THE EFFECTS OF SUPREME COURT DECISIONS UPON NEW DEAL LEGISLATION

BY

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THE EFFECTS OF SUPREME COURT DECISIONS UPON NEW DEAL LEGISLATION

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I. THE NEW DEAL WAS CHALLENGED BY ADVERSE DECISIONS

The United States Supreme Court, in a series of decisions in 1935 and 1936, invalidated key units of the New Deal program. An immediate consequence was the effort of Congress to revise its laws to conform to the wishes of the Court. Those revisions compose the core of this study. In 1937 President Roosevelt, having selected the alternative of revising the Court, failed to obtain passage of the coercive items. Before the culmination of this episode the Court began a revision of its interpretation of the Constitution. Thus the struggle ended in peace without crushing defeat for either side.

The call for a "New Deal" had been brought on by the severe depression, which engulfed the United States after 1929, creating widespread social and economic suffering among the great masses of people. Approximately 15 million gainful workers were unemployed as a result of the curtailment of production coincident with bank failures and bankruptcies. There was a great clamor for relief, especially in the great industrial centers. Those who

were fortunate enough to have a job often earned little because many worked only a short week or supported jobless dependents. Men and women walked the streets looking for work or stood in bread lines. There was increasing distress among the farming population due to the declining prices of agricultural commodities. Farm and home mortgages were being foreclosed, wiping out the savings of many years.

To many it became increasingly apparent that individuals and local agencies could not cope successfully with this national problem. President Roosevelt had promised a solution and the people, having elected him, expected him to assume legislative as well as executive leadership. Faced with the task of reviving business and reducing unemployment, the President and Congress presented the nation in 1933 with the vast program which has been known as the "New Deal". They planned to provide relief to the victims of the depression by direct grants, by emergency employment through public works, by preventing the foreclosure of homes and farms through the operations of the Home Owners Loan Corporation and the Frazier-Lemke Farm Mortgage Act. With the passage of such measures as the Agricultural Adjustment Act, Social Security Act, and the Tennessee Valley Authority Act,

the administration sought to achieve, among other things, a revival of business activity, re-employment, an increase in the purchasing power of the farmer and laborer, and the provision of social security for the masses.

All of these New Deal laws were destined sooner or later to come under Supreme Court scrutiny. Some of them, including President Roosevelt's favorite measures, failed to meet the approval of this branch of the government. The Supreme Court, accustomed to passing judgment on past precedent, could not at first conceive, it appears, how this sudden deluge of laws, growing out of present need, could be accomodated logically within the established Constitutional system. Therefore, it invalidated them. In haste and over-anxiety to please, Congress had followed obediently the Executive. Now, when these conspicuous branches of the government no longer "checked" upon each other, the Supreme Court emerged from its relative obscurity and checked on the other two.

No period of such conflict and portent had ever been experienced in the history of the Supreme Court. Between 1900 and 1923, forty minor negative decisions were handed down and between 1923 and 1935 there had

been none. Again, since 1936 there have been no adverse decisions. On the other hand, during the short two years of 1935 and1936 were coalesced nine of the most destructive decisions ever rendered. These had the effect of destroying or threatening with destruction the most important of the New Deal measures. Occurances of such magnitude could not fail to elicit bitter criticism which became strong enough that the President dared to propose a "Court Packing" measure to Congress. But before that point was reached, the Congress made repeated efforts to modify legislation to meet the objections of the Court. In time the Court changed its interpretation of various clauses of the Constitution after legislation had been improved and harmony was restored among the three branches of the Government.

II. TWO CASES THREATENED AND DESTROYED N.I.R.A.

The Schechter case provided the primary shock to the New Deal because it invalidated the whole National Industrial Recovery Act. This adverse decision came not without warning for the Panama case, which invalidated the "oil clauses" of the same act, warned of the blow to come.

A. The Panama Case Began the Fragmentation of the N.I.R.A. and Contributed to More Careful Delegation of Legislative Power

The Panama Case of January 7, 1935,[1] forwarned that definite defects of the N.I.R.A. needed to be improved. President Roosevelt characterized it in the following words:

> The first major case which sought to break down our attempts to cure the abuses and inequalities and instabilities which had thrown our economic system out of joint involved the provisions of the National Industrial Recovery Act, which conferred on the President the power to prohibit the transportation in interstate commerce of petroleum which had been produced in excess of the quantity permitted by the respective State laws.[2]

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1 Panama Refining Co. v. Ryan, 293 U.S. 388, 1935.

2 Franklin D. Roosevelt, Public Papers and Addresses of Franklin D. Roosevelt, IV, Ed. by Samuel I. Rosenman, (New York: Random House, 1938) p. 7.

The Court's opinion in the case stated that Congress had not done three things requisite to a legal delegation of power: (1) it had not stated the purpose or declared why it had passed the law or what the law had attempted to accomplish, so that there would be some measure or "standard" by which to guage whether the President were using the delegated legislative power to accomplish legitimate purposes of the government; (2) any prohibition by Presidential proclamation of the transportation of oil in interstate commerce, which was the legislative power delegated in the law, did not have to measure up to any purpose or be in accordance with any specifications laid down by Congress, precedent to his exercise of the delegated power; (3) it had not required any finding of fact by the President upon which to predicate his prohibition of oil in interstate commerce.

The Court feared that, if this law were upheld, a precedent would be set by which

> instead of performing its law-making function, the Congress could at will and as to such subjects as it chooses, transfer that function to the President or to an administrative body.[3]

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3 293 U.S. 388.

The Court's objection to an illegal delegation of legislative power had a two pronged effect upon the legislation passed in its wake.

The first of these, the effect upon the delegation of legislative power was an accessory to the effect of the Schechter case. In the great bulk of the literature written about this issue, the two cases are quoted, and in decisions of subordinate courts, both were relied on as precedent if the issue of delegation of legislative power were involved. As far as this issue is concerned, there was little difference between the two cases in kind of effect; but there was a difference in the amount of effect achieved. In the Schechter case, four months later, the annihilation seems to be complete, while in the Panama, it took the effect of a warning. In fact it was only a warning and an unheeded warning at that; for no amendments to improve the act in this respect were passed until after the later decision was forthcoming.

In fact, Chief Justice Hughes in the Panama case had hinted that the Court had never been "regarded as denying to Congress" the ability or opportunity to delegate to the proper "selected instrumentalities" the power to make "subordinate rules" if such were

"within the prescribed limits and the determination of facts" to which the policy would apply.[4] This futile attempt to signify to Congress the defect in the whole N.I.R.A. was concurred in by all the Justices except Justice Cardozo. By the time of the Schechter case he, too, would be persuaded to join the majority. Later the identical language of this warning was repeated in the Schechter case with unanimous concurrence.

The other effect of the Panama decision had to do with the breaking up of New Deal legislation into smaller units. On February 22, immediately after this decision, the Petroleum Act was passed. This act supplanted only the oil provisions of the N.I.R.A. and was the first step in the breaking up of that mammoth law into its separate segments. This breaking up process remained dormant, however, until after the Schechter case.

B. The Schechter Case Stimulated immediate defensive legislation

The Schechter decision which in 1935 invalidated much of the National Industrial Recovery Act of 1933 resulted in two immediate modifications in Congres-

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4 Ibid.

sional legislation. The Court's objection to the delegation of legislative power led to revisions in the 1933 version of the Agricultural Adjustment Act and to particular legalities in the Guffey-Snyder Bituminous Coal Act passed during the ensuing summer. The Court's objection to regulation of what it considered intrastate commerce was later reversed in the National Labor Relations Act case and had no momentous effects upon legislation.

The National Industrial Recovery Act provided that codes of fair competition were to be drawn up by code officials, and after being approved by the President, became binding upon all members of the industry. Code-making thus became a method of furthering monopolistic business practices by the trade associations. One such code was drawn up in New York regulating the business establishments which dealt in live poultry. It had been approved by the President.

The Schechter brothers had violated this code by paying wages below the prescribed minimum and by selling chickens in less than "run-of-the-coop" lots. These violations, and others, were contrary to specific provisions which had been drawn up by the code members and approved by the President to

be valid law for the regulation of this industry under the N.I.R.A. The corporation had the case brought before the Supreme Court on the ground that their practices had not directly affected interstate commerce and that the codes were not constitutional because they had been determined by the President and not by Congress. This placed in question the validity of the poultry code and the authority of the code-making body, thus testing the constitutionality of the N.I.R.A. The Supreme Court in the Schechter decision declared the N.I.R.A. to be unconstitutional on the basis of two main legal principles: one, that it was an unconstitutional delegation of legislative power; and two, that the business of the Schechter Poultry Corporation was not interstate commerce and therefore could not be regulated by Congress.[5]

To consider the question of interstate commerce first, the Schechter Corporation had contended that the poultry was no longer in interstate commerce when it was sold in New York City and therefore beyond Congressional regulation, but the government

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5 A.L.A. Schechter Poultry Corporation, et al. v. United States, 295 U.S. 495, 1935.

argued that there was an "indirect" effect upon interstate commerce which justified the regulation. Voicing the unequivocal opinion of the Court, Chief Justice Hughes insisted that a "well established" distinction existed between direct and indirect effects, even though the distinction could be determined only in individual cases. Not to recognize this distinction would be to admit Federal authority to "embrace all the activities of the people." Consequently, a distinction would have to be made between direct and indirect effects. A large number of cases interpreting the interstate commerce power under the Sherman Anti-Trust Law were analyzed. From these the Court deduced that such a line of distinction could be drawn. The Schechter actions, it explained, had only indirect effects on interstate commerce because the poultry was being sold within New York State and would not leave the State. Many legal as well as lay observers considered the question thereby settled. While the decision was praised and critized by both opinions, it did so limit the use of the interstate commerce clause as to cause President Roosevelt and his New Dealers to fight for a reversal. They were successful, and in less than two years, the Court recognized the power of Congress to regulate activities having even

an indirect effect on interstate commerce. In upholding the National Labor Relations Act on April 12, 1937, the Court explained that the effect of an activity upon the general "stream" of commerce as it flowed from state to state is the factor which should determine whether such activity should be regulated or not.[6] Thus this basis of the Schechter decision, unlike that pertaining to the delegated power, was reversed when the Court was "converted."

Although the opinion in as far as it referred to interstate commerce left no lasting imprint upon legislation; in as far as it referred to the delegation of legislative power it left effects which were definite and profound. In writing the majority opinion of the Court, Chief Justice Charles Evans Hughes said, "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed . . . ."[7] After explaining in decisive terms that no limit except the purposes of the law had been established to guide the use of the delegated

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6 National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 1937.

7 295 U.S. 495, 1935.

legislative power, he recognized the "broad delegation" of power and concluded that " . . . the discretion of the President . . . is virtually unfettered."[8]

This language naturally reflects upon the wording of the law itself. Section 10 (a) is typical. Here, the President was authorized

> . . . to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and fees for licenses and for filing codes of fair competition and agreements.[9]

Again Section 4(b) illustrates the character of all the clauses delegating legislative power. In this section, the authority to license businesses was granted whenever he should "find it essential" if the President should "find" that activities contrary to the purposes of the title were being practiced.[10] Other power granting clauses in the act follow the same pattern. Other than the President's own discretion, the only significant limit on his authority under this act is that it had to be used to accomplish the purposes of the act, namely, to rehabilitate industry, to relieve unemployment, eliminate

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8 Ibid.

9 48 Stat. 195, Sec. 10 (a).

10 Ibid. Sec. 4 (b).

unfair trade practices, obtain united action of labor and management and otherwise provide for the general welfare.

All the above refers to the manner in which legislative power was delegated, but at the same time, there were, in this opinion, words which indicate that another factor probably contributed to the aversion of the Court to this law. In "one fell swoop" the opinion said it attempted to regulate "a host of different trades and industries." Along with the other issues in the case it is likewise true that this law attempted "extending the President's discretion to all the varieties of laws which he may deem to be beneficial." All in one unit, this "sweeping delegation of power" attempted to regulate the "vast array of commercial and industrial activities throughout the country." It is necessary to the understanding of this law to realize that nearly all parts of the destroyed N.I.R.A. were later revived, rephrased and repassed as separate pieces of valid legislation.

In a subsequent case, J.W. Carter v. Carter Coal Co.,[11] the Court found the delegation particularly obnoxious in a third way and for that referred

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11 J.W. Carter v. Carter Coal Co., 298 U.S. 238, 1936.

back to the Schechter case as precedent. In the Schechter case it was inquired whether "trade or industrial associations or groups" could be "constituted" as "legislative bodies" to enact the laws they deem wise." In answer it was averred that "such a delegation . . . is unknown to our law." These enactments, "binding equally those who assent and those who do not assent," were "obviously" not constitutional.[12] While this anomally received only incidental reference in the Schechter opinion it did contribute further to the decision to declare the N.I.R.A. unconstitutional and ultimately to vastly reduce the reliance on this legislative device.

Three aspects of the delegation of power stand out: first, the technique or the manner of delegation of legislative power to a non-legislative agency; second, the volume of the power so delegated in one unit; third, the delegation to private or semi-private agencies. These were all apparent in the Schechter case, in addition to the bearing upon the interstate commerce power.

1. The A.A.A. was fortified against possible Judicial assault. The effect of the Schechter deci-

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12 295 U.S. 495, 1935.

sion upon the A.A.A. was immediate. At the time that the N.I.R.A. was declared unconstitutional certain amendments to the Agricultural Adjustment Act were under consideration in Congress. In the Senate several amendments had been accepted in committee, amendments designed to improve the workings of the Act. By May 27th these had gone through committee and been referred back to the Senate. Then came the announcement that the National Industrial Recovery Act was unconstitutional. The bill was then immediately sent back to the committee and further amended. "Practically all the changes made after the bill went back to the committee were made to put it in line with the decision in the N.R.A. case," said Chairman William B. Bankhead.13

These amendments fall under the two general classifications of (1) marketing agreements, and (2) processing taxes. All of these amendments, however, of either classification, bear quite distinctly upon the question of the delegation of legislative authority.

The powers of the Secretary of Agriculture to make marketing agreements were now more minutely

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13 Congressional Record, LXXIX, p. 11031.

specified. Instead of simply delegating authority to the Secretary of Agriculture to reduce crops, pay rentals and advance sums on stored produce,[14] he was now directed in detail, rather than authorized, to make investigations of fact, proclaim findings, and "hold one or more hearings and give due notice and opportunity for interested parties to be heard."[15] Not only were the details of these powers carefully set out, but in answer to the charge that it gave the Secretary arbitrary power over the farmer, the power of initiating the agreements was left with local groups of farmers themselves: "The only way the powers which this confers can be brought into play is by the action of the producers themselves through the marketing agreements" said L. C. Hatch.[16] The word "licenses" was changed to "orders" in giving the Secretary power to make marketing agreements; and the Secretary could now issue orders to processors to "cease and desist" selling produce on the interstate market.[17]

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14 48 Stat. 31.

15 49 Stat. 750.

16 Congressional Record, LXXIX, p. 11157.

17 49 Stat. 750.

Not only were the processing taxes of the law buttressed against threats implied from the Schechter decision, but it was retroactively amended in an attempt to make the past exercises of authority immune from attack. Lest the Court impound any of the processing tax, nine hundred million dollars already collected under the act were declared to have been constitutionally collected.[18] Any suits to collect refunds of already paid processing taxes were likewise prohibited, "without remedy."[19] Even the future Constitutional fate of the law the Committee on Forestry and Agriculture sought to pre-determine by prohibiting suits to enjoin collection. Said William H. King:

> This bill not only seeks to strengthen the legal status of the processing taxes, but also would bar equity suits for the recovery of such taxes which it is claimed were unlawfully assessed.[20]

That this was all done in order to remove grounds for a Supreme Court annulment of the law because it unconstitutionally delegated legislative power to the Secretary of Agriculture is shown by many statements. Ellison D. Smith, chairman of the committee

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18 Ibid.

19 Congressional Record, LXXIX, 11088.

20 Ibid.

to which the bill was referred stated to the press at the time the above amendments were added, "The A.A.A. amendment Act seeks to plug every loophole against the charge of undue delegation of power by Congress . . . ."[21]

As far as any effect on these amendments of the interstate commerce reference in the Schechter case is concerned, there is almost no mention in any source. Even the Butler case dismissed it shortly. It could, Justice Roberts said, "be put aside as irrelevant," since the "stated purpose is the control of agriculture, a purely local activity" and since the brief of the defense did not "attempt to uphold the validity of the act on the basis of the commerce clause."[22]

While many changes had been made in the wording of the act, there is good reason to feel that in fact the Secretary of Agriculture exercised almost as much unconstitutional legislative power as he did before the amendments. Exchanging the term "orders" for that of "licenses" was the only substantial change in the section granting this power and left the Secretary as much in control as previously. The wording of the act permitted the iniation of bene-

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21 News item in the New York Times, 10:1, August 27, 1935.

22 United States v. Butler, 297, U.S. 1, 1936.

fit payments at the same time that a processing tax was levied notwithstanding repeated specifications that "due notice" must be given and "one or more hearings" conducted before levies could be increased or acreage reduced.[23] This superficiality was not erased by

> . . . spelling out his single act of decision; as first a mathematical calculation; second a determination as an executive to spend money -- chiefly to be raised by taxes resulting from his determination; and third the incident of a tax which goes into being only when he makes his decision to spend it.[24]

All in all, to call it caulking legislation would be quite proper, since it seemed to aim only at plugging the leaks to save the act from Supreme Court assult.

Nevertheless, though the changes were perhaps more apparent than real, the Supreme Court did not subsequently object to the A.A.A. on the grounds of the delegation of power. In the Butler case of 1936 the A.A.A. was censured for permitting the Secretary of Agriculture to exercise a power reserved to the states but not for exercising legislative power. Here the Schechter decision resulted in

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23 48 Stat. 31.

24 Editorial in the American Bar Association Journal, 22:63, January, 1936.

eliminating a vulnerable spot in the structure of one New Deal law. Thus the provisions about marketing agreements and processing taxes in as far as they pertained to delegation of legislative authority were special amendments passed which modified A.A.A. in response to the Schechter decision.

3. Powers in the Guffey-Snyder Bituminous Coal Law were carefully delegated but private bodies exercised them. The effect of the Schechter opinion upon the Guffey-Snyder Bituminous Coal Law, passed to fill the gap opened by destruction of the N.I.R.A. coal codes, can be observed in four aspects: the separation of the N.I.R.A. into its component parts; the delegation of legislative power in such a carefully controlled way that there was no controversy as to approval by the Supreme Court; the inclusion, as in N.I.R.A., of the practice of delegating this legislative power to bodies of citizens who were not salaried officials of the United States Government; and a specific statement of the relevance to interstate commerce.

The Guffey-Snyder coal law repeated the essence of the coal provisions of N.I.R.A. In this way it was like the National Labor Relations Act and less well known laws which repeated particular provisions

with necessary modifications. This was a continuation of the process, begun after the Panama decision, of the breaking up of the all-inclusive effort to regulate the bulk of the American economy under one ponderous law.

That legislative power in the Guffey-Snyder Bituminous Coal Stabilization Act was carefully delegated is borne out by a comparison of the two laws and the Schechter opinion. Over and over in the N.I.R.A. the requirement of notice and hearing was made, but it was usually emasculated by some such phrase as that in Section 3(d); "as he shall specify."[25] Rather than directing that the President do something, it was stated that he "may" do it. One can justifiably conclude that there was, beneath the guise of the law, the tacit intention to leave the President's hand quite free to act as he would. When one turns to the Guffey-Snyder Law of 1935[26] in comparison, one finds more specific limits set to the Executive's authority.

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25 48 Stat. 195.

26 49 Stat. 991.

Many provisions such as the following examples in the two acts exhibit this distinction between controlled and unlimited delegations of legislative authority. The statement that the Commission shall have "the power and duty of hearing evidence and finding of facts upon which its orders and action may be predicated"[37] is very different from the statement that the President "may" hold hearings and make findings of facts. It is significant that the Commission had the "duty" as well as the power to do so in the later law. Many distinctions between one clause and another can be found, but these examples are sufficient to illustrate the many similar differences between the two acts.

The efforts of Henry Warrum, and other draughtsmen of the law, to circumscribe delegated powers carefully were vindicated in the opinion of the Court, notwithstanding that it was declared unconstitutional. Justice Sutherland, delivering the majority opinion in the Carter case, while flaying without reservation the delegation to code authorities, apparently found nothing about the manner of delegation itself to

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37 Ibid.

criticise. The minority opinion, written by Justice Cardozo, flatly stated that " . . . there has been no excessive delegation of legislative power." He found that "the standards established by this act are quite as definite as others that have had the approval of this Court."[38] He did not mention code authorities.

The delegation of legislative power to code bodies of a semi-private nature, while such was discountenanced in Schechter and criticised in Congress, was not thereby successfully excluded from the Guffey-Snyder law.

Technically, in the N.I.R.A., the law delegated this power to the President. Even though trade associations wrote the codes, he approved them and they became valid by virtue of his approval. His power of approval was not merely a matter of agreement or or disagreement: he could ". . . impose conditions, provide exceptions as the president, in his discretion deems necessary."[39] In this way the exact phrasing of the law delegated the law-making elements of this power to the President.

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38 298 U.S. 238, 1936.

39 48 Stat. 195, Sec. 3(a).

The technicality of the law leaving the approval of codes to the discretion of the President, did not however win the approval of the Court and it pointed out that this language went further than merely conferring privileges or immunities but involved the coercive power of the state. Both "those who assent and those who do not assent" are equally bound "under the obligation of positive law."[30]

During the course of the summer of 1935 as the embryo coal law was debated in Congress, the N.I.R.A. and the Schechter case were frequently mentioned. No other constitutional matter in the course of these debates was referred to as recurrently as the implications which that case had for the code bodies being built into the Guffey-Snyder law. In speaking of code authorities, William King said:

> As a matter of fact the philosophy of this bill is that which was written in NIRA; indeed many of its provisions are more obnoxious to personal and individual rights than those found in N.R.A.[31]

Associating code authority with price fixing power, Senator William E. Borah said:

> . . . let not those who own the natural resources fix the prices, but let the government of the United States itself fix the prices . . . I say to those who are urging price fixing by private interests, you are driving toward government price fixing.[32]

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30 295 U.S. 495, 1935.

31 Congressional Record, LXXIX, p. 14073.

32 Ibid. p. 14073.

More clearly for the layman, but no more sincerely intended were the pertinent words of Tom Connolly of Texas who dissented from the "theory of the N.I.R.A." that the Federal government should

> delegate its legislative power to a group of any particular industry and allow that industry in and of itself to constitute a law making body and . . . superimpose upon the minority . . . the burdens and the rules and the regulations adopted by the majority.[33]

Defying or misunderstanding these criticisms, Congress delegated to each District Board, whose members served without compensation, the power to "establish minimum prices." It further specified that each one had "full authority" to classify coals with regard to their quality, sources and destinations "as it may deem necessary and proper." In regard to labor the District Boards could fix "maximum hours of labor."[34] The Guffey-Snyder Act, like the revised A.A.A., reflected in many sections the influence of the Schechter decision but it persisted in delegating legislative powers to private business groups despite the denunciation in Schechter. The vulnerability of the Guffey-Snyder Act in this respect was demonstrated in the Carter case a few months later.

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33 Ibid., p. 14066.

34 49 Stat. 991.

The third perceivable effect of the Schechter decision upon the Guffey-Snyder law is upon its interpretation of interstate commerce. It may be recalled that Chief Justice Hughes' opinion stated, "There is a necessary and well established distinction between direct and indirect effects."[35] That is, Congress may regulate commerce within a state if it directly affects interstate commerce. That it was so understood in Congress is indicated by speeches such as that of Senator Samuel B. Hill, in which he stated, "The Court holds that if it directly affects and burdens commerce, it comes within that regulatory power."[36] The Guffey-Snyder law clearly stated this as a foundation: ". . . that all production of bituminous coal and distribution . . . directly affect its interstate commerce and render regulation . . . imperative."[37] Congress attempted by this statement to establish the purpose and constitutionality of the law which followed. It was hoped that this would help to elicit more favorable action by the Court.

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35 295 U.S. 495, 1935.

36 Congressional Record, LXXIX, p. 13443.

37 49 Stat. 991.

We have herein considered as the effects of the Schechter decision upon the Guffey-Snyder Coal law; first, the enactment of a separate law for the coal industry; second, the more careful delegation of legislative power in the form of restraints to such power; third, the inclusion of code bodies as in the parent law in the absence of an outright prohibition in the decision; and fourth, the specification that the coal industry directly affects interstate commerce.

The futile warning in the Panama case was followed up in Schechter and stimulated vigorous efforts to safeguard the A.A.A. and to provide the miners with a substitute for the N.I.R.A. coal codes. In the case of A.A.A. most of the protective amendments modified marketing agreements and processing taxes, meanwhile accomplishing little in the way of positive improvement. In the case of the Guffey-Snyder Coal Law, a well constructed law was the product, nevertheless having the fatal flaw of delegating power to code authorities in the absence of a specific statement of invalidity of this feature in the Schechter case.

III. PRIVATE AGENCIES EXERCISED VASTLY REDUCED LEGISLATIVE POWERS AFTER THE CARTER CASE

The major effect of the Carter opinion of May 18, 1936[38] upon legislation was the discontinuance of the practice of delegating legislative authority to non-official bodies. This had been an inherent part of the N.I.R.A. The Schechter opinion had unspectacularly recognized this feature and it had been continued in the Guffey-Snyder law. In that law, Congress had given extensive powers to District Boards which represented the coal producers. These Boards, and the legislative powers conferred upon them, were the casualty of the Supreme Court pen in the Carter decision.

The District Boards were established by the Guffey-Snyder Law of August 24, 1935. The United States was divided into twenty-three bituminous districts. Each district was to have a board composed of three to seventeen members holding two year terms. One member was to be selected by the labor organization representing the preponderant number of employees in the districts; one-half of the remaining membership was to be chosen by a majority of the pro-

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38 298 U.S. 238, 1936.

ducers and the other half by the producers voting on a tonnage basis. The District Boards were to fix prices; and, in conjunction with one-half of the union membership, establish minimum wages and maximum hours. These were subject to revision by the Bituminous Coal Commission. A Bituminous Coal Commission was instituted whose duty was to "formulate into working agreements" the prices "established" by the District Boards. It also had this power over the Boards' determinations as to organizations, marketing, and fair methods of competition.[39]

It was these bodies to which legislative power had been delegated in "its most obnoxious form" for it was "not even delegation to an official body presumptively disinterested, but to private persons . . . ." The fixing of prices and wages, which were to be decided by two-thirds of the producers was "power conferred upon the majority""to regulate the affairs of the minority" whose interests often are "adverse" to each other.[40]

A comparison of the two Guffey Coal laws of 1935 and 1937, especially in the light of the avowed congressional purposes, demonstrates the effects of the Carter decision on the Guffey-Vinson Bituminous Coal Conservation Act of 1937.

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39 49 Stat.991.

40 298 U.S. 238, 1936.

The most significant group of changes stated that the District Boards, whose members were selected by management and labor, would "propose" minimum prices, not "establish" them as in the 1935 version. The Commission charged with administering the act in 1935 was directed to "formulate" these established prices "into working agreements."[41] Now the federal commission could "promulgate" these "proposed prices" as its own decision, if it so chose.[42]

In several places in the act the former authority of the boards was left out or cut down. Now, only the Commission could issue subpoenas and have them backed up by the Circuit Court: only the Commission could require reports and inspect the records of the members.[43] Attitudes of Congressmen had crystalized in the meantime and agreement on modifications seemed to be general. The attitude of Vinson is typical of those expressing themselves. Referring to the Carter and Schechter decisions he said, "We have endeavored to meet the Court decisions." "Instead of authorizing these boards to fix the prices" they only "propose prices, leaving them to be "established"

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41 49 Stat. 991.

42 50 Stat. 72.

43 49 Stat. 991.

by the Bituminous Coal Commission. The latter being an official agency of the government could validly have the authority delegated to it to promulgate or to "fix prices."[44]

That the Boards now had power only to propose prices and that the Commission would promulgate such is attributable directly to the Carter decision.

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44 Congressional Record, LXXIX, p. 9731.

IV. THE FARM MORTGAGE MORATORIUM CASE ACCOMPLISHED A REDUCTION BY TWO YEARS IN THE MORATORIUM PERIOD OF THE NEW LAW

In May, 1935, the Supreme Court invalidated the Frazier-Lemke Act but Congress was able, through a slight modification, to make it acceptable to the Court. The purpose of this act, an amendment to the National Bankruptcy Act, was to extend relief to farmers faced with foreclosure of mortgages on their farms. Under the act, a farmer could declare bankruptcy and buy the property on deferred payments of up to fifteen per cent the first five years and the balance within six years or require the bankruptcy court to "stay all proceedings for five years" providing he paid an annual "reasonable" rental to be distributed to the creditors.[45] The constitutionality of this act was tested in the Supreme Court in the case of the Louisville Joint Stock Land Bank Company v. Radford[46] on May 27, 1935.

The crux of the issue was whether or not the suspension of payments to the creditor, except for the "reasonable" rental was of long enough duration to be construed as taking his "rights in specific

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45 48 Stat. 1289.

46 Louisville Joint Stock Land Bank Co. v. Radford, 295 U.S. 555, 1935.

property" "without compensation." If the "public interest" requires the taking of individual mortgages, the Court said, then the "burden of relief" must be "borne by the public" through the power of eminent domain.[47] Since the law had taken this property without compensation it violated "due process" of law and was held void.

The sponsors of the Frazier-Lemke law rewrote it to meet the objections of the Court, and the new Frazier-Lemke Farm Mortgage Act was passed and signed on August 29, 1935. The act was essentially the same except that the waiting period was changed from five years to three years. That the new law yielded only two years in deference to the Supreme Court opinion may seem unimportant but apparently the members of the Court were ready to admit that farm foreclosures had become so malignant as to now amount to a major social problem. On March 29, 1937, the Court declared unanimously that the two year modification was enough to meet the limitations of due process.

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47 Ibid.

V. SUITS TO COLLECT GOLD OR ITS EQUIVALENT WERE PROHIBITED AS A RESULT OF THE GOLD CLAUSE CASES

The decisions on the Gold Clause created pressure which resulted in a law preventing suits to recover more than face value on the Government's gold promises.

A vital phase of the Recovery Program was the new monetary policy of the Administration. By regulating the value of money, it was believed that commodity prices could be raised and aid lent to the rehabilitation of industry and agriculture. On June 5, 1933, gold clauses were abolished in contracts on the ground that they obstructed the monetary policy of Congress. On Oct. 22, 1933, in his fourth Fireside Chat to the nation, President Roosevelt explained that the dollar was "altogether too greatly influenced by the accidents of international trade" and insisted that the nation must therefore "take firmly in its own hands "the matter of the gold value of the dollar."The continued recovery of our commodity prices" was declared to be the goal.[48]

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48 F. D. Roosevelt, Public Papers . . . , Vol.II, p. 436.

An element disturbing to this policy was the Government's own and others' promises to pay in gold. These promises permitted the holders to lay claim first of all to the sum due in devaluated dollars. They guaranteed, further, if substantiated by the Court, that besides this face value, holders could additionally collect the difference between the former dollar and the devaluated dollar. Meanwhile, holders of other promises collected only devaluated dollars; so it was felt that this approached the condition which can be called profiteering.

Accordingly, a rider was attached to the A.A.A., presently to be passed, which in the pursuit of the monetary policy abolished private and governmental promises to pay in gold.

The abolition of the gold clauses raised two Constitutional questions: one, could Congress validly abrogate the gold clauses in existing private contracts; and two, could it abrogate the clauses in the government's own bonds and gold certificates by which payment in gold was guaranteed. In regard to the first question, the validity of the action was upheld in two decisions by the Supreme Court, February 18, 1935.[49] Holders of private gold clause

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[49] Norman v. B.&O. R.R. Co., 294 U.S. 240, 1935.

contracts stood to be "unjustly enriched,"[50] but the Court decided that because the holders suffered no injury, they could not collect in excess of the face value of devaluated dollars on the contracts in question. Regarding the second question, even though the Court decided that the provision of the law overruling the gold obligation of the Liberty bond was unconstitutional, damages could not be collected because the plaintiff could not show actual loss.[51]

The case answering the latter question was decided somewhat adversely to the interests of the government. It is therefore to be expected that this is the case which would have reverberations in following legislation. It opened the possibility of much litigation on the part of all holders of United States' promises to pay in gold who thought they could show damages sustained. With the President Congress complied, and on August 27, 1935, at the end of the session, in the rush to finish the A.A.A. amendments, the Guffey-Snyder Coal Law, and the new Frazier-Lemke Farm Mortgage Moratorium Act, among other things, before the Congressional recess, it passed the legislation requested by him as Public

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50 Robert H. Jackson, The Struggle For Judicial Supremacy (New York: Alfred Knopf, 1949.), p.99.

51 Perry v. U.S., 294 U.S. 330, 1935.

Resolution No. 63.[52] It prohibited suits for "any gold or silver" or upon "any claim or Demand" by "any such coin or currency" which would arise out of "any surrender, requisition, seizure, or acquisition" by the Government of "any gold or silver."

In this way, the gold clause decisions facilitated the passage of a law establishing the immunity of the Government from certain kinds of suits, thus contributing a mite to the power of government over its citizens.

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52 Congressional Record, LXXIX, p. 12623.

VI. FRUSTRATION OF THE RAILROAD RETIREMENT EFFORT UNDER THE COMMERCE POWER LED TO THE BROADENING OF THE GENERAL WELFARE POWER

The effects of the Railroad Retirement Board v. Alton Railroad Co.[53] upon legislation can be traced through first, the expedient of dividing of that act into its revenue and spending parts and passing as two laws, and second, the increasing recognition and broadening of the general welfare power.

The Railroad Retirement Act[54] aimed at pensioning railroad employees at age 64 or after 30 years of service. Compulsory payments by the railroads were to be paid into a common pool, incorporated in the United States Treasury, and disbursements to recipients were to be made from this pool. The opinion of the Court stated, "Thus the Act denies due process by taking property of one and bestowing it upon another."[55] The opinion also refused accomodation to the law within the interstate commerce power.

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53 295 U.S. 330, 1935.

54 48 Stat. 1283.

55 295 U.S. 330, 1935.

On August 29, 1935, Congress met the objection by separating the compulsory payments from the pensions in separate laws. The expedient resulted from conversations between President Roosevelt, Attorney General Homer Cummings, and Sam Rayburn who was Chairman of the House Interstate and Foreign Commerce Committee.[56] The Carriers Taxing Act provided for levies upon the railroads which became a part of the general funds of the United States Treasury. It was a simple revenue measure, the money to be "paid into the Treasury as internal revenue" and not particularly earmarked for pensions.[57] The Railroad Retirement Act provided pensions for railroad employees under the Constitutional power of Congress to provide for the general welfare. It was assumed that this separation of function would satisfy the Court. Its acceptability to the Court was never indicated, however, because it was superseded by new legislation which was based upon voluntary agreements between the railroads and paid by them directly to their employees.

The second legislative effect of the Railroad Retirement Act decision was the impetus given to a

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56 F. D. Roosevelt, Public Papers . . . , Vol.IV, p. 235.

57 49 Stat. 974.

broader use of the general welfare clause. This was manifest through the course of the Social Security Law, the Second Railroad Retirement Act, and the Soil Conservation and Domestic Allotment Act. The Congress of course could not interpret it more broadly; but it could hope for a broader interpretation by the Supreme Court and build its laws accordingly. This is exactly what it did in regard to the general welfare power and this was evident in 1935 and 1936, especially in the three laws enumerated.

The first major legislation passed following this decision was the Social Security Act.[58] This law provided for financial aid for the blind, the aged, and other needy groups, and for dependent children. It encouraged state governments to pass unemployment insurance laws by allowing credit up to ninety per cent against the uniform nation-wide tax upon employers for contributions made to approved state compensation plans. It pledged the Federal government to match the pensions paid by a state to needy persons over sixty-five years of age, provided that the federal government's share did not exceed fifteen dollars a month. An Old Age Reserve Fund was created in the U.S. Treasury, out of which old-

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58 49 Stat. 620/

age annuities ranging from ten dollars to $88.50 per month, were to be paid to workers upon retirement. Another fund, sustained by payroll taxes, provided for unemployment insurance in certain designated occupations. Finally, the act provided for grants to the states for maternal and child health services; for welfare work with delinquent, homeless, and dependent children; and for medical, surgical and corrective services to crippled children. In addition, several million dollars annually was provided to help the states expand their public health activities.

To conceive of this law as an implementation of the general welfare power would require a broader understanding of that clause than had heretofore obtained. The Constitution does not mention the specific welfare of giving pensions to the aged or to the unemployed. These had to be justified under a broader power which included many welfares. Heretofore only those powers otherwise enumerated were included in what the general welfare was understood to be. Now Congress tried in two ways to prepare for a broader interpretation of that power by, (1) explaining a constitutional basis for the law in its statement of purpose, and by (2) broader use of

Federal aid to states as a furtherance of general welfare. The purpose was specifically described as "an act to provide for the general welfare . . . by enabling the states to make more adequate provision [for these groups] . . . ; to raise revenue . . ."[59]

The second way in which the nullification of the Railroad Retirement Act contributed to broadening of the general welfare was by invoking the power in the Social Security Act of granting aids to states for broader general welfare purposes than those for which it had formerly been used. The apprehension created by that decision was expressed by Chief Justice Hughes in the dissenting opinion, that it denied " . . . to Congress, the power to pass any compulsory pension act for railroad employees." [60] The shock of the destruction of social security for railroad employees to the hatching Social Security Law caused some casting about for a Constitutional basis for it.

To use the technique of granting aids to states was a very inviting solution for this problem because it had been used very successfully for many years. Functions which were originally considered primarily

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59 Ibid.

60 295 U.S. 330, 1935.

of state welfare had been, since the time of Andrew Jackson, accomplished by the Federal government through the granting of road building funds, educational aids and other aids in lands and money which had encouraged states to carry out national purposes through their own powers. Since the formation of the Republic these had been passed on by the Supreme Court only once, in 1923.[61] There the question had been whether or not a taxpayer could maintain suit under the due process guarantee against an appropriation for the general welfare. It had been answered that there was ". . . no precedent sustaining the right to maintain suits like this . . . ." Since the time of this decision educational and highway grants had increased tremendously.

Now, shortly before the passage of the Social Security Law, the Railroad Retirement decision definitely excluded the possibility of social security on the basis of interstate commerce as explained in the words of Justice Roberts, " . . . the fostering of a contented mind on the part of an employee by legislation of this type" is "obviously outside the orbit of Congressional power."[62] It was natural to turn to this increasingly important source of

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61 Massachusetts v. Mellon, 262 U.S. 447, 1923.

62 295 U.S. 330, 1935.

Federal power to find a solid base for a law which obviously promoted the general welfare. Consequently, all benefits of the act except old-age pensions were made payable by the states who were recipients of grants-in-aid for this purpose. This, of course, was an extended use of the general welfare power.

Both specific mention of the general welfare in the purpose of the law and the use of Federal aid to states for the purposes of social security were lines along which the general welfare power was broadened in the Social Security Act.

The Soil Conservation and Domestic Allotment Act is the third in this series of incubating general welfare laws. Because that law was affected more immediately and more significantly by the Butler case than by the Railroad Retirement decision, it is more appropriate to discuss it in that connection. Suffice it here to point out that the general welfare was the stated purpose of the act and that it used broadened grants-in-aid to States to accomplish general welfare purposes as did the Social Security Law.

One effect of the Railroad Retirement Act decision was to accomplish the division of the law

into its two aspects before passage. Another effect was the broadening of the general welfare power through the series of Social Security Act, second Railroad Retirement Act, and the Soil Conservation and Domestic Allotment Act. The general welfare power was to be further broadened by the Butler decision.

VII. THE BUTLER CASE EXPANDED AND ESTABLISHED THE INDEPENDENCE OF THE GENERAL WELFARE POWER

In declaring the A.A.A. of 1933 unconstitutional, the Butler case helped to effect the passage of two laws to fill the nation's agricultural needs--the Soil Conservation and Domestic Allotment Act of February 29, 1936 and the A.A.A. of 1938--and it resulted in a provision in the Revenue Act of 1936 to minimize the loss from taxes refunded in accordance with its decision. In the Butler decision, the criticisms of the minority plus the concessions of the majority contributed towards understandings which ultimately made a broader interpretation of the General Welfare clause possible.

A. The Opinion Destroyed the Law and Had Implications for the Spending Power.

The Agricultural Adjustment Law as it stood on the Statute books before January 6, 1936 intended to do an equal service for agriculture as the N.I.R.A. had intended for other industry: through the cooperation of farmers to regulate their affairs in such a way as to make their endeavors profitable and bring back prosperity to the nation. Processing taxes levied on the first processors of farm products would finance benefit payments to raise farmers' standards

of living and, it was expected, would be passed on to the consumer and thus be borne by the nation.

The opinion declared this law to be unconstitutional in four ways. The expenditure was unconstitutional because: (1) it was being used to accomplish a Federal purpose never delegated to the Federal government; (2) it was used to transgress state powers; (3) it coerced states into compliance. The processing tax was unconstitutional because (4) it took property from one class and gave it to another in violation of "due process of law."

First, the Court denunced the expenditure of tax money when it was for a federal purpose which was originally unconstitutional. In doing so the Supreme Court disregarded the maxim that it will not review the constitutionality of Federal appropriations. In the unaminous opinion in the Massachusetts v. Mellon case in 1923,[63] Justice Sutherland had written that the purposes to which federal expenditures are to be put present no issue for judgment. The Administration had relied on this precedent in formulating the emergency basis for the A.A.A. of 1933 on the general welfare spending power. When it

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63 262 U.S. 447, 1923.

came before the Court on January6, 1936, Justice Roberts attempted to distinguish this case from the previous case of Massachusetts v. Mellon. The Massachusetts case he interpreted to mean that as a taxpayer a plaintiff may not challenge the validity of expenditures because they "will deplete the public funds and thus increase the burden of future taxation." He compares that in the Butler case the plaintiff resists not because it will deplete the Treasury but rather only "as a step in an unauthorized plan." "This circumstance clearly distinguishes the case," he asserted.[64] Even though the majority decided that the Agricultural Adjustment Act of 1933 was not constitutional, Roberts, with the concurrence of five other justices, surprisingly conceded that "the power of Congress to authorize expenditures of public moneys for public purposes is not limited by direct grants of legislative power found in the Constitution."[65]

Second, the conclusion was reached that the regulation was unconstitutional because it transgressed state powers. The majority opinion said it was ". . . means to an unconstitutional end." The issue was joined when Justice Stone's dissent answered that the action so induced was "a permissable

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64 United States v. Butler, 297 U.S. 1, 1936.

65 Ibid.

means to a legitimate end." This deadlock demands to be resolved. The explanation lies in the fact that the majority saw the power of the states over agriculture as clear and definite: since it had not been delegated to Congress it still resided in the states; while the minority saw this view of state power as a "contradiction" to "the power to spend for the national welfare" as it rejected the power to "impose conditions reasonably adapted to the attainment of the end. . . ."[66] The reasonably adapted conditions here referred to were the processing taxes and benefit payments which the majority declared invalid because they infringed upon the residual powers belonging to states.

Justice Stone in the dissent, concurred in by Justices Cardozo and Brandeis, objected to this argument by citing a long list of federal expenditures for schools, roads, vocational rehabilitation, the practice of teaching the science of agriculture in State universities, wherein conditions must be met to qualify for the funds, and questioned if these functions must also meet disaster under the principle now set forth by the majority. The pertinency of

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66 Ibid.

this answer was shortly vindicated in the passage of the Soil Conservation and Domestic Allotment Act which carried the line of legislative reasoning in this direction to a further development.[67]

Third, the spending under this statute was unconstitutional because it contained the element of "coercion" in a subject over which Congress had no authority in the first instance. To the government's contention that it was "voluntary" because no farmer was forced to comply, Justice Roberts answered, "the price of such refusal is the loss of benefits." "Purchasing" of such compliance was thus interpreted as "economic coercion." Justice Stone's answer to this assertion was, "Threat of loss, not hope of gain, is the essence of economic coercion."[68]

Fourth, the processing taxes were an essential part of the A.A.A.. In the opinion, the levy was declared to "lack the quality of a true tax"[69] because it took the property of one class and bestowed it upon another "without compensation." This aspect merits only passing attention here as it was sterile of legislative effects.

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67 Infra. p.53.

68 297 U.S. 1, 1936.

69 297 U.S. 110, 1936.

Having considered the decision in these four major aspects which pertain to the expenditure and the processing tax, it is now fitting to consider the effects of the Butler decision upon legislation.

B. The Base of the New Agricultural Law Was Changed to Conservation

The effect of the Butler decision upon the Soil Conservation and Domestic Allotment Act was to broaden the usage of the general welfare power in three aspects. The first of these was to make soil conservation the major purpose of the act; the second was to extend the device of making grants to states for purposes of the general welfare to include soil conservation and crop adjustment payments as not done heretofore; and the third aspect was the matching of all this into a long range plan for the nation's farmers.

This law was based directly upon soil conservation. The agricultural law destroyed by the Butler decision had been for the purpose of bringing the prices of agricultural produce to "parity" with other commodities.[70] The Soil Conservation and Domestic Allotment Act could "curb production somewhat by means which at the same time deal with

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70 48 Stat. 31.

another agricultural problem": the reduction of crops and payment of benefit checks to farmers.[71] Now, however, this was only an indirect effect, the direct purpose stated, being, ". . . to promote the conservation and profitable use of land resources . . . ."[72] This made soil conservation the major and prices of farm products minor purposes of the act.

Grants to states were now to be the medium by which new general welfare purposes were to be accomplished. In the Railroad Retirement case, this process had been started.[73] The Social Security law was now functioning through payments of grants-in-aid to states. The general welfare clause was a promising source of power. Justice Roberts in the Butler decision had declared the control of production in agriculture to be "regulation of a subject reserved to the states."[74] The Report of the House Committee on Agriculture on the Soil Conservation law observed, "The Supreme Court recognized in the Butler Case that Congress could spend public moneys for the general welfare."[75] Now, upon writing the law,

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71 Henry A. Wallace, "The Next Four Years in Agriculture," New Republic, 89:133, Dec.2, 1936.

72 49 Stat. 1148.

73 Supra. p. 43.

74 297 U.S. 1, 1936.

75 Vital Speeches, 15:86.

the purpose further stated that "Federal aid to states for such purposes" was to be one of the means by which Conservation was to be achieved.[76] For planting soil building crops; for plowing or drainage to prevent erosion and for other soil conserving practices states were now given grants from which to make benefit payments to complying farmers.

The change to the basis of conservation in the Soil Conservation Act of necessity demanded planning over a longer cycle than for only crop control payments as in the act of 1933. This likewise extended the use of the general welfare power. Upon signing the act, President Roosevelt had indicated his understanding that the Butler case ". . . had the effect of hastening this transition from the emergency phase to the long time phase which had been planned."[77] The act which he then signed expressed as part of its purpose, ". . . providing for a permanent policy . . . ."[78]

In analyzing the Soil Conservation and Domestic Allotment Act for the effects of the Butler decision, consideration has been given to first, the change

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76 49 Stat. 1148.

77 F.D. Roosevelt, Public Papers. . . , Vol.IV,P.437.

78 49 Stat. 1148.

to the basis of soil conservation; second, the use of the device of grants-in-aid to states for making expenditures for the purpose; third, the innauguration of a long-term policy. In the case of this law, the effect of the Butler decision was to greatly enhance the importance of the general welfare power in each of these aspects. How suitably the constitutional issues in this law had been handled was indicated by the House Committee on Agriculture in its report of approval, wherein it was observed that Justice Roberts' statement had "recognized" that "Congress could expend public moneys for the General Welfare" and that "a more necessary or appropriate field . . . can hardly be imagined"[79] for promoting the general welfare.

C. Windfall Taxes Minimized the Loss due to refunding illegal collections

After the Butler case, and an associated case, had declared the processing taxes unconstitutional and subject to refund, the Administration sought to minimize the disaster to the nation's budget that would result upon the refunding of such taxes.

To finance the program of crop reduction, the A.A.A. had imposed a processing tax on the first

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79 Vital Speeches, 15:86.

domestic processor of the products covered by the act. The Court declared that the taxes regulated agricultural production-- a right reserved to the states and that these taxes were beyond the scope of congressional authority because the levies imposed were not really taxes, since they were exacted for the benefit of a particular group, rather than for the general welfare.

Immediately there was a demand for the refund of almost a billion dollars in taxes which had been collected. Before the way was cleared for this, however, it was necessary that the amendments passed after the Schechter case be invalidated. It will be recalled that one of the amendments forbade suits to obtain a refund of taxes collected under the act. In the unaminous decision, Richert Rice Mills, Inc. v. Fontenot, the Court ordered the refunding of the processing taxes, saying that the amendments of August 24, 1935, did "not cure the infirmities of the original act."[80] The repayment of this colossal sum was thus made necessary.

The inclusion in the Revenue Act of June 22, 1936 of a provision to lessen the impact on the national economy of the refunding of these taxes

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80 Richert Rice Mills, Inc. v. Fontenot, 297 U.S. 110, 1936.

was effected as a result of the Butler case. The Administration, determined that the processors should not profit by refunds of processing taxes, included the provision imposing an eighty per cent "windfall" tax on all processing taxes recovered from the government. The refund was only to the extent that the processors actually bore the burden of taxation. They had to prove that they had not shifted the burden of the tax by passing it on to their customers through an increase in price. The constitutionality of this provision of a "windfall" tax was affirmed by the 8 to 1 decision handed down by the Supreme Court on May 17, 1937.[81]

D. The Passage of the Marketing features rounded out agricultural Legislation

The Soil Conservation and Domestic Allotment Act was followed by the A.A.A. of 1938, a more inclusive compulsory control act based on the effect of agricultural production upon interstate commerce and spending for the general welfare. The purpose of the act is stated in part:

> . . . To regulate interstate and foreign commerce [of specific products] to the extent necessary to provide an orderly adequate and balanced flow of such commodities in interstate and foreign commerce . . . .[82]

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81 Anniston Mfg. Co. v. Davis, 301 U.S. 337, 1937.

82 52 Stat. 31.

Fearing that since the Supreme Court had decided against so many New Deal laws because they attempted to regulate intrastate matters, the Administration wisely waited until the Court indicated its willingness to accept a broader concept of interstate commerce clause before passing the law. The affirmative decision in the N.L.R.A. case in 1937 showed this willingness. Here it was decided that the "flow" of interstate commerce was not the only locus of transactions which could be regulated, but Congress can control activities ". . . if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."[83]

This language gave the lawmakers courage to go ahead with further legislation, and accordingly new production and marketing provisions were added to the Soil Conservation and Domestic Allotment Act. Significantly, as above quoted, the 1938 act declared as its purpose, among other things, to regulate commerce.

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83 301 U.S. 1, 1937.

Several differences from the earlier A.A.A. were noticeable. The objectionable processing taxes so critized by the Court were deleted from this later act. Likewise, it contained no production quotas which obviously, since the Butler case, could not be brought in under the intra-state commerce power. Instead, a farmer could now produce all he wanted, but could only sell on the market his quoted share of the commodity. These minor changes, however, were in addition to basing the law on the interstate commerce clause. All these responses to the Butler decision in both the Soil Conservation and Domestic Allotment Act and the production and marketing Amendments of 1938, thereto, had the effect of providing a law which still ultimately brought to the farmer essentially the same benefits as the former A.A.A., but in a legally different form.

From the foregoing analysis, it is necessary to observe that, while the Butler decision destroyed the A.A.A. of 1933, it had the very constructive effect of broadening the interpretation of the "general welfare" clause---a necessary instrumentality to the formation of future New Deal legislation. It also effected the change over from a temporary farm

program to a long range permanent one in the form of the Soil Conservation and Domestic Allotment Act and the A.A.A. of 1938. Lastly, it created the necessity for additional legislation to partially recover funds lost through the refunding of processing taxes collected under the first A.A.A.

VII. PROPOSED LEGISLATION TO PACK THE COURT IS PASSED AS IMPROVED LEGISLATION

A secondary effect of the adverse court decisions appeared in the effort of President Roosevelt to reorganize the Supreme Court in 1937. Although announced as a device to compensate for incompetency of the aged justices it was in fact prompted at least in part by a desire to persuade anti New Deal justices to retire. The proposal inaugurated a legislative process which finally accomplished some positively beneficial reforms. These reforms were the Supreme Court Retirement Act, providing for the retirement of aged justices after years of public service, and the Judicial Procedural Reform Act, pertaining to the expediting of justice in the Federal Courts.

The President worked out a court reorganization plan with Attorney General Homer S. Cummings and Solicitor General Stanley Reed and presented it to Congress. Many believed that this was done because the Supreme Court had prevented the carrying out of his New Deal measures. He began by suggesting that Congress reorganize the Judiciary "in order that it . . . may function in accord with modern neces-

sities."[84] After dealing with the effects upon government and private interest of overburdened and superannuated judges and discussing the infirmities of age of justices and the need for a "constant and systematic addition of younger blood" to "vitalize the courts,"[85] the bill proposed an increase of one judge, in all Federal courts, for each incumbent over seventy years of age who did not retire as the existing law permitted. It limited new Supreme Court justiceships to six. Other provisions of the bill were directed towards making the "judiciary more elastic by providing for temporary transfer of . . . judges to those places where Federal courts are most in arrears," furnishing the Supreme Court "practical assistance in supervising the conduct of business in the lower courts," and eliminating ". . . delay now existing in the determination of constitutional questions involving Federal statutes."[86] The President claimed that this reorganization would make unnecessary any fundamental changes in the power of the courts or in the Constitution for he was convinced that the negative decisions were dictated by

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84 F.D. Roosevelt, Public Papers . . ., Vol. VI, pp. 51-59.

85 Ibid.

86 Ibid.

the conservative bias of many of the judges. At a later date, he explained his attitude at this time:

> The reactionary members of the Court had apparently determined to remain on the bench as long as life continued--for the sole purpose of blocking any program of reform.[87]

This proposal met with opposition from most of the Republicans, many of the Democrats, Supreme Court justices, and the general public. Ex-President Herbert Hoover accused President Roosevelt of trying to pack the Supreme Court.[88] The Democratic Party split over the issue, with opposition coming from the Southern Democrats and some liberal Democrats, led by Senator Burton K. Wheeler. It was a part of the strategy of the opposition to defeat the packing feature by passing the Supreme Court Retirement Act, on March 1, 1937, of which Justice Van Devanter later took advantage. This did not stop the President in his efforts to get the reorganization bill passed. On March 9, in a radio address, he got to the heart of the problem, saying, "We want a Supreme Court which will do justice under the Constitution--not over it."[89]

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87 Franklin D. Roosevelt, "The Fight Goes On," Colliers' (September 20, 1941) p. 17.

88 Herbert Hoover, Addresses upon the American Road-1933-1938, (Scribner, New York, 1938) p. 150.

89 F.D. Roosevelt, Public Papers . . . , Vol.VI, p.97.

Without referring to the President's motives behind the court packing proposal, the Chief Justice, in a letter to Senator Wheeler, indicated his reaction to the plan:

> An increase in the number of Justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide.[90]

He also added:

> It must also be remembered that justices who have been dealing with such matters for years have the aid of long and varied experience in separating the chaff from the wheat.[91]

The Senator used this letter in presenting his argument to the Senate Judiciary Committee which analyzed the bill. In June the Committee returned an adverse report on the plan.

Several factors or combinations of factors entered into the defeat of the reorganization bill. First, the need for reform was lessened by the four affirmative decisions (on the Washington Minimum Wage case, the second Frazier-Lemke Farm Act, the National Labor Relations Act, and the Social Security Act) which were handed down by the Court between the 1936 election and the pigeonholing of the bill in

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90 News item in the New York Times, 86:1, Mar. 23, 1937.

91 Ibid.

July, 1937. In this election was proven the overwhelming support of the voters for the New Deal program. Immediately thereafter the decisions indicating changed views were evidenced. One might conclude from this that Charles E. Hughes and Owen Roberts read the writing on the wall and determined, even at the sacrifice of traditional concepts, to save the Court and the nation from disaster. Especially, it is possible, they may have been interested in taking the edge off any resentment farmers and laborers felt against the Court by now validating class legislation beneficial to them. All this mounting coercion in the spring of 1937 conspired to detract from the need for the Reorganization law.

The second factor contributing to the defeat of the bill also detracted from the causative need for it. This was the President's opportunity to make his first appointment to the bench due to the resignation in the early summer of the arch-conservative, Willis Van Devanter. This provided the coveted opportunity of the President's desire, besides bringing one more liberal, one less conservative vote, it was hoped, to the bench. As to Justice Van Devanter's conscious contribution to lessen the need for the bill, Robert H. Jackson suggests:

> What planning preceded it has never been revealed, but it was so perfectly timed as a strategic move that it seems unlikely to have been accidental.[92]

Third, the President's most ardent and influencial backer to the plan, Senator Joseph Robinson, died. At the time of his death, Senator Robinson was striving to press through the Senate a modified plan which would allow the President to appoint two additional Justices to the Supreme Court instead of six. Even this attempt was now lost.

Fourth, the President's indiscretion in emphasing the age of the judges as the factor in blocking reform contributed to this "lost battle which won a war."[93] He reflects:

> I made one major mistake when I first presented the plan. I did not place enough emphasis upon the real mischief--the kind of decisions which, as a studied policy had been coming down from the Supreme Court.[94]

All of these factors, the affirmative decisions, the election, the strategy of Justices Roberts and Hughes, Justice Van Devanter's retirement, the death of Senator Robinson, and the President's failure to emphasize the "real mischief," had a bearing upon the defeat of the Bill to Reorganize the Judicial Branch of the Government.

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92 Robert H. Jackson, The Struggle . . . , pp.192-3.

93 Roosevelt, Public Papers . . . , Vol.VII, p.185.

94 Roosevelt, "The Fight Goes On," p. 37.

Even though the court-packing bill itself was set aside, certain beneficial results came from it in the form of two new laws. The first, the Supreme Court Retirement Act,[95] passed on March 1, 1937, provided that a justice could retire on full pay, after years of service, at the age of seventy, maintaining his judicial status, rather than resign. On June 2 of that year, at the end of the current session, Justice Van Devanter retired; his retirement was followed by that of Justice Sutherland in January, 1938. It is interesting to note that within three years of the court packing proposal, President Roosevelt was able to place on the Supreme Court bench a majority of six justices.

After the death of Senator Robinson, Vice President John Garner took over the lead of the reform bill and struck out the President's proposals for Supreme Court reorganization, leaving only procedural changes. These changes were incorporated in the Judiciary Procedural Reform Act, passed on August 24, 1937.[96] Instead of single judges of lower courts issuing injunctions on constitutional grounds, such

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95 50 Stat. 24.

96 50 Stat. 751.

actions were to be tried in courts composed of three judges, including at least one circuit judge; injunctions were to run for only sixty days; and appeals to the Supreme Court were to be expedited. The law further specified that judges in the inferior courts could not pass upon constitutional questions in litigation between private parties without giving the Government notice of such impending issues. Finally, it stated that Federal Courts were required to notify the Attorney General whenever the constitutionality of an act of Congress was drawn in question, and the Government was allowed to intervene as a party for the presentation of evidence and argument on the matter of validity. It is important to note that this law installed reforms which would prevent the arising of such a situation as had made the constitutionality of several acts of Congress doubtful for as much as two years.

From the foregoing analysis, it can be observed, that arising out of a need to overcome the Supreme Court's obstruction to his New Deal program, President Roosevelt's plan to reorganize the judiciary led to some needed changes in legislation.

IX. A CHANGED COURT

For two years the Administration and Congress had been forced to modify legislation to meet Court objections but in 1937 the Court began to change its position and thenceforth the "doctoring" of legislation was unnecessary. The changed position of the Supreme Court was notable in (1) the New York Unemployment case, (2) the Washington Minimum Wage case, (3) the second Frazier-Lemke Law, (4) the National Labor Relations Act case, and (5) the Social Security Law case.

The first official sign that the Court would reverse itself was on November 23, 1936. On that date, it handed down what came to be known as the New York Unemployment Act decision,[97] which was in reality an inconclusive preliminary testing of the Social Security Law. Split decisions had been common, with the four more or less consistently voting on the liberal side. Now, one of the liberals, Justice Harlan Stone, was absent. The vote, however, showed that there were still four who were willing to agree that precedent set in the Railroad Retirement case "is not appli-

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97 299 U.S. 515, 1936.

cable" and that notwithstanding a contradictory statement of the minority as to that precedent and as to the due process limitation, upon taxation, it "deprives " no "employer of his property without due process of law."[98] Inasmuch as Railroad pensions had been previously rejected because a contented mind bore no real relationship to interstate commerce, one might expect the justices to vote against the present New York law, passed in pursuit of the national Social Security Law.

Since there was a tied vote, there was no decision; and since there was no decision, there was no opinion. The decision and opinion of the New York court stood unchanged and the record did not show how each Supreme Court Justice had voted, but it did raise the question as to who had switched sides. That this passive concession to a New Deal law was not considered to be very much of a gain by the Administration is shown by the Roosevelt statement:

> We do not ask the Courts to call non-existant powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective instruments for the common good.[99]

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98 Chamberlain v. Andrews, 271 N.Y. 1, 1936.

99 F.D. Roosevelt, Public Papers . . . ,Vol. V, p. 641.

The first victory of the liberals came on March 29, 1937 when the Court upheld the right of the State of Washington to set minimum wages for women.[100] This was a direct reversal of the decision nine months previous in the New York Minimum Wage case, which had simply followed the Adkins case, invalidating a statute to set minimum wages because it deprived the employee of his "freedom of contract." In the Washington case, however, "the health of women" was considered of superior importance to the "public interest" as their "necessitous circumstances" were exploited by "unscrupulous and overreaching employers." Here, "freedom of contract" was explained to be "a qualified and not an absolute right."

On the same date, the second Frazier-Lemke Law was validated. This, however, was after it had been rewritten with changes which reflected the opinion invalidating the former act. But one may reasonably question whether the reduction of the moratorium period from five years to three was sufficient to transform unanimous opposition into unanimous approval. It was, however, the validation of an important Federal law and was followed closely

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100 Parrish v. West Coast Hotel, 298 U.S. 587, 1937.

by two more decisions which firmly established two important New Deal laws.

On April 12, 1937, the National Labor Relations Act was validated in a direct reversal of the Court's previous stand on the commerce clause.[101] The vote was five to four. Hughes and Roberts both voted with the liberals. This was the first Supreme Court case wherein interstate commerce was so construed as to include labor. It was herein pointed out, "It is the effect upon commerce, not the source of injury which is the criterion."[102] Commerce was considered as a "stream." Influences effecting the flow of this stream adversely was considered as having the undesired "effect." This was a broadening of the interstate commerce clause not familar in the Schechter or Carter cases. It was a reversal of the "direct or indirect" effects concept which had determined unconstitutionality in those cases.

On May 24, 1937, the Social Security Law was validated.[103] Doubt as to the constitutionality of this law had been in the minds of many since the invalidation of a similar measure, the Railroad Retirement

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101 Supra., p. 12.

102 301 U.S. 1, 1937.

103 301 U.S. 619, 1937.

Act.[104] In order to obtain a five to four decision, Justices Hughes and Roberts both had to vote with the liberals. That the unemployment insurance tax, provided for in the law, serves the public interest and does not violate the due process of law was decided.[105] The federal tax on employees and employers for old age pensions was also declared valid as the right of the federal government to tax for the general welfare. In this opinion, Mr. Justice Cardozo explained that the needs filled in the law were "interwoven. . . with the welfare of the nation." The problem is "plainly national in area and dimensions," and therefore "only a power that is national" is competent to satisfy the "interests of all."[106] This was the type of opinion which the new majority decided to support.

We have traced through the cases in which this change in the Court was manifested. There was first of all the inconclusive validation of Social Security in the New York Unemployment case. Then the Washington Minimum Wage case validated the setting of minimum wages for women. Next the interstate commerce

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104 Supra., p. 39.

105 301 U.S. 619, 1937.

106 301 U.S. 548, 1937.

power was determined to extend to labor in productive industry in the N.L.R.A. case. The Social Security case broadened general welfare. These cases were events along the way marking the progress of the Court in its new role of validating New Deal legislation.

X. SUMMARY

The effects of adverse decisions upon subsequent legislation run through many different laws after 1934.

After a prior warning in the Panama case, the Schechter case inaugurated a movement to improve the A.A.A. and to pass the first Guffey Coal Law. This was done with some consideration for delegating legislative power more carefully than had been done in the N.I.R.A., the predecessor to those laws.

The Frazier-Lemke Law was modified as a result of the decision in that case by two years in the waiting period before foreclosure would take place.

The Railroad Retirement case, like the Butler, contributed to the broadening of the general welfare power. It occasioned a new Railroad Retirement Act divided into its two component parts and encouraged the implementation of the general welfare clause in the passage of the Soil Conservation and Domestic Allotment Act.

The Gold Clause decisions instigated a joint resolution that private or governmental promises to pay in gold could not be enforced for more than the current value of the currency.

The Carter decision resulted in a new Guffey Coal law which was modified over the earlier law in a few ways including that sub-legislation decided upon would be only recommended by two-thirds of the miners and promulgated as law by salaried officials of the government, operating as a Coal Commission. This opinion presaged the N.L.R.A. by indicating that some other kind of effect than "direct" could justify Federal regulation in the interest of interstate commerce.

The Butler case can claim greater influence upon the general welfare clause than any other case. In fact this was the first time it was ever officially interpreted. This case instigated the passage of the Soil Conservation and Domestic Allotment Act and later the amendments to this act, which together formed the "A.A.A. of 1938." The former act was likewise based on the general welfare power largely, as a result of the Butler case. It also made necessary the "windfall" tax on refunds of money unconstitutionally collected under the A. A.A. of 1933 and ordered refunded by the Court.

Despite efforts by Congress to rewrite laws to meet objections of the Court, a great handicap was placed upon efforts of the New Deal Administration

to pass legislation deemed necessary to relieve the depression. The President and other leaders in the administration determined to discipline the Court. This resulted in the "Court-packing fight," during which time the Court started to reverse some of its objectionable decisions, forestalling the actual "packing" bill but still not interfering with the passage of positively beneficial but uncontroversial improvements in Court organization and procedure, which grew out of the threat to pack.

The major reversals of this period were those validating the Social Security and National Labor Relations Laws. These two cases broadened both the general welfare and interstate commerce clauses which together with the expansion of the taxing power were the three greatest sources of expanding power upon which the New Deal and an enlarged Federal Government thrived.

Thus the Court compromised in more liberal interpretation at the same time that Congress had been busily engaged in rewriting and revising its unsatisfactory laws. Out of both these compromises the "packing" plan was obviated, legislation was modified to suit the changed judgment of the Court making possible thereafter the passage of new "social legis-

lation." In the meantime, the separation of the powers and other foundation stones of government remained intact to permit government under the Constitution to continue.

BIBLIOGRAPHICAL ESSAY

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