 Ann. Cas. 82 (1911); *Harrigan* v. *The Conn. R. L. Company,* 129 Mass. 580, 37 Am. Rep. 387 (1880); *Burrows* v. *Delta Transportation Company,* 106 Mich. 582, 64 N.W. 501, 29 L.R.A. 468 (1895).

[9] *Morgan's Louisiana & T. R. & S. Company* v. *Louisiana Board of Health,* 118 U.S. 455, 6 Sup. Ct. 1114, 30 L.Ed. 237 (1885); *Johnson* v. *Chicago & P. Elevator Company,* 119 U.S. 388, 7 Sup. Ct. 254. 30 L.Ed. 447 (1886); *Sands* v. *The Manistee R. Imp. Company,* 123 U.S. 288, 8 Sup. Ct. 118, 31 L.Ed. 149 (1887); *Wadhams Oil Company* v. *Tracy,* 141 Wis. 150, 123 N.W. 785, 18 Ann. Cas. (1909).

See, Nebraska Law Bulletin, Nov. 1932, "What Is Meant by 'Police Power'," F. Essert. "The power of promoting the public welfare by restraining and regulating the use of liberty and property" is the definition of Prof. Ernest Freund in his book, The Police Power, Public Policy and Constitutional Rights (1904). This work precede dthe great development of that subject in the United States Supreme Court. Such leading and significant cases as *Lochner* v. *New York,* 198 U.S. 45, 25 Sup. Ct. 529, 49 L.Ed. 937 (1905); *Jacobsen* v. *Massachusetts,* 197 U.S. 11, 25 Sup. Ct. 258, 49 L.Ed. 643 (1905); *Adair* v. *United States,* 208 U.S. 161, 28 Sup. Ct. 277, 52 L.Ed. 436 (1908); and *Noble State Bank* v. *Haskell,* 219 U.S. 104, 31 Sup. Ct. 386, 58 L.Ed. 112 (1911) had not been decided—"nevertheless the book has a considerable amount of prophetic vision."

[10] Acts of the Seventy-Third Congress, Extra Session, Act of June 16, 1933, 48 St. L. ——.

[11] "The question will arise as to the applicability of any such code (federal code) to commerce which would be wholly intrastate in character. It may well be that intrastate transactions are included by reason of the fact that they effect interstate commerce. It would be preferable, however, to enact legislation explicitly bringing intrastate transactions within the provision of any code which is approved by the President. In this way, violators of the code could not escape punishment by asserting that the law is ineffective insofar as it applies to intrastate transactions." Special Message to the Legislature of New York, Governor Herbert Lehmann. The necessity for state legislation was indicated at an early date by the N.I.R.A. authorities. See, N.I.R.A. official release No. 7, June 22, 1933; id. No. 27, July 5, 1933.

[12] California, Colorado, Kansas, Massachusetts, New Jersey, New York, Ohio, Texas, Utah, Virginia, and Wisconsin. See Note 58.

passed similar recovery legislation. This being obviously an exercise of the "police power" as defined by Professor Freund,[13] it is necessary to determine what has been previously held to be a valid exercise thereof to determine whether this type of legislation generally exceeds its limitations.[14]

It has been held that a state may in the exercise of its police power, and without denial of the equal protection of the laws, prescribe reasonble regulations for the practice within its jurisdiction of the various professions, trades, and occupations, and for the conduct of business.[15]

The beneficent exercise of the police power has been gradually extended in scope,[16] but prior to 1929 it was apparent that the complete welfare of the public was by no means achieved.[17] However, agitation to subordinate private rights in property and contract to social needs caused legislative bodies to respond first in the matter of "yellow dog" contracts. Founded on the idea that there is a substantial inequality in bargaining power between the employer and employee, and that labor unions are necessary instruments for advancing the workers' interests,

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[13] Freund, op. cit., 260-294, contains a careful cataloging of economic interests that have been secured.

[14] "Consideration of public health and welfare are superior to the rights of private property and so-called vested rights." *State ex rel. Atty. Gen.* v. *Thekan,* 184 Wis. 42, 198 N.W. 729 (1924).

[15] *People* v. *Van De Carr,* 199 U.S. 552, 26 Sup. Ct. 144, 50 L.Ed. 305 (1905); *Ah Sin* v. *Wittman,* 198 U.S. 500, 25 Sup. Ct. 756, 49 L.Ed. 643, 3 Ann. Cas. 765 (1904); *Jacobsen* v. *Mass.,* supra; *Davis* v. *Massachusetts,* 167 U.S. 43, 17 Sup. Ct. 731, 42 L.Ed. 71 (1897); *Jones* v. *Brim,* 165 U.S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677 (1896); *Minneapolis, etc., R. Company* v. *Beckwith,* 129 U.S. 26, 9 Sup. Ct. 207, 32 L.Ed. 107 (1888); *Missouri Pacific R. Company* v. *Humes,* 115 U.S. 512, 6 Sup. Ct. 110, 29 L.Ed. 463 (1885); *Missouri Pacific R. Co.* v. *Mackey,* 127 U.S. 205, 8 Sup. Ct. 1161, 32 L.Ed. 107 (1887); *Soon Hing* v. *Crowley,* 113 U.S. 703, 5 Sup. Ct. 730, 28 L.Ed. 1145 (1884); *Barbier* v. *Connolly,* 113 U.S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923 (1885); Also, *Mehlos* v. *Milwaukee,* 156 Wis. 591, 146 N.W. 882, 51 L.R.A. (N.S.) 1009 (1914), sustaining an ordinance regulating public dance halls. For an extended citation of cases on this point see 12 C.J. 1157.

[16] "It may be said in a general way that the police power extends to all the great public needs * * * it may be put forth in aid of what is sanctioned by usage or held by the prevailing majority of strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Holmes, J. in *Noble State Bank* v. *Haskell,* supra.

[17] "If we think of those in all our industries who may lack mechanical skill but who nevertheless shoulder the heavy weights and do the roughest work, we find a great part of American industry shot through with these unfortunates. It is not exaggeration to say that we have some millions of these hard-worked but underpaid Americans. Taken together with their families and their dependents, I would venture to say that we have among us ten to fifteen millions of people who do not share as they should in the prosperity enjoyed by the rest of us. Morally, economically, and on the grounds of simple humanity, this inequality should not be allowed to exist in this richest nation in history." Address of James J. Davis, Secretary of Labor in President Coolidge's Cabinet, June 22, 1927, quoted in Nystrom, Economic Principles of Consumption (1929), 180 et seq. See also dissent of Mr. Justice Brandeis in *Louis K. Liggett Company* v. *Lee,* 288 U.S. 517, 53 Sup. Ct. 581, 77 L.Ed. 553 (1933). This dissent is heavily annotated with references to material bearing on growth of great American corporations relative to their effect upon the general public well being. See also Gardiner Means, The Growth of the Relative Importance of the Large Corporation in American Economic Life, 21 Am. Econ. Rev. 10-37 (1931). See Berle & Means, The Modern Corporation and Private Property (1932).

eight states have enacted laws declaring as void, agreements exacted from the employee as a condition of his employment, not to join labor unions.[18] In addition laws requiring employers to maintain unemployment insurance or reserve funds have been enacted.[19] Because of the general agricultural unrest, indicated more boldly by farmers' strikes and picketing on highways and the dumping of milk, statutes have been enacted in at least four states to fix the price of milk;[20] minimum wage laws were enacted in five states for the benefit of women and minors;[21] and finally legislation to check over-production and prevent waste, duplication of service, supply and demand of goods "to the end that capital be not wasted in unwise ventures; the labor market be not disturbed; and eras of alternating hilarious prosperity and melancholic de-

[18] Arizona, Colorado, New Jersey, Ohio, Oregon, Pennsylvania, Utah, and Wisconsin. See, 21 Am. Lab. Leg. Rev. 168-172 (1932); and also, Witte, "Yellow Dog Contracts," 6 Wis. Law Rev. 21 (1930).

[19] Chapter 20, Laws of Wisconsin, Special Session, 1931-32. 23 Am. Lab. Leg. Rev. 9 and 73 (1933); see also, Chapter 20, supra, as amended, Chapters 186 and 383, Laws of 1933; also, Goodrich, "Unemployment Reserves by Law," 22 Am. Lab. Leg. Rev. 33 (1932); Brandeis and Raushenbush, "Wisconsin's Unemployment Reserves & Compensation Act," 7 Wis. Law Rev. 136 (1932); Lambert, "Compulsory Unemployment Insurance & Due Process of Law," 7 Wis. Law Rev. 146 (1932); Commons, "The Groves Unemployment Reserves Law," 22 Am. Lab. Leg. Rev. 8 (1932); Jacobson, "The Wisconsin Unemployment Compensation Act," 32 Col. Law Rev. 409 (1932); Raushenbush, "Wisconsin's Unemployment Compensation Act," 22 Am. Lab. Leg. Rev. 11 (1932). This proposed legislation falls into two types, first, based upon an insurance idea, sometimes called the Ohio plan; and second, the Reserve plan. As to the efficacy and workability of these two plans see article by Karl T. Compton, in 23 Am. Lab. Leg. Rev. 96 (1933).

[20] Chapter 64, Laws of Wisconsin of 1933; Chapter 158, Laws of New York of 1933; Chapter 169, Laws of New Jersey of 1933; H. B. No. 671, Ohio, 1933. Section 300 of the New York Act provides "This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare."

[21] Illinois, New Hampshire, New Jersey, New York, and Utah. See, Monthly Labor Review, issue of June, 1933. In the teeth of the United States Supreme Court's reactionary decision in *Adkins* v. *Children's Hospital,* 261 U.S. 525, 43 Sup. Ct. 394, 67 L.Ed. 785 (1923), where the Court held unconstitutional a similar act for the District of Columbia, these enactments were bold steps forward and are in line with Mr. Justice Holmes' conception of the police power. Nine other states already had such legislation; California, Colorado, Massachusetts, Minnesota, North Dakota, Oregon, South Dakota, Washington and Wisconsin. The preamble to the Illinois and New York Acts state expressly the guiding and uniform philosophy on which they are based: Illinois, "Many women and minors employed for gain in the State of Illinois are not as a class equally equipped for bargaining with their employers in regard to a minimum fair wage and standards, and 'freedom of contract' as applied to their relations with their employers is in many cases illusory." The New York Act states: "The evils of oppressive unreasonable and unfair wages are such as to render imperative the exercise of the police power of the state for the protection of industry and of the men and women and minors employed therein, and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race."

pression be banished,"[22] have come in the National Industrial Recovery Act,[23] and similar state legislation.[24]

It must be conceded at the outset that these laws in respect to their probable economic and social effect are unprecedented.[25] Moreover, the conclusion cannot be avoided that the Supreme Court of the United States when construing the scope of the police power in the light of the due process clause of the Fourteenth Amendment has almost always, without exception, leaned towards the reactionary side, and held for private rights in property and contract and the practically unrestrained bargaining power of the vested interests, and has refused to lend a hand to the more economically inferior party.[26] Prior to 1908 it might be said that there was a tendency on the part of the federal supreme court to admit at least that inequality between employer and employee was possible,[27] and that the police power might extend to the regula-

[22] Ray A. Brown and Howard L. Hall, "The Police Power in Its Relation to Economic Reconstruction," 1 Chicago Law Rev. 224 (1933). The authors of this article deal with this subject very comprehensively, giving much valuable data.

[23] "We have not been brought to our present state by any natural calamity, by drougth, or floods, or earthquakes, or by the destruction of our productive machinery or man power. We have a superabundance of raw materials, of equipment for manufacturing these materials into the goods we need, and transportation and commercial facilities for making these available to all who need them. A great portion of our machinery stands idle, while millions of able-bodied men and women in dire need are clamoring for the opportunity to work. Our power to operate the economic machine we have created is challenged * * * That which seems most important to me in the long run is the problem of controlling by adequate planning the creation and the distribution of those products, which our vast economic machine is capable of yielding." Franklin D. Roosevelt, Looking Forward, (1933), 45, 47.

[24] See Note 12, supra. In the Special Session of the 1931 Wisconsin Legislature a measure know as Bill No. 3A was introduced with the sanction of Governor LaFollette to foster economic planning. It did not pass—probably for political reasons. "When the nation becomes substantially united in favor of planning the broad objectives of civilization, then true leadership must unite thought behind definite methods." Roosevelt, op. cit., supra Note 23, 47. In 1929 the Committee on Recent Economic Changes of President Hoover's Conference on Unemployment reported through Wesley C. Mitchell: "If we are to maintain business prosperity we must continue to earn it, month after month, and year after year by intelligent effort."

[25] "The bill marks a far-reaching departure from the philosophy that the government should remain a silent spectator while the people of the United States, without plan, without organization, vainly attempt to achieve their social and economic ideals. It recognizes that planlessness and disjunctive efforts lead to waste, destruction, exploitation and disaster and that purposive planning awaits the substitution of regulated planning in place of the unlimited and frequently pernicious competition which we have heretofore regarded as the sole guardian of the public welfare." Sen. Robert F. Wagner before the Committee On Finance of the United States Senate, as reported in Fed. Trade Rev. Serv. C. C. H. (7th ed. 1933), 1944 et seq.

[26] Consider the case of *Adkins* v. *Childrens' Hospital,* supra, where the Court as late as 1923 was mentally living in a world of Utopian economic bliss, indicating its belief that women and children could bargain equally with employers (usually large corporate interests) as to fair wages and hours of employment.

[27] See, *Holden* v. *Hardy,* 169 U.S. 366, 18 Sup. Ct. 383, 42 L.Ed. 780 (1898). In *Knoxville Iron Company* v. *Harbison,* 183 U.S. 13, 22 Sup. Ct. 1, 46 L.Ed. 55 (1901), the Court said as to a statute requiring that all orders for merchandise given in payment of wages be redeemable at their face value in cash: "The statute's tendency, though slight it may be, is to place the employer and

tion of business clothed with something in the nature of a public interest.[28] Subsequent thereto the Supreme Court made an about face. *Adair* v. *United States*[29] held unconstitutional a statute making it a crime for an employer to interfere, by discharge, threats of discharge, or by imposing restrictive agreements in the contract of employment, with the employee's right to join a labor union.[30] This decision was followed by *Coppage* v. *Kansas*[31] involving the same type of statute wherein the court reiterated its opinion in the former case.[32] In 1923 *Adkins* v. *Children's Hospital*[33] was decided and from then on it was conceded that individual rights were supreme, and the general public welfare was in effect disregarded.[34] This change in attitude of the court was further reflected in the opinions following *Munn* v. *Illinois*[35] to that historic day in October of 1929. At the same term of court at which the *Munn* case was decided statutes relating to the fixing of railroad rates were sustained;[36] later regulation of prices for grain elevators were sustained,[37] and for fire insurance companies,[38] and also for carriers of oil by means of pipe lines.[39] From this point the recession begins. The first case reaffirming the individualistic theories of economy was *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*[40] decided in 1923, in which the court maintained that the manufacture and transportation of food, clothing, and fuel were not such businesses as were affected

employee upon equal ground in the matter of wages, and so far as calculated to accomplish that end it deserves commendation."

[28] This was the doctrine enunciated in the famous case of *Munn* v. *Illinois,* 94 U.S. 113, 24 L.Ed. 77 (1877), where the Court sustained the fixing of storage charges for grain elevators in the City of Chicago. The court said: "When private property is affected with a public interest it ceases to be a *jus privati* only * * * Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public, interest in that use, and must submit to be controlled by the public for the common good."

[29] 208 U.S. 161, 28 Sup. Ct. 277, 52 L.Ed. 436 (1908).

[30] It is interesting to note that Mr. Justice Harlan maintained there existed no inequality but rather equality of right of contract, which the Supreme Court was bound to protect!

[31] 236 U.S. 1, 35 Sup. Ct. 240, 59 L.Ed. 441 (1915).

[32] In this case Mr. Justice Pitney admits an inequality exists, but that this is true of all contracts and that there always will be inequality of fortunes. It might be interesting at this point to look at *Truax* v. *Corrigan,* 257 U.S. 312, 42 Sup. Ct. 124, 66 L.Ed. 254 (1921) which further indicates the stubborn attitude of the Supreme Court in its defense of capitalism against the further "baiting" by labor.

[33] See Note 21, supra.

[34] Gibbons, Decline and Fall of the Roman Empire, Vol. I, Chap. IX: "Civil governments in their first institution, are voluntary associations for mutual defense. To obtain the desired end it is absolutely necessary that each individual should conceive himself obliged to submit his private opinion and actions to the judgment of the greater number of his associates."

[35] See Note 28, supra.

[36] *C. B. & Q. Ry. Co.* v. *Iowa,* 94 U.S. 155, 24 L.Ed. 94 (1877).

[37] *Budd* v. *New York,* 143 U.S. 517, 12 Sup. Ct. 468, 36 L.Ed. 247 (1892); *Brass* v. *North Dakota,* 153 U.S. 391, 14 Sup. Ct., 857, 38 L.Ed. 757 (1894).

[38] *German Alliance Ins. Co.* v. *Lewis,* 233 U.S. 389, 34 Sup. Ct. 612, 58 L.Ed. 1011 (1914).

[39] *United States* v. *Ohio Oil Co.,* 234 U.S. 548, 34 Sup. Ct., 956, 58 L.Ed. 1459 (1914).

[40] 262 U.S. 522, 43 Sup. Ct. 630, 67 L.Ed. 1103 (1923).

with public interest, which the people of the state could regulate to protect themselves in case of industrial strikes. With the succeeding cases of *Tyson* v. *Banton*[41] in 1927 involving the fixing of prices for resold theater tickets, *Ribnick* v. *McBride*,[42] where the state attempted to control employment agencies, and *Williams* v. *Standard Oil Co.*,[43] in which the state attempted to fix the price of gasoline, "the retreat became almost a rout;"[44] and Justice Sutherland who wrote all three of the latter opinions held the acts unconstitutional as violative of the due process clause of the Fourteenth Amendment and limited the effect of *Munn* v. *Illinois* to cases with the same set of facts, stating that "a business in order to be affected with a public interest must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public." (Italics Mr. Justice Sutherland's).[45] The conclusion of this line of decisions comes with the comparatively recent case of *New State Ice Co.* v. *Liebmann*,[46] where the court held unconstitutional a statute denying to any person the right to enter into the business of manufacturing ice if in the opinion of the commission there were already sufficient facilities to meet public demands.[47]

If the only constitutional question here concerned were the matter of emergency legislation,[48] it is highly probable that state recovery legislation would be sustained in view of the decisions in the *Legal Tender Cases*,[49] *Wilson* v. *New*,[50] and the *Rent Cases*.[51] "An emergency may

[41] 273 U.S. 418, 47 Sup. Ct. 426, 71 L.Ed. 718 (1927).
[42] 277 U.S. 350, 48 Sup. Ct. 545, 72 L.Ed. 913 (1928).
[43] 278 U.S. 235, 49 Sup. Ct. 115, 73 L.Ed. 289 (1929).
[44] See Note 22, supra.
[45] Mr. Justice Stone dissenting in *Ribnick* v. *McBride*, said: "Price regulation * * * is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole."
[46] 285 U.S. 262, 52 Sup. Ct. 371, 76 L.Ed. 747 (1932).
[47] Mr. Justice Brandeis in his dissenting opinion says: "The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread in a time, not of scarcity, but of over-abundance * * * Rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry, which is already suffering from overcapacity." It must be said that for anyone gathering material on this subject, he may be well satisfied with only that presented in this dissent, which is sustained by innumerable authorities.
[48] Chapter 476, Laws of Wisconsin, 1933, in 109.02: "This chapter * * * shall cease to exist at the expiration of two years * * * " In Chapter 186, Laws of Wisconsin, 1933, the compulsory operation of Wisconsin Unemployment Reserves Act was extended "until business recovery is well under way in Wisconsin."
[49] 12 Wall. 457, 20 L.Ed. 287 (1871) where the Court sustained the authority of the state to issue money in the emergency caused by the Civil war.
[50] 243 U.S. 332, 37 Sup. Ct. 298, 61 L.Ed. 755 (1917) where the Court sustained the fixation of wages and hours of railroad employees to avoid a threatened nation-wide railroad strike.
[51] Here the regulation of rents by a governmental commission was sustained due to an acute housing shortage with consequent high rents, shortly after the World War. *Block* v. *Hirsh*, 256 U.S. 135, 41 Sup. Ct. 458, 65 L.Ed. 865

not call into life a power which has never lived, nevertheless the emergency may afford a reason for the exertion of a living power already enjoyed."[52] Two recent cases sustaining this emergency exercise of a power and which may be considered important in this respect are *People* v. *Nebbia*[53] and *Home Building & Loan Ass'n.* v. *Blaisdell.*[54] In the former case an act regulating the milk business and authorizing the milk control board to fix minimum wholesale and retail prices was held constitutional;[55] in the latter, a statute authorizing the extension of redemption period in mortgage foreclosures, during the present emergency, was held a valid exercise of the police power.[56]

To surmount certain constitutional difficulties some of the states have enacted emergency recovery legislation regulating intrastate commerce;[58] and all have provided, with the exception of Wisconsin, for the enforcement of the standards of fair competition established by the national code, either by fines, injunctions issued at the suit of the state, or, in extraordinary cases, the use of the licensing power. California, New Jersey, Ohio, and Utah have gone further and have provided for local codes. All the state enactments, except that of Utah, require that the provisions of section 7 of the federal act be in the state codes.[58]

(1921); *Marcus Brown Holding Company* v. *Feldman,* 256 U.S. 170, 41 Sup. Ct. 465, 65 L.Ed. 877 (1921); *Levy Leasing Company* v. *Siegel,* 258 U.S. 242, 42 Sup. Ct. 289, 66 L.Ed. 595 (1922). But in 1924 in *Chastleton Corporation* v. *Sinclair,* 264 U.S. 543, 44 Sup. Ct. 405, 68 L.Ed. 841 (1924), it was held that when the emergency ceases to exist, the acts are inoperative and unenforceable.

[52] See Note 50, supra.

[53] (N.Y., 1933), 186 N.E. 694. See, *Southport Petroleum Company* v. *Ickes,* (see, C. C. H. Fed. Trade Regl. Service, 7th ed. 5203), decided August 15, 1933 by Supreme Court of District of Columbia, which held constitutional sec. 9 (c) of the N.I.R.A.; *Economy Dairy Co.* v. *Wallace* (C. C. H. Fed. Trade Regl. Service, 7th ed., 5201) decided August 29, 1933, by the same court which held constitutional the Agricultural Adjustment Act

[54] 54 Sup. Ct. 231 (1934); Contra: *State ex rel. Cleveringa* v. *Klein,* (N.D., 1933), 249 N.W. 118.

[55] Chapter 158, New York Laws of 1933, sec. 300: "This article is enacted in the exercise of the police power of the state and its purposes generally are to protect the public health and public welfare." Other sec. headings: 302—Milk Control Board; 308—Licenses to Milk Dealers; 312—Order Fixing Price of Milk.

[56] Some authorities are inclined to minimize the effect of this decision. It might be fairly said that while the decision merely construes a state statute, it goes a long way in sanctioning of the further extension of the scope of the police power.

[57] California (see, Session Laws 1933, c. 1037, 1039); Colorado, (see, Session Laws, Extraordinary Session, 1933, c. 1); Kansas (see, House Bill No. 2, approved November 20, 1933); Massachusetts, (see, Acts 1933, No. 347, approved July 22, 1933); New Jersey, (see. Laws 1933, c. 372); New York, (see, Laws 1933, c. 781); Ohio, (see, House Bill No. 705, approved July 12, 1933); Texas, (see, House Bill No. 10-X, approved October 23, 1933); Utah, (see, Senate Bill No. 10, approved July 31, 1933); Virginia, (see, Senate Bill No. 19, approved September 14, 1933); and Wisconsin (see, Laws 1933, c. 476). For an excellent discussion of the content and effect of these statutes see paper read before Wisconsin State Bar Ass'n., Dec. 8, 1933 by Francis C. Wilson of the New Mex. Bar, "National Industrial Recovery Act and the Response of the States." See also, "Some Legal Aspects of N.I.R.A.," 47 Har. Law Rev. 85, 117 (1933).

[58] Provides for maximum hours of labor, minimum rates, right of organization and collective bargaining, with provisions against compulsory company unions and "Yellow Dog" contracts.

Virginia and New York did not anticipate that local codes would be necessary, providing that federal codes when approved shall apply to the intrastate trade of that state,[59] accompanied by the necessary enforcement provisions. In some states there will be additional constitutional difficulties where the state constitutions contain provisions as to the illegality of agreements to fix prices or to control production,[60] or where the state constitutions impose on the state legislature the duty of enacting appropriate enforcement measures.[61] All of these states, with the exception of California, have exempted from liability under their respective anti-trust laws any action complying with any code,[62] either national or local.

The Wisconsin act differs from the legislation of other states in that it provides for the approval, adoption, and enforcement of separate codes for intrastate trade by the state administration, distinct from any national codes. It is in many points identical with the national recovery act. It provides in substance:

First, the declaration of policy, that the purpose of the Act is to relieve unemployment and disorganization of industry in the present emergency, to promote cooperation among trade groups and between employers and employees, to eliminate unfair competitive practices, and to improve the standards of labor.[63]

Second, that it shall cease to be in effect two years from the date of enactment, or sooner, if the Governor shall declare that the emergency under which the Act was created has ceased to exist.[64]

Third, that the Governor may delegate his functionings and powers to such officers, agents, and employees as he shall see fit, and may utilize such other State officers as he deems necessary.[65]

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[59] For an adequate discussion of legislation by reference, see Wilson, op. cit., Note 57, supra.

[60] North Dakota Const. Art. VII, Sec. 14; South Dakota Const. Art. XVII, Sec. 20; Wyoming Const. Art. X, Sec. 8.

[61] Arizona Const., Art. XIV, Sec. 15; Idaho Const. Art. XI, Sec. 18; Montana Const. Art. XV, Sec. 20; Utah Const. Art. XII, Sec. 20; Washington Const. Art. XII, Sec. 22; New Mexico Const. Art. IV, Sec. 38, provides that "Legislature shall enact laws * * * to prevent combinations in restraint of trade." Louisiana Const. Art. XIX, Sec. 14, is by its terms self-executing and enforceable by injunction.

[62] None of these, except Utah, has constitutional anti-trust provisions. Utah and those states having constitutional provisions are, in the opinion of a few authorities, likely to meet with strong arguments against the validity of the codes, as contravening their respective constitutions. The force of this contention is somewhat weakened in the light of the recent philosophy of the Supreme Court in *Home Building & Loan Ass'n.* v. *Blaisdell,* supra.

[63] 109.01. Cf. sec. 1, N.I.R.A. See Note 48, supra.

[64] 109.02. Cf. sec. 2 (c), N.I.R.A. See Note 48, supra.

[65] 109.03. Cf. sec. 2 (a) and 2 (b), N.I.R.A. Mr. L. C. Whittet has been appointed the administrator for the state recovery act with offices in the Capitol building, Madison. The writer is indebted to Mr. Whittet for valuable material and suggestions.

At the present time the governor is utilizing the services of the Industrial Commission in the investigation of violations of this chapter.

For a comprehensive discussion of the delegation of powers under the N.I.R.A. and similar recovery legislation see 47 Har. Law Rev. 85, 93. See also the following cases in which the Wisconsin court has sanctioned the delegation to commissions of power to determine the administration of the laws and give effect thereto: *State* v. *Railroad Comm. of Wis.,* 140 Wis. 145, 121

Fourth, that the method of adoption for the individual trade or industrial codes shall be by application to the Governor and if the Governor finds that the code has (a) been approved by a preponderant number of the persons engaged in the industry, (b) that those approving do the preponderant amount of the business in units of output, and (c) that such group pay a prepoderant amount of the wages in the industry or trade group; it is also necessary that the Governor shall find that no such association or group applying shall impose inequitable restrictions on admission to membership therein; that the code proposed is not designed to promote monopolies or to eliminate small enterprises; that the code promotes the interest of consumers; that it is in harmony with the Federal Code; and that it is necessary for the stabilization of the intrastate commerce of such trade or industry.

The Governor may as a condition of approval for any such code impose any such conditions as may be necessary to protect the interest of consumers, competitors and employees, and may modify such by exceptions and exemptions as he sees fit.[66]

Upon approval the code shall bind all persons and firms engaged in such trade or industry as to its intrastate business. The code shall, inter alia, establish standards of maximum hours of labor, minimum rates of pay, and working conditions, and where the code provides that it shall constitute unfair competition to sell below the cost of production, the Governor may provide a method for determining said cost. Every code of fair competition shall contain as a condition precedent to approval, the following provisions: (a) that employees shall have the right to organize and bargain collectively and shall be free from any interfer-

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N.W. 919 (1909); *State* v. *Kenosha Elec. Ry. Co.,* 145 Wis. 337, 129 N.W. 600 (1911); *Lime Co.* v. *Railroad Comm.,* 144 Wis. 523, 129 N.W. 605 (1911); *City of Milwaukee* v. *Railroad Comm.,* 162 Wis. 127, 155 N.W. 948 (1916); *State* v. *Canning Co.,* 164 Wis. 228, 160 N.W. 57 (1916); *State* v. *Whitman,* 196 Wis. 472, 220 N.W. 929 (1928); *Wis Tel. Co.* v. *Pub. Serv. Comm.,* 206 Wis. 589, 240 N.W 411 (1932).

[66] 109.04. Cf. sec. 3 (a) and sec. 6, N.I.R.A. A detail of the method of the formulation, adoption, and approval of the codes is contained in Bulletin No. 1 of the Wisconsin Recovery Administration. It provides, inter alia, that the code shall be checked by the following state departments to see that the state laws are complied with and that the public interest is safeguarded: Dept. of Agriculture and Markets, Industrial Commission, Insurance Commission, State Board of Vocational Education, and the Attorney General. Public hearings shall be had on each code before approved and notice thereof shall be given at least one week in advance. To date one code has been approved and is in effect, viz., the Cleaning & Dyeing Industry Code, approved September 22, 1933. At the date of this writing a hearing is scheduled for the Motor Vehicle Retailing Trade code for February 20, 1934, with approximately thirty other codes in the process of approval ranging from the sawdust industry to the monument industry.

The method of enforcing the Cleaners' & Dyers' code is substantially as follows: The state is divided into five districts, each of which is controlled by a board of seven members. One representative from each one of these boards is a member of the "state code authority," which authority includes one representative of the state consumers and one representative of labor, making a total of seven thereon. It is provided that the state administrator is the directing head. The Industrial Commission investigates all complaints for the "authority."

ence by employers, (b) that no employee shall be compelled to join a company union as a condition of employment.[67]

Upon approval the code shall be the standard of fair competition for the intrastate business of the trade or industry to which the code shall apply.

Any violation of the provision of the approved code or standard shall be deemed an unfair method of competition and shall be penalized as provided for in the enforcement section. The several Circuit Courts of the State are vested with jurisdiction by any suit in equity instituted by the several District Attorneys to prevent and restrain such violations or upon petition by any member of any trade group who is damaged thereby.

Fifth, that the Governor may modify or amend or terminate any code or rule thereunder if he shall determine that such does not effectuate the purpose of this Chapter.[68]

Sixth, that as a condition of his approval of any code, the Governor may require reports, the establishment of a uniform system of accounts, access to the accounts and to records of persons operating under the code, for examination. He may issue subpoenas and take testimony, may direct sworn or unsworn reports in writing to specific questions, have access to and copy any document in matters relevant to determining whether such code is being effectually operated according to the purpose and intent of this statute.

It is provided that no person shall without cause fail to comply with any subpoena, refuse to be sworn or to be examined, or to answer proper questions, or produce pertinent documents, upon being ordered to do so by the Governor. Nor shall any person make false entries or statements in any reports or documents as required. Any person who violates this provision is guilty of a misdemeanor and shall upon conviction pay a fine or not more than $5,000.00, or by imprisonment in the county jail for not more than one year, or both.[69]

Seventh, while this Chapter is in effect and for sixty days thereafter any action complying with any code approved hereunder or under any Federal Law, which is exempt in the provisions of the anti-trust laws of the United States, shall be exempt from the application of the anti-trust laws of this state as long as the exemption from the anti-trust laws of the United States prevails.[70]

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[67] See Note 58, supra. Cf. sec. 7 (a), N.I.R.A. In this connection see *Bayonne Textile Corp.* v. *Am. Fed. of Silk Workers,* (N.J. Ch., 1933), 168 Atl. 799; *H. B. Rosenthal-Ettlinger Co.* v. *Schlossberg,* (Sup. Ct., 1933), 266 N.Y.S. 762; *Wis. State Fed. of Labor* v. *Simplex Shoe Co.,* Am. Fed. of Labor Weekly News Serv., September 21, 1933 at 1, where the trial court held that an employer had violated sec. 7 (a) by refusing to deal with the vice president of a shoe union, not an employee of his shop. See order of the president of September 18, 1933, eliminating from the code submitted by the Bituminous Coal Industry certain provisions attempting to construe section 7 (a) of the N.I.R.A. relating to the right of collective bargaining on the part of the employee.

[68] 109.05. Cf. sec. 4 (a), N.I.R.A.

[69] 109.06. Cf. sec. 3 (b) to 3 (f) incl., N.I.R.A.

[70] 109.07. Cf. sec. 5 N.I.R.A.

Whether state anti-trust laws apply to transactions in or affecting interstate commerce has not been as yet decided. The question was raised however

Eighth, any charges incurred by the Governor in connection with the supervision of codes shall be assessed to the trade or industrial group to whom such applies.

Ninth, it is intended that under this Chapter, that the State shall assist the President of the United States in the administration of the Congressional Act entitled: "The National Recovery Act." The Governor may authorize him to utilize such officials and employees where such is practical, provided that such employees be used in connection with the supervision of industries doing a substantial proportion of their business in Wisconsin.[71]

SUMMARY

It is apparent that the state recovery acts, and more particularly the Wisconsin Recovery Act can be construed as constitutional; and, in the light of the most recent decisions, it might be said, although with some hesitation, that were the constitutionality of this question to come before the Supreme Court, the Act would probably be held valid. Nevertheless, there are real constitutional difficulties, such as conflict with the commerce clause and the due process clause of the federal constitution and the theory of delegation of legislative powers.

While it has not been the intention herein to review a philosophy of American Government, nevertheless we cannot refrain from opining that the Supreme Court in the past has in most cases based its constructions and disposed of the problems involved with reference to the economic, social and political concepts cherished by the majority then on the bench. This could be noted in the review of the cases subsequent to 1908, which showed that whenever a conflict arose between the rights of a private individual and the public weal, the Supreme Court almost without exception ruled in favor of the individual.

Under the present emergency, the Supreme Court, however, has indicated a change in attitude and has indicated a tendency to extend the scope of the police power.

CLEMENS H. ZEIDLER.

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in *Standard Oil Co. of Ky.* v. *Tenn.,* 217 U.S. 413, 30 Sup. Ct. 543, 54 L.Ed. 817 (1910). Viewing past decisions (Notes 8 and 9, supra) it seems apparent that the state anti-trust statutes or constitutional provisions (for a survey of this field see, 32 Col. Law Rev. 347 [1932]) have no affect on those activities over which congress has validly exercised control under the commerce clause or under the Recovery Act, voiding any inconsistent state legislation. In *McDermott* v. *Wisconsin,* 228 U.S. 115, 33 Sup. Ct. 431 57 L.Ed. 754 (1913) it was held that a local pure food statute providing for certain labels to be affixed to food sold at retail, could not apply where compliance therewith necessitated the removal of the label required by the Federal Pure Food and Drug Act. However business essentially local in character may be in all probability beyond the power of the federal goverment to regulate. See Notes 7 and 11, supra. It is also very probable that the states would decline to prosecute their anti-trust laws against anyone operating under either the federal or local code. See, Cook, "The Adequacy of Remedies Against Monopoly Under State Law," 19 Yale Law Jour. 356 (1910). Cf. *Railroad Comm. of Wis.* v. *Chi. B. & Q. Ry. Co.,* 257 U.S. 563, 42 Sup. Ct. 232, 66 L.Ed. 371 (1922); *Alabama* v. *United States,* 279 U.S. 229, 49 Sup. Ct. 266, 73 L.Ed. 683 (1929). Authoritative discussions valuable in this connection are: Handler, "Industrial Mergers and the Anti-Trust Laws," 32 Col. Law Rev. 179 (1932); Dickinson, "The Anti-Trust Laws and Self-Regulation of Industry," 18 A. B. A. Jour. 601 (1932); McLaughlin, Cases on the Federal Anti-Trust Laws of the United States (1933), 719.

[71] Cf. Note 65, supra.