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# WASHINGTON LAW REVIEW

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## NATIONAL LEGISLATION OF THE DEPRESSION

I shall undertake to review something of the background,—something of the idealism, conceptions, and compromises—of some of the national legislation of the depression. I shall examine this background primarily for its significance as a possible aid in judging the social, economic and legal validity of the more important of these legislative measures. For the most part, I shall have in view the so-called Inflation Bill, the National Industrial Recovery Act, and the Agricultural Adjustment Act.

I hope that my remarks shall not sound as of the utterances of political campaign speeches. I shall, therefore, do little more than raise questions respecting this legislation and leave the questions with you to answer as you will. For the most part, I shall refrain from imposing upon you any of my own views of this legislation.

Do these laws fit patterns of social views, of economic policies, and of political functions held by men now in charge of our national government? Do they speak ideals of the NEW DEAL, or do they represent compelled compromises? May they enjoy continued support of the Administration? What social-economic-political principles motivated these measures? Shall we conclude that these laws have come to stay notwithstanding that, by their terms, they are enacted for the duration of the "emergency"? If they are only temporary and transient, will economic organization be returned to its former order? Shall old relations of government and business be restored. And, of special interest to lawyers, what bearing do answers to these questions have upon questions of constitutionality of the new statutes?

We recall that in 1929 something happened. The dawn of the New Era, the Era of Perpetual Prosperity, faded in total eclipse. Wheels of production idled, channels of commerce filled with wreckage; grass began its growth in the streets, damnable spots of unemployment and poverty intensified each hour. Only general principles were enunciated by the national administration. There had been such storms before, the people were told. Our forefathers, in such cases, took up on their belts, and, in due course, we had gone on to greater and greater heights of prosperity. And above all, proper functions of government must be restated, lest we forget, Government, we were told, shall ever be concerned with this cardinal principle of government, to-wit, that it shall so function as to determine what shall be proper functions of government years hence. Such must be a fundamental postulate of government, for by more opportunist action, by "emergency" measures of experimental and transitory character, government may make "mistakes."

Under this conservative administration, conservative in part for lack of conviction that anything should be done, and because of fear

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and because of political impotence, the spiral of deflation carried lower and lower the hopes and the courage of a nation. Men awaited the "crash" And if one dared to inquire the meaning of the noun, one was likely to be answered "Why, 'the crash', the final smash-up, 'the crash'!" We were ever slipping—and "What if we should get off the gold standard?" and "How long could the price system withstand the strain?"—"When the tread of troops under red flags, plundering private property in revolution?"

In this condition was the nation handed to Mr. Roosevelt at one o'clock p. m. on March the Fourth. Banks were closed, commodity and security markets were locked, financial and commercial transactions were in moratorium, the nation was economically prostrate. The Federal Budget was unbalanced, the Reconstruction Finance Corporation was organized and increasing debts, the Bankruptcy Act had been amended four times (twice in about the same place), neighborhoods were preparing supper for more than a dozen million unemployed.

How should the New Administration of a democratic government proceed? It was born to the necessity of *action*. "Action" became the keynote, "action" to resuscitate a prostrate nation, to re-establish its banks and markets and to restore enterprise. "Action"—even some action merely to show the people of the United States that action could be taken—even as a gesture—to instill confidence of the people in the facility of the national government to act in peace as well as in war. But what of limitations of any credo of government-of-action-for-the-sake-of-action? And where, within any such limitations, shall any reference be made to the national legislation here being considered?

Is this legislation a manifestation of the considered effort of the NEW DEAL, or were its conception and motivations of more remote but compelling compromises? If the latter, what may have been the compromises? Let me turn to the Inflation Bill, which has been condemned and commended as one of the most vital measures of the New Administration. Let me sketch its background.

As the deflationary process wore on from 1929 with poverty becoming more and more acute in the midst of our surpluses, voices were raised to question why the drifting, and to question who was at fault.

Indeed, we may say that in grim distraction it became a considerably popularized matter to search to ascertain who should be blamed for the devastation. True to typical impositions upon the psychology of the masses, little man-hunts were started up here and there. Who were the Devils of our Adversity?

There had been one Coolidge and Andrew Mellon who had issued public statements to fan the speculative flames of the Bull-Market, —but, at most, they came to be only naughty boys.

And there was the Federal Reserve with its powers of open market operations, its credit control through its rediscounting powers. Why did it not do its duty and check the wild speculation 'ere it assumed proportions sufficient to run the country? But, who was the Federal Reserve to be the butt of popular indignation? Only bankers and professors know of the Federal Reserve.

Again, there was Hoover—but poor President Hoover had his

hands made full by a Congress bent on further upsetting the national budget with pork barrel and veterans' appropriations. At most, it seems, and notwithstanding his fate in the national elections, did he evoke more than *persona non grata!*

But Devils of Adversity there must be. Who sold short the market—And who did?

Then there were bankers—why, in 1929 they teased to lend us money, teased us to buy into the New Era! And now—a Liberty bond will not support a loan for half of its market quotation! And though they blatantly advertised their indispensability in the councils of customers' affairs, they themselves have folded-up by the thousands unable to account for other people's money which they had engaged for fabulous profits. But few of the masses had ever more than seen a banker, to their vital concern was the fact that the gates of employment were closed—and they had never worked for bankers! And so, while bankers may have been victims of gibes at the annual banquet of the chamber of commerce, scarcely did they become the Devils of our Adversity

But on with the man-hunt, somebody is to be condemned, tried, and found guilty of the devastation of this depression! Alas, a Senator of the New Administration speaks—speaks a matter of some tradition with the Democratic Party Creditors—the creditor class—are charged. Claims were being pressed for collection, bankruptcies and receiverships were taking toll everywhere, farms and homes were falling on the auction block at foreclosure, pending measures of the New Administration to refinance farm and home mortgages were too remote, too slow. All America it was thought was divisible into two classes, the debtor class and the creditor class. Superimposed upon this oversimplification was a finding that creditors had ravished the debtor class in days gone by, and now restitution should be adjudged, the Federal Government should execute the judgment. And the Federal Government could do as much through its constitutional powers to coin money and determine the value thereof.

Such is of the background of the Inflation Bill. Apparently it should be understood that there was irresistible political power back of the demands for inflation, apparently it should be understood that the Inflation Bill represents a compromise whereby the powers of inflation were finally vested in the President rather than being written directly into mandatory statutory provisions. We recall that the act makes available for its purposes open market purchases by the Federal Reserve Board, an issue of three billion dollars in government demand notes as additional currency, limited acceptance of silver in payment of governmental debts owed by foreign governments, remonetization of silver and devaluation of the gold dollar. This act has been supplemented with suspension of specie payment, a gold embargo of various restrictions, and repudiation and declaration-of-illegality of gold clause contracts by the new Administration.

However compulsory and compromising may have been the background of the Inflation Bill, the President has declared his purpose to use it. Indeed, judging from his announcement, his inflation powers were welcomed by him. He has declared that he will use

them, or one or more of them, "when, as, and if it may be necessary to accomplish" what he has stated to be a "definite objective" of the Administration, namely, "raising commodity prices to such an extent that those who have borrowed money will, on the average, be able to repay that money in the same kind of dollar which they borrowed."

There is the purpose, it appears, to create for debtors an ability to pay, rather than to relieve them of their obligations by proceedings and discharge in Bankruptcy. Implicit in this is the ideal that debtors shall not, as in Bankruptcy, lose their estates to their creditors.

Obviously, with this complex history of the Inflation Bill, one can scarcely conclude upon the regard with which it is held by the Administration. Even though it may have been imposed in whole or in part by recalcitrant political pressure, it may have acquired approval subsequently. On the other hand, it may have granted powers which are proving difficult and embarrassing to abandon. Even as a measure to salvage debtors by increasing commodity prices, it is open to challenge as a long-term social measure—open to challenge, among other reasons, for increasing consumers' prices without regard for efficiency in production and business organization. Its ultimate use by the Administration remains to be observed. In the meantime, perhaps we may plausibly hazard some guesses upon its ultimate disposition, after we have given further consideration to the background of the additional measures of the recovery program. Perhaps there is consistency in a completed program—and perhaps there is not.

Let us turn especially to the Recovery Act and the Agriculture Adjustment Act. In the Recovery Act higher wages and increased employment are promised. In the Agricultural Act increased prices to farmers are promised, as higher prices were promised to debtors by the President under the Inflation Bill. With respect to the Recovery Act, at least, there appears to have been less popular demand and less compelling political pressure upon the Administration than in the case of the Inflation Bill and Agricultural Act. Substantial elements of the Agricultural Act reflect farm relief proposals which had been sponsored by powerful political interests in previous sessions of the Congress. Campaign promises also made mandatory some action for the farmers.

In the Recovery Act we may observe, I believe, more voluntary action—more of the initiative—of the New Administration. Its more technical motivations, its more complex purposes, are, it is believed, more completely the original conceptions of the New Deal than the other measures just mentioned.

But shall we conclude that even the Recovery Act embodies the ultimate social ideals of the New Administration? If, on the contrary, it is regarded as only transient, shall we conclude that it has been sponsored by the Administration as a temporary instrumentality for immediate relief or that it is regarded as only a step in the promotion of more revolutionary objectives respecting our social organization?

Unless these laws fit the social and economic views of the *New Deal*, shall we expect more than their temporary support from

the Administration? If they are only tentative expedients in the estimation of the New Administration, shall they be accorded any special constitutional tolerance?

These questions relating to whether or not these legislative measures are regarded by the Administration as only temporary, "emergency" measures provoke interesting considerations.

Of course, as has been said before, by their terms, these laws are of emergency character. Their preambles recite the special necessities of their enactment, and their duration is provided for the period of the emergency. On the other hand, so intricate and pervasive are their potentialities in the reorganization of the habits of men and of economic and governmental relationships that one may speculate upon the facility of readjustment at the close of any particular period of time. Millions of dollars of business will have come under temporary and permanent codes, millions in salaries and wages will have been regulated, determined and paid under governmental prescriptions of minimum wages and maximum hours of labor; millions of farmers will have operated under provisions for crop destruction and reduction, and millions of dollars will have been distributed to them on a program of bonuses computed and raised by most involved methods of taxation. And these involvements of government with our agrarian, industrial and general economic life are of significance even upon so narrow a question as that of the constitutionality of these measures. Certainly such a challenge would present itself to the Supreme Court as a more pervasive issue than any implicit in usual causes concerning the scope of the powers of the Congress under the Interstate Commerce Clause of the Constitution, or under the Due Process Clause of that document, or under any prescriptions assuring a republican form of government, or under any constitutional doctrine of checks and balances between the legislative, executive and judicial branches of the Federal Government. In short, with the diffusion of these measures into the daily lives of so many million people and involving so extensively their business, earnings, and employment, one cannot over emphasize the implications of a case involving an attack upon the constitutionality of these measures. Indeed, I shall ask these questions without attempt at their answer. Would the Supreme Court dare to hold so pervasive legislation invalid in any substantial respect? On the other hand, upon any reasonably plausible case, would the Supreme Court dare not to annul these measures? Must it not annul in such a case to warn that even an administration stimulated by a credo of action-for-action-sake shall not deploy its measures on a front so far-flung that the Supreme Court shall incur undue public criticism and prejudice of political office in performing its sworn obligations under the Constitution? And how far would it be significant in such a case for the Supreme Court to appreciate the convictions of the Administration respecting these measures—convictions that they embody ultimate social ideals or, on the contrary, convictions of their serviceability as only transient expedients?

Let us attempt briefly to square these measures against the social views of the NEW DEAL. In this connection I shall venture to make reference to some of the ideals and convictions which have

been expressed by at least some of the men presently powerful in the NEW DEAL. The New Administration is, I presume to say, extraordinary for the social attitude of its dominant members, extraordinary for their unanimity in these views, extraordinary for their unanimity as to the functions of government in the premises. These attitudes and views involve an appreciation of the inhumanity and insecurity of the traditional order of society, they champion new opportunity for the masses—opportunity for greater purchasing power, opportunity for leisure, opportunity for self-expression in more creative work, opportunity for education, security. I hazard the opinion that the following observations, recently published by an acute observer of social order, Professor Harold Rugg, would be favorably accepted by those of importance in the New Administration. "Nowhere on the earth has there ever existed a truly great culture. The earlier ones called great by academic historians were, in reality, inadequate and inhumane. For all of them, including our current one, rested upon the debasement of the mass of human beings—either by slavery or serfdom of bodies, by the perpetuation of ignorance and intolerance, by the continuance of economic insecurity, or by the denial of a community life of aesthetic appreciation. It is true that in various societies a very small class of well-to-do and cultured men have produced a comparatively comfortable living and a high level of art and literature. But enjoyment of these was restricted largely to that class, and the civilization itself was made possible by the degradation of the greater proportion of the people."

I shall venture briefly into three specifications of the implications of this general social philosophy, and with thought of referring them to the new legislation under consideration.

Let me refer first to the significance of the development of the machine in our present economy. While there is pervasive opinion decrying its ever increasing scope of adaptability, and disposition to cite its contribution to depressions by its displacement of the labor of human beings, those more realistic and appreciative of inherent probabilities, welcome it. They welcome it as facilitating a new social culture, a culture of leisure, a culture wherein human beings will be freed more and more from substituting at labor which the machine can do better, a culture of re-made work which is creative and which gives the worker opportunity for self-expression. These observers also point out that the existing system, ever pressing against "costs", makes inevitable this displacement of human labor by machine, by machines equipped to operate machines, by complete automatization of lines of production of economic goods. Even workers, it is held, are indeed shortsighted in resisting this inevitable incoming of mechanization—this trend of invention and science.

But what shall become of laborers so displaced—shall they be perpetually unemployed, perpetual charges of the state? It is answered "no." Given a new social philosophy, a new social view of work, a departure from the virtue idealized in the dogma, for example, that one shall earn one's bread by the sweat of one's brow, and workers, freed from machine-jobs shall find opportunity in a re-made work. There shall be opportunity not merely to repair,

supervise, and manage machines, but to conceive, plan and prosecute new production more efficiently. May I quote in this connection from the "Brain Trust", from Mr. Tugwell, Assistant Secretary of Agriculture, one of the ablest of the NEW DEAL? "I believe," he writes, "that we are within a stone's throw of the end of labor—as labor, not as willing and cooperative activity. We know how to make machines do nearly everything. The role of human beings is that of the expert, who does, not a repetitive task, but a thinking, manipulating one. And our industrial achievement is to be measured not only by our conquest of poverty, but also by the remaking of work. So long as men continue to have manipulative abilities, they will continue to modify this, that or the other process, and this continuous alteration will, because such influence radiate throughout a closely articulated system to its utmost limits, contrive to set new problems for solution."

Mr. Tugwell likewise decries, in this connection, the "despairing notion that there is only a limited amount of work to be done in the world and that what is left to be done must be shared out carefully. This idea is thoroughly inconsistent with what any person of sense knows—that there are still people insufficiently supplied with goods, that cities and country side alike cry out for physical reconstruction, and so on. Everyone knows there is work to be done, plenty of it."

Education, moreover, will serve new functions in this new culture—and for adults as well as children. And these functions will be more than to dispense "learning", for qualification for opportunity for creative art and the new craftsmanship will make new demands.

Any such philosophy of the exploitation of mechanization and the freeing of humans from labor obviously decries *restrictions upon production* of economic goods for the sake of higher prices. Indeed, *increased production* at low price is demanded that more of the people may be able to acquire and enjoy more goods. The trend of wages, by the same token, must be to higher levels. "A nation of well-paid workers, consuming most of the goods it produces, will", to quote Tugwell again, "be as near Utopia as ever human beings are likely to get. Is it as necessary, from the social point of view, that prices should be low, as that wages should be high? Such is, indeed, the case."

A consideration of immediate concern under these social attitudes, is the recognition of the necessity of the period of transition, the period of accumulating mechanization with humans, in the interim, filling the gaps of the development. We may provide relief in shorter hours and higher wages, and seek to strike down the costs of goods to make available their more universal enjoyment. At least, this is one procedure for the transition period.

How shall we reconcile with such a social philosophy, the "definite objective" to raise prices in behalf of debtors under the Inflation Bill, as declared by the President? And how shall we view the Agricultural Adjustment Act with its program for crop reduction and destruction for the sake of increased prices to farmers of agricultural commodities and livestock products? Can these measures be regarded as more than temporary expedients? Will they ultimately

be adapted to the new culture? Or will social ideals yield? And how shall we reconcile the avowed purpose under the Recovery Act of putting our unemployed "back to work"? The fixation of minimum hours for those employees who come within the scope of the act promises relief from labor consistently, we may believe, with the necessities of transition to the new culture, fixation of minimum wage scales may likewise be of some aid in the transition. But does the Administration conceive of even these provisions as serving primarily the long-run purpose of enforcing this transition to the once more the old economic system? If the latter, will the old new social organization, or is it mostly concerned in "priming" order, once successfully "primed" and "going" yield to any further promotion of the more ideal social organization?

Leaving these questions for what they may argue unanswered, let me turn to a second aspect or specification of the new social culture with its ideals of a new freedom from labor and of greater social income through greater production-efficiency, as it may be gathered from men of power in the NEW DEAL. I refer to their conviction of the necessity for new efficiency of business organization as well as of machines, and especially to their conviction of the necessity of the elimination of the unnecessary costs of "free competition." Integration and coordination of business units must go forward as an aid in effecting the new freedom, the greater efficiency. Present anti-trust laws promote many contrary results and, by the same token, are socially too costly. More efficient measures must be devised to obviate undue monopoly. And in this connection it may be remarked that, while the anti-trust laws have been effective (although more for their threatened enforcement, than because of their actual enforcement), paradoxically enough, the era of these laws has been a period of concentration of business organization into units of ever increasing size. The brilliant researches of Mr. Berle, another member of the "Brain Trust", have strikingly revealed the scope and detail of this concentration of control over our economic life.

"Already", to quote one of his illustrations, "The Telephone Company controls more wealth than is contained within the borders of twenty-one states in the country." He has observed more generally upon this concentration as follows. "The corporate system has done more than evolve a norm by which business is carried on. Within it there exists a centripetal attraction which draws wealth together in aggregations of constantly increasing size, at the same time throwing control into the hands of fewer men."

This concentration of enterprise under the competitive doctrine articulated in the anti-trust laws has brought new competitive costs, as socially undesired as those which may have been eliminated.

May we conclude that, through its major measures here being considered, the NEW DEAL has made progress toward the greater social efficiency of business organization? Has it captured adequate control of the anti-trust laws so that it may promote coordination and integration to the ends of the new economy, the more universal consumer-enjoyment? We recall the variations in the Recovery Act from the Agricultural Act, respecting the reservations of the operation of the anti-trust laws. Under the Agricultural Act (Section 8

(2) marketing agreements, authorized as therein provided, are expressly protected from the anti-trust laws by the provision that "the making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful." But under the Recovery Act (Section 3) codes of "fair competition" may be authorized, but with the restriction "if the President finds that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them" and "Provided, that such code or codes shall not permit monopolies or monopolistic practices."

These provisions of the Recovery Act reserving the sanctions of the anti-trust laws may, I believe, be identified as compromises forced upon the Administration by recalcitrant political power. I hazard the opinion that they were not and, as yet at least, are not, of the NEW DEAL'S choosing. Unless these provisions prove, in practice, unanticipated happy consequences, one may expect future efforts of the Administration to eliminate them. We may anticipate, I believe, that the ideals of the Administration will yet express themselves more effectively for more efficient organization of business by the elimination of social costs resulting from undue competition. Accordingly, with respect to questions, for example, as to the constitutionality of these acts, it may be considered, I believe, that they are instrumentalities of an Administration which entertains the belief that a greater social welfare can be facilitated through the elimination of the costs of the traditional competitive system—through coordination and integration of business organization to an extent which would if voluntarily undertaken by enterprisers transgress the provisions of the present anti-trust laws.

A third tenet of the new social culture is the ideal of security—security of work, security of earnings, security of savings. Neither the concentration of economic control through corporate combination of business organization, nor the earlier organization of the competitive system, has obviated the hazards of recurring periods of prosperity and poverty. Unplanned control of capital investment from unplanned accumulations of surpluses and unplanned schedules of production have been the stuff from which our business cycles have been made. In this condition our economic system, to quote Mr. Bernard Baruch, "periodically disgorges indigestible masses of unconsumable products" by processes of cut throat competition and bankruptcies—all to the "degradation of labor standards."

Here lie the necessities for new functions of governmental regulation—regulation more pervasive than the anti-trust laws, and in defiance of traditional doctrines of *laissez-faire*. Categories of enterprise "affected with a public interest" would be expanded and intensified. And it seems that, at least the major part of these new functions, must be undertaken by the national government. Mr. Tugwell has argued this point as follows. "If the general disposition to involve national administrations in whatever blame or praise arises from depression or prosperity is an indication of social will in the matter, there must be assumed an accompanying willingness in public opinion to allow the government scope for control.

True, there may be an entirely inconsistent feeling that depression is attributable to 'government meddling', and that, if the administration's hands were kept completely off, everything would be all right. But this reaction is characteristic only of those who happen to be doing well with things as they are, a far wider feeling that 'the government might do something', exists."

The Securities Act seems to be a step toward this general ideal of security—security of savings.

By way of general summary, I shall venture only the following observation upon the national legislation of the depression heretofore cited in this paper. The present administration of these laws is in the hands of men extraordinary for their social ideals. They have hopes and ambitions for a new social culture, a more humane economy, a greater security. These legislative measures, it is suspected, are only partially acceptable, in part they have been imposed. It seems probable that, in most respects at least, these measures will be used by the NEW DEAL chiefly as temporary expedients in attempting to resuscitate our economic life, that, subject to the fortuities of politics, new measures, more consistently integrated, more pervasive and intensive in expression of federal regulation of economic affairs, will, eventually, be promoted by the Administration to the ends of the new social culture.

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