

Some Legislative and Constitutional Aspects of the American Recovery Policies

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When Herbert Hoover came to the Presidency in 1929, the economic condition of the United States seemed to almost everyone to be unusually favorable. To be sure there were a few critics who doubted whether the prosperity that he had promised in his pre-election speeches would continue, but such persons were distinctly exceptional, and certainly Mr. Hoover gave no indication that he anticipated any serious changes in the system of relationships between government and business. Mr. Hoover believed even more strongly than President Coolidge that by refraining from any considerable interference with or regulation of business, unless desired by business itself, we should come yet nearer to the goal of "an automobile in every garage and a chicken in every pot."

Within six months, however, it became apparent that Mr. Hoover had inherited from his predecessors an economy that was far less sound than had been supposed. The stock market crash of 1929 was followed by all of the familiar signs of an economic depression. For many months he refused to believe, or at least to admit, that this was to be anything more than a temporary halt in the upward movement, and his policies in what may be called the first phase of his attack on the depression reflect this attitude. In 1930 there came a reduction in all normal income taxes, including corporation taxes, the purpose being to free more money for private and industrial expenditures. He further advocated increased expenditures for public works undertaken by governments, Federal, State and local. A third line of activity was the holding of conferences with business leaders. Many of them, including such large employers as the railroads and the utilities, agreed to increase rather than to diminish their expenditures and to maintain wage scales. The leaders of organized labor agreed to discourage untimely demands and strikes. But when it became apparent, as it did by 1931, that such measures as these were entirely unavailing in the face of a continued decline of all of the indices of economic activity, the Hoover Admin-

istration entered upon the second phase of its attempt to check the ravages of the depression.

The greatest share of the Administration's efforts were bent toward the direct stimulation of business and the bolstering up of the credit structure. An increase of mass purchasing power was sought by pouring credit into the top of the economic machine. The Reconstruction Finance Corporation (RFC) came into being on January 22, 1932 with an initial capital of \$ 500,000,000 supplied by the Government, and with power to issue debentures to the extent of \$ 1,500,000,000, part of the market for which was to be the United States Treasury. The purpose of the Corporation was to extend its credits to railroads, to certain public and quasi-public authorities, and, more especially, to banks whose resources were tied up in assets which could not easily or even safely be liquidated at current prices. The National Credit Corporation, another device for the release of credit, was not, like the RFC, a governmental corporation but a private corporation. It was an attempt to relieve banks of their "frozen" assets by mutual aid, and was created to offset the hoarding of currency and the export of gold following the 1753 bank failures in the United States in the first ten months of 1931.

Another aspect of the Administration's policy in this period was the attempt to deal with the farm situation. This problem was not a new one. Farm prices had been declining and surplus stocks of agricultural commodities had been accumulating since the war, but the plight of the farmer became acute after 1929. The Federal Farm Board, created in the Spring of 1929, was given additional powers. Stabilization corporations like the Grain and the Cotton Corporations were created for the absorption of surplus agricultural stocks. These organizations went into the open market and bought grain and cotton in an effort to raise the prices of these commodities or at least to keep them from declining further. However, the effect upon price was temporary in each instance. Loans of money were made to wheat and cotton co-operatives but the effect here was likewise unsatisfactory. Wherever an increase of price took place there followed an increase in production, and there were no adequate means for controlling the production of such surpluses although such control was one of the avowed objectives of the Agricultural Marketing Act. In 1931 the Board recommended to the farmers that every third row of cotton be plowed under, but the only effective control in this direction, and it was very haphazard, was taken by the Governors of Texas and Oklahoma. The problem of farm credits and the impossibility of meeting fixed charges (primarily mortgages) led to an increase by \$ 125,000,000 in the capital of the Federal Land Banks, but this amount was totally inadequate.

Another attempt, a ridiculous one when viewed in the perspective which is now possible, was the attempt to increase employment by conducting a campaign to find 1,000,000 jobs in thirty days. A house-to-house drive was started on February 15, 1932 with the cooperation of thirty Governors, the American Legion, and the American Federation of Labor. Mr. Hoover consistently opposed anything comparable to the English "dole", that is, direct unemployment relief, through a fear that there would be created a body of permanent unemployables and malingerers.

So far as finance is concerned, Mr. Hoover never varied from an unqualified faith in the gold standard and a balanced budget. He believed that the Government should primarily seek to revive business and expected that its revival would result in a sympathetic acceleration of the whole economy. But the enormous expenditures which would have been necessary, if indeed great public outlays could at that time have served the purpose that he had in mind, were not forthcoming. The measures taken on behalf of agriculture and labor were mere palliatives. In general, there was no effective control of the many variables involved. Under these circumstances, no one part of the economy could be held sufficiently constant to make effective any throughgoing plan for recovery, if indeed Mr. Hoover had been willing to undertake such a plan.

At the expiration of Mr. Hoover's term of office (March 4, 1933) every form of economic life showed the effects of a depression which was of from two or three years to, in the case of agriculture, twelve years duration. The estimates of the American Federation of Labor show that the high point of unemployment in the United States from 1930 to the middle of 1933 was reached in March of 1933 with 13,689,000 idle. Perhaps of more significance, since the Government has not kept an accurate census of general unemployment, are the percentages of unemployment in the membership of the Federation itself. The average membership of the organization in 1928 was 2,896,063, while in 1933 before the codes went into operation, it stood at 2,126,796. The percentage of unemployment in the Federation in 1928 was 9.2. The percentage in 1933 up to August was 25.3, with a high peak in March of that year, of 26.6. To these percentages may be added another 21% of the membership of the Federation who were on only part time work in the first seven months of 1933. These figures are especially striking when it is borne in mind that the Federation represents the well organized labor groups with a considerable bargaining power¹⁾.

The price level had declined markedly. Using the wholesale price index of 1926 as 100, the situation in February 1933 was as follows:

¹⁾ U. S. Bureau of Labor Statistics, November, 1933, pps. 1128, 1129.

farm products, 40.9; foods, 53.7; leather products, 68; textile products, 51.2; fuel and lighting, 63.6; metals and metal products, 77.4; building materials, 69.8; chemicals and drugs, 71.3; and household furnishings, 72.3. The average of all wholesale commodities was 59.8²⁾. Retail prices showed some improvement over these averages.

The farmer's position was particularly precarious. With a base index of 100 in the August 1909—July 1914 period for prices paid by the farmer, the farmer in March 1933 was still paying out an equivalent of 100, but with the same base the farmer was receiving only an equivalent of 50 for the products he sold. The farmer group was besides saddled with mortgages amounting to between eight and nine billions of dollars.

Statistics on the banking business indicate a great shrinkage both in number of banks and in bank credit. In 1922 there were approximately 30,400 banks in the United States. A gradual deflationary process in the banking business set in in 1922 so that the number of banks in the United States in 1929 was roughly 25,300. In the three years of the depression, 1930—1932, this number had dropped to 19,000, representing the loss of some 3,100 banks in the year 1932 alone. In this three year period individual deposits in all banks dropped from \$ 55,000,000 to \$ 42,000,000, while in the same period individual deposits subject to check declined from \$ 21,100,000 to \$ 14,300,000. At the time of the inauguration of President Roosevelt, the banks in twenty-one states had been suspended by the Governors thereof, including the all important states of New York and Illinois.

Consequently, the most pressing situation with which the new President had to deal after he was inaugurated on March 4, 1933 was the collapse of the banking system. His first step was to give official recognition to what was fast becoming a national fact, and under authority of an almost forgotten war time act, to declare a banking holiday, and to forbid the banks to reopen except upon a certificate of solvency.

With this crisis at least temporarily met, the new Administration could begin to present a program to Congress. The legislation subsequently enacted, most but not all of which was based upon Presidential recommendation can be said to be directed towards relief, recovery and reform. The relief measures have included the creation of public works agencies, and the distribution of funds by loan and grant to individuals, business enterprises and local public authorities. In its recovery program the Administration has sought to redistribute the national income in such a way that the purchasing power of the farmer and the wage earner groups will be enhanced. For the first group, an attempt has been made to control production, absorb surpluses and

²⁾ U. S. Bureau of Labor Statistics, July, 1933, p. 234.

loosen credit. The more nearly direct measures to achieve the same result for the second group have been the raising of wages, shortening of hours and the spread of employment through public works. Coincidentally the Government has made efforts to stimulate a rise in prices to the 1926 level, largely through management and control of the currency. Both for purposes of reform and recovery, industry, under governmental supervision, has bound itself to comply with codes of fair competition to which Congress has given the force and effect of law. Reforms in banking and stock transactions have created new areas of governmental regulation by corporation and commission, and an experiment in the governmental operation of electrical plants has been undertaken ³).

The collapse of the banking structure made the use of vigorous remedies a necessity. On the first day of its special session, Congress gave to the President broad powers to regulate transactions in credit, currency, gold, silver and foreign exchange, and the Secretary of the Treasury was empowered to require the delivery of all gold and gold certificates. Provision was made for the appointment of conservators of banks in difficulties, an expedient for avoiding the processes of the courts and bankruptcy proceedings. Solvent banks were reopened upon certification of their solvency.

These provisions were designed to tide over the banking crisis; reform legislation was enacted in June of 1933. Deposits were to be guaranteed by a new Federal agency called the Federal Deposit Insurance Corporation (FDIC), the funds of which were to be supplied by the Government, the Federal Reserve banks and the member banks. Only deposits up to \$ 10,000 were to be guaranteed completely with the percentage of insurance decreasing in inverse ratio to amounts of deposit over this figure. It may be noted that this legislation had been pending in Congress for two years before the inauguration of Mr. Roosevelt.

Provision was made for the separation from member banks of the FDIC of affiliates engaged in security speculation, a policy strengthened by the disclosures of a Senate investigation into banking which had been begun under Hoover and continued under Roosevelt. This prohibition was supplemented by the further requirement that investment bankers avoid infringing upon the activities of commercial banks. Provision was made to permit industrial and savings banks to become members of the Federal Reserve system, and the Federal Reserve Board

³) The following surveys of this legislation may be especially recommended: Louis Hacker, *A Short History of the New Deal*, (New York, 1934); J. B. Hubbard, ed., *Current Economic Policies*, (New York, 1934); Leo Pasvolksy, *Current Monetary Issues* (Washington, 1933); S. C. Wallace, *The New Deal in Action* (New York, 1934).

was empowered to discourage security speculation by withdrawing credit facilities from banks lending too much money for this purpose.

This plan of insurance has not come completely into operation as yet, the effective date being July of 1935. A temporary plan for the insurance of deposits up to \$ 5000 is, however, now functioning.

Closely tied in with this legislation is the regulation of the issue of new securities which the Securities Act of 1933 and its amendments and the Securities and Exchange Act of 1934 embody. The facilities of the mails and interstate commerce are denied to any prospectus or security (with certain exemptions) unless the issuer has complied with the provisions of the Acts. These requirements are the registration of the issuer and the filing of detailed information concerning salaries, commissions, the character and soundness of the issuer's business and the like. Civil liability for misstatements or omissions of material facts is extended to signers of the statement, professional men in certain cases who have prepared any report or valuation in connection with the statement and upon which it is based, and every underwriter of the issue.

The Securities and Exchange Act of 1934 took the supervisory duties of the first Act from the Federal Trade Commission (FTC) and entrusted them to a new commission, the Securities and Exchange Commission (SEC). The liability of underwriters, directors, and others was considerably modified. Purchasers under the first Act could recover the consideration paid or damages for false or omitted material statements. This was amended to require proof of reliance when the purchase has been made after the publication of a statement of the earnings of the company issuing the security. The SEC was also empowered to license stock exchanges and to require detailed information concerning the capital structures and operations of corporations. This commission has started functioning and in December of 1934 issued forms and rules for the permanent registration of the securities in the nation's stock exchanges.

Accompanying the attempts of the Administration to effect economic recovery in the United States are the measures that have been taken for immediate relief. The agency for this purpose is the Federal Emergency Relief Administration (FERA) which was given an initial fund of \$ 500,000,000 and an additional appropriation of \$ 950,000,000 in February 1934. This agency has been concerned in large part with the distribution of funds for relief purposes among the States on condition that the recipient State appropriate supplementary funds. In November of 1933, a Civil Works Administration (CWA) with a credit of \$ 400,000,000 was created. This agency was to provide self-sustaining work for 4,000,000 relief receivers. Work for about 3,800,000 was ac-

tually provided before the CWA was disbanded in the Spring of 1934 and the workers returned to the relief rolls. A feature of the relief administration has been the disposal of some of the agricultural surpluses to persons on the relief rolls.

An activity which is designed to afford not only relief but employment and the stimulation of the production of capital goods is the Public Works Administration (PWA). This agency was created to undertake the construction of public works, the conservation of natural resources, and a program of low cost housing and slum clearance. A fund of \$ 3,300,000,000 was assigned to the PWA for its work, and the entire sum had been earmarked for various enterprises by June of 1934. About one-third of this money, however, had been diverted by Executive order or Congressional enactment. The remainder was allotted to 13,266 Federal projects and 2,407 non-Federal projects. In round numbers, about \$ 1,400,000,000 went to Federal construction activities throughout the country and \$ 1,000,000,000 went into loans and grants to various local governments for public constructions. The program for slum clearance and low cost housing has not moved very rapidly, however, because of the obstacles presented by the land and property laws.

Further relief for the unemployed has been one of the objectives of the Act of March 31, 1933 creating the Civilian Conservation Corps (CCC). In order to remove some of the competition in the labor market and to effect sorely needed projects of conservation, the declared policy of the Act has been the employment of unemployed American citizens in reforestation and similar activities. Camps were established for their housing and a cash allowance of \$ 30 a month was given to the workers, \$ 25 of which has to be sent home to relations and dependents. The enrollment in the camps has been limited so far to 350,000 but there is a possibility that it will be increased considerably. The work of the camps was put in the charge of experts on forestry while the administration of camp affairs has been in the hands of regular army officers. There is no semblance of military discipline or regimentation in the camps, however. The only punishment that is used is discharge from the camp. Moreover those who sign up are free to leave at any time and indeed are encouraged to do so when they can obtain permanent employment outside.

One of the first objectives of the Roosevelt program for the recovery of economic health was the restoration of the purchasing power of the farmer group. The purpose of the Agricultural Adjustment Act, which has been the basis of the Agricultural Adjustment Administration (AAA), was to raise the price of agricultural commodities so as to give the farmer a purchasing power (with respect to the articles that

farmers buy) equal to the purchasing power of agricultural commodities in the base period, August 1909 to July 1914. The AAA hopes to reach this equivalence of purchasing power by gradual correction, although as rapidly as the condition of the domestic and the foreign markets will admit. This Act it must be noticed has no time limit on its effectiveness.

Special relief for America's great export crop, cotton, was needful in view of the depressed condition of the world market for this commodity. The Secretary of Agriculture was required to obtain all the cotton stocks in the hands of Federal agencies. This meant particularly the Federal Farm Board and the Cotton Corporation, both of which were expedients of the Hoover Administration for the absorption of surpluses, and both of which were incidentally abolished by the Roosevelt Administration. With the reserves of cotton so acquired, the Secretary of Agriculture was empowered to enter into agreements with cotton producers for the restriction of cotton production by at least 30% below the previous year's amount. In return for this promise the producer was to have an option on an equivalent amount of cotton at the average price paid by the Secretary, or the Secretary would sell such cotton for the account of the producer, paying to the producer the excess of the market price at the date of sale over the average price referred to above. There was also a deduction for carrying charges. A proviso forbade the production of any nationally grown agricultural commodity on lands so withdrawn from production.

In respect to other basic agricultural commodities, the Act provided for voluntary reductions of acreage or production, or both, in return for rental payments for the lands so withdrawn and benefit payments for the commodities or crops so restricted. Funds for the making of the extensive payments contemplated by the Act have come out of a processing tax therein authorized. The Secretary of Agriculture was also empowered to enter into voluntary marketing agreements with associations of producers and processors, such agreements to be exempt from the strictures of the Anti-trust Acts. Some means of coercion of those associations of producers and processors who shipped in interstate commerce, however, were provided.

In response to the agitation of the farmers, the list of basic commodities has been extended to crops the production of which has been increased since the enactment of the above legislation. Increased and improved processes of production on lands not withdrawn by agreement have made necessary the compulsory restriction of the production of cotton and tobacco. A prohibitive tax on the ginning of cotton above an allotted quota is the device by which the AAA is to limit the production of cotton to 10,000,000 bales in the years 1934 and 1935. The control of tobacco production is effected through taxation also.

Although the farmer had, before 1933, received special assistance from the Federal Farm Board in securing loans for certain cooperative enterprises and from the RFC by way of regional agricultural credit agencies, the credit condition of the farm industry in February 1933 called for a broad program of relief. New reserves of credit were made available for the redemption of farms lost by foreclosure and for the refinancing of mortgages. An impetus was given to cooperative borrowing, although provision was also made for direct loans to individuals where a farm loan association had not been set up or for certain reasons could not apply.

By Act of June 16, 1933, all the farm credit agencies were consolidated in the Farm Credit Administration (FCA). Such credit instruments as the regional credit agencies and crop production loans are admittedly of a temporary and emergency nature, but the FCA has now the outlines of permanent organization. There are now twelve geographical units of the FCA in each of which are four permanent institutions. They are a Federal Land Bank; an Intermediate Credit Bank, a discount bank for cooperatives and some individuals; a bank for cooperatives only, making loans to and supplying part of the working capital of these organizations; and a Production Credit Corporation which does not loan directly to the farmer but to production credit associations. Over each of these twelve regions is a board of directors under each of which is a general agent for the coordination of the activities of the region.

The organization of the FCA and the condition of the farmer do not yet warrant the abandonment of temporary emergency relief. Legislation in 1934 has included further aid in the refinancing of farm debts, the redemption of foreclosed properties, the making of agreements between distressed farmers and their creditors, and the extension of time to farmers during which they may remain in possession of their farms. To some of this legislation the Administration is antipathetic but the considerable influence of the farmer group in Congress makes it politic to concede something.

The plan of the Roosevelt Administration to provide an increase of purchasing power to the wage earner group has involved the fixing of wage scales and the spread of employment through shortened hours, and public works, about which something has already been said. The National Industrial Recovery Act (NIRA) required every code of fair competition to include a promise by the employer of compliance with maximum hours and minimum wages provisions approved or prescribed by the President. Out of the first 300 codes approved (that is, by March 5, 1934) 275 fixed 40 hours as the working week; 25 fixed 48 hours as the working week; 16 fixed 44 hours as the working week; 12 fixed 36

hours as the working week; and 11 codes fixed the working week at 35 hours. The remaining codes fixed the working week at from 27 to 56 hours. Wages were fixed in these codes from 14 to 50 cents an hour, and for those codes which fixed the wage by the week, the minimum ranged from 8 to 17 dollars a week.

Because the process of code making was so slow, and in order to keep the upward movement of wages ahead of the price rise in July 1933, the President availed himself of his powers under the NIRA to make voluntary agreements with the employers of labor not covered by codes at this time. This agreement came to be known as the President's Reemployment Agreement (PRA), sometimes erroneously called the "blanket code", and an appeal for signatories was made on July 27, 1933. The PRA bound the signatories to maintain for non-manufacturing and mechanical workers a maximum week of 40 hours and for factory workers, a maximum week of 35 hours. Minimum rates of pay which varied from \$ 12 to \$ 15 a week were intended to correct some of the abuses in the "sweated" occupations. There was further agreement that the then existing rates of compensation should not be reduced. Provision was made for the allowance of exemptions and the adjustment of the terms of the agreement to fit special cases where it would have worked hardship. Finally there was provision for the substitution of a code for the PRA whenever such code should be drawn up and approved.

The actual work of supervising the administration of the codes has been undertaken by deputy administrators responsible to the Administrator of the powers granted by the NIRA. The codes were divided up into eight divisions with a deputy administrator over each. These deputies provide the contact between the Government and industry, for under the deputies are the various code authorities.

Other departments of the Recovery Administration deal with general aspects of the codes and not with specific codes as the deputies do. The Compliance Department supervises State directors of compliance. The latter operate side by side with local compliance boards, the special function of which is investigation and supervision of compliance with the PRA. Recently, regional compliance boards have been created to facilitate effective supervision and to remove some of the pressure on the agencies in Washington. A Public Relations Department maintains a contact with newspapers and other organs of publicity to inform the public concerning the activities of the Recovery Administration. The Legal Department advises the organization on legal matters pertaining to the codes and prepares cases for suit and action. The Research and Plan Department analyzes codes and policies from the point of view of statistics and economics. An Imports Department advises the organization on the necessity and advisability of restricting imports. The

Review Department reviews orders and rulings on the codes for the administration.

A reorganization of the Recovery Administration in September 1934 substituted for the office of the Administrator a dual board control. The function of one of these boards is the formulation of policies while that of the other is the execution of these policies. The personnel of the policy board of five members is made up largely of officers of the Administration. Of the five members of the executive board, two are business men, two are college professors, and one is a labor leader. A Coordinator, responsible to the President, is in charge of the integration of the many functions of the Recovery Administration.

Responsibility for the administration of the codes has been lodged as far as possible in existing associations representing the industry or group which has presented the code for the approval of the President. Where an industry or group has had no such mature organization, an enforcing agent or code authority has been created by agreement between the Administration and the interested parties. Minority participation in the code authority is given in some cases to the Administration and to labor groups. The Automobile Code is administered by the National Automobile Chamber of Commerce, a trade association. The code authority for the cotton textile industry is one of the best organized of the trade associations, the Cotton Textile Institute, Inc. On the other hand, the code for the Cloak and Suit Industry is administered by ten members who have been chosen from the three organizations of manufacturers submitting the code and the International Ladies Garment Workers Union, a labor organization.

Besides making provision for wages and hours, the codes contain prohibitions against unfair methods of competition. The scope of activities under this category is of course a very broad one. The codes prohibit many activities which are actionable at law, e. g., defamation, misrepresentation and intimidation. In addition are those activities which are felt to be violations of business ethics, as price cutting below a published schedule, price guarantees, failure to make charges for extra service and parts, and the making of lump sum bids.

The means of enforcement at the disposal of the code authorities are limited to persuasion and supervision. They have no powers of their own to enforce compliance. The actual enforcing agencies are the Federal Trade Commission with its "cease and desist" orders and other machinery, and the Department of Justice through the ordinary processes of the courts.

Although the measures of the Government to increase the purchasing power of the farmer-labor groups would, if successful, result in the raising of the price level, the Administration has also attempted to

achieve this result even more directly through the manipulation of the currency.

It was to this end that the hoarding of gold was forbidden and that gold coin, currency and bullion were called into the Treasury. It was also to this end that the United States went off the international gold standard and that an embargo was placed on the export of gold abroad. The results, however, were not very satisfactory. The price level took an anticipatory upward swing from March to July 1933 and then declined. There was a short recovery in October followed by another recession.

On October 22, 1933, Roosevelt announced a new policy in respect to the currency, a pronouncement hastened by the development of forceful discontent in the Middle West and the rise of the price of gold on foreign exchange in terms of the dollar, due chiefly to purchases of the metal abroad. The new plan was the purchase and sale of gold in the world market in order to depreciate the value of the paper dollar in terms of gold. On October 25, buying operations were begun in the domestic market when the RFC bid for newly mined gold at \$ 31.16 an ounce. On January 2, 1934, the RFC announced that it had spent \$ 24,800,000 for domestic newly mined gold and \$ 50,000,000 for purchases in foreign markets. In making these expenditures, the RFC had been forced to bid higher and higher in its attempts to depreciate the dollar.

On January 31, 1934, Roosevelt, having been duly authorized by Congress, fixed at \$ 35 an ounce the price at which the Treasury would buy and sell gold. This was a devaluation of the old gold dollar to 59.06 cents and was intended to be permanent. Roosevelt was also given authority to vest in the Treasury title to all monetary gold and to set aside a stabilizing fund of \$ 2,000,000,000 out of the "profit" from devaluation to keep the dollar from fluctuating too widely or rising too high on foreign exchange.

In response largely to the pressures of silver interests in the western States, efforts are being made in the direction of a larger use of silver in the national currency. The new policy in respect to silver is the increase of the metal in the nation's monetary stocks with the object of acquiring and maintaining a 25—75 ratio with the gold monetary reserve. On December 24, 1934 the Treasury's silver holdings were unofficially estimated at just over 1,000,000,000, or still 1,000,000,000 ounces short of the ratio desired.

Another device for the raising of the price level to the 1926 norm has been the limitation of industrial production and the fixing of prices in the codes. More than half the codes accepted by May 1934 contained price fixing in some form. They included the establishment of minimum prices and the maintenance of resale prices; the prohibition of the sale

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of commodities below the cost of production; and the creation of open priced posting arrangements. Variations of these price fixing arrangements were adapted to the special needs of particular industries. In the code for the retailing of automobiles for example, price increases after an effective date were restricted to the mere coverage of added costs, a maximum rather than a minimum limitation on prices. There has been a tendency in the direction of the abandonment of the price fixing provisions of the codes in the last few months and it is doubtful that any permanent reorganization of the Recovery Administration will include price fixing as a policy.

Fewer codes have restricted production. These limitations have taken the form of prohibitions on the installation of new machinery, on increase of productive plant capacity, or on hours of operation of machinery. In order to check the introduction of new machinery, the code provisions have required the recommendation of the code authority or some other authorization.

The RFC, one of the institutions created under Hoover, has been made the financial hub of much of the activity for relief and recovery under Roosevelt. In March 1933 the RFC was used to bolster up the failing bank system through the purchase of the capital notes, debentures and preferred stocks of the banks and through the extension of loans secured by such stock. It may be noted that the control of voting stocks in the banks contains significant possibilities for an effective regulation of the banks. In June of the same year the RFC was authorized to purchase the preferred stocks and capital notes of insurance companies and to extend similar loans.

In respect to agricultural relief the RFC has occupied a conspicuous position under Roosevelt. Crop loans to farmers, authorized by Congress in February 1933 have been continued. Funds for the program of cotton buying by the Secretary of Agriculture and other purposes have been supplied by the RFC. The Corporation has also extended its funds to the Governor of the FCA. These agencies of course have also acquired funds and credit from other sources. The RFC has furthermore been engaged under Roosevelt in making direct loans to industry. Its announced policy in this respect has been the financing of working capital as contrasted with fixed capital.

Besides the broad areas of control and supervision by the Federal Government which have been outlined above, the Roosevelt Administration has undertaken a significant experiment in the governmental planning and development of an entire region. The Tennessee Valley Authority (TVA) is the agency for the achievement of this project. It is a corporation with a board of three directors appointed by the President and the Senate. It is the proprietor of the hydroelectric plant at Muscle

Shoals on the Tennessee River and of the nitrate plants there. These enterprises were undertaken by the Government during the war for the production of military supplies, and for the national defense. The problem since the war has been to decide what to do with these plants. The specific duties of the TVA include the building of two great dams on the Tennessee River as well as various projects for flood control, soil erosion prevention and reforestation. The TVA is in short entrusted with the planning and development of an area which embraces parts of seven States. The TVA has so far emphasized the electrical power aspect of its functions and is at present engaged in a campaign to promote the use of electricity in homes and farms in the Tennessee Valley. The aim of the Government is to sell this power wholesale to municipalities, which in turn will retail it to the inhabitants. A subsidiary but by no means inconsiderable objective is to prove that electrical power can be produced more cheaply than the utilities have done.

Under the American constitutional system it is not enough for the President and the Congress to be in agreement as to the desirability of legislation. Acts receiving the support of these branches of the Government may be declared unconstitutional by the courts. If the Supreme Court of the United States does so hold the only recourse open to the other branches of the Government is the proposal of a constitutional amendment 4). It is entirely possible that important parts of the Roosevelt legislation will be held unconstitutional by the Supreme Court, even though the judiciary is itself powerless to supply or even to recommend any substitutes.

Under the federal scheme of the distribution of powers existing in the United States, the central government has only those powers which are granted to it in the Constitution 5). The powers under which the recovery legislation is presumably enacted are to be found in section 8 of Article I. Most specific in their character are those delegating to the Federal Government power to raise money by taxes and by borrowing, and to regulate the coinage. It would seem that so far as the financial and banking legislation of 1933—1934 is concerned, with the possible exception of the gold-hoarding order, the constitutional provisions, together with a long line of decisions construing them broadly, are quite sufficient to afford the necessary basis for favorable rulings 6).

With some minor exceptions the other Acts depend for their va-

4) There have been some sixty cases in which the Supreme Court has held an Act or a part thereof invalid. See C. G. Haines, *American Doctrine of Judicial Supremacy* (2d ed., Berkeley, 1932) for a list.

5) See Amendment X.

6) For a general survey of such cases see C. K. Burdick, *The Law of the Constitution* (New York, 1922); W. W. Willoughby, *On the Constitution*, (2d ed., New York, 1929).

lidity almost entirely upon the provision in which Congress is given power "To regulate commerce with foreign Nations and among the several States". Following the principle first laid down by Chief Justice Marshall in *Gibbons v. Ogden* 7) this clause has been construed very liberally 8). Not only have the agencies of transportation been submitted to very extensive control, and that control sustained by the courts, but the courts have also upheld Acts dealing with, in some cases even prohibiting, the size and organization of business enterprises (the Anti-trust Acts), lotteries, the content and preparation of foods and drugs, the transportation or re-sale of stolen motor vehicles, the traffic in women for immoral purposes, the activities of buyers in stockyards, and the conduct of grain exchanges 9). Indeed so broad has been the interpretation of this clause that the only decision which is of a seriously limiting character in this respect is *Hammer v. Dagenhart* 10), in which the Congressional attempt to regulate child labor was declared to be without constitutional justification. This was, however, a case in which the Court divided five against four; many critics have always insisted that it was not in accordance with the judicial precedents, and it is at least possible that it will be over-ruled, or more probably, distinguished. Certainly the Court will have little difficulty in finding precedents with which to support its ruling if a majority of its members are of the opinion that the Acts in question are within the powers granted to the Federal Government. The statute which has been most discussed from the point of view of constitutionality is the NIRA. It is unlikely that the Court will pass upon its validity in a single decision. Rather is it probable that it will, in successive cases, consider the validity of regulating specific forms of industry. It may well be that codes adopted under provisions of this Act and which apply to businesses having a relatively remote connection with interstate commerce, as that term is usually understood, will be denied the judicial sanction, while those applying to other forms whose connection with the stream of commerce among the several States is more direct will be sustained.

Although it would appear that the most serious obstacle to the constitutionality of the Roosevelt legislation is the possibility that the Court will find that important portions of it transgress the federal distribution of powers, there are other bases for unfavorable verdicts.

7) 9 Wheaton 1 (1824).

8) See B. C. Gavit, *The Commerce Clause*, (Bloomington, Indiana, 1933); G. G. Reynolds, *Distribution of the Power to Regulate Interstate Carriers between the Nation and the States* (New York, 1928).

9) See "Some Legal Aspects of the NIRA," 47 *Harvard Law Review*, 85 (1933). E. S. Corwin, "Congress' Power to Prohibit Commerce," 18 *Cornell Law Quarterly*, 477 (1933), Corwin, *Twilight of the Supreme Court* (New Haven, 1934).

10) 247 U. S. 251 (1918).

Of most significance is the innocent seeming phrase in the Fifth Amendment, "No person shall be deprived of life, liberty, or property without due process of law." At the time of the adoption of this Amendment (1791) this had reference to procedural rather than to substantive safeguards, but in the last fifty years the phrase, which appears as a limitation on the States in the Fourteenth Amendment, has been greatly broadened in its meaning, and has been the basis of several decisions invalidating Acts of Congress and of scores in which State legislation has been declared to be unconstitutional ¹¹⁾. Of the former the most relevant are *Adair v. United States* ¹²⁾ in which a Congressional statute forbidding interstate railroads to discharge employees because of membership in a labor union was held void, and a similarly unfavorable decision in *Adkins v. Children's Hospital* ¹³⁾ involving a statute providing for the fixing of minimum wages for women in the District of Columbia. Due Process is a legal concept which the Court has always refused to define, except as it does so in passing upon cases as they arise, but under the influence of *laissez faire* economic principles a majority of the Court has been loath to sustain regulatory legislation excepting where it dealt with subject matter long subject to government control and where it followed methods which did not offend the justices' sense of reasonableness. The consequence has been the judicial disapproval of certain kinds of regulation — rates, prices, limitation of competition — excepting in the vague category called "businesses affected with a public interest" ¹⁴⁾. Several forms of industry sought to be regulated by the NIRA or some other part of the current legislation have been held, at least by implication, to be outside this category. There are, however, two reasons for believing that this obstacle will not be so serious as these precedents might indicate. In the first place, the Court has on two occasions upheld extreme forms of regulation imposed by Congressional Act on the grounds of the emergency situation involved and because the legislation was of a temporary character ¹⁵⁾.

¹¹⁾ See, in general, R. L. Mott, *Due Process of Law* (Indianapolis, 1926); R. A. Brown, "Due Process of Law, Police Power and the Supreme Court," 40 *Harvard Law Review*, p. 943 (1927); T. R. Powell, "The Supreme Court and State Police Power, 1922—1930," 17 und 18 *Virginia Law Review*, (1932).

¹²⁾ 208 U. S. 161 (1908). With this case, however, compare *Texas and New Orleans R. R. v. Brotherhood*, 281 U. S. 548 (1930).

¹³⁾ 261 U. S. 525 (1923).

¹⁴⁾ B. P. McAlister, "Business Affected with a Public Interest," 43 *Harvard Law Review*, p. 759 (1930); W. H. Hamilton, "Affection with a Public Interest", 39 *Yale Law Journal*, 1089 (1930). This doctrine has not yet been used to limit Federal regulation but its possible use is indicated by the *Adkins* opinion.

¹⁵⁾ *Block v. Hirsh*, 256 U. S. 135 (1921); *Wilson v. New*, 243 U. S. 332, (1917). See also *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398 (1934), and the note on this case in 47 *Harvard Law Review*, p. 660 (1934).

The Roosevelt legislation is largely of this kind. In the second place, the decision in the case of *Nebbia v. New York* ¹⁶⁾ in March of 1934 upholding a New York statute fixing the price of milk reflects a more liberal tendency toward such control than the Court has shown for many years. One cannot be sure that this may safely be taken as a forerunner of subsequent decisions, but it apparently indicates that the Court is not now prepared to follow the point of view set forth in the *Adkins* case in 1923.

The only case in which the Supreme Court has thus far passed upon any portion of the current legislation dealt with another constitutional problem, that of the separation of powers. The Constitution contains no single provision specifying that the three governmental powers shall be kept separate, but in the first sentence of each of the first three Articles it stipulates that "All legislative powers", "The executive power", and "The judicial power" shall be exercised by the Congress, the President, and the Courts respectively. Many parts of the recovery legislation do vest unusual powers in the Executive. In the *Amazon Petroleum Company Case*, decided January 7, 1935 ¹⁷⁾, the Court, with but one dissenting voice, held section 9 (c) of the NIRA ¹⁸⁾ invalid on the grounds that in this section Congress did not set forth with sufficient definiteness the conditions under which the powers of the President were to be exercised, and therefore attempted to grant legislative powers to the Executive. The Court assumed without deciding, that the Federal Government has power to prohibit the transportation of oil in interstate commerce, the object sought under this provision. It is probably easy to exaggerate the importance of this decision. By altering and adding to the statement contained in section 9 (c) Congress could evidently achieve the same result in a way which would be satisfactory to the Court. Certainly this one decision is no indication of the invalidity of the entire NIRA, much less of the other portions of the Roosevelt legislation. The case is interesting from the point of view of the development of constitutional law in the United States since it is the first in which a statute or rather a part of a statute, of Congress has been declared unconstitutional on this ground. Heretofore the Court

¹⁶⁾ 291 U. S. 502 (1934).

¹⁷⁾ *New York Times*, January 8, 1935.

¹⁸⁾ The section is as follows: "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$ 1000, or imprisonment for not to exceed six months, or both."

has frequently said in dicta that Congress might not delegate its power to decide on policies, but it has also more than once quoted the phraseology of a Pennsylvania case to the effect that "The legislature . . . can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its action depend¹⁹." One can but await further decisions in order to ascertain how the members of the present Court intend to construe this principle.

When considering this legislation from either a political, or in the American sense, a constitutional point of view, it is especially to be observed that it is the product of no *coup d'état*. The President was elected according to the constitutional custom, and all of the legislation has been enacted in accordance with settled procedure. Mr. Roosevelt has only that control over Congress which his great popularity and the existence of the emergency have afforded him. Congress has been content for the most part to follow his leadership, but the legislative record shows that it has not been entirely compliant. Roosevelt had great difficulty in getting his Economy Bill through the special session of the 73d Congress. In 1934 the Senate refused to ratify a treaty with Canada for the development of the St. Lawrence Waterway, a project in which Mr. Roosevelt had been interested for many years. The Administration has been forced from time to time to accept measures which were sponsored by Congress, and indeed in some cases of which the Administration disapproved. The Glass-Steagall Bill for the guarantee of bank deposits and the reform of the banking system was, for example, not an Administration measure. The Bankhead Cotton Restriction Bill to reduce by 41% the five year average production of cotton, and to place the restriction of cotton production on a compulsory basis, not only originated in the cotton States but was actually opposed by the AAA. In March 1934 Roosevelt vetoed a bill to restore pay cuts to Federal employees and pension cuts to veterans. Congress overrode his veto by the necessary two-thirds majority and the bill became law. If Congress has delegated great powers to the President, it has nevertheless retained the active exercise of its constitutional powers of legislations, as the above evidence shows.

There is little doubt, however, concerning the popularity of the Administration in its attempt to achieve economic recovery. The Government has had no difficulty in disposing of its bond issues even in the

¹⁹ Locke's Appeal, 72 Penn. State, 491 (1873). For opinions of the Supreme Court see especially *Field v. Clark*, 143 U. S. 649 (1892); *Hampton & Co. v. U. S.*, 276 U. S. 394 (1928). Also James Hart, *Ordinance Making Power of the President* (Baltimore, 1925); J. P. Comer, *Legislative Functions of National Administrative Authorities*, (New York, 1927).

face of a record public debt for the first half of the fiscal year of 1935 of \$ 28,478,663,924. In November 1934 the entire membership of the House of Representatives and one-third of the Senate were before the people for election or reelection, and practically every seat was contested. The result was a sweeping endorsement of the "New Deal", the Democrats gaining 13 seats in the House to bring their membership to a total of 322, as against a Republican minority of 103. In the Senate the Democrats added 9 seats to bring their total to 69 as against the 25 seats which the Republicans possess.

Another observation that seems to be called for by the frequency with which the phrase "Roosevelt revolution" has been used is that some parts of the "New Deal" are not new at all while others merely represent additions to pre-existing legislation. It remains to be seen whether any important portions of the legislation will involve economic or political changes sufficiently great to warrant the use of the term "revolution".

The public works program of course represents an extension of the policy begun under Hoover. The banking and financial legislation, where it was not occasioned by the temporary emergency was an extension, an important one to be sure, of long established Federal control of the National and Federal Reserve Banks. The Securities and Exchange Commission has its forerunner in various Federal regulatory commissions. The farm policy of the new Administration undoubtedly represents a considerable change, although the hesitating and half-way measures of the preceding Administrations clearly helped to pave the way. It would be idle now to attempt to predict the future of the AAA but it is at least doubtful whether the policy of crop restriction and that of the processing tax will be continued beyond the duration of the emergency in American agriculture.

The excessive publicity given to the NIRA in 1933 caused many people to believe that it constituted the primary, if not the entire method of combating the depression. This Act represented an attempt to secure the objectives discussed earlier in this paper through a technique of dealing with industry which is the logical outgrowth of the development of trade associations in the decade prior to 1933, a movement to avoid the strictures of the Anti-trust Acts ²⁰⁾. The development of trade associations coincided with the promotion of trade practice conferences by the Federal Trade Commission. These conferences were agreements reached by the business world and the Commission as to standards of fair competition ²¹⁾ although in a good many respects they tended to become merely agreements as to price. The codes under the

²⁰⁾ S. N. Whitney, *Trade Associations and Industrial Control* (New York, 1934).

²¹⁾ See T. C. Blaisdell, *The Federal Trade Commission* (New York, 1932).

NIRA included in addition the principles regarding laboring hours, wages and organization, and the prohibition of child labor. Aside from the attempts of Congress to abolish child labor, unsuccessful because of unfavorable decisions by the Supreme Court, the chief precedents for these labor provisions were those in the railroad field. The Adamson Act of 1916 regulated hours of labor on interstate railroads, and various boards of appeal have been created from time to time to hear disputes between employers and employees of such railroads ²²).

The Tennessee Valley Authority is an extension of the policies of water power development and conservation earlier manifested in such forms as the Power Commission ²³), the system of forest reserves and the building of a number of great dams, including that at Muscle Shoals on the Tennessee River.

Even the tendency toward national self-sufficiency which has been accelerated by Roosevelt is to be found in developments of the post-war decade. The high tariff walls set up by the tariff of 1929 and the restriction of immigration to 154,000 a year from certain countries are efforts to immunize the United States from influences adversely affecting business and labor groups. This trend is also manifested in the attempt through the Federal Farm Board to absorb agricultural surpluses which could not be taken care of by foreign markets. The policy of the Government here was to free American agriculture for the time being at least from dependence upon international markets. Roosevelt in cutting the United States from the gold standard and in using the tariff as a bargaining device in the making of advantageous trade agreements represents, as he does in many other respects, not something new under the sun but the focus of processes long in development.

In general it can be said that the months since the inauguration of Roosevelt have seen an upward swing in the direction of recovery. The wholesale price index at its low point (1933) was 59.6% of the 1926 average. On February 1, 1934 the Commissioner of Labor Statistics reported that the percentage had reached 72.4% of the 1926 ideal. On August 24, 1934, the Bureau of Labor Statistics announced that the wholesale price index had reached its highest point since 1931, 76.9% of the 1926 level. Retail prices increased by about 18% from March 1933 to May 1934. The ratio of prices received by the farmer to the prices paid by the farmer stood at 50% in March 1933. In May 1934 this ratio had advanced to 61%. With a base period from 1923—1925 as a standard of 100, industrial production has increased from 65 in

²²) See the opinions in *Wilson v. New*, 243 U. S. 332 (1917), and *Texas and New Orleans R. R. v. Brotherhood*, 281 U. S. 548 (1930).

²³) W. E. Mosher and F. G. Crawford, *Public Utility Regulation*, (New York, 1933) chapter XXXIII; M. Conover, *The Federal Power Commission*, (Washington, 1923).

January 1933 to 76 in December 1934; factory employment, from 61.4 to 77; and payrolls from 39.5 to 61. These figures do not represent a steady unhalting swing, for there have been great fluctuations from time to time. They do, however, indicate a general improvement which has had a particular emphasis since September. The picture has its dark shades of course. The American Federation of Labor reported an unemployment estimate of 11,459,000 in December 1934. The farmers' purchasing power has not reached the equivalence in the base period. The rise in prices has not reached the 1926 levels. The index of building contracts shows little improvement over January of 1933. But in general there has been improvement, although how much of this is the result of the recovery legislation it is impossible to say. Undoubtedly the deflationary processes of the preceding years made possible an upward movement which would hardly have been possible, even with the same measures, two or three years earlier. The President's banking policy perhaps aided by the Glass-Steagall Banking Bill certainly produced an atmosphere of stability in that important field. The increase of prices may be in part the result of the devaluation of the gold content of the dollar. Increased expenditures for relief and for public works, as well as the great sums poured into the farm area, have certainly helped to stimulate buying. The effect of the NIRA is extremely unclear. There are some critics who believe that it has served to hinder recovery, others that it has aided the development of large scale businesses at the expense of smaller enterprises. On the whole, it seems to have resulted in an increase in the total wage income and somewhat shorter hours, and, at least temporarily in the diminution if not the abolition of child labor. It was avowedly an experiment and it is probable that it will be reenacted by the present Congress in a somewhat modified form.

If we may judge by the President's Message to Congress of January 4, 1935, the emphasis in the present year will be upon a continued public works program — slum clearance, rural housing, rural electrification, reforestation, reclamation, improvement of roads, and extension of the CCC. In addition he has announced that he will recommend legislation intended to secure greater social security — unemployment and old age insurance, and benefits for mothers, for children, and for the handicapped. Just what forms this will take, either in his proposals or in Congressional statutes remains to be seen, but legislation of this character, like that of which the Tennessee Valley Authority Act is so far the principal example, will very probably be among the most significant long-run effects of the recovery period. One can also safely predict that the experiments of this Administration will tend toward a closer Federal supervision of many forms of trade and industry than has previously existed in the United States. At the present time further prediction is unwarranted.