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CURRENT TRENDS IN FEDERAL LEGISLATION

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When President Stauffer asked me to deliver an address on the topic "Current Trends in Federal Legislation," I reminded him that the epidemic of "Federalitis" then flagrant made this a broad subject. Since then the scope of my subject has been greatly enlarged and my task made more difficult by certain momentous decisions of the Supreme Court. By those decisions concepts of constitutional limitations and States' rights which had survived 148 years of controversy and the Civil War, were swept away. The powers of Congress have been expanded by interpretation to embrace the regulation of matters heretofore regarded as within the exclusive province of the States. The right freely to contract in respect of terms and conditions of employment has been abridged in deference to exertions of the police power which had previously been condemned by the Supreme Court itself. And legislators whose pet projects have been side-tracked because of their doubtful constitutionality, are studying Chief Justice Hughes' opinions with an anticipatory gleam in their eyes.

The situation in which we now find ourselves illustrates the desirability of expanding or contracting governmental powers by constitutional amendment rather than by interpretation. Less than a year ago the Supreme Court rendered decisions which were diametrically opposed to the ones recently handed down. Those decisions were based on precedents and proceeded on the theory that the law then was as the Court declared it to be. In the recent decisions the Court cites a wealth of precedents calculated to show a pre-existing judicial sanction for the revolutionary conclusions arrived at. Nothing is more mystifying to laymen than the judicial postulate that the law is fixed and unchangeable when so obviously it is in a state of flux. While this process of evolution or revolution has proven satisfactory in the development of many branches of the law, it is a doubtful

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expedient for meeting demands for fundamental changes in our governmental structure. The judicial process limits decisions to the facts of the particular cases dealt with and courts can not lay down broad rules of general application. Consequently the enunciation of a new doctrine necessarily engenders great uncertainty as to where the line will be drawn, and these mists can not be dispelled until a wide variety of cases have been brought forward for determination. Even the recent sweeping decisions of the Supreme Court leave the closest students in a maze of doubt as to whether industries and persons whose situations are not identical with those of the industries and persons then before the Court come within the scope of those decisions.

We will, therefore, be warranted in devoting a few minutes to the consideration of these decisions, first, because an adequate appreciation of the enlarged sphere of Federal influence is essential to an understanding of the discussion which follows, and, second, because the laws involved in those decisions are themselves indicative of the legislative trend. The Wagner Act cases² hold that Congress may regulate the relationship of employer and employee in a factory which derives its raw materials from other States, refines, fabricates or assembles (i.e. manufactures) them and sells the finished products in interstate commerce. Thus there has been evolved a theory of a continuing current of interstate commerce from the production of the raw materials through the factory to the purchaser or consumer. Heretofore it was supposed that, while the buying, selling and transportation of goods in such commerce were subject to Federal regulation, the processes of production were a part of the domestic economy of the States, immune from Federal control. Now it would seem that the processes of manufacture, although conducted wholly within a State, are not to be regarded as something separate and apart from the interstate transportation which precedes and follows them, but rather as a "milling in transit," a temporary interruption in a continuous interstate movement.

In four of the five decided cases under the Wagner Act, all three of the facts mentioned—(1) the gathering of raw materials in interstate commerce, (2) the manufacturing thereof, and (3) the sale in interstate commerce—were present³ and these facts were stressed in the opinions. It is interesting to speculate what effect the absence of any

² Nos. 419-423, 469, decided April 12, 1937.

³ The fifth case involved an interstate bus line the entire business of which was interstate.

one or more of these facts might have upon the applicability of the Act to a particular business. For example, what is the situation of a concern which supplies its own raw materials and merely refines the same and sells the refined product in interstate commerce? This category embraces the entire mining industry and—of special interest to you—the lime industry as well. The element of buying or transporting raw materials in interstate commerce is missing in such cases, but the evil effects of strikes and other forms of industrial strife upon interstate commerce in the products are equally great. I find no support in the opinion for concluding that the Wagner Act does not apply to a concern which supplies its own raw materials so long as the products are sold in substantial volume across State lines.

Quite clearly the absence of the second factor—manufacture—has no bearing on the situation. There is even greater reason for saying that a concern which buys and sells commodities in interstate commerce, without doing anything to change their physical condition, is subject to the Act. This would embrace wholesalers, jobbers, etc., buying and selling in interstate commerce. Influenced more by personal predilection than strict logic, I doubt whether the Wagner Act will be held to apply to the retail trade. The new order has come about too suddenly and I am not yet sufficiently oriented to envision Uncle Sam bossing the corner grocery store. But if any business men today derive satisfaction in counting themselves out of the Wagner Act, their contentment is likely to be short lived, as it is probable that many of the States will now enact similar statutes applicable to purely local employments. And it is within the range of possibility that an enlarged Supreme Court may go even farther in extending the Federal jurisdiction or that the Administration may seek voluntary adherence to the standards of the Wagner Act on the part of employers not now subject thereto by means of a new N. R. A.

In view of the imminence of the problem to all business men, let us review very briefly the provisions of the Act, the true title of which is, National Labor Relations Act. It provides that "employees shall have the right of self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." It then declares that it shall be an unfair labor practice for an employer (1) to "interfere with, restrain or coerce employees in the exercise of" the foregoing rights, said to be "guaranteed" by the Act; (2) to "dominate or interfere with the

formation of any labor organization or to contribute financial or other support to it"; (3) to "encourage or discourage membership in any labor organization," "by discrimination in regard to hire or tenure of employment or any term or condition of employment"; (4) to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under" this Act; (5) to "refuse to bargain collectively with the representatives of his employees." Representatives chosen by a majority of the employees in "a unit appropriate for such purposes" shall be the exclusive representatives of all the employees in such unit for bargaining purposes, although individual employees or groups of employees may present grievances to their employer. The right to strike is expressly reserved to the employees. The National Labor Relations Board is authorized to administer the Act, to hear complaints and to issue orders. As an indication of the sweeping authority vested in this Board, the orders upheld by the Supreme Court in the recent cases required the re-employment of discharged employees and the payment of accumulated wages.

So much for the provisions of the Act; it is equally important to reflect on what it does not require. As pointed out by Chief Justice Hughes, "The Act does not compel agreements between employers and employees. It does not compel any agreements whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' . . . The theory of the act is that free opportunity for negotiation with accredited representatives is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the (National Labor Relations) Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other purposes than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right

of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge."

The Women's Minimum Wage Case ⁴ is of less immediate concern to your industry, but the decision merits attention as it also is indicative of a trend. It sustained as a proper exercise of the police power of the State of Washington, and not violative of the Fourteenth Amendment of the Constitution, a statute providing for a method of formulating, promulgating and enforcing minimum wage scales for women employed in that State. Many years prior to this decision the Supreme Court held invalid under the Fifth Amendment a similar law enacted by Congress to provide minimum wages for women employed in the District of Columbia. Since the Fourteenth Amendment imposes on the States the same limitations which the Fifth Amendment places on Congress, the recent decision required that the former decision be overruled. It follows that Congress and the States, legislating within their respective jurisdictions, are competent to enact minimum wage laws which must be observed in the employment of women, even though those employed are of legal age to contract in their own right and are sound in mind and body. The decision took account of the facts that women (1) "are in the class receiving the least pay"; (2) "that their bargaining power is relatively weak"; (3) "and that they are the ready victims of those who would take advantage of their necessitous circumstances." The decision concerns only women, but certain passages lead me to wonder if similar legislation applicable to other "exploited" classes might not be sustained. No gender is specified in the generalizations of the Chief Justice regarding the power of the State to insure that, in the matter of wages, "bare cost of living must be met," because "what these workers lose in wages the taxpayers must pay"; "the community is not bound to provide what is in effect a subsidy for unconscionable employers," and hence "the community may direct its law-making power to correct the abuse." However, as we shall later point out, there is still one more river to cross, or, rather, one more precedent to smash, before this can be brought about.

Already proposals are being discussed for utilizing to the utmost the new and enlarged powers of Congress. Revival of the thirty-hour week bill was among the first suggestions to be put forth. And the President has been quoted as saying, anent the decision in the

⁴ No. 293, decided March 29, 1937.

Minimum Wage Case, that minimum wages for women is not enough and that similar protection must be extended to men. As this speech is being prepared—some weeks in advance of the date set for its delivery—it is generally known that bills are being drafted in Administration circles embodying some or all of these proposals. The pro-labor elements being uppermost in Congress, it is a foregone conclusion that any legislation beneficial to labor and not frowned upon by the Administration will be passed. The recent flurry over the sit-down strikes afforded ample proof of the strength of the labor bloc. However sympathetic one may be with the aspirations of labor, there should be no division of opinion regarding the seizure of property and withholding it from the rightful owners in defiance of lawful orders of the courts. Yet the Senate voted down an amendment to the new Guffey Act condemning sit-down strikes and adopted a resolution on the subject only after there had been included therein an equally vigorous denunciation of unfair tactics allegedly used by certain employers. The criticisms of the Supreme Court issuing from these sources, even after the decisions herein dealt with, indicate that they are determined that the Federal authority shall be extended to all workers in the factories and in the fields, on the railroads and on the ships at sea, and even to those in the darkest subterranean passages of the deepest mines.

It is fair to say that the way has not yet been cleared for so comprehensive a program. Unless or until the membership of the Court is changed, or the ruling in the *Carter Coal Case*⁵ is overruled by the present Court, or clarifying amendments are adopted, there will be serious doubt as to whether legislation (1) affecting the wages of adults male workers, or (2) relating to employments not including all three of the elements hereinabove noted, will be sustained. That case involved the first Guffey Coal Law, an extraordinary piece of legislation. Briefly stated it imposed an excise tax of 15 per centum on the sale price of bituminous coal at the mines and then provided for a drawback or refund of 90 per centum of the amount of such tax to all producers who had filed with the National Bituminous Coal Commission their acceptance of the coal code provided for in the Act. The code was to be formulated by said Commission and was to provide, among other things, for the observance of minimum prices for coal, for labor provisions resembling those embodied in the Wagner Act, and for minimum wage scales negotiated and agreed

⁵ 56 S. Ct. 950.

to under the principle of collective bargaining. The Supreme Court held that the so-called tax was actually a penalty in aid of enforcement of the Act and that since the labor provisions bore upon the production of coal within the States rather than upon interstate transactions in coal, the so-called tax must fall; further, that since the marketing provisions were inseparable from the labor provisions, they also must fall. Thus the entire Act was declared to be unconstitutional without passing upon the legality of the marketing provisions, standing alone. Just recently Congress has passed a new Guffey Act providing for a code of fair trade practices including minimum and maximum prices, enforced by a 19½ per cent tax on all coal sold in violation of the code, but without labor provisions except as declarations of policy. The Act, however, was strongly supported by organized labor represented by the influential United Mine Workers of America.

The Court did not undertake in the Wagner Act to overrule or to distinguish the Guffey Law decision beyond saying that that statute was invalid on several grounds—that there was an improper delegation of power, etc.—which does not reconcile the obvious conflict between the two decisions. As a result there is still a fly in the zealots' ointment. It is probable that future court battles over the validity of labor legislation will not involve so much fine spun arguments as to what is and what is not interstate commerce, and who are and who are not engaged therein, as whether the activities to be regulated or the abuses to be remedied substantially affect such commerce. In the Wagner Case the Court accepted the view, stated in the preamble of the Act, that strikes and other disturbances resulting from the refusal of employers to recognize the right of workers to bargain collectively, as well as discriminations practiced against workers for union activities, threaten to and often do burden and impede interstate trade and commerce. "The Congressional authority to protect interstate commerce from burdens and obstructions," said the Chief Justice, "is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate and foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources." Assuming that this is the test which will govern future litigations involving the validity of Acts of Congress, can it not be urged with equal reason that the failure of employers to pay living wages, or to shorten excessive working hours, or to afford a safe place to work, also threatens and

often results in the same dire consequences? Pandora's box has been opened and the end is not in sight.

Turning to the prospects for legislation designed to be of direct benefit to the business interests of the country, there seems little likelihood that any such measures will be enacted at the current session. Indeed the only general laws which could be so characterized during the past four years really had as their primary object the reduction of unemployment and amelioration of the conditions of labor. One of the principal tenets of the New Deal is that the Government has so long discriminated in favor of industry at the expense of the farmers and laborers that special legislation beneficial to the latter is necessary to bring about a proper balance in the national economy. It is entirely outside the purview of this address to deal with mooted questions of politics, economics and sociology. Moreover, it is much too early to correctly evaluate much of the recent and prospective legislation. For example, the A.A.A., despite much criticism, alleviated a dangerous unrest among the farmers and probably spared the nation a complete collapse in agriculture. The Securities and Exchange Commission Act, designed to eliminate fraud in the sale of securities, may prove in the long run to be highly beneficial to substantial business interests by allaying public suspicion and distrust, enhancing credit and reducing unfair competition. And if labor organizations can be induced or required to assume responsibility for the carrying out of their agreements and the unlawful acts of their members, in return for their new-found privileges, it may transpire that existing and prospective labor legislation will make for an industrial peace which will redound to the benefit of all interests alike. Those of us who have had experience with collective bargaining as practiced by some of the older, well-managed craft unions, know that it can provide a degree of stability and confidence that is highly satisfactory from the standpoint of the employers. In any case fundamental changes in industrial relations and business methods are in store for many industries and it is best they should accustom themselves to the new order.

It is unfortunate that at this writing so little of the Administration's legislative program has been revealed. Apparently the unemployment and farm relief programs are being withheld pending the outcome of the struggle over the Supreme Court reorganization plan. Only a few minor measures of interest to this group are actually being considered on Capitol Hill. One of these is Senate

Bill No. 1077 to amend the Federal Trade Commission Act. The principal change to be effected by this bill is to give the Commission authority to prevent the use of "unfair or deceptive acts and practices" as well as "unfair methods of competition" in interstate commerce. While "unfair or deceptive acts or practices" are largely comprehended in the existing prohibition against "unfair methods of competition", the new language is made necessary by the ruling of the Supreme Court in the *Raladam Case*,⁶ that one of the facts necessary to support the jurisdiction of the Commission in any case is the existence of competition. This imposed upon the Commission the burden in every case involving fraudulent and deceptive practices of showing that competitors, legitimate or otherwise, of the concern engaging in such practices were injured thereby. It is evident that this bill, which has already been passed by the Senate, will greatly strengthen the Commission in its efforts to protect honest business and the public against fraudulent enterprises which now enjoy immunity under the law. The bill also will establish beyond controversy the power of the Federal Trade Commission to institute economic investigations "upon its own initiative," a point that has been sharply contested both in the Commission and in Congress. The Economic Division, pursuant to direction of the Commission, has conducted constructive investigations in reference to resale price maintenance and basing points; and if the Commission exercises its powers in the future as wisely as it has in the past, legitimate business will have nothing to fear from its activities in this connection.

Most business men and all trade association executives are anxious to learn whether prospective legislation relating to minimum wages, maximum working hours, etc., will include or be supplemented by provisions for cooperative machinery to stabilize markets, eliminate wasteful competitive practices, and otherwise assist industry to sustain the additional burdens which may be imposed upon it. N. R. A., in the beginning, was in the nature of a compact between the Government and industry whereby industry assumed the burden of the labor provisions of the act upon assurances freely given that the Government would encourage and protect it in constructive cooperative endeavors. But N. R. A. sought to cover too much ground, the problems of administration proved to be insuperable, and the Blue Eagle was doomed before the Supreme Court brought it to earth. Those of us who had advocated the principles of indus-

⁶ 283 U. S. 643.

trial cooperation under governmental auspices long before N. R. A. came into being, while glad to be relieved of a burdensome administration which was fast disrupting the industries that we served, were nevertheless saddened by the failure of an undertaking in which we placed so much hope. I believe that the preponderance of opinion in industrial circles favors the establishment of some method whereby the competitive problems of industry can be worked out cooperatively under the watchful eye of the Federal Government and without undue interference on the part of inexperienced and opinionated bureaucrats. The tragedy of N. R. A. was its maladministration.

Possibly the only hint as to what is in store in this connection is to be gleaned from the recommendations of Major George L. Berry's Council for Industrial Progress. The extent to which this movement enjoys the support of the Administration has been shrouded in mystery. Speculation on this point, rife on the eve of the December mass meeting, undoubtedly tended to discourage attendance by the responsible heads of industry. However, the membership list of the Council contains the names of many prominent trade association executives (probably without authority to bind their industries), as well as leaders in the field of organized labor, from whose ranks Major Berry sprang. The recommendations of the Council, together with draft bills embodying the same, have been submitted to the President. Chief among these recommendations are (1) the establishment of schedules of maximum working hours and minimum wages for each of the several industries and trades and the abolition of child labor; (2) establishment of enforceable rules for outlawing unfair methods of competition; (3) amendment of the anti-trust laws to permit, without jeopardy, cooperative action to maintain fair methods of competition; (4) establishment of a National Economic Council to conduct economic studies; (5) establishment of a system of Government insurance of commercial loans to small enterprises; and (6) authorization of a complete national census of unemployment every five years, supplemented by periodical between-census checks, to give a "running inventory of employment and unemployment."

The report of the Committee on Fair Trade Practices adopted by the Council in March, 1936, reflects a reaction from the grandiose schemes of N. R. A. and harks back to the Nye Bills of 1932. That is to say, the Committee recommends that provision be made for

enforcing the so-called Group II Rules when adopted by a substantial majority in an industry and approved by the Federal Trade Commission. The provisions specifically recommended for inclusion in the category of enforceable rules were, for the most part, the routine rules of the trade practice conference procedure, such as prohibitions of sales below cost "when made for the purpose or with the effect of injuring a competitor or misleading the public"; the employment of loss-leaders for a similar purpose; circulation of false or misleading information; defamation of competitors; including breach of contract; misbranding, etc. The suggestions relative to price discrimination, granting of rebates, etc., have been merged into the Robinson-Patman Act. The only proposal not of a routine nature was that open price reporting be permitted and sponsored by the Government, "with the understanding that no such plan shall be used as a device or cloak for price-fixing." The report contained no information or suggestions relative to the details for ascertaining "cost" or enforcing a provision against selling below cost; or as to the nature of the safeguards to be erected against price-fixing.

These timid proposals and the confusion which would result from their adoption emphasize the need for constructive thought and deliberate action in amending the anti-trust laws. It is by no means clear that our organic law would sanction any provision to empower the majority in an industry to legislate for the minority in the matter of fair trade practices. Existing conditions are greatly to be preferred to another period of experimentation and confusion ending in futility. Of the unfair practices specified in the recommendations, only one can now be regarded as of any real importance. It would be a relief to business men and their lawyers if Congress or the courts would clear up the prevailing uncertainty in reference to open-price reporting. As matters now stand, the practice has been upheld in only one case—that involving the Sugar Institute⁷—and there the Supreme Court emphasized two peculiarities of the sugar business: the standardized nature of the product and the pre-existing custom of selling pursuant to publicly announced prices on "moves". While it would seem that any attempt to distinguish between an industry where price publication has been a matter of custom and one where it grew directly out of an industry agreement would be unsound, nevertheless adoption of the practice by the latter method involves elements of risk which many industries are unwilling to

⁷ 56 S. Ct. 629.

incur. And assuming that such a policy can be lawfully instituted, it still must be carried on without any agreement express or implied among the members participating therein that the prices openly announced shall be adhered to in any and all transactions. Up to this point the ruling in the *Sugar Institute Case* is a little like the permission given by the lady in the familiar couplet to her daughter who wanted to go swimming. But the situation is even more complicated since the enactment of the Robinson-Patman Law, under which any departure from published prices would constitute *prima facie* evidence of unlawful price discrimination. Thus we have arrived at the happy state of affairs where an industry employing the open-price policy must tread softly lest the Federal Trade Commission prosecute them for too rigid an adherence to published prices, on the one hand, or for too lax an adherence thereto, on the other hand. If any of my listeners think this is far-fetched, let them compare the complaints recently issued by the Commission under the Robinson-Patman Act for alleged price discrimination with those issued under Section 5 of the Federal Trade Commission Act charging price-fixing growing out of N. R. A. Code procedure.

We will not be warranted in exploring further into these recommendations and their possibilities for good or evil. There is little likelihood that they will be adopted by the present Congress. Indeed that hardy perennial, the bill to permit resale price-fixing on trademarked articles, has been tabooed by the White House. Cracking down on this measure the President said: "The present hazard of undue advances in prices, with a resultant rise in the cost of living, makes it most untimely to legalize any competitive or marketing practice calculated to facilitate increases in the cost of numerous and important articles which American householders, and consumers generally, buy." Coincident with the sending of this message, the President approved the new Guffey Act, which definitely legalizes competitive practices calculated to increase the cost of coal. Coal, however, is a special case and there doubtless are other industries where prevailing intolerable conditions call for special treatment. But it is not regrettable that there may be some delay in the enactment of general "trade practice" legislation. The business interests now have no definite program supported by a clear-cut majority of those who would be affected by it. Their councils are a confusion of tongues. And Congress is not qualified to legislate on this delicate and important subject without adequate research and information.

This brings me to a proposal which I have advanced in the past which I suppose will continue to fall on deaf ears; nevertheless, at the risk of being consistent at a time when inconsistency is rated a virtue, I quote from a paper read at a symposium held at the Law School of Columbia University in 1931: "I propose legislation for another Industrial Commission, similar to the Industrial Commission which led to the creation of the Bureau of Corporations, and the Monetary Commission which paved the way for the Federal Reserve Act, to consist of representatives of both Houses of Congress and distinguished lawyers, economists and business men, to make a thorough study of the trust problem and report on a program which will command confidence and which can be enacted with a minimum of tinkering on the floor."

The time allotted will permit of only a few observations on the fiscal policy and the possibility of adding to the tax burden. It has been demonstrated that Treasury estimates of prospective revenue were unduly optimistic and that your Uncle Samuel is deeper in the red than ever. The situation calls for additional taxes or for retrenchment; possibly for both. The Administration, for the first time since 1933, is advocating economy and the President's message met with a favorable reception from all save the most radical elements in Congress. It is now proposed to go the President one better and provide for a flat reduction of ten per cent in all governmental expenditures. This latter proposal will encounter rough going but if it is achieved only in part we may escape the paralyzing effects of additional taxes levied on enterprise. There is, however, a reform in our taxing policy which should be made irrespective of the need for additional revenue or the amount that would be produced thereby. The income tax base should be broadened so as to include in the lower brackets a much larger percentage of our population. Every person who enjoys a livelihood, no matter how meager, should make a direct contribution to the Federal Treasury, even though the amount paid barely covers the cost of collecting it. All citizens now pay heavily in the form of indirect taxes, but the payment of a direct tax would create a sense of responsibility and induce sober thinking on the part of a vast number who today think of the Federal Treasury only in terms of a game of put and take—they take while others put. And before I leave this general subject it will not be amiss to remind you that throughout this period of reconstruction and high finance, industry has been mercifully spared

one blight which might have been visited upon it. No general revision of the tariff has been attempted and there is no indication that any such unsettling experience is in store. And the Council for Industrial Cooperation has included a plea for adequate tariff protection in its recommendations to the President.

Mr. Stauffer has suggested that I say a few words concerning the Robinson-Patman Act. I, of course, am aware of some of the problems confronting certain lime manufacturers under the Act. I have endeavored to render assistance in reference to these when referred by Mr. Stauffer to my office. But because each situation is controlled or at least affected by its peculiar facts, it would be dangerous to risk the generalizations inherent in any academic discussion as to what the Act permits and what it forbids. I believe, however, that I can fairly treat of the question that has been raised as to the part which your trade association should play in policing the industry to secure obedience to the Act. In the first place let me say that the Act (by reference to the Clayton Act) provides for proceedings by the Federal Trade Commission, for civil and criminal prosecutions by the Federal district attorneys, and for private suits for treble damages. Nowhere in the Act is there any suggestion that private parties have any right to supplant or supplement public agencies in enforcing the statute; and there is no precedent for any attempt by trade associations or other private agencies to perform any such function. The authority attempted to be delegated to the code authorities under N. R. A. constitutes no exception to this rule since there the authority sprang from a public source and was attempted to be delegated to quasi-public agencies; and if anything further is needed to destroy the precedent, you need only recall that the entire undertaking was unconstitutional.

Moreover, let me remind you that the Robinson-Patman Act was intended as a restriction upon and not an enlargement of the rights of industry. It was not intended to be and must not be regarded as an instrument for compelling observance by your competitors of their publicly announced prices. Obviously the best way to comply with the Act, and the best method of rebutting any charge that you have violated it, is to publish prices and terms of sale and to adhere to them in all transactions. But any unusual activity on the part of your association to secure compliance with the statute would almost certainly be construed as a concerted effort to secure adherence to published prices and this, we have seen, is not permissible under the

decision in the *Sugar Institute Case*. The law ought not to put you in a situation where you "will be damned if you do and damned if you don't"; but we must conform to the situation as we find it, and try to keep out of trouble until the law has been changed or satisfactory interpretations have been made. Pricing policies and adherence to prices must be by individual action and wholly voluntary, and no cooperative activities should be engaged in which might give rise to an inference or suspicion that such policies are the result of collusion or coercion. However, there is no reason why instances of seeming violation of the Act should not be submitted to industry counsel for advice as to whether a complaint to public authority or the institution of a private action is warranted. And, if a condition of aggravated non-compliance with the law threatens to inflict injury upon the entire industry or a substantial portion thereof, there is no reason why the association should not act for the industry in presenting the facts to the Federal Trade Commission or the Department of Justice. Cooperation with public authority in such matters should negative any inference of collusive action or ulterior motive.

In barest outline I have attempted to present those aspects of the situation in Washington which should be of interest to you as business men and trade association members. Perhaps my remarks may have seemed to place limitations on the future usefulness of such organizations. That is because I have dwelt a good deal on those activities which became familiar to us under N. R. A. I seriously doubt whether the administration of codes of fair competition will play an especially important part in trade association activity during the next few years. Business men, with the guidance of counsel, will have to feel their way in the existing unsettled state of the law. However, I think the opportunities for constructive service, while differing in kind, have been greatly enlarged and that you will find your association playing an even more important and comforting role in the years which lie ahead. The Federal Government is to be expanded at the expense of the States, the solution of many of your every-day problems will no longer be found in the four walls of your plant, and you will have need to make frequent pilgrimages to Mecca, which is on the banks of the Potomac. In the future, whenever an employer discharges an employee, the former will contend that it was for inefficiency and neglect of duty, the latter that it was because of his union activities, and the case will go to the National Labor Relations Board. Whenever an employee feels

that there is too little in his pay envelope, or that the shop manager has given him a long count in the matter of working hours, the prospects are that the controversy will go to the Department of Labor or other designated Federal agency. And if one of your customers feels that you are giving one of his rivals a better price than you are offering him, you may be haled before the Federal Trade Commission. In the solution of these new and troublesome problems, in the formulation of plans for the future, in the promotional work which is so necessary to repulse the invasion of substitute products and in a hundred other ways you will require the guidance and assistance which only a well-organized, efficiently conducted trade association can supply.