1934

The Constitutional Theory of the National Industrial Recovery Act

Oliver P. Field

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/2027

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
THE CONSTITUTIONAL THEORY OF THE NATIONAL INDUSTRIAL RECOVERY ACT

By Oliver P. Field*

The ineffectiveness of judicial review as an instrument for continuous constitutional supervision over branches and units of government in a federal system is illustrated by the experience of the nation with the legislation of the New Deal administration. Almost a year has passed since the earlier New Deal statutes were enacted. Many months have elapsed since the last of them were approved. For half a year great industries have operated under "codes of fair competition," and nobody knows whether the statute authorizing the codes is constitutional or not. Nobody knows whether the deposit guaranty law for banks is constitutional, nor is the validity of the securities act assured. Yet government must go on, and under a system of judicial review, such as we have it in the United States, many more months may elapse before we know what the answer will be to the numerous constitutional questions to be raised in connection with these acts.1

The draftsmen of the National Industrial Recovery Act, which is the only one of the New Deal statutes enacted by the "Hundred Days Session" to be considered here, drew the statute with the cases before them, and the statute gives evidence in provision after provision that they "knew their cases" and were trying in one section to chart their course inside of this decision, and in the next provision were trying to get on the outside of another decision. It is interesting to study the N. I. R. A. as a complete statute, and as a group of detailed provisions, with the decisions in mind, to see what the constitutional theories are that

---

*Professor of Political Science, University of Minnesota.

1Judicial review, by its very nature, being confined to cases presented to the courts by private or public litigants, and subject to the present rules on adverse interests and parties, is a less certain method of enforcing constitutional limitations upon government than is supposed popularly to be the case. Extreme examples of the failure of judicial review to inform interested groups of the answer to be given to constitutional questions are to be found in such cases as that of the act of 1834, reducing the gold content of the dollar, said in dictum to be valid in Hepburn v. Griswold, (1870) 8 Wall. (U.S.) 603, 19 L. Ed. 513, and the Tenure of Office Act of President Johnson's administration, held invalid in Myers v. United States, (1926) 272 U. S. 52, 47 Sup. Ct. 21, 71 L. Ed. 160.
underlie it. It is the purpose of this article to examine into some of the more significant constitutional questions presented by the National Industrial Recovery Act and, in testing the statutory provisions by the theory and decision of past cases, to surmise, if possible, what the general formulations of rules and principles would sound and look like, if the Act were to be held constitutional.

I

Section one of "an act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes" announces the constitutional theory of its draftsmen when it recites that "a national emergency productive of widespread unemployment and disorganization of industry which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist."

The following sentence makes this theory more explicit, by saying that

"it is hereby declared to be the policy of congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restrictions of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

This statute is not based upon the theory that it is a regulation of only interstate and foreign commerce. It regulates commerce which relates to or bears upon interstate and foreign commerce, on the theory that the power of congress over interstate and foreign commerce extends to the regulation of conditions and factors, activities and individuals, which affect these two types of commerce, just as fully as that power extends to the regulation of interstate and foreign commercial transactions themselves. It is perfectly clear that many of the commercial activities covered by
this statute are of an interstate character, and it is equally clear
that many of them are not of that character at all, but that the
conditions prevailing in these intrastate businesses are such as to
affect interstate commerce adversely.

The declaration of an emergency is of importance in this con-
nection only as showing that the conditions obtaining in intrastate
business are affecting interstate business to an unusual degree, to
such a degree that the whole, or a major part, of commercial activ-
ity must be subjected to national regulation in order to save inter-
state commerce. The National Industrial Recovery Act is not to
be regarded as an attempt to vest congress with some new power
by the declaration of an emergency, as such, for the statute is
based upon the commerce power, and not upon an emergency
power.

The references to public welfare, the standards of fair com-
petition, and the position of labor, are all to be read in the light of
the principles formulated in the preceding paragraphs, and are to
be read with the limitations implicit in them. Congress is not
pretending here to legislate for the general welfare as such, for it
is well known that existing constitutional doctrines do not permit
congress to exercise any such governmental power in general. But
congress has attempted to legislate for the general welfare, the
welfare of industry, and the welfare of labor and agriculture, in
order to remove the burden on interstate and foreign commerce
which it declares is resting upon those types of commerce to such
an extent that they must be protected against the effects of this
burden. The codes, licenses, and "blue eagle" agreements are
methods for accomplishing the removal of this burden.

That this is the theory underlying the National Industrial Re-
covery Act is the unmistakable import of such a provision as that
contained in subsection (b) of section three of the statute, wherein
codes establishing standards of fair competition are authorized.

"Any violation of such standards in or affecting interstate or
foreign commerce shall be deemed an unfair method of competi-
tion in commerce within the meaning of the Federal Trade Com-
mion Act, as amended; but nothing in this title shall be con-
strued to impair the powers of the Federal Trade Commission
under such Act, as amended."

It would be difficult to formulate a more clear statement that the
codes are to be extended to businesses which normally would be
considered intrastate, and thus outside the sphere of congressional
control, than is contained in the sentence just quoted from the statute, reading as it does, "in or affecting interstate or foreign commerce." Subsection (f) of section three uses the same phrasology, in prescribing penalties for the violation of any code promulgated in accordance with the statute. Identical phrasing also is to be found in subsection (a) of section four, which authorizes the president to enter into voluntary agreements "if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce. . . ."

From the standpoint of the constitutional power of congress to regulate interstate and foreign commerce, the National Industrial Recovery Act may be considered under the following divisions. There is, first, the portion of the statute which regulates interstate and foreign commerce by the use of ordinary penal sanctions, such as fine and imprisonment for the violation of the rules formulated by the statute itself, or for the violation of rules made by some other agency authorized by the statute to make them. The codes are to be considered under this heading.

There is, in the second place, the licensing provision of section four (b), which as yet has not been put into effect by the executive, but which, nevertheless, is authorized by the statute, although it is limited in its operation to only one year, while the Act generally is to operate for a period of two years, subject of course to termination of the emergency at an earlier date by resolution of congress, or by executive proclamation. This section involves the prohibition of commerce as a phase of licensing.

There is, in the third place, the provision in section nine (c), relating to the regulation of oil, wherein the executive is authorized by congress to exclude articles from interstate and foreign commerce, if withdrawal or shipment of the oil is illegal under state law.2

II

Some of the cases that must have been in the minds of the draftsmen of the Act when they enunciated the doctrine that congress could regulate not only interstate and foreign commerce but also its instrumentalities, the sources of supply, and persons, and

2See generally, on the problems of this paper, Note (1933) 47 Harv. L. Rev. 85. The Securities Act is given elaborate discussion in (1933) 43 Yale L. J. 171-316.
activities related to such commerce, in addition to intrastate commerce which adversely affects interstate and foreign commerce, should be mentioned at this point.

The railroad rate cases furnish the best illustrations of this principle. It is now well settled that congress may regulate intrastate rates if such rates discriminate against interstate commerce. In no sense is this based upon any argument that the business regulated is interstate, for it is admittedly intrastate, but it is placed squarely upon the theory that its regulation is necessary to protect interstate commerce.

The safety appliance law is applicable to intrastate transportation by railroad as well as to interstate transportation, because of the close connection between the two. The safety of interstate traffic is affected by the conditions of safety appliances used in intrastate carriage.

To forge a bill of lading is a crime against the national government, even though the forger sent no goods in interstate commerce, and contemplated sending none. The protection of these instruments, which are so convenient in commercial transactions, is so important for interstate commerce that congress may protect them by the imposition of criminal penalties for their fraudulent issuance.

The Packers and Stockyards Act, regulating the charges of commission merchants in the stockyards, has been upheld, not because these men are engaged in interstate commerce, but because the protection of the buyer and seller in such transactions as are connected with this business is important for interstate commerce. The elevator which stores wheat is not engaged in interstate commerce, but nevertheless the Federal Grain Standards Act may be applied to it. The relation between wheat in an elevator to


7Merchants Exchange v. Missouri, (1919) 248 U. S. 365, 39 Sup. Ct. 114, 63 L. Ed. 300. Such an act is to protect the buyer and seller, presumably.
interstate commerce, into which it passes in the normal course of business, is sufficiently close to justify such legislation.

The Grain Futures Trading Act, which was first held invalid in *Hill v. Wallace,* was amended to include the sales called intra-state by the Supreme Court in that case, and when so amended was upheld in *Chicago Board of Trade v. Olsen.* Professor Gavit correctly observes that

"the real distinction between the cases is that in the first case the court overlooked the fact that so-called intrastate sales could be regulated, if they were reasonably necessary for the protection of interstate sales and transportation."

The Sherman anti-trust law provided for the punishment of persons combining to restrain commerce between the states, and it is not necessary that the persons combining be engaged in interstate commerce to come within the prohibition of that law. A quotation from *Bedford Cut Stone Company v. Journeymen Stone Cutters Association of North America* shows the trend of the more recent cases on this point. The Supreme Court said in that case:

"But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the anti-trust act."

It was held in the *Bedford Case* that the statutes could be applied to laboring groups who by concerted action prevented goods from entering into interstate commerce from the major source of supply of those goods. Much emphasis was laid by the Supreme Court in this, and in the *Coronado Case,* on the natural effect of the acts complained of being such as to affect and restrict the normal flow of interstate commerce from the source of supply. It seems pretty certain now that intent is not the major factor in these deci-

---

9(1923) 262 U. S. 1, 43 Sup. Ct. 470, 67 L. Ed. 839.
10Gavit, The Commerce Clause, 245.
12(1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916.
sions, but that the closeness of the connection between the action
taken and interstate commerce, and the social significance or com-
mercial significance of the result, really constitute the basis for
them.14

Turning to the Recovery Act, it can be said that in a certain
sense nobody intended by his actions to bring on the depression
which began in 1929. But is it necessary that anyone should in-
tend it to bring into play the power of congress to remove the
burdens resulting from the depression so far as interstate com-
merce is concerned? Under the analysis just presented, no such
intent would be necessary. If the natural and normal result of
the factors operating upon interstate commerce in a period of de-
pression is to restrict that commerce, or adversely affect the sup-
ply of that commerce, or the amount of it, or if intrastate com-
merce is so carried on as to unfairly compete with interstate com-
merce, then congress may legislate to correct these conditions, pro-
viding the burdens upon interstate commerce are as congress de-
clares them to be, and providing that the measures of correction be
appropriate.

A question of fact thus presents itself: does the depression
create an economic condition in which interstate commerce is un-
duly burdened by the situation existing in intrastate commerce?
A classical economist would deny that an economic emergency
exists, no doubt, because depressions are as normal, that is, as
usual, as are periods of prosperity. In 1930 a great many people
felt that no real emergency existed, but now, in 1933, the great
majority of the population of the United States believe that a real
economic emergency exists. Also, the inevitable result of this
emergency must be to diminish the amount of goods flowing into
interstate commerce. The economic pressure of the depression
may well cause unfair practices to be used much more than in a
time of prosperity.

At this point two cases suggest themselves. The first holds
that manufacturing is not commerce. This is the E. C. Knight

14"The words 'intent' and 'necessary effect' are used almost synon-
ymously by the courts in this connection." Comment, (1933) 32 Mich. L.
Rev. 240, p. 248, n. 35. See United Leather Workers Int'l Union v.
Herkert & Meisel Trunk Co., (1924) 265 U. S. 457, 44 Sup. Ct. 623, 68 L.
Ed. 1104; Pittsburgh Terminal Coal Corp. v. United Mine Workers, (D.C.
Pa. 1927) 22 F. (2d) 559. The subject of "Strike As Interference With
Interstate Commerce" is dealt with in an excellent comment under that
title in (1933) 32 Mich. L. Rev. 240.
Case. It should be observed that no claim was made in that case that the business so affected interstate commerce as to come within the rule that congressional power over commerce extends to intrastate as well as interstate commerce if the former requires regulation to save the latter from discrimination or burden. Manufacturing is still intrastate commerce, just as it was when the Knight Case was decided. The National Industrial Recovery Act does not seek to regulate manufacturing on the ground that it is interstate commerce. It seeks to regulate intrastate commerce, that is, manufacturing for example, because it is affecting interstate commerce in a substantial and real manner.

The second of the two cases is the child labor case, Hammer v. Dagenhart, wherein congress sought to exclude goods from interstate commerce because they were manufactured in factories employing child labor. The difference which immediately suggests itself, between this case and the Recovery Act, is that child labor was not creating any great nation-wide burden on interstate commerce, while the present economic emergency is creating such a burden. From this point of view the Recovery Act might well be held constitutional, without molesting the child labor case, so far as congressional regulation is concerned, assuming that the method of regulation be permissible. The power to regulate was absent in the child labor case, while the draftsmen of the Recovery Act would insist that the present conditions bring into play a different constitutional theory which permits congress to exercise the power to regulate the businesses affected by the Act, because of the close relation between the depression and interstate commerce. The question of the permissibility of the exclusionary technique employed in the child labor case will be discussed later. It is with the question of the power to regulate the businesses involved that we are now concerned.

At this point it may be well to differentiate between two standards that are applied to the reasonableness of congressional regulations of interstate commerce and such intrastate commerce as comes closely in contact with interstate commerce. In the first place, the reasonableness of the regulation is to be tested by its appropriateness to accomplish the end desired, in the sense of the necessary and proper clause. That is to say, in accordance with a

---

15 (1895) 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325.
16 (1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 110.
century old canon of interpretation of the constitutional powers of congress, that body has the powers enumerated in the constitution and in addition such powers as can be implied from the powers thus expressly enumerated. The process of implying a power from an express power or group of express powers is the process of combining the express power and the necessary and proper clause. In this sense it is always the practice of the Supreme Court to inquire, when the issue is presented properly, into the question whether the regulation of commerce in any particular instance is "necessary and proper" as this phrase has been applied. This is a standard implicit in all grants of power to congress and is not peculiar to the power over commerce.

In the second place, there are those other standards of reasonableness which are established by other provisions of the constitution, such as due process of law. This is not a standard applied in connection with a grant of power, as the first one is, but is a standard arising from an express limitation upon congressional power. Granted that the power of congress over the subject is established, and granted that the control exercised is reasonable in the sense that it is within the scope of the express power itself and the necessary and proper clause, there always remains the question whether the control and the methods of control meet the requirements of such an express limitation upon governmental power as that contained in the due process clause. Professor Gavit properly emphasizes this point in his recent work on The Commerce Clause.\(^7\) The commerce clause itself contains no such requirement of reasonableness as that imposed upon congress by the due process clause of the fifth amendment.

The regulation involved in the blanket agreement is voluntary, although voluntary in about the same sense that election is voluntary under workmen's compensation laws.\(^8\) Nevertheless, from a constitutional point of view, the fact remains that economic and social pressure is insufficient to render the "blue eagle" agreements compulsory.

The codes, likewise, in the typical instances, are voluntary, for although the privileges of codes are denied to non-code industries,

\(^7\)See Gavit, The Commerce Clause 171-78; Corwin, Congress's Power to Prohibit Commerce, (1933) 18 Corn L. Q. 477.

\(^8\)Booth Fisheries Company v. Industrial Commission of Wisconsin, (1926) 271 U. S. 208, 46 Sup. Ct. 491, 70 L. Ed. 908, upholding a so-called "elective" act.
such as the limited immunity from prosecution for violation of the anti-trust laws, it is permissible for them to remain under those laws if they wish to do so. The more serious difficulty here is that the president is authorized to prescribe a code for an industry if the industry itself does not submit one. But here the executive can only impose the code after notice and hearing, and the code must establish rules designed to insure fair competition. In authorizing this to be done congress is doing no more than it did in the anti-trust laws and in the Trade Commission Act, for those acts also established standards of competition. The Recovery Act goes a step further and provides for a code of fair competition.

From the standpoint of the commerce clause, the codes, then, are not any great deviation from legislative precedent. Classical economics doubtless would contend that the standards of the Sherman Act really tended to maintain competition, while those of the codes are aimed at the restriction of competition, but competition as a principle is not required by the constitution, and the legally significant thing here is that in both cases congress imposed upon industry a set of rules dealing with fair competition. If the power to establish standards of this kind be established, as it is under the Sherman Act, then the question of the reasonableness of those standards is to be settled under the due process clause. This all assumes, of course, that both interstate and intrastate business can be subjected to this type of control under the principles enunciated in section one of the Recovery Act. It should be emphasized again that this regulation is authorized only for the period of the present burden on interstate commerce, or, at most, under the present Act, for two years.

The methods of enforcement utilized in the Recovery Act at this point present no new problems, for fines and imprisonment alone are prescribed, with some provision for equitable relief also, but these are all established in previous anti-trust legislation.

These are the general regulatory phases of the Recovery Act. No particularly difficult problems either of commerce or due process are presented by this phase of the N. I. R. A. The fact that economists may feel that these measures retard recovery does not justify the Supreme Court in limiting congress to that particular view. If congress wishes to adopt institutionalist economic theor-
ies in recovery legislation, it should be free to do so despite a past record on the part of institutionalists of severe criticism of the Supreme Court. The fact of the matter is that the Supreme Court has adopted institutionalist doctrines more than once before this.

III

More difficult questions are raised when the exclusionary features of the Act are considered. Does the power of congress over interstate and foreign commerce include within "regulation" the power to exclude articles from commerce, that is, to prohibit commerce?

At the outset of a discussion of congressional power to close the doors of interstate commerce to certain articles or persons, an important distinction between two types of exclusion should be kept in mind. On the one hand goods may be excluded from commerce because something in connection with them is declared to be illegal by congress. Something about the goods or the conditions or persons connected with them is penalized by congress by barring the goods from interstate channels. This should be distinguished from exclusion which, on the other hand, is the result of congressional recognition of an illegality impressed upon the goods by state law. The second of these problems of exclusion will be considered in connection with section nine (c) of the Recovery Act, dealing with oil. The problem at this point is not whether congress may aid state policy in this manner, but whether congress by its own power can impress upon the goods a sufficient quality in law to bar them from interstate trade.

This inevitably leads to an inquiry into the power of congress over the conditions surrounding the production and marketing of goods, through the medium of closing the doors of interstate commerce to the goods.

The licensing provisions found in section four (b) of the Act use the exclusionary method of enforcement of the policy of the Act. This portion of the Act has not been put into operation as yet, but it must be considered because it is the most severe control provided for in the Act, and for that reason raises the question of congressional power in an acute form. A reproduction in toto of section four (b) will make the re-statement of it which follows the easier to check by reference to the text itself.
“(b) Whenever the president shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and, after such public notice and hearing as he shall specify, shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, and shall publicly so announce, no person shall, after a date fixed in such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce, specified in such announcement, unless he shall have first obtained a license issued pursuant to such regulations as the president shall prescribe. The president may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the president suspending or revoking any such license shall be final if in accordance with law. Any person who, without such a license, or in violation of any condition thereof, carries on any such business for which a license is so required, shall, upon conviction thereof, be fined not more than $500, or imprisoned not more than six months, or both, and each day such violation continues shall be deemed a separate offense. Notwithstanding the provisions of section 2 (c), this subsection shall cease to be in effect at the expiration of one year after the date of enactment of this Act or sooner if the president shall by proclamation or the congress shall by joint resolution declare that the emergency recognized by section 1 has ended.”

The meaning and significance of subsection (b) of section four is somewhat clarified if it is restated in the following manner, although such a restatement should not be taken to cast any reflection upon the phraseology employed in the Act itself.

Section four (b) provides that:

I. The president may require licenses of "any business" specified in such announcement "in or affecting interstate or foreign commerce."

A. If he finds that in any trade or industry,
   1. Destructive wage cutting,
   2. Destructive price cutting,
   3. Or other activities contrary to the policy of this title are being practiced.

B. And gives public notice and hearing.

C. And finds it "essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title."

D. "And shall publicly so announce."
II. "No person shall, after a date fixed in such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce . . . unless he shall have first obtained a license issued pursuant to such regulations as the president shall prescribe."

A fine or imprisonment or both is prescribed for the violation of (1) the terms of the license, or (2) the requirement of a license for the conduct of a business, that is, for carrying on a business without a license when a license is required.

The significance of this subsection lies in the fact that the president is authorized to require a license of "any business" "in or affecting interstate or foreign commerce" if he finds it "essential" "in order to make effective a code of fair competition or an agreement under this title." This must refer to the codes of fair competition and the "blue eagle" agreements authorized by the Act because of the emergency threatening interstate and foreign commerce.

If it can be assumed that congress is acting within its power when it subjects interstate and intrastate business to codes of fair competition, either voluntarily adopted or imposed by executive order after hearings, on the theory advanced in the preceding section of this discussion, then the question next to be answered is whether licensing is a proper method of enforcing such codes and agreements.

Licensing is a strict and a more severe method of control than the method discussed in the preceding section, because it substitutes administrative supervision, which is continuous, or can be continuous, for the sporadic and case-to-case method of control under a system of legislatively formulated rules enforced by criminal prosecution. Revocation of a license has the effect of making illegal that which is made legal by the possession of a license. This is of the essence of a licensing system, and is the nature of a license, namely, that a license makes legal conduct which without a license is illegal. A licensing statute has that effect. Barring the goods from interstate commerce is the method of enforcing the licensing policy, it being legal to carry on interstate or related intrastate business with the license, and illegal to carry it on without one.

The control through licensing here is the more severe because of the power of revocation vested in an administrative authority,
which is customary in the case of license in the law generally, and making the administrative revocation "final" if in accordance with law.

Is licensing a proper method of regulating commerce? Does the power to regulate include the power to exclude or prohibit? Licensing inevitably raises this question of prohibition, for without an express statutory declaration to that effect it is implied in a licensing system that the conduct licensed is illegal without the license.

There can be but little question concerning the validity of licensing as a method of controlling the facilities of interstate and foreign commerce. Licenses and permits have for years been required by congressional act, as applied to railroads, ships, and other instruments of commerce. It would seem also that licensing is valid as a method of regulation, including, as it does, prohibition, if congress has power to control the field, which here is interstate and intrastate business. If the premise of the Act is sound, that intrastate business may now be regulated during the depression because of its effect upon interstate business, then licensing would seem to be a valid method of regulation. Licensing is an old and established method of regulation in the law generally, and has been used in the field of interstate and foreign commerce.

If licensing is a valid method of regulation in the field of interstate and foreign commerce, it should likewise be valid if applied to intrastate business, if such intrastate business adversely affects interstate and foreign commerce. It is appropriate as a method of regulation, because of the advantages of administrative

21 Licensing is not restricted to businesses affected with a public health or moral aspect, such as liquor, pool halls, milk, or the healing professions, but is validly applied to perfectly legitimate businesses having no such aspect, and is often used as a method of enforcing standards upon a business which is subject to regulation under the police power of government. The fact of licensing, in and of itself, raises no difficulties, but attempts to use licensing as a method of creating monopolies do raise serious constitutional questions, aside from the reasonableness of notice and hearing, in the revocation and granting of licenses.

22 See The Daniel Ball, (1871) 10 Wall. (U.S.) 557, 19 L. Ed. 999. Licenses are granted to railroads in the more modern form of certificates of convenience and necessity, as under the Transportation Act of 1920. Trade-marks to businesses in interstate commerce may be validly registered, regulated, and protected by national law, and constitute a permit type of licensing. Examples of current licensing statutes in the national government, are: 21 U. S. C. A. secs. 154, 155, 2 Mason's U. S. Code tit. 21, secs. 154, 155; 7 U. S. C. A. sec. 252, 1 Mason's U. S. Code tit. 7, sec. 252.
over judicial supervision and enforcement in many fields of the law, particularly in the commercial field.

Assuming that licensing is included within the power to regulate, and assuming that licensing includes prohibition, does this portion of the Recovery Act run counter to the child labor case? That case is to be regarded, not as deciding against the power of congress to exclude materials from interstate commerce, if the conditions or persons regulated are within the permissible field of regulation, but as deciding that the manufacturing involved in that case, under the conditions then prevailing in industry throughout the country, did not come within the congressional power over interstate commerce. This must be the meaning of that decision unless earlier and later cases are to be termed exceptions to the rule of the child labor case.

The Lottery Cases, wherein lottery tickets were denied entrance into interstate commerce, upheld the legislation. The interstate transportation of persons for immoral purposes has been forbidden by congressional statute, and the statute has been upheld.

Congress has made it a crime to transport stolen automobiles in interstate commerce, and has also visited this punishment upon those who receive the goods knowing of their stolen character, and this statute has also been sustained. Goods subjected to quarantine have been barred from interstate commerce. Likewise, goods coming under the Pure Food and Drug Act are prohibited from interstate channels unless they are labelled as required by law.

24(1903) 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. See on the whole problem of using national power over commerce to accomplish ends normally reached by the use of police power whenever that power is reserved to the particular governmental unit, Cushman, National Police Power Under the Commerce Clause, (1919) 3 MINNESOTA LAW REVIEW 289, 381, 452. The statute excluding prize-fight films from interstate and foreign commerce was upheld as to foreign commerce in Weber v. Freed, (1915) 239 U. S. 325, 36 Sup. Ct. 131, 60 L. Ed. 308, and that excluding opium, in Brolan v. United States (1915) 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.
The Hepburn Act of 1906 contains a clause, known as the commodities clause, which forbids interstate carriers to transport commodities in which they have an interest.\(^\text{20}\)

This power to prohibit goods and persons to enter interstate commerce has been exercised by Congress in numerous instances, and in several of them has been upheld by the Supreme Court. The child labor case is the only decision invalidating such an act of Congress, and there, as noted elsewhere, the Supreme Court held that manufacturing was not commerce, and so could not be regulated. It was not the fact of prohibition, but the fact of regulation, which was the weakness of the child labor statute.

So we are back again to the original question lying back of all phases of the Recovery Act, namely, the question whether manufacture now in the depression of 1929 is so closely connected with interstate commerce as to come within the power over interstate commerce. No mistake should be made in assuming that the Supreme Court must hold that manufacture is commerce to uphold the Recovery Act under the commerce power. What is required to uphold it is that the Supreme Court give its judicial approval to the declaration in section one that a burden is now resting upon interstate and foreign commerce because of existing conditions in the sources of supply for interstate commerce, the sources being manufacturing, among others.

John Marshall thought that the power to regulate included the power to prohibit commerce, and while some statements in later cases have cast some doubt upon this, the actual decisions seem clearly to establish the authority of Marshall's view in the modern law.\(^\text{30}\) After all, prohibition is sometimes about the only method available which is effective, so far as governmental procedures are concerned. It is practically impossible to license or supervise some kinds of practices. The only thing which can be done with them is to prohibit them. If Congress feels that prohibition is the only effective manner in which to deal with a subject, then prohibition should be permissible, if it be appropriate, convenient, and within

---

\(^{30}\)For an excellent analysis of the history of this view, as expressed by Marshall, in Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23, see Corwin Congress's Power to Prohibit Commerce, (1933) 18 Corn. L. Q. 477.
the rule of the "necessary and proper" clause referred to earlier, and if the subject itself be within the sphere of congressional regulation.

From the standpoint of the second standard of reasonableness, namely, that established by the due process clause, prohibition and licensing are both established methods of control. The use of licenses has been widespread, and the use of prohibition has had some vogue, and both have met with favor at the hands of the courts. Licensing, if it be reasonable, is permitted by due process of law.

Reasonableness, in licensing, under due process, consists of several things. Notice and hearing are important, if important property rights are involved. Notice and hearing are carefully provided for in the Recovery Act at almost every stage. Likewise, some recourse to courts of law upon questions of revocation may be insisted upon, and the Recovery Act provides expressly that the president's revocation shall be final if in accordance with law. This implies, of course, that recourse to court is permissible when revocation is not in accordance with law.

Some have thought that the recent decision in the *Oklahoma Ice Case* has thrown some doubt upon the use of licensing as a method of control, but that case is quite different from those likely to be raised under the Recovery Act, for that case involved an attempt to create a monopoly by the use of licensing.31 There is nothing in the Recovery Act to show that such is the intention of that statute. Licensing here is to be a form of control, not a form of monopoly. Even that extreme form of control is sometimes permitted under the licensing power.32 But although the ordinary business could not be subjected to licensing for the purpose of monopoly, few businesses are constitutionally exempt from regulation through licensing, when used as a method of control.33 The licensing provision in the Recovery Act, however, pretty clearly is restricted in its scope and purpose, being limited to the effective enforcement of the codes of fair competition. This clearly limits the use of licensing to a legitimate purpose and field. The words of the statute make it clear that licensing is to be resorted to only

---

32 This is sometimes true in liquor licensing, for example.
33 Many states exact licenses from seventy-five to one hundred different activities and businesses and professions, exclusive of those licensed by cities.
when certain phases of the recovery program require licensing to make that program effective. That program is one of control, subject to the exceptions concerning limited production mentioned in the statute, and these exceptions are expressly put on a temporary basis.

It is evident that the framers of the recovery legislation had some precedents upon which to rely, and although in each instance this recovery legislation goes slightly further than the precedents, they establish a trend in which the Recovery Act is only a logical next step, so far as congressional control over commerce is concerned.

IV

Section nine (c), relating to oil, raises a somewhat different question. It is the second of the exclusionary questions mentioned earlier. In it congress has sought to close the doors to interstate commerce for goods declared by state law to be improper subjects of commerce for one reason or another. Section nine (c) reads as follows:

"The president is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer or other duly authorized agency of a state. Any violation of any order of the president issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both."

An executive order issued by the president on July 11, 1933, recited that in interstate and foreign commerce the transportation of petroleum and the products thereof "produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law . . . is hereby prohibited."

The question raised by this section of the statute and the executive order issued by authority therein granted is whether congress may lend its aid in this way to the states in enforcing state laws governing the production and storage of oil in a state, and the withdrawal of oil from the state. The manner in which the national executive is hereby authorized to aid the state in enforcing its policy is that of closing the channels of interstate and for-
eign commerce to the products sought to be regulated by the state. It is to be noted that the channels of interstate commerce here are closed at the source of supply, or, to state it in another way, at the point of the beginning of the interstate journey or transaction. It should be noted also that only that oil is excluded from interstate commerce which valid state laws make it illegal to produce or withdraw. This subsection does not make a state regulation valid, if under the due process clause of the Fourteenth Amendment, for example, it is invalid.

The theory of this subsection is that if the interstate commerce clause limits the state in its constitutional power to forbid the withdrawal of the oil from the state after it has been extracted from the well, then this limitation shall no longer be effective, because congress hereby subjects the oil thus produced and stored to state law, divesting it, as it were, of any character as an article of interstate commerce which it may have acquired. The words of the statute do not divest it of such a character in express terms, but do say that it shall not be an article in interstate commerce, so far as national law is concerned. Read in this light, the statute might be said to be an attempt to apply the doctrine of the liquor cases to oil at the beginning of the journey, and to avoid the result of some decisions which have limited the power of the states to restrict the sale or transportation in interstate commerce of natural resources produced or extracted in the state until the needs of the home market had been satisfied. Section nine (c) seems designed to remove this restriction upon the state so far as oil is concerned.

This seems to be a reasonable interpretation to place upon the subsection, and under this view the exclusion of the oil from the channels of interstate and foreign commerce would only be applying a congressional policy of permitting state laws to apply.

This is not the only time that congress has enacted legislation barring from interstate commerce goods illegally produced or sold or acquired contrary to state law. The transportation of game

---

34 See, on this problem, Gavit, The Commerce Clause sec. 111. Also Dowling and Hubbard, Divesting An Article of Its Interstate Character, (1921) 5 Minnesota Law Review 100, 253.

slaughtered in violation of state law,\textsuperscript{88} and the Webb-Kenyon Act,\textsuperscript{87} prohibiting the shipment of liquor into a state in which the transportation of liquor was forbidden by state law, and the Reed Bone-Dry Amendment of 1918, prohibiting the transportation of liquor into a state in which the manufacture of liquor was forbidden,\textsuperscript{88} are examples of earlier statutes of this type. These statutes have been upheld whenever tested in the Supreme Court.\textsuperscript{89}

It should be remembered that the child labor case did not apply to this kind of a situation, for there the goods were forbidden to enter interstate commerce \textit{because} of a character sought to be impressed upon them by national law, not because of a character impressed upon them by state law. The child labor case, then, is distinguishable from the cases bearing upon this phase of the Recovery Act.

Oil is a natural resource of a state just as game is, according to the theory of the Recovery Act, and although the Supreme Court has never had occasion to pass upon the constitutionality of the game statute no serious doubt concerning its validity seems to have been entertained.

Throughout the foregoing paragraphs of the discussion of section nine (c) it is assumed, of course, that the state has the power to make the acts illegal or the goods illegal, and no intimation should be drawn from these observations that congress could have closed the door of interstate commerce to these articles in the absence of a valid state exercise of power to impress upon the goods or upon the persons or acts related to them a character of illegality. In some cases, as noted earlier, congress has been able to do this. There seems to be no valid reason why congress may not apply the doctrine of the \textit{Clark Distilling Company Case}\textsuperscript{40} to the state of origin as well as to the state of destination. The relations to interstate commerce are the same. In both instances congress is seeking to relieve the goods of an interstate character


\textsuperscript{89} The Hawes-Cooper Act is an application of the principle of the Webb-Kenyon Act to prison-made goods, and, inasmuch as it now takes effect, its constitutionality may be tested soon.

\textsuperscript{40} Clark Distilling Company v. Western Maryland Ry., (1917) 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326.
which restricts state control over them. The principle upon which the removal of this character was upheld at the destination of the goods should, it is submitted, be equally applicable to removal of this character at the state of origin.

V

Some miscellaneous questions of constitutionality remain to be considered. They are: (1) the labor provisions of the Act, (2) the problem of the delegation of legislative power to the executive, and (3) the declaration in the final section of the Act concerning the effect of a decision as to its unconstitutionality.

(1) Labor provisions. The labor provisions of the Recovery Act which most particularly raise questions of congressional power are to be found in section seven (a).

"Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the president."

The case that comes to mind immediately in this connection is that of Adair v. United States, wherein an act of congress was declared invalid because it provided for penalties for the discharge by a common carrier of its employees on the ground that they were members of labor unions. Wilson v. New, sustaining the Adamson Act, regulating the hours of labor and wages of labor on interstate railroads, seemed not to make any inroads upon the Adair Case, but the recent decision in Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks seems to have restricted the principle of the Adair Case considerably. In the Texas & New Orleans Case, a congressional statute was involved

which provided that representatives of employees to speak for
them in negotiations before the Board of Mediation, and with the
employers, should be chosen "without interference, influence, or
coercion exercised by either party over the self-organization or
designation of representatives by the other." The Brotherhood was
awarded an injunction ordering the company to desist from inter-
ferring with the free choice of representatives by the employees.
This order was sustained, and the statute upheld on appeal to the
Supreme Court. It appeared that the company discriminated
against employees who led the opposition to the company union.
In the course of the opinion of the Supreme Court, Chief Justice
Hughes said:

"We entertain no doubt of the constitutional authority of con-
gress to enact the prohibition. The power to regulate commerce
is the power to enact 'all appropriate legislation' for its 'protec-
tion and advancement.' . . ."

And again:

"Exercising this authority, congress may facilitate the amic-
able settlement of disputes which threaten the services of the
necessary agencies of interstate transportation. . . . The legality
of collective action on the part of employees in order to safeguard
their proper interests is not to be dispufed. . . . Congress was not
required to ignore this right of the employees but could safeguard
it and seek to make their appropriate collective action an instru-
ment of peace rather than of strife. Such collective action would
be a mockery if representation were made futile by interferences
with freedom of choice. Thus the prohibition by congress of inter-
fERENCE with the selection of representatives for the purpose of
negotiation and conference between employers and employees, in-
stead of being an invasion of the constitutional right of either, was
based on the recognition of the rights of both. . . . The Railway
Labor Act of 1926 does not interfere with the normal exercise of
the right of the carrier to select its employees or to discharge them.
The statute is not aimed at this right of the employers but at the
interference with the right of employees to have representatives
of their own choosing. As the carriers subject to the Act have no
constitutional right to interfere with the freedom of the employees
in making their selection, they cannot complain of the statute on
constitutional grounds."

An equitable, instead of a criminal, action was involved in the
Texas & New Orleans Case, while in the Adair Case a criminal
prosecution was attempted. The statute in the Texas & New
Orleans Case did not forbid discharge on any particular ground,
nor did it forbid discrimination on the ground of membership in
a labor union. The Recovery Act goes a step further and combines the provisions of the Railway Labor Act with those of the statute invalidated in the *Adair Case*. It may be of some significance that section seven (a) of the Recovery Act contains no provision for a criminal penalty, such as was included in the statute involved in the *Adair Case*.

The labor provisions of section seven (a) can be sustained in toto only by distinguishing the conditions existing in commerce and labor in 1908 and in 1933. It may be said with some show of adherence to the facts that membership in a labor union was not particularly connected with interstate commerce in 1908, while it is probably true that in 1933 a close and substantial connection between the two can be made out. If this is true, it is possible to uphold the provisions of section seven (a) without doing violence to *Adair v. United States*, although the practical effect of such a decision would be to render the *Adair Case* of very limited application. *Wilson v. New* certainly marked a point of departure in the recognition by both congress and the Supreme Court of the close relationship existing between labor unions and their methods and interstate commerce. Perhaps the phrase "relations between employer and employee" would more accurately describe the situation sought to be regulated by the Adamson, Railway Labor, and Recovery acts, than the phrase "labor unions."

(2) *Delegation of legislative power.* With respect to the constitutional question presented by the delegation of legislative powers to the president, the National Industrial Recovery Act has been drafted with special care to abide by the requirements of past decisions on this subject. Guides are furnished, and events specified, and conditions described, upon which executive action is to be predicated.

Delegation of legislative power is perfectly permissible, provided that sufficient restrictions are placed by the congress upon the exercise of the power so that the Supreme Court can say that the "policy" has been indicated by congress, and the "details" to be filled in left to the president. It must be remembered that it is the *president* that these powers are given to, not some inferior officer, and despite the fact that the Act permits delegation by him in turn to others, these others are officers in high position.

Great discretion may be vested in the president by congress, and in most instances care has been taken to indicate just when
the president is to act, and what the scope of his action is to be when he acts. But in section four (b) the Act authorizes the president, in the licensing section, to issue licenses “pursuant to such regulations as the president shall prescribe.” At first glance this seems a very broad grant of power, but, as noted earlier, the grants of power in the licensing provision are circumscribed by one set of purposes, namely, those connected with the effectuation of the policies of the provisions authorizing codes of fair competition and agreements. It is an implied restriction, therefore, that the regulations to be issued by the president are to be for the purpose of effectuating the enforcement of the codes and agreements authorized by the Act.

It should also be noticed that the president does not prescribe the penalties to be visited upon persons violating his rules and regulations, but that these are fixed by statute. The Recovery Act should, therefore, not have any serious difficulty before the Supreme Court on the score of the delegation of legislative power. Previous acts of congress going as far or further have been upheld.

(3) Declaration as to the Effect of Unconstitutionality. The Recovery Act, in the separability clause in the final section of the Act, provides:

“If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.”

Separability clauses have been common in legislation for many years, but the form of this clause is somewhat different from those generally in use hitherto. The typical separability clause usually provides that if any portion of the statute is held to be invalid, that portion shall be deemed separable from the remainder of the act, and the invalidity of the one provision is not to affect the validity of the other provisions. To this declaration the separability clause of the Recovery Act adds a new feature, namely, that

---

44 Penalties must usually be fixed by statute, and statutes giving administrators the power to fix them are usually held to be invalid. But there are instances in the national administration, as in foreign commerce and immigration, when it is permissible for congress to delegate even this power. See Lloyd Sabaudo Societa Anonima v. Etting (1932) 289 U. S. 320, 53 Sup. Ct. 167, 77 L. Ed. 341.

if the Act is held invalid in its application to one set of persons or circumstances it should, despite this, be held unaffected as to other persons and other circumstances.

Separability clauses are not binding upon the courts. They are of evidential value in showing that the legislature feels that the policy of the statute is sufficiently complete to be enforced or carried out even though one of the provisions be declared unconstitutional. The courts decide for themselves whether the remainder of the statute leaves a workable program, or, as it is phrased sometimes, leaves a program which the legislature would have approved had it known that the particular section would have been invalidated.

This partial unconstitutionality of the text of the statute is to be distinguished from the unconstitutionality of a statute as applied to a situation or to a person or group of persons. A statute may be valid as to one person and as to one situation and invalid as to another person and another situation. This rule of the effect of unconstitutionality is applied more often in the due process and commerce fields than in any other branches of our national constitutional law. The rule is a judicial rule, formulated by the courts themselves. The whole law of the effect of decisions on unconstitutionality is judge-made law. It is not dependent upon statute, exists independently of statute, and depends only upon broad grounds of constitutional theory for its support.

This is the field of law, due process and commerce, where this rule of separability as to purpose and object is enforced by the courts, and the separability clause of the Recovery Act only declares that the rule shall apply to this Act. If the Supreme Court wished to apply a different rule, such, for example, as the rule that the whole of the statute is invalid as applied to all persons and all things and situations contemplated by the text, it could do so. As in the textual separability, the legislative expression is of weight, but only of evidentiary weight and value, not of conclusive force on the Court. It is unlikely that the courts will permit legislative

40Stockyards Nat'l Bk. v. Baumann, (C.C.A. 8th Cir. 1925) 5 F. (2d) 905.
declarations on the rules applicable to this branch of constitutional law to be any more binding than they are in this branch of the law generally. A wise draftsman will always put these provisions in a statute, but they do no more than to aid the court if it wishes, on independent grounds, to achieve the result contemplated by the words of the separability clause itself.

The importance of this type of separability rule is illustrated by supposing that the Act is held invalid as to barber shops in New York, and valid as to the steel industry. Steel is necessary to recovery; hair cuts are convenient but not necessary in a recovery program.

VI

In conclusion it must be said that the draftsmen of the National Recovery Act proceeded with great care and considerable courage to chart their way through the body of case law which embroiders the text of the constitution of the United States. Analytically considered, they have assumed that the logic of past decisions would be extended to render the statute valid. Historically considered, they have assumed that the trends in constitutional law would proceed just one step further, so as to make it possible to uphold the statute. Considered from the standpoint of political policy, they have assumed that the Supreme Court would view the Act in the light of present conditions, rather than in the light of strict stare decisis as that doctrine is applied in private law.

It is perfectly possible to hold the Recovery Act valid without overruling any decision. However, the Supreme Court has been known to overrule past decisions when it found it necessary to do so. On all fronts the Recovery Act pushes logical analysis one step further, and historical trends another step further, but in no sense does it call for anything revolutionary in constitutional law to sustain it.

Mention should be made of the confusion which is present in current discussion of the constitutionality of the Recovery Act, arising as it does out of an assumption that because a code may contain something which is unconstitutional the Recovery Act itself is invalid. The Act is not to be judged by the codes or agree-

48Fox Film Corp. v. Doyal, (1932) 286 U. S. 123, 52 Sup. Ct. 546, 76 L. Ed. 1010.
NATIONAL INDUSTRIAL RECOVERY ACT 295

ments formulated under it. Codes may be formulated which are not authorized by the statute. The statute will not be unconstitutional merely because those administering it fail to follow it. The code provisions may in some instances be illegal, or they may be unconstitutional, but the Recovery Act is to be judged on its own merits, on what it authorizes to be done, and not upon what is done in its name. Many questions of statutory interpretation and administrative law doubtless will come before the courts because of the Act, but these are to be distinguished from questions of the constitutionality of the Act itself. Due process imposes a standard of reasonableness not only upon the Act itself, but also upon the administrative actions taken in pursuance of it.\(^\text{49}\) Actions taken must be reasonable, and if the Act does not fix any standard the due process clause does so, and the courts will apply that standard. But if the Act fixes a standard which is reasonable, and the administrators fix an unreasonable standard, it is the administrative action which is invalid, not the statute.

Nothing stated herein is intended to refer to any other portion of the National Industrial Recovery Act than that included in Title I, unless expressly stated to the contrary. This author believes that the Supreme Court should and will hold the Act constitutional. This is not to say that everything done under the Act is constitutional. With this reservation its judicial validation calls for no new constitutional theory.

\(^{49}\)Price-fixing is not expressly provided for in the Act under Title I. If the power to fix prices is there, it must be implied from some other provision, such as the provision on licensing. On due process applying to administrative action, see Yick Wo v. Hopkins, (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 229; People ex rel. Lieberman v. Van de Carr, (1905) 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305.