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THE N. R. A. AND THE INTERSTATE COMMERCE CLAUSE

A REVIEW OF LOWER COURT DECISIONS ON THE VALIDITY OF THE NATIONAL INDUSTRIAL RECOVERY ACT

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THE President of the United States in his herculean efforts to combat a nation-wide economic depression has effected Federal regulatory acts relating to industry which are unprecedented in American history. At the present time all industry is under the supervision of the N. R. A. and we find that our national government is now dictating to local businesses such matters as hours of labor, wages, prices, and output of production. Much speculation has been aroused as to whether the Federal government in enacting such legislation has exceeded the powers granted to it under the Constitution.

It is probably conceded that the only basis upon which the Federal government can predicate its power is the Interstate Commerce Clause of the Federal Constitution. If the subject matter sought to be regulated is not within the Commerce Clause, the national government has not satisfactorily explained its exercise of powers which are otherwise reserved to the states or to the people.

Among the cases which approve the validity of the N. R. A. is *United States of America and Henry A. Wal-*

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lace, Secretary of Agriculture v. Calistan Packers, Inc.[2] This was a suit by the United States and the Secretary of Agriculture for injunctive relief against certain operations of the defendant, a peach canner. The defendant

[2] 4 F. Supp. 660. Dist. Ct. Nor. Dist. of Cal. Decided Oct. 2, 1933.

The cases herein considered are lower court decisions on the N.R.A. with respect to the Interstate Commerce Clause of the Constitution. There are numerous related decisions on the N.R.A. not herein considered but which may be found in C. C. H. Federal Trade Regulation Service, Volume II, Seventh Edition. For cases upholding the validity of the N.R.A. but which do not consider the question of interstate commerce see the following paragraphs of that service:

Par. 7060. Economy Dairy Co. v. Wallace et al., Sup. Ct. D. C. Decided August 29, 1933.
Par. 7062. Southport Petroleum Co. v. Ickes, Sup. Ct. D. C. Decided August 15, 1933.
Par. 7072. Bayonne Textile Corp. v. American Federation of Silk Workers et al., 114 N. J. Eq. 307. Decided October 26, 1933.
Par. 7078. Capitol City Milk Producers Assn., Inc. v. Wallace, Sup. Ct. D. C., Equity No. 56113. Decided November 15, 1933.
Par. 7079. U. S. v. Hercules Gas Stations, Inc., U. S. Dist. Ct. Eastern Dist. of N. Y. Decided December 1, 1933.
Par. 7110. Brodsky v. Sharbu Operating Co., Inc., Sup. Ct. New York County, N. Y. Decided February 7, 1934.
Par. 7127. Garment Manufacturer's Assn., Inc. v. Hugh S. Johnson, Sup. Ct. D. C. Decided February 8, 1934.
Par. 7152. U. S. v. Greenville Finishing Co., U. S. Dist. Ct. of R. I. and N. J. Decided April 27, 1934.

For cases holding that the agreement between the employer and the President is a contract for the benefit of a third party beneficiary see the following:

Par. 7082. Beaton v. Major Avondale, Dist. Ct. Second Jud. Dist. of Colo. Decided October 25, 1933.
Par. 7067. Wisconsin State Fed. of Labor, et al. v. Simplex Shoe Manufacturing Co., Cir. Ct. Milwaukee County, Wis., No. 131900. Decided October 13, 1933.
Par. 7084. Fryns et al. v. Fair Lawn Fur Dressing Co., 114 N. J. Eq. 462. Decided November 15, 1933.
Par. 7147. Greleck v. Amsterdam, Munic. Ct. Phil. Civ. Div. No. 1105. Decided April 7, 1934.

For cases considering the question of what parties may bring suit for the enforcement of the N.R.A. see the following:

Par. 7069. Starring v. Frazier, U. S. Dist. Ct. at Chattanooga, Tenn. No. 145, in Equity. Decided October 24, 1933.
Par. 7085. Staley v. Peabody Coal Company, U. S. Dist. Ct. South. Dist. of Ill., North. Div. Equity No. 1239. Decided December 16, 1933.
Par. 7117. Chicago Flexible Shaft Co. v. Katz Drug Co., U. S. Dist. Ct. of Del. Decided February 23, 1934.
Par. 7155. Progressive Miners of America v. Peabody Coal Co., U. S. Dist. Ct. East. Dist. of Ill. Decided May 7, 1934.

State N.R.A. legislation has been enacted in various states. For cases relating to State N. R. A. litigation see the following:

7087. In the Matter of the Application of Rosenthal for a Writ of Habeas Corpus, First App. Ct. of Cal., Div. No. 1. Decided December 14, 1933.

was charged with violations of the A. A. A. The violations complained of were, first, total production and sale in excess of amount specified under plan; second, failure to pay into control fund sums assessed against canners for purchasing surplus peaches from the farmers; and third, failure to permit Secretary's representatives to examine defendant's books, records, and papers.

District Judge St. Sure upheld the validity of the N. R. A. and A. A. A. and said:

Upon the constitutional question a number of points have been raised which need not be treated in great detail; for example, as to the improper delegation of legislative powers. It may readily be answered that where Congress has laid down fairly definite standards, the courts have consistently held that the procedure thereunder, even to the extent of providing rules and regulations, violations of which may be punished, may be placed in the hands of the administrative agencies of the government. This power of delegation is highly essential to the efficacy of such statutes.

The power to regulate interstate commerce is granted in broad terms to the national Congress and this power should not be restrictively construed. Rather it must be construed to give the Congress the power to regulate any and all commerce which may seriously affect the interstate trade. . . .

The Congress has made a legislative finding that a national emergency exists. This court, upon that finding and upon its own judicial notice of the economic distress throughout the nation, here arrives at a similar conclusion. . . .

Under conditions such as these the court is bound to arrive at the conclusion that the peach industry is affected with a national public interest and that the Congress has the constitutional power to adopt appropriate legislation to cure these evils.

Par. 7089. Sherman v. Abels, Sup. Ct. New York County, N. Y. Decided January 2, 1934.
Par. 7133. California v. Capitol Cleaners & Dyers, Inc., Super. Ct. of Cal., County of Los Angeles, No. 367143. Decided February 27, 1934.
Par. 7134. Utah v. Marthakis, No. 52810, Dist. Ct. Third Jud. Dist., Salt Lake County, Utah. Decided December 29, 1933.
Par. 7142. California v. Hall, App. Dept. Super. Ct., City and County of San Francisco, Cal. Decided March 27, 1934.

The due process clause in such a situation cannot properly be construed to obstruct the national policy. . . .

To adopt the view that the Constitution is static, and that it does not permit Congress from time to time to take such steps as may reasonably be deemed appropriate to the economic preservation of the country, is to insist that the Constitution was created containing the seeds of its own destruction. This court will not subscribe to such a view.

The case of *State of Texas* v. *Standard Oil Company*[3] is a similar case. This was a suit based upon an alleged violation of the Anti-Trust laws of the State of Texas. Defendant demurred contending that the Texas law was superseded by the N. R. A. and petroleum code. Judge Moore sustained the demurrer. The court said:

The State contends in this connection that the business done at an ordinary filling station is not interstate commerce and that to prevent the defendants from observing the Code sections challenged in its petition in transactions taking place at filling stations can not and will not "affect" interstate or foreign commerce. The President's findings, as before pointed out, are to the contrary, and this court has no power in the present proceeding to review the President's findings in a purely collateral way.

. . . . . .

The Act is to be interpreted in the light of prior court decisions dealing with exertions of Congressional power under the Commerce Clause. It is to be interpreted in the light of the many decisions announced in the transportation cases. It is obvious that it was designed to remove obstructions to interstate and foreign commerce created by the conditions mentioned in the Act wherever these conditions may exist. In so far as the Act deals with unfair competition, it is declared that unfair methods of competition are diminishing the amount of, and impeding the flow of, interstate and foreign commerce; and the plain intent was to prevent unfair methods of competition from having that effect even though these methods might be pursued wholly within one or more of the forty-eight states.

[3] No. 50,537, Dist. Ct. of Travis County, Texas. Decided Oct. 12, 1933. C. C. H. Federal Trade Regulation Service, Vol. II, par. 7066, P. H. Federal Trade and Industry Service, par. 8003.

The President has not found that one operating a filling station is engaged in interstate commerce but merely that the unfair methods of competition pursued at hundreds and thousands of filling stations throughout the United States are affecting interstate commerce.

It may be noted in this case that the court stated that the President's findings in approving the petroleum code were to the effect that what takes place at the filling station affects interstate commerce. However, the court stated that these findings could not be reviewed collaterally, and the court felt it did not have the power to try such an issue of fact when no government enforcing officer was made a party to the suit. So it would appear that much of the decision is obiter dictum.

The case of *Victor* v. *Ickes, Secretary of the Interior,*[4] is a landmark case upholding the validity of the N. R. A. with respect to the petroleum code. The facts are substantially as follows:

Suit was filed by four retail distributors of gasoline at Detroit against Harold L. Ickes, Secretary of the Interior and Administrator of the Code of Fair Competition for the Petroleum Industry. They objected to the provision of the petroleum code prohibiting the giving away of premiums and alleged that as they were not engaged in interstate commerce they were not subject to said provision. The plaintiffs prayed that the defendant should be enjoined from interfering with their business and from attempting to have them prosecuted under the N. R. A. or under the code. The defendant moved to dismiss, and alleged that the practice of giving premiums results in price wars which vitally affect interstate commerce. The court dismissed the bill. Judge Jesse C. Adkins delivered the opinion. He stated that there was a price war in Detroit and that this imposed a direct burden on interstate commerce. The court then cited numerous Supreme Court cases on interstate commerce. The

[4] 61 Wash. L. Rep. 870, Eq. No. 56298, Sup. Ct. D. C. Decided Dec. 1, 1933, C. C. H. Fed. Trade Reg. Serv., par. 7080. See comment in 22 Georgetown L. J. 358.

cases cited by the court, however, were all cases which involved direct burdens upon interstate commerce and which might therefore be distinguished from the case before the court. The court said:

> The petroleum industry is the third largest in this country. The great bulk of gasoline does flow in interstate commerce. The function of filling stations is as essential to that flow as is the function of the commissionmen and dealers in the packing industry at the stock yards.
>
> The only difference of fact is that the intrastate function is performed during the various steps in the interstate commerce and while cattle are being processed for sale to the consumers; while in the present case the function of the distributors is performed after interstate commerce has concluded.
>
> But the principle is the same in both cases. The intrastate acts come within Congressional control if they substantially affect interstate commerce.
>
> . . . . .
>
> In my opinion it follows from the foregoing decisions of the Supreme Court as applied to the evidence in this case that the action complained of by the plaintiffs is within the power of Congress under the commerce clause of the Constitution.

The last of this line of cases here considered is *United States* v. *Spotless Dollar Cleaners, Inc.*[5] This was a suit by the United States government to restrain the defendant from performing services below prices prescribed by the Code of Fair Competition for the cleaning and dyeing trade. The code fixes the retail price for cleaning men's suits at seventy cents and for cleaning women's dresses at seventy-five cents. The defendant made charges of thirty-nine cents for men's suits and forty-five cents for women's dresses. The evidence showed that the defendant sent out his work to a New Jersey company, and the plaintiff contended that this feature of the case made the operations of the defendant subject matter of interstate

[5] U. S. Dist. Ct., South. Dist. of N. Y., In Equity, 77-207. Decided March 31, 1934. C. C. H. Fed. Trade Reg. Serv., par. 7130.

commerce. The government also contended that such cuts in prices brought about price wars which were very detrimental to the industry and seriously affected the flow of interstate commerce. District Judge Knox decided the case in favor of the government and said,

> . . . enough has been shown to enable me to conclude that such price cutting, as has occurred, has seriously impeded and changed the customary and usual flow of interstate commerce in the dry cleaning industry between the States of New York and New Jersey. If defendant be permitted to continue its unfair prices, further changes in such currents and flow are inevitable and these will contribute to the frustration of the purposes of the National Industrial Recovery Act. . . . In order to overcome tendencies which divert and stem movements in interstate commerce, Congress may act as it has, and is competent to authorize this court to take such steps as will allow interstate trade to be conducted in smoother channels, and in accordance with the execution of policies that are believed to be wise and expedient.
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> . . . . .
>
> In rendering this decision, I know full well that it may be a distinct step beyond the boundaries, which in peace times have been said to circumscribe the powers of Congress. If defendant be immediately restrained from continuing its violation of the minimum prices of the code, and my conclusion should hereafter be held to be erroneous, great damage will be its portion. Therefore, I will suspend operation of the injunction for ten days. Within that period, defendant can apply to the Circuit Court of Appeals for a further stay.

In the above case it can readily be seen that the judge, although he decided as he did, was laboring under very grave doubts. It may also be noted that the judge was influenced by the interstate feature of this case, namely, that the work was done by the defendant in two different states.

Of the most recent cases upholding the validity of the N. R. A. is *United States* v. *Shissler and Peoples Dairy*

Company.[6] This case involved a bill for an injunction to restrain defendants from selling milk in Chicago area. Defendants had been licensed to sell milk under certain regulations of the A. A. A. and had been violating said licenses by purchasing milk from sources in Wisconsin and Illinois at a price lower than regulated. The licenses of the defendants, after a hearing, were revoked. The defendants contend in this suit that the A. A. A. is invalid and that they are not bound thereby. The injunction was granted, and the A. A. A. upheld. The court said:

It is insisted by defendants that the Agricultural Adjustment Act is invalid. The defendants say that it is beyond the power of Congress, in the exercise of the power granted to it to regulate interstate commerce, to fix the price at which a commodity may be bought or sold. But the power granted to Congress to regulate interstate commerce by Clause 3 of Section 8 of Article One of the Constitution has no limitations other than those that may be found in the Constitution itself. Except as prohibited by some other provision in the Constitution, Congress has complete and arbitrary power.

The next line of cases are those which hold that the N. R. A. or parts of the N. R. A. are invalid.

The first case to be considered is the case of *Purvis* v. *Bazemore.*[7] This was an injunction suit filed by an individual engaged in the cleaning and dyeing business to restrain the defendant from violating the cleaning and dyeing code. This case was decided on two points. A point which will not be considered herein was that the court felt that an individual could not file a suit to restrain violations under Section 3 (c) of the National Industrial Recovery Act. As to the other point, which

[6] District Court of the United States, for the Northern District of Illinois, Eastern Division, in Equity No. 13803. Decided April 14, 1934, by District Judge William H. Holly. C. C. H. Fed. Trade Reg. Serv., par. 7143. It may be here noted that the court based its decision on Nebbia v. People of the State of New York, 54 S. Ct. 505, decided March 5, 1934, by the U. S. Supreme Court which case upheld the validity of the New York milk price fixing statute.

[7] 5 F. Supp. 230. In the United States District Court for the Southern District of Florida, decided on December 2, 1933. Also in C. C. H. Fed. Trade Reg. Serv., par. 7081.

involved the question of interstate commerce, Judge Akerman said:

If the operation of a local cleaning and dyeing establishment, or what is more commonly called a pressing club, is to be construed as coming within the purview of the act of Congress commonly known as "The National Industrial Recovery Act," then I am bound to hold that Congress had no power under the Constitution to enact the National Industrial Recovery Act. I do not mean to hold that the National Industrial Act in its entirety is without constitutional authority, but merely to hold that, if it is to be construed as authorizing the regulation of a local pressing club, then there is no authority in the Constitution for the enactment of the same.

Section 1 of the National Industrial Recovery Act attempts to justify the enactment of the same upon two theories: One is to remove obstructions to the free flow of interstate and foreign commerce, and the other is in the time of an emergency to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups. It is conceded by counsel for complainants that neither the complainants nor the defendant are engaged in interstate commerce, and without such concession, it would require a stretch of imagination beyond the power of this court to conceive that a local industry engaged in the pressing, cleaning and dyeing of clothes was engaged in interstate commerce. So, if the code for this industry is to be justified under the Constitution, it must be upon the ground that an emergency exists which would justify Congress in attempting to regulate a purely intrastate business, and I can find no authority in the Constitution which authorizes the national government in any emergency to depart from its constitutional function and invade the reserved power of the states. Mr. Justice Davis, speaking for the Supreme Court in the case of *Ex parte Milligan* . . . made the following announcement, which, in so far as I am advised, has never been questioned by any court in the land:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious conse-

quences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence." *Ex parte Milligan,* 4 Wall. at pages 120 and 121, 18 L. Ed. 281.

I am not unmindful that Congress at its recent session found not only the United States, but the whole world, to be in a deplorable condition, nor do I criticize the noble motive prompting Congress and the President to attempt to relieve this condition, but I cannot conceive of any emergency, especially in the time of peace, which would authorize Congress to ignore the Constitution and enact measures tending to regulate purely local business within the several states. Article 6, clause 2 of the Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

A complete argument against the validity of the A. A. A. was set out by District Judge Akerman in the case of *Hillsborough Packing Company* v. *Wallace.*[8] The court in holding portions of the A. A. A. invalid insofar as they applied to the plaintiffs and those similarly situated, said that those portions:

[8] U. S. District Court for the Southern District of Florida, Tampa Division. Decided Feb. 1, 1934. C. C. H. Fed. Trade Reg. Serv., par. 7102. This case was reviewed in the case of Yarnell v. Hillsborough, U. S. Circuit Court of Appeals for the Fifth Circuit, No. 7309, decided April 14, 1934. C. C. H. Fed. Trade Reg. Serv., par. 7144. The Circuit Court of Appeals reversed Judge Akerman's decision on the ground that the District Court had no jurisdiction to grant an injunction merely because an act is unconstitutional and pointed out that plaintiffs had failed to show that they were entitled to an injunction on some clear ground of equity jurisdiction. The court said: "As the committee has no power, and so far as appears has not assumed and will not undertake to enforce either its prorate orders or its alleged threats, injunction does not lie against it." The court intimated that if the defendants had done some outward acts, the district court might have had jurisdiction to grant an injunction.

(a) Deprive plaintiffs of their property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States of America.

(b) Contain an unwarranted and invalid delegation of power to the Secretary of Agriculture of the United States of America in violation of Article I, Section 1 of the said Constitution.

(c) Are an attempt by the Federal Government to exercise police power reserved to the State of Florida by the Tenth Amendment to the Constitution of the United States.

(d) Are an attempt by the Federal Government to exercise a non-existent police power over the liberty and property and freedom to contract of citizens of the State of Florida.

(e) Constitute essentially a price-fixing scheme regulating the control or disposition of a lawful and innocent commodity by a private citizen in a proper manner.

(f) Prohibit lawful shipments of wholesome and innocent commodities in interstate commerce for reasons having no relation to public health, morals, sanitation, fraud, unethical dealings or crime.

(g) Cannot be upheld as a valid regulation of interstate commerce, in that:

(aa) The guise of such regulation of interstate commerce is but a subterfuge, and the true intent and effect of said provisions of said Act, and of their attempted enforcement, constitute an unpermissible regulation of, and price fixing in relation to, the ordinary and customary business dealings of citizens of the State of Florida.

(bb) And in that the said business of growing and shipping of citrus fruit by private citizens is essentially a private business and not one affected with a public interest.

(cc) And that in any feature of said Act in the nature of taxation is not in truth permissible taxation, but is likewise a subterfuge to raise funds, not for the benefit of the public, but to defray expense of administration and to confer monetary benefits on the few at the expense of the many.

(dd) And in that same constitutes not a regulation, but a prohibition of interstate commerce with respect to innocent and wholesome commodities.

(h) Attempt to fix prices on articles that are not for public use.

(i) Tax one citizen for the benefit of another.

(j) Give to the said Secretary of Agriculture regulatory powers over businesses not affected with a public use.

(k) Delegate taxing powers to the said Secretary of Agriculture.

Another case is that of *Amazon Petroleum Corporation* v. *Railroad Commission of Texas.*[9] The facts are as follows:

Complainants alleged that they were engaged solely in the business of producing and marketing oil; that goods produced by complainants were sold and delivered to purchasers on the premises where they were produced; that the respondents were attempting to enforce the petroleum code and were demanding of and compelling complainants to supply reports and that complainants were subjected to repeated inspection and damage. Complainants contended that the National Recovery Act and code of regulations were null and void. The provision pertaining to limitation of production of petroleum was particularly attacked. Bryant, District Judge said:

There is not perceived in the terms of this Act any intention, express or implied, by Congress to invade the sphere of purely local action in aid of or to remove burdens or restrictions upon interstate commerce.

The court then quoted from an argument of the present Chief Justice before the Oil Conservation Board in 1926, when he was speaking as counsel for The American Petroleum Institute:

In this view, it has been urged that Congress has the authority to exercise any power that it might think necessary or expedient for the common defense or the general welfare of the United

[9] 5 F. Supp. 639. U. S. District Court, Eastern District of Texas, decided Feb. 12, 1934. Also in C. C. H. Fed. Trade Reg. Serv., par. 7104. This case is pending in U. S. Circuit Court of Appeals for the Fifth Circuit. Nos. 7350, 7351. See C. C. H. Fed. Trade Reg. Serv., par. 7151.

States. Of course, under such a construction the government of the United States would at once cease to be one of the enumerated powers, and the powers of the states would be wholly illusory and would be at any time subject to be controlled in any matter by the dominant Federal will exercised by Congress on the ground that the general welfare might thereby be advanced. That, however, is not the accepted view of the Constitution. . . . The government of the United States is one of enumerated powers and is not at liberty to control the internal affairs of the states respectively, such as production within the states, through assertion by Congress of a desire either to provide for the common defense or to promote the general welfare.

The district court in this case decided that the National Industrial Recovery Act is limited by Congress to the regulation of the transportation of petroleum in interstate and foreign commerce, and therefore the regulations of the Secretary of Interior are invalid insofar as they apply to the production of petroleum in the absence of a declaration by Congress that such production affects interstate commerce. The court also cited many cases indicating that the National Recovery Act was unconstitutional, but only decided the case on the point that the complainants here were not engaged in interstate commerce, and therefore were not subject to the code.

The case of *United States of America* v. *Suburban Mortor Service Corporation,*[10] should be compared with *Victor* v. *Ickes,* already cited.

The plaintiff in the former case asked for a temporary injunction against the defendants, owners and operators of gasoline service stations, enjoining them from giving premiums in violation of the petroleum code which prohibited the giving away of premiums. The defendants in their answer denied the legality of the premium provision of the code. Judge Barnes denied the motion.

[10] 5 F. Supp. 798. District Court of the United States, for the Northern District of Illinois, Eastern Division, in Equity, No. 13687. Decided Feb. 10, 1934. Also in C. C. H. Fed. Trade Reg. Serv., par. 7103.

The court considered the question of emergency and held that emergency does not create powers not already in existence, using the following language:

It seems to the court that Congress in this act has been so indefinite in its pronouncement of the legislative policy that the principle of constitutional law which we are considering has cased to have any effect in national affairs, if the act is valid. If the Congress may constitutionally delegate power as it has delegated it in the National Industrial Recovery Act, it is difficult to see why the Congress may not, in an act, declare that its policy is to provide for the general welfare of all the people and that, accordingly, the President may promulgate such rules and regulations, having the effect of law, as will in his discretion best provide for the general welfare of all the people, and when that happens constitutionally, constitutional government, as we have known it, will cease to exist.

But, while the principle that legislative power may not by Congress be delegated to other agencies of Government has been frequently announced, yet decisions which have held acts of Congress invalid because of violation of the principle are difficult or impossible to find. Accordingly, this court, being one of the inferior courts contemplated by the Constitution, does not feel justified in declaring the act in question invalid because of the violation of the principle of constitutional law prohibiting the delegation of legislative power.

. . . . .

These allegations raise a question of fact. Does the giving away of premiums with retail sales of gasoline adversely affect interstate commerce as a necessary consequence, or is the adverse effect on interstate commerce of the giving away of premiums with retail sales of gasoline merely accidental, secondary, remote, and problematical? The court very much doubts whether the giving away of premiums with retail sales of gasoline affects interstate commerce at all, but is definitely of the opinion that if the giving away of such premiums does adversely affect such commerce, such adverse effect is not a necessary consequence, and, on the contrary, is merely accidental, secondary, remote, and problematical.

The people did not grant to Congress the power to regulate commerce generally. The power which was granted was, as we have observed it, to regulate commerce "with foreign nations, among the several states, and with the Indian tribes." It is submitted that these words "with foreign nations, among the several states, and with the Indian tribes," were intended to be and are a limitation upon the power granted. But if the construction insisted upon by the government in this case is given to the grant of power, then the limitation "with foreign nations, among the several states, and with the Indian tribes" must be disregarded.

It has been said that the decision of the Supreme Court in the case of *Hammer* v. *Dagenhart,* 247 U. S. 251, . . . effectually prevents the sustaining of the National Industrial Recovery Act under the Commerce Clause of the Federal Constitution. That was a case in which an act of Congress, prohibiting the transportation in interstate commerce of goods produced in factories employing child labor, was held to be unconstitutional and invalid. In that case, the Supreme Court held that the evil sought to be prohibited was involved in the manufacturing and not in the transportation, and that it was complete before interstate commerce began. Viewed in this light, it is an authority against the validity of the National Industrial Recovery Act. . . . In the case at bar, interstate commerce certainly ceased, at the latest, with the sales of petroleum products at wholesale to the defendants, and upon no theory can it be held to have continued so as to include the retail sales at the gasoline stations. But the case at bar, in the opinion of the court, is a much stronger case than *Hammer* v. *Dagenhart, supra.* In that case, the product of child labor actually entered into interstate commerce, while in the case at bar, the practice of giving premiums, alleged to be unfair, does not inhere in or constitute a part of the interstate commerce in petroleum products.

The court cannot find any justification in the Commerce Clause of the Federal Constitution for the promulgation of rules 2 and 17 of article V of the Code of Fair Competition for the Petroleum Industry, or for the adoption of the National Industrial Recovery Act, so far as it may authorize the promulgation of such rules; and no other provision of the Constitution has

been called to the court's attention as being justification for that act.

The last case herein considered is *United States* v. *Lieto*.[11] This was a criminal prosecution case for failure to comply with the petroleum code. Three informations were filed against the defendants, gasoline retailers, for failure to comply with certain provisions of the petroleum code relating to wages and hours. The court decided in favor of the defendants.

It seems to me that the recent Minnesota moratorium decision by the Supreme Court, has no direct bearing upon the National Recovery Act. Emergencies that may be involved or recognized by a state may be sustained under the general police power inherent in such states. But Congress has no general police power. It must bring its enactments within one of the specifications or implications granted by the national Constitution, otherwise there is a lack of constitutionality.

But in the present situation that we are considering there is conceded to be an unemployment emergency. Now the national government has a right to do anything it can, and it is the business of that government to do anything it can to relieve that emergency, provided that which it does is within its power to do. Local business, business confined exclusively to a state, business which does not impinge upon or affect, or disturb interstate commerce, is wholly beyond the fingers of the national government. Such business is amenable to the local government. The fundamental laws of the land preserve and recognize both sorts. The very charter of the national government proclaimed the continuity of the power in the people and of the power in the states. The power that rests and remains with the citizen and with the state is as sovereign and unamenable to attacks from the national government as is the power of the national government sovereign and immune from any act of the state. Each must retain this separateness and this distinctness and this independence in order to preserve the autonomy of the American system. The system is itself of infinite value. Experiments in the governmental field in other countries, as exhibited in history, drove the

[11] 6 F. Supp. 32. United States District Court, Northern District of Texas, Feb. 16, 1934. Also in C. C. H. Fed. Trade Reg. Serv., par. 7111.

fathers to the thought, and keep us true to it, that a government such as is ours must have a dual system. That is a national and a state system. Our country is too large, sections are too remote, interests are too diversified, liberties are too numerous and valuable, and the activities of the people are too multiplied to permit a congestion of all power in the national seat.

. . . . . .

The only controversy that is here is between the humble citizen who asserts his right to carry on his little business in a purely local commodity and in a purely local fashion, without being arrested and punished for a mythical, indirect effect upon interstate commerce. If this were a suit at equity such as have been presented in different jurisdictions, there might be more liberality for the position of the sovereignty.

My opinion is, without multiplying thoughts and reasons, that the regulations and the law sought to be applied under this information and bill of particulars, are wholly without authority, and are in violation of the well recognized and established guarantees of the citizen.

From an examination of the foregoing cases it appears that the N. R. A. and A. A. A. will be upheld as constitutional where their application is limited to businesses and transactions that may be controlled under the Interstate Commerce Clause. The difficulty is one of definition—what constitutes a business engaged in interstate commerce? To what degree must a business affect interstate commerce to be the subject of Federal regulation? An answer to these questions will be no answer so long as it is attempted to be made by numerous district and appellate courts whose views differ. Only the United States Supreme Court can produce harmony.